THE EARLY YEARS OF FIRST AMENDMENT LOCHNERISM

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From Citizens United to Harris v. Quinn to Hobby Lobby, civil libertarian challenges to the regulation of health, safety, and commerce are increasingly prevalent. Critics of this trend invoke the specter of Lochner v. New York. They suggest that the First Amendment, the Religious Freedom Restoration Act, and other legislative conscience clauses are being used to resurrect the economically libertarian substantive due process and equal protection jurisprudence of the early twentieth century. Yet the worry that aggressive judicial enforcement of the First Amendment could undermine the regulation of healthy, safety and commerce has a long history. In fact, as this Article demonstrates, anxieties about “First Amendment Lochnerism” date back to the judiciary’s initial turn to robust enforcement of free exercise and free expression in the 1930s and 1940s.

Then, it was those members of the Supreme Court perceived as most “liberal” who struck down economic regulations on First Amendment grounds. They did so in a series of contentious 5-4 decisions involving the Jehovah’s Witnesses, who successfully challenged local taxes on the door-to-door sale of goods and services as burdening a central aspect of their missionary faith—the mass sale and distribution of religious literature. In dissent, Justice Robert Jackson warned that the new liberal majority’s expansive conception of First Amendment enforcement repeated the mistakes of Lochner era substantive due process jurisprudence, undermined democratic regulation of economy and society, and imposed the beliefs of some on “the rights of others.”

Jackson’s warnings sound strikingly similar to contemporary critiques of “First Amendment Lochnerism.” Yet today’s critics treat recent case law as an economically libertarian cooption of an otherwise commendable project – judicial enforcement of civil liberties. The Justices who dissented from the peddling tax decisions, on the other hand, perceived an inextricable relationship between economic libertarianism and judicial civil libertarianism. In recovering the history of the peddling tax cases and their decades-long doctrinal aftermath, this Article argues that an effective critique of “First Amendment Lochnerism” must grapple with the economically libertarian tendencies that are inherent in the judicial – as opposed to political – enforcement of civil liberties.

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INTRODUCTION

From Citizens United to Harris v. Quinn to Hobby Lobby, civil libertarian challenges to the regulation of health, safety, and commerce are increasingly prevalent. Critics of this trend invoke the specter of Lochner v. New York. They suggest that the First Amendment, the federal Religious Freedom Restoration Act (RFRA), and other legislative conscience clauses are being used as doctrinal substitutes for the economically libertarian substantive due process and equal protection jurisprudence of the early twentieth century. As campaign financiers, food and drug companies, right-to-work activists, and a host of religious employers defend their economic autonomy on civil libertarian grounds, the discourse of “First Amendment Lochnerism” has become widespread among dissenting judges and legal scholars. Consider a few examples:

- In 2011, Supreme Court Justice Stephen Breyer warned that the Court’s First Amendment invalidation of a medical confidentiality law “reawakens Lochner’s pre-New

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2 198 U.S. 45 (1905).

3 See infra notes 5-12 and accompanying text. For the “anticanonical” status of Lochner and its symbolic power in constitutional argument, see Jamal Greene, The Anticanon, 125 Harv. L. Rev. 379, 417-422 (2011).

Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue."5

• In 2012, law professor Jed Purdy elaborated on Justice Breyer’s warning: “Lochner-era cases gave constitutional weight to an ideological view of the economy: that the market was a realm of individual freedom that should be kept separate from government interference. . . . [They] chimed with the laissez-faire theory that celebrated unfettered industrial capitalism as the greatest triumph of progress and freedom that humanity had ever produced. If today’s courts go that far, they will be armed with new constitutional tools for a new era of capitalism. A free-market jurisprudence for an economy built on information and consumption looks different from a classically laissez-faire theory suited to industrial capitalism. Ironically enough, its most important tool looks to be that icon of liberal constitutional faith, the First Amendment.”6

• In 2013, Seventh Circuit Judge Ilana Rovner described the RFRA-based injunction of the Affordable Care Act’s contraceptive coverage mandate as “reminiscent of the Lochner era, when an employer could claim that the extension of statutory protections to its workers constituted an undue infringement on the freedom of contract and the right to operate a private, lawful business as the owner wished.”7

• That same year, law professor Tim Wu reported a “hijack[ing]” of the First Amendment, arguing that conservative judges and corporate litigants have “resurrected the spirit of Lochner by reconstituting its judicial overreach under the banner of freedom of speech.”8

• In 2014, law professor Samuel Bagenstos similarly lamented that, while “[t]he property-and-contract objection to public accommodations laws . . . [is] politically vulnerable in a post-Lochner world,” “First Amendment arguments have remained resonant across the political spectrum.”9 Accordingly, “[b]y withdrawing from the vulnerable ground of property and contract to the more politically congenial ground of the First Amendment . . . libertarian skeptics have put themselves in a position to threaten even the core applications of public accommodations laws.”10

• In 2015, law professor Elizabeth Sepper put it most emphatically: “Today, in their interpretations of the First Amendment and the Religious Freedom Restoration Act, courts replicate the commitment to private ordering and resistance to redistribution that were at the heart of Lochner.”11

As these quotations suggest, the prevailing sense is that we are in the midst of a relatively recent, economically libertarian cooption of civil liberties law. Yet the worry that aggressive

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5 Sorrell, 131 S. Ct. at 2685 (Breyer, J. dissenting); see also Reed v. Town of Gilbert, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring) (“[V]irtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity.”).


7 Korte, 735 F.3d at 693 (Rovner, J., dissenting).


10 Id.

judicial enforcement of the First Amendment could undermine the regulation of healthy, safety, and commerce has a long history. In fact, as this Article demonstrates, anxieties about such “First Amendment Lochnerism” date back to the judiciary’s initial turn to robust enforcement of free exercise and free expression in the 1930s and 1940s. Then, it was those members of the Supreme Court perceived as most liberal who struck down economic regulations on First Amendment grounds. They did so in a series of cases involving the Jehovah’s Witnesses, who challenged local taxes on peddling as burdening a central aspect of their missionary faith – the mass sale and distribution of religious literature.12

In June 1942, soon after the Court declared commercial speech unprotected by the First Amendment,13 a five-Justice majority rejected the Witnesses’ peddling tax challenge.14 But less than a year later, the Court flipped when Wiley Rutledge replaced James Byrnes. The new “liberal” major reversal the earlier peddling tax decisions and held for the first time that the First Amendment occupied a “preferred position” in the constitutional order.16 The Amendment’s newly privileged status meant that even an indirect and attenuated financial burden on free exercise or free expression – even when that exercise or expression was intermingled with commercial motives – was forbidden.17

Hailed at the time as one of the most astounding about-faces in the Supreme Court’s history,18 the May 1943 peddling tax decisions are today overshadowed by a much less contentious case decided a month later – West Virginia Board of Education v. Barnette.19 While Justice Robert Jackson famously penned the majority opinion in Barnette, recognizing the right of Jehovah’s Witness schoolchildren to refuse to salute the American flag, he fiercely dissented from the Court’s expansive interpretation of the First Amendment in the earlier peddling tax cases. Jackson warned that the new liberal majority’s First Amendment “transcendentalism” repeated the mistakes of the old “liberty of contract” jurisprudence, threatened to undermine

14 Jones v. City of Opelika, 316 U.S. 584 (1942) [hereinafter Opelika II].
15 Wallace Mendelson, Clear and Present Danger from Schenck to Dennis, 52 Colum. L. Rev. 313, 332 (1952) (describing “Black, Douglas, Murphy, and Rutledge” as “the ‘liberal’ quarter” and noting that “Chief Justice Stone’s early inclination to vote ‘liberal’ coupled with his distaste for the libertarians’ doctrinaire approach accounts for a large part of the judicial maneuvering during the period in which he presided”).
16 Murdock, 319 U.S. at 115. The first occurrence of the phrase “preferred position” was in Chief Justice Stone’s dissent in Opelika I, 316 U.S. at 608 (Stone, C.J., dissenting) (“The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position. . . . They extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it.”).
17 Compare Murdock, 319 U.S. at 115 (“A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike.”) with Opelika II, 319 U.S. at 119 (Reed, J., dissenting) (“[T]he plan of national distribution by the [Witnesses], with its wholesale prices of five or twenty cents per copy, delivered to the public by the [W]itnesses at twenty-five cents per copy, justifies the characterization of the transaction as a sale by all the state courts.”); City of Jeanette, 319 U.S. at 179 (Jackson, J., concurring in part and dissenting in part) (“Does what is . . . commercial . . . become less so if employed to promote a religious ideology?”).
18 Citizes XXX.
democratic regulation of economy and society, and risked imposing the beliefs of some on “the rights of others.”

Jackson’s worries were echoed by President Roosevelt’s former Solicitor General, Justice Stanley Reed, who wrote a dissent in which Justices Roberts, Frankfurter, and Jackson all joined: “This late withdrawal of the power of taxation over the distribution activities of those covered by the First Amendment fixes what seems to us an unfortunate principle . . . capable of indefinite extension.”

Driving the point home, Justice Frankfurter filed a separate dissent in which Jackson joined:

[A] tax [cannot] be invalidated merely because it falls upon activities which constitute an exercise of a constitutional right . . . There can be no doubt that these petitioners, like all who use the streets, have received the benefits of government. Peace is maintained, traffic is regulated, health is safeguarded – these are only some of the many incidents of municipal administration. To secure them costs money, and a state’s source of money is its taxing power. There is nothing in the Constitution which exempts persons engaged in religious [or press] activities from sharing equally in the costs of benefits to all . . . provided by government.

The seventy-year-old dissents of these Roosevelt appointees sound strikingly similar to contemporary criticisms of First Amendment Lochnerism. Today’s critics, however, tend to treat recent case law as an economically libertarian perversion of an otherwise commendable project – judicial enforcement of civil liberties. Many follow Cass Sunstein’s justly famous yet strikingly narrow interpretation of Lochner’s error: the judicial assumption of common law property and contract rights as a politically neutral “baseline,” regulatory departures from which had to survive heightened judicial scrutiny. According to this interpretation, the problem that “Lochnerism” represents is not aggressive judicial review of democratic decision-making or the promulgation of expansive and constitutionally privileged individual rights. By narrowing the

20 City of Jeanette, 319 U.S. at 181-182 (Jackson, J., concurring in part and dissenting in part).
21 Murdock, 319 U.S., at 133 (Reed, J., dissenting).
22 Id. at 136, 140 (Frankfurter, J., dissenting).
24 See, e.g., Sepper, supra note XX, at *3-6 (citing Sunstein, supra note XX, at 875); see also Frederick M. Gedicks & Rebecca G. Van Tassell, Of Burdens and Baselines: Hobby Lobby’s Puzzling Footnote 37, in The Rise of Corporate Religious Liberty XX, XXX (Micah Schwartzman, Chad Flanders, and Zoë Robinson eds. 2015) (describing Hobby Lobby’s “adoption of a negative-liberty or libertarian baseline for assessing whether religious exemptions impose third-party burdens” as “the very baseline that underwrote the justly maligned ‘liberty of contract’ jurisprudence enshrined in Lochner v. New York”); Nelson Tebbe, Religion and Marriage Equality Statutes, 9 Harv. L. & Pol’y Rev. 25, 57-58 (2015) (comparing to Lochner the argument that religious exemptions from antidiscrimination law for businesses that decline to serve same-sex couples restores politically neutral baseline of market ordering); Nelson Tebbe, Richard Schragger, & Micah Schwartzman, Update on the Establishment Clause and Third Party Harms: One Ongoing Violation and One Constitutional Accommodation, BALKINIZATION (Oct. 16, 2014), http://balkin.blogspot.com/2014/10/update-on-establishment-clause-and.html (elaborating the baseline argument).
25 See, e.g., Sepper, supra note XX, at *7 (explaining that her critique of “free exercise Lochnerism” does not “seek to criticize the endeavor of judicial review of legislation or examine the role of unenumerated rights in the
problem of “Lochnerism” to particular judges’ economically libertarian worldviews, critics of “First Amendment Lochnerism” avoid unsettling questions about the relationship between “First Amendment Lochnerism” and their own commitments to the judicial enforcement of expansive, constitutionally privileged individual rights. In contrast, the Justices who dissented from the peddling tax decisions perceived an inextricable relationship between economic libertarianism and judicial civil libertarianism. Although Jackson, Frankfurter, and Reed were adamant civil libertarians themselves, they believed that judicial, as opposed to political, enforcement of civil liberties, in all but the rarest of cases, threatened to re-install courts in their pre-New-Deal role as anti-democratic arbiters of economic and social life.

26 See, e.g., Sepper, supra note XX, at * 3 (citing Sunstein for the proposition that “the heart of Lochner” is “the ideal of private ordering and the resistance to redistribution”). There is considerable debate about just how economically libertarian Lochner era courts really were. Compare Michael J. Phillips, The Progressiveness of the Lochner Court, 75 Denv. U. L. Rev. 453, 488-90 (1998) (finding that “the Lochner Court rejected considerably more substantive due process claims than it granted”) with Julie Novkov, Constituting Workers, Protecting Women Gender, Law and Labor in the Progressive Era and New Deal 29-31 (2001) (finding that federal courts struck down sixty percent of general employee protective legislation but usually upheld protections specific to children and, at times, to women). Much of this disagreement can be attributed to the failure to specify the concrete dynamics of the class struggle in which Lochner era courts intervened – a struggle precipitated by the efforts of a mostly-male class of wage laborers and property-poor farmers to organize in their own economic interests. See generally Elizabeth Sanders, Roots of Reform: Farmers, Workers, and the American State, 1877-1917 (1999); William Forbath, Politics, State-Building, and the Courts, 1870-1920, in II The Cambridge History of American Law XX, XXX (Michael Grossberg & Christopher Tomlins eds. 2008); Claudio J. Katz, Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era, 31 Law & Hist. Rev. 275 (2013). Most scholars do actually agree on the paradigmatic form of regulation that Lochner era courts opposed – regulations that could be seen as either favoring, or favored by, organized labor. See, e.g., David E. Bernstein, Lochner’s Legacy’s Legacy, 82 Tex. L. Rev. 1, 39-40 (2003) (“The Court did invalidate one specific category of laws that might be considered redistributive: laws that it believed had no purpose other than to aid labor unions.”); Daniel A. Farber, Who Killed Lochner?, 90 Geo. L.J. 985, 988 (2002) (“The Lochner-era’s philosophy may be best encapsulated in the Court’s recognition of a constitutional right of employers to fire union members. In its analysis of the issue, the Court rejected the legitimacy of any state effort to deal with unequal bargaining power or to change the distribution of wealth.”); Victoria F. Nourse, A Tale of Two Lochers: The Untold History of Substantive Due Process and the Idea of Fundamental Rights, 97 Cal. L. Rev. 751, 753 (2009) (“The Lochner bias was not against regulation simpliciter; it was bias against labor and price regulation.”).

27 For two important if partial exceptions, see Leslie Kendrick, First Amendment Expansionism, 56 Wm. & Mary L. Rev. 1199, 1210-1219 (2015) (arguing that the “opportunistic” use of the freedom of speech to protect business interests is dependent on the expansiveness of the category of “speech” and the inherently unstable nature of legal rules); and Amanda Shanor, The New Lochner, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652762, *43, *46-47 (arguing that the “libertarian turn in commercial speech doctrine” resembles the “old” Lochner in “render[ing] courts, not the political branches, the key arbiters of our economic life” but differs from the “old” Lochner in working through a more ideologically neutral “naturalization of speech” rather than the ideologically freighted naturalization of a common law regulatory baseline).

28 In his Barnette majority opinion, Justice Jackson identified the flag salute controversy as the rare instance where judicial intervention was appropriate. 319 U.S. at 630-631 (“The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so.”).
As the legal historian G. Edward White has shown, it was in its 1940s First Amendment jurisprudence that the Supreme Court first explored the ambiguities of bifurcated review, mooted only a few years earlier in United States v. Caroleine Products Co. The peddling tax cases brought these ambiguities to the fore. While the peddling tax majority argued that they would know presumptively constitutional regulation when they saw it, the four dissenters concluded that the heightened judicial scrutiny invited by Caroleine Product’s famous Footnote Four was in considerable tension with the presumption of constitutionality that the body of Caroleine Products extended to government regulation of social and economic life. In particular, the first and third paragraphs of Footnote Four – which singled out textually enumerated rights and “discrete and insular minorities” for special judicial solicitude seemed to empower judges to depart from the “presumption of constitutionality” in a great many cases principally involving political economic decision-making. Indeed, according to the peddling tax dissenters, “the question of where [the Witnesses’] rights end and the rights of [other citizens] begin” could only be answered by a political decision about the most prudent and just distribution of social and economic power in a given polity, not by a legal decision about whether the polity had overstepped its constitutional authority.

This Article reconstructs the broader legal and political forces that enabled the Jehovah’s Witnesses to exploit the ambiguities of bifurcated review, establishing judicial enforcement of the First Amendment as a potentially powerful tool for challenging the regulation of health, safety, and commerce. It shows how the tiny and much-maligned religious sect became a vehicle for First Amendment arguments largely developed by secular, anti-New-Deal critics of economic regulation in the 1920s and 1930s, most notably the American Newspaper Publishers Association (ANPA), the American Liberty League (ALL), and the American Bar Association’s Bill of Rights Committee (ABA). Throughout the 1940s, the Witnesses championed these
organizations’ core legal arguments: that any financial constraint on the exercise of expressive rights was constitutionally suspect, and that the protection of civil liberty depended on aggressive judicial supervision of legislators and administrators. ABA lawyers also coached the Witnesses, and both the ABA and ANPA filed amicus briefs supporting the Witnesses’ litigation campaigns. This collaboration between corporate elites and a socially and economically vulnerable religious minority proved remarkably successful in convincing many, though not all, pro-New-Deal Justices to adopt a vision of civil liberties law pioneered by critics of the Roosevelt regime.

Part I of this Article traces the development of a pro-business and court-centered vision of civil libertarianism in the 1920s and 1930s. At the time, most civil libertarians were on the political left: they saw courts as the guardians of private property, and focused their energies instead on encouraging administrative and legislative enforcement of civil liberties, most especially the speech and assembly rights of workers.34 But in response to progressive and New Deal regulation of corporations, including national newspaper chains, conservative lawyers at ANPA and the ALL offered an alternative account that linked civil liberties to the rights of employers, and emphasized the judiciary as a civil libertarian check on an expanding administrative state. While these lawyers scored a few early victories,35 their argument that the regulation of labor disputes within the newspaper industry violated the First Amendment lost at the Supreme Court in 1937.36

That same year, however, as Part II describes, President Roosevelt’s plan to pack the Supreme Court revitalized the conservative account of civil liberties law. Wall Street lawyer and former Roosevelt supporter Grenville Clark took the lead in assailing court packing as a threat to that institution which could best defend the civil liberties of rich and poor alike – the judiciary. After the defeat of Roosevelt’s plan, Clark continued to press the conservative civil libertarian vision, forming the ABA’s Bill of Rights Committee and joining forces with the Jehovah’s Witnesses, a group that ostensibly exemplified the kind of Americans most in need of judicial protection. Unlike industrial workers, the hard core of the Roosevelt coalition, the Jehovah’s Witnesses could not rely on New Deal bureaucrats to protect their highly entrepreneurial proselytizing and publication program.37 The Witnesses’ practice of flooding towns with peddlers

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37 Indeed, by the early 1940s, federal courts were coming around to the view that New Deal legislation had effectively secured workers’ rights to organize, obviating the need for further First Amendment activism on labor’s behalf. See Weinrib, The Liberal Compromise, supra note XX, at 550-551; see also NLRB v. Ford Motor Company,
of apocalyptic pamphlets attacking Catholicism and mainstream Protestantism led to a fierce, and sometimes violent, backlash. This backlash bore a faint but ominous resemblance to the contemporaneous suppression of German Jehovah’s Witnesses at the hands of the Nazi regime. Emphasizing this dark parallel, the Bill of Rights Committee helped Witness lawyers develop their argument for aggressive judicial enforcement of an expansive First Amendment.

Part III recounts how the Witnesses, after losing their first challenges to compulsory flag salute laws and peddling taxes, convinced the Supreme Court that the First Amendment protected both their expressive and their economic activities. With the support of the American Newspaper Publishers, Witness lawyers successfully argued that peddling taxes, even though they were fiscally reasonable, non-discriminatory, and targeted at all forms of peddling – whether of literature or of other goods and services – impermissibly burdened the Witnesses’ mass distribution and sale of religious literature. For the rest of the decade, the Supreme Court would struggle with the implications its 1943 peddling tax decisions, which seemed to invest the First Amendment with the power to render suspect any regulation of health, safety, or commerce that incidentally burdened free expression or religious exercise.

Part IV brings the story forward to the present day. The history of the peddling tax cases sheds light on the basic instability of bifurcated review, which justified newly aggressive judicial review without clearly cabining such review to non-economic matters. This instability, Part IV argues, continues to foster “First Amendment Lochnerism” today. As early critics of bifurcated review noted, neither the text of the First Amendment nor the concept of “discrete and insular minorities” provide a means of distinguishing “pure” civil liberties claims from economically libertarian ones. Indeed, as the peddling tax cases themselves demonstrated, coalitions of “discrete and insular minorities” are well suited to exploiting the economically libertarian tendencies of bifurcated review – particularly coalitions of religious and economic minorities. Such religious-economic coalition building has been identified as a root cause of today’s “First Amendment Lochnerism.”

Part IV next argues that the relationship between the peddling tax cases and today’s “First Amendment Lochnerism” is doctrinal as well conceptual. While the peddling tax majority’s use of the First Amendment to safeguard economic autonomy remained a recessive trait in Supreme Court doctrine, it did make controversial appearances throughout the 1950s and 1960s, often via

114 F.2d 905, 914 (6th Cir. 1940) (“The servant no longer has occasion to fear the master's frown of authority or threats of discrimination for union activities, express or implied.”).
39 See Prince v. Massachusetts, 321 U.S. 158 (1944); Follett v. Town of McCormick, 321 U.S. 573 (1944); Thomas v. Collins, 323 U.S. 516 (1945); Marsh v. Alabama, 326 U.S. 501 (1946); see also White, supra note XX, at XXX; Gillman, supra note XX, at XXX.
constitutional avoidance. Those who emphasize the novelty of “First Amendment Lochnerism” and associate it with judicial belief in a common law regulatory baseline are prone to marginalize or entirely overlook these cases, many of which involved the judicial protection of “public benefits” rather than “private” contract or property rights. In the 1970s, First Amendment protection of economic autonomy took on a more obvious mien in the Burger Court’s campaign finance and commercial speech jurisprudence. And in the late 1980s, the peddling tax cases were themselves revisited, and partly overruled, in the context of Establishment Clause limits on tax exemptions for religious magazines. The peddling tax cases’ near-death experience, it is argued, helped to precipitate the Supreme Court’s decision in Employment Division v. Smith and the backlash that ensued. This backlash resulted in the passage of the federal Religious Freedom Restoration Act, the proliferation of state conscientious objector laws, and the increasingly expansive interpretation of both by litigants and courts.

Finally, Part IV assesses the obstacles that legal progressives must overcome in their response to the present conjunction of civil and economic libertarianism. On the one hand, progressives face a challenge from economic libertarians in the legal academy and the courts who have called for the end of bifurcated review altogether, arguing that economic and civil

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42 Wieman v. Updegraff, 344 U.S. 183, 190-192 (1952) (holding that a state could not deprive an individual of employment simply because of her membership in a particular political organization); Dickinson v. United States, 346 U.S. 389, 395-396 (1953) (holding that Congress could not have intended the definition of “minister” to preclude those who earned income from secular work); Peters v. Hobby, 349 U.S. 331, 345 (1955) (holding that Congress could not have intended to allow “political appointees who perhaps might be more vulnerable to the pressures of heated public opinion” to deprive a public employee of his livelihood based on his political opinions and associations); Speiser v. Randall, 357 U.S. 513, 528-529 (1958) (holding that a state could not deprive an individual of a tax benefit simply because he refused to swear that he had not engaged in criminal forms of speech); Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961) (avoiding First Amendment question by interpreting Railway Labor Act’s authorization of union shops to prohibit a union from spending dues from an employee on a political cause to which the employee objects); E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (avoiding First Amendment question by interpreting Sherman Act not to outlaw lobbying of Congress for legislation that would have negative effects upon business competitors); Lathrop v. Donohue, 367 U.S. 820 (1961) (avoiding First Amendment question by determining that the record did not support lawyer’s contention that his state bar association dues were being used to advocate for political positions with which he disagreed); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that a state could not deprive an individual of an economic benefit because of his religious beliefs); see also Sophia Lee, The Workplace Constitution 70-75, 120-131 (2014) (discussing the economically libertarian “right to work” movement’s use of First Amendment arguments in the 1950s and 1960s); Philip P. Frickey, Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court, 93 Cal. L. Rev. 397 (2005); Edward Rubin, Due Process and the Administrative State, 72 Cal. L. Rev. 1044, 1053-1060 (1984).


44 Texas Monthly v. Bullock, 489 U.S. 1, 21 (1989) (“To the extent that language in those opinions is inconsistent with our decision here, based on the evolution in our thinking about the Religion Clauses over the last 45 years, we disavow it.”).


47 See, e.g., Elizabeth B. Deutsch, Note, Expanding Conscience, Shrinking Care: The Crisis in Access to Reproductive Care and the Affordable Care Act’s Nondiscrimination Mandate, 124 Yale L. J. 2470, 2482 (2015) (“The aggressive expansion of . . . state [conscientious] refusal laws began in the mid-1990s. The laws broadened exemptions in two respects. First, they expanded beyond abortion and sterilization to apply to contraception, then to end-of-life care, stem-cell research, and even, in some cases, to any unspecified health service to which a religious or moral objection may be raised, including counseling or the provision of information to patients about their health status. Second, they granted religious accommodation to more kinds of entities.”).
liberty merit equal constitutional respect. On the other hand, efforts to reassert the “hierarchy of rights” that bifurcated review assumes may only loosen the reins of that framework’s latent, economically libertarian tendencies, first identified by the dissenting Justices in the peddling tax cases. Critics of today’s “First Amendment Lochnerism” have generally focused on the “Lochnerian” political economy that underlies recent civil liberties decisions, without questioning the “Lochnerian” conception of the judicial role that has undergirded judicial enforcement of civil liberties for the last seventy-five years. The Article concludes by arguing that this effort to separate the economically libertarian assumptions of individual judges from the economically libertarian tendencies of judicial review itself has been a historical failure, and should be abandoned.

I. FIRST AMENDMENT LOCHNERISM IN THE 1930S

A. The American Newspaper Publishers Association Discovers Civil Liberties

Founded in 1887, the American Newspaper Publishers Association (ANPA) first took an official legal interest in press freedom in 1922. The time was ripe for the turn to civil liberties – the American Civil Liberties Union had itself formed two years earlier in response to wartime and Red Scare prosecution of political radicals. Yet the immediate occasion for ANPA’s embrace of civil libertarian advocacy was a congressional effort to criminalize the publication of news about sports betting. A classic piece of progressive protective legislation, this bill was only striking in its federal scale; it reflected the spirit of Prohibition more than the Palmer Raids.

The defense of radicals was, however, becoming increasingly mainstream, and when ANPA finally formed a Committee on the Freedom of Press in 1928, it chose as its chairman Robert McCormick, the Chicago Tribune publisher who was then funding the litigation in Near v. Minnesota. Near involved a local newspaper’s challenge to a state law allowing permanent judicial injunction of any obscene or defamatory publication; the case would provide the occasion for the Supreme Court’s incorporation of First Amendment press freedom.

While Near involved a classic prior restraint, ANPA’s next big litigation effort, Grosjean v. American Press Co., raised closer questions: whether corporations were persons for the purposes 14th Amendment Equal Protection and Due Process, and whether a facially neutral license tax on all newspapers with a circulation of over 20,000 copies violated First Amendment press freedom as incorporated by the 14th Amendment. McCormick and his assistant Elisha

48 Sherry, supra note XX, at 1475.
50 Emery, supra note XX, at 221.
52 Emery, supra note XX, at 221.
53 283 U.S. 697 (1931).
55 297 U.S. 233 (1936).
Hanson, future ANPA general counsel, together helped to brief *Grosjean* while Hanson participated in oral arguments at the Supreme Court. The circumstances of *Grosjean* made it quite clear that the license tax in question was discriminatory in intent (aimed by Huey Long at his press critics), and Justice Sutherland’s unanimous opinion alluded to the “present setting” of the case and a “long history” of intentionally discriminatory circulation taxes in finding that the tax violated the Louisiana newspaper corporations’ press freedom. Yet at other moments in the opinion, Sutherland suggested that a tax on high circulation might be unconstitutional on its face:

> It . . . operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising; and, second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid, it well might result in destroying both advertising and circulation.

This last argument could, of course, apply to any regulatory tax levied on a particular mode of industry. In fact, Justice Sutherland’s initial opinion treated *Grosjean* as a pure economic liberty case, one of many in which he and the conservative majority saw “unequal taxation of similarly situated persons” as an unconstitutional form of class legislation. Sutherland eventually, however, rewrote the opinion to emphasize the First Amendment implications of the tax, avoiding a concurrence from Justices Cardozo, Brandeis, and Stone. Because of this compromise, which combined a general aversion to regulatory taxation with a specific defense of press freedom, *Grosjean* would later provide ammunition for Elisha Hanson and ANPA in the Jehovah’s Witness license tax cases. Between *Near* and *Grosjean*, Elisha Hanson and ANPA had developed an openly hostile stance toward New Deal regulation, “advance[ing] the argument that business activities of newspapers either were exempted under the First Amendment from government regulation, or should be protected against any adverse effects of federal general business laws.” For instance, after the passage of the National Industrial Recovery Act in 1933, ANPA took charge of drafting a code for daily newspapers which administrators viewed as “completely out of harmony with the intent of the entire [National Recovery Administration] system.” Under Hanson’s leadership,
the drafting committee made the code voluntary – “the only voluntary code in the country” – and included open-shop provisions and exemptions from child labor laws. Hanson also inserted a final clause stating that the adoption of the code should not “be construed as waiving, abrogating, or modifying any rights secured under the Constitution . . . or limiting the freedom of the press.”

While most big newspaper chains cheered Hanson’s tactics, there were some revelatory dissents. The New York Evening Post, for instance, called Hanson’s code “a chiseling performance.” “Big business,” the Evening Post argued, “has merely raised the freedom of the press issue as a smokescreen.” In the end, the Roosevelt administration accepted the voluntary code, though only after knocking out the open-shop and child labor provisions. President Roosevelt also insisted on issuing a statement announcing that the freedom of the press clause was “pure surplusage”: “The freedom guaranteed by the Constitution is freedom of expression and that will be scrupulously respected but it is not freedom to work children, or to do business in a fire trap or violate the laws against obscenity, libel and lewdness.”


As the relationship between FDR and the press deteriorated in the spring of 1934, a group of powerful lawyers and industrialists was considering an all-out attack on the legitimacy of the New Deal. Although former Solicitor General and Democratic Presidential candidate John W. Davis had endorsed FDR in the 1932 election, by December 1933 he was despondent. Reflecting on the past year, Davis told a friend that the National Industrial Recovery Administration had “advocated things little short of a universal reign of terror.” That same month, two of Davis’s old political allies, John Raskob and Jouett Shouse, were discussing what to do in the wake of their successful campaign to repeal prohibition. In 1926, Raskob had joined with the DuPont brothers to form the Association Against the Prohibition of Alcohol (AAPA), and Shouse had left the Democratic National Committee to chair the AAPA in 1932. Like Davis, Raskob and Shouse had seen prohibition as an affront to the free market and a harbinger of an expanding federal police power. But with the passage of the Twenty-First Amendment on December 5, 1933, the AAPA’s job was done. The Executive Committee, however, agreed to “continue to meet from time . . . and have in view the formation of a group . . . which would in the event of danger to the Federal Constitution, stand to defend the faith of the fathers.”

By the following summer, it was clear to the former AAPA leaders and their friend John Davis that the New Deal was just such a threat to the “faith of fathers.” In July, Davis travelled to the University of Virginia to decry the rhetoric of “emergency” that had licensed the rejection

65 Id.
66 EMERY, supra note XXX, at 224-225.
67 LEBOVIC, supra note XX, at Chapter 3, 116.
68 Id.
69 1 ALFRED MCCLUNG LEE, THE DAILY NEWSPAPER IN AMERICA 243 (1937) (quoting March 12, 1934 order).
71 Dec. 7, 1933 Letter from Davis to Herbert Brookes, Box 176, John W. Davis Papers, Yale University [hereinafter JWDP].
72 Wolfskill, supra note XXX, at 54.
73 Id. at 39, 55.
74 Goldstein, supra note XX, at 15 n.62.
75 Wolfskill, supra note XX, at 54.
of “the basic American doctrine of a limitation on the powers of government.”

He asked his audience whether “the binding power of an oath to support the Constitution cease[s] when some ostensible public good may be detained by its evasion.”

In August, back in New York, Davis met with Raskob, Shouse, former presidential candidate Al Smith, and a host of other corporate directors, financiers, and lawyers to establish a new organization, modeled on AAPA, but with the goal of challenging the “constitutional validity of the New Deal.”

In debating what to call the organization, most members proposed names reflecting the immediate financial interests that drove their opposition to the New Deal. Alfred Sloan suggested “AssociationAsserting the Rights of Property,” Shouse the “National Property League,” and E.F. Hutton the “American Federation of Businesses.” But it was Davis’s idea to call the new group the far more capacious “American Liberty League.”

Shouse, who resumed the role of president that he had held in the AAPA, got the point. On August 24, he convened a press conference at which he announced the formation of the League, explaining that it was a non-partisan organization and that its acronym, A.L.L., represented the fact that “the League spoke for ‘all’ of the American people, whose liberties were under attack by the New Deal.”

In writing to recruit prominent lawyers and businessmen to the League’s cause, Davis always acknowledged the threat that the New Deal posed to fairly-earned wealth, but he also grounded his critique in deeper constitutional, national, and moral values, often including what his biographer called his “personal credo”: “I believe in the Constitution of the United States; I believe in the division of powers that it makes.”

Lines like these helped Davis bring in legal luminaries from across the private bar, including Elihu Root and Joe Proskauer (although Davis’s own senior partners Frank Polk and Allan Wardwell demurred).

Despite Shouse and Davis’s appeals to the liberty of all, many saw the League’s universalism as a thin veil for self-interest. Newsweek announced that “The Tories have come out of ambush” and the Christian Century called it foolishness to interpret “the stated aims of the League as implying anything less than a concerted attack upon the main features of the President’s policies.”

President Roosevelt himself “compared the league with a mythical organization formed to uphold strongly two of the Ten Commandments but disregarding the other eight,” the New York Times reported. FDR went on to note that “someone had observed to him that the tenets of the organization appeared to be ‘to love thy God but forget thy neighbor,’” allowing that “‘God,’ in this case, appeared to be property.”

Four days later, the Times reported that Arthur Garfield Hays, general counsel of the ACLU, had sent the League a series of questions concerning “how far the organization would go in protecting the constitutional rights of radicals and liberal minorities.” Hays asked “Will you protect the right to full speech to the fullest extent . . . . Will you protect the right of assemblage for people to express views with

76 John W. Davis, The Old Order, Series IX, Box 176, JWDP.
77 Id.
78 Goldstein, supra note XXX, at 17; Wolfskill, supra note XX, at 25/
80 Id. at 141-142.
81 Goldstein, supra note XXX, at 17; see also Shouse Elected by Libery League, N.Y. TIMES, Sept. 7, 1934.
82 Harbaugh, supra note XXX, at 346.
83 Id.
84 Wolfskill, supra note XXX, at 29.
85 Roosevelt Twits Liberty League as Lover of Property, N.Y. TIMES, Aug. 25, 1934.
86 Id.
87 Pledges Pour in at Liberty League, N.Y. TIMES, Aug. 29, 1934.
which [you] violently disapprove – for Communists, for instance? . . . Will you insist upon the right of a free press in the same sense?“

It is tempting to agree with these contemporary critiques of the Liberty League’s allegedly deceptive – or at least partial – invocation of liberty. Yet Davis was no fair-weather civil libertarian. In 1931, he had taken to the Supreme Court the case of a Canadian theologian denied naturalization because of his pacifist beliefs.89 And just months after his 5-4 defeat in that case, Davis agreed to defend Theodore Dreiser, John Dos Passos, and other members of the “National Committee for the Defense of Political Prisoners,” who were facing potential extradition from New York to Kentucky for their role in the coal miners’ strike in Harlan County the previous May.90 The meaning of civil liberties in this period was truly up for grabs,91 and Davis’s decision to help found the American Liberty League in 1934 was one of the many plausible paths available to a civil libertarian faced with the social, political, and economic upheaval of the Great Depression.

No issue better exemplified the slippery boundary between civil and economic liberty in the 1930s than freedom of the press. When the ACLU’s Hays asked whether ALL would “insist upon the right of a free press in the same sense,” he meant the right of a free press “to express views with which [you] violently disapprove” – the rights of radicals.92 Davis would soon enough take on a major free press case, defending an organization – the Associated Press – that was, in a sense, making a radical claim: that the National Labor Relations Board’s oversight of newsroom employees violated the First Amendment. This was not the sort of radicalism Hays had in mind. But the First Amendment arguments that Davis would offer in Associated Press v. NLRB93 emerged from the same big-news network that had funded and argued Near and Grosjean, the canonical press freedom decisions of the day.

Davis’s path to the Court in Associated Press began in June 1935 when, in response to the passage of the National Labor Relations Act, he joined with Earl F. Reed – who would later argue Jones & Laughlin Steel Corp.94 – and fifty-six other prominent attorneys to establish the American Liberty League’s “Lawyer’s Vigilance Committee.”95 The purpose of the Committee was to analyze the constitutional validity of various New Deal programs and to prepare public test cases to topple them. In September of that year, Reed announced the Committee’s first report: by unanimous vote, the lawyers declared the NLRA an unconstitutional exercise of the congressional power to regulate interstate commerce and a violation of the Fifth Amendment rights of employers and employees to contract freely.96 Soon, John Davis’s role as outside

88 Id.
90 Nov. 21, 1931 Letter from Theodore Dreiser to Davis, Series IV, Box 162, JWDP.
91 See generally Weinrib, Civil Liberties Outside the Courts, supra note XX; Zackin, supra note XX.
92 Pledges Pour in at Liberty League, N.Y. TIMES, Aug. 29, 1934.
93 301 U.S. 103 (1937)
94 301 U.S. 1 (1937)
95 PETER H. IRONS, THE NEW DEAL LAWYERS 244 (1982); WOLFSKILL, supra note XXX, at 70-71.
counsel for the Associated Press presented him with perfect opportunity to make good on the Vigilance Committee’s denunciation of the NLRA.97

That same fall, lawyers at the National Labor Relations Board were looking for cases to test the constitutionality of the NLRA, as the efficacy of the Board would be severely limited unless lower courts could be counted on to enforce its rulings. In particular, they needed a case involving interstate transportation or communication, in addition to the manufacturing test cases they already had in play.98 The Board’s lawyers found one in the plight of Morris Watson, a reporter and American Newspaper Guild organizer at AP. Watson was fired on October 7 shortly after winning unanimous approval from the Guild local to bargain collectively under the NLRA.99 While AP General Manager Kent Cooper had written on Watson’s dismissal that it was “solely on the grounds of his work not being on a basis for which he has shown capability,” the NLRB’s regional director Elinor Herrick discovered a memorandum in Watson’s file from an executive news editor, stating that, “He is an agitator and disturbs morale of staff at a time when we need especially their loyalty and best performance.”100 On this basis, the NLRB initiated a proceeding against AP for illegal labor practices in its effort to forestall unionization.

On January 17, 1936, John Davis sought a preliminary injunction against the NLRB.101 Repeating the arguments that ALL’s Vigilance Committee had outlined the previous fall, Davis insisted that the NLRB lacked constitutional authority to bring its action.102 His efforts were unavailing and on April 8, Davis stood before his former co-counsel from the pacifist naturalization case, Dean Charles Clark of Yale Law School, then serving as an NLRB trial examiner. When Clark “denied [Davis’s] motion to dismiss the case on constitutional grounds,” Davis unsuccessfully challenged Clark’s jurisdiction to hear the case at all.103

Pending appellate review of Clark’s decision, the AP’s General Manager Kent Cooper reported to Davis that many members of his board felt that the underlying constitutional issue was not property or contract rights but freedom of the press.104 Some of them had already floated the argument in their editorial pages, suggesting that Watson had been fired for “deliberately color[ing] the news reports.”105 Cooper himself insisted that the central question was whether the news would remain “‘unsullied’ by the bias of self-interested employees.”106 These views echoed those of ANPA and its General Counsel, Elisha Hanson, who had been arguing since 1933 that closed shops infringed on press freedom.107 In December 1936, for instance, ANPA released a statement announcing “that the inclusion of all editorial employees in the guild would lead to biased news writing and consequently to the violation of freedom of the press.”108 And when Associated Press reached the Supreme Court a few months later, Hanson filed an amicus brief reiterating these arguments.

98 IRONS, supra note XXX, at 265.
99 HARBAUGH, supra note XXX, at 373.
100 IRONS, supra note XXX, at 265. Earl Reed had done the same at the hearing stage in Jones & Laughlin, which was then also working its way through the courts. Id.
101 Id. at 266.
102 HARBAUGH, supra note XXX, at 374.
103 IRONS, supra note XXX, at 266.
104 See June 11, 1936 Letter from Cooper to Davis, Series IV, Box 102, JWDP.
105 Id.
106 Dec. 13, 1935 Letter from Cooper to Frank Noyes, Series IX, Box 176, JWDP.
107 See supra notes XXX and accompanying text.
108 Emery, supra note XXX, at 235.
Back in the spring of 1936, however, Davis, remained unconvinced: “Let us keep clearly in mind what this case is about,” he wrote to Cooper.109 “Primarily we are not litigating the question of the reason or lack of reason for Watson’s discharge. We are denying the right of the National Labor Relations Board to control our right to hire and fire.”110 The seasoned litigator was truly skeptical that “employee-employer relations fell under the purview of the First Amendment.”111 He nonetheless asked an associate assigned to the case, Paschall Davis, to “work up a First Amendment argument.”112 Both men were uncertain whether the activities of the AP, which was not itself a publisher, could be characterized as exercising a “press” function. Yet they agreed that if the court accepted that AP was “press,” “they could properly argue that the Wagner act violated both the First and Fifth amendments.”113

Davis did make the First Amendment point in his oral arguments at the Second Circuit, but he spent most of his time on the Fifth Amendment and the Commerce Clause.114 On July 13, a unanimous three-judge panel rejected the AP’s constitutional challenge; the opinion did not even address the First Amendment argument by name.115 Following this defeat, however, the AP board only became more convinced that Davis should foreground the First Amendment defense. On July 17, Davis got word that Cooper “still reiterates his view that their real defense . . . lies in the fact that they cannot satisfactorily maintain of impartiality in news service without a free-hand in the selection of their so-called editorial employees.”116

Filed in January 1937, Davis’s Supreme Court brief included a six-page First Amendment argument.117 In it, Davis first noted that the NLRB’s “order to reinstate Watson presupposes, and is wholly dependent upon, the power to regulate [the AP’s] gathering, production, and dissemination of news for the American press” as an aspect of interstate commerce.118 This being so, NLRB was treating “[n]ews and intelligence . . . as an ordinary article of commerce, subject to Federal supervision and control” – “in disregard of the First Amendment to the Constitution.”119 “Logically, and on principle alone,” Davis concluded, “the National Labor Relations Act, as applied to The Associated Press, is thus an infringement upon that freedom of expression that is the essence of free speech and of a free press.”120 He also added a First-Amendment-absolutist grace-note: “Freedom of the press and freedom of speech, as guaranteed by the first amendment, means more than freedom from censorship by government; it means that freedom of expression must be jealously protected from any form of governmental interference and control.”121

In drafting his response to Davis’s free press argument, Charles Fahy, the NLRB’s general counsel, himself acknowledged a broad free press right: “the right to publish the news, without previous or subsequent restraint and without government interference with free and

109 June 12, 1936 Letter from Davis to Cooper, Series IV, Box 102, JWDP.
110 XXX.
111 HARBAUGH, supra note XXX, at 377.
112 Id.
113 Id.
114 Id.
116 July 17, 1936 Letter from Bissell to Davis, at 1, Series IV, Box 102, JWDP.
118 Id. at 99.
119 Id.
120 Id.
121 Id. at 100.
general expression of opinion or circulation of news.”

But, he continued, the NLRA “is not concerned with this right” and “is not legislation directed to the press as such.”

“What it does do,” Fahy concluded, “is to prevent the petitioner from destroying the freedom of its employees.”

As will see below, the tendency of expansive civil libertarian arguments to encroach on the rights of others would become a central issue in the Jehovah’s Witness license tax cases. Of course, this question of the just distribution of rights, the political economy of liberty, was also the central question that *Lochner* and its ilk raised for a generation of progressive lawyers.

Fahy recognized the link: below his final typed line about preventing the destruction of employee freedom, Fahy noted by hand, “Whole freedom of press argument is really a due process argument.”

William Harbaugh, Davis’s biographer, has suggested that when Davis filed the brief on January 22, 1936, he was still uncertain how much emphasis to put on the First Amendment point during oral arguments the following month. But on February 8, while heading down to Washington, Davis apparently remarked to an associate that “he believed that they would actually win the case on freedom of the press. It was quite possible, he explained, that the Jones & Laughlin Steel Corporation might lose the companion case on the commerce clause and Fifth Amendment arguments; but of all the Wagner Act appellants, the AP alone was in a position to invoke a First Amendment argument.”

The most obvious reason for Davis’s newfound focus on the First Amendment argument, as Harbaugh notes, was President Roosevelt’s announcement of his court-packing plan three days earlier. If moderate Justices were looking to set some outer limit on FDR’s imperious designs, the First Amendment provided as liberal a limit as any. As we will see below, Davis’s good friend Grenville Clark would make a similar calculation, turning to First Amendment advocacy as a way of vindicating judicial review.

In any event, Davis’s performance before the Supreme Court confirmed that sometime between July 1936 and February 1937 he had shed his diffidence toward the First Amendment argument. As Peter Irons writes, “Davis ended by cloaking himself with the First Amendment,” calling the NLRB’s reinstatement order “a direct, palpable, undisguised attack upon the freedom of the press.” Characterizing the editorial employee fired by the Associated Press as “the writer, the reporter, the rewriter, the composer of headlines,” Davis insisted that, “The author and the product are one and inseparable. No law, no sophistry can divide them; and if you restrict the right to choose the one you have inevitably restricted the right to choose the other.”

“[I]f there is one field which, under the Constitution of the United States, escapes congressional intrusion,” Davis went on, “that field is the freedom of the press.”

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123 Id.
124 Id. at 2.
127 HARBAUGH, supra note XXX, at 378.
128 Id.
129 Id. at 379.
130 IRONS, supra note XXX, at 284; HARBAUGH, supra note XXX, at 379.
131 Olken, supra note XXX, at 313-314.
132 Quoted in HARBAUGH, supra note XX, at 380.
would soon become the normative foundation of a consensus civil libertarianism, Davis “[i]nvok[ed] the specter of Nazi and Communist press restrictions,” asking “what more effective engine could dictatorial power taken than to name the men who shall furnish the food of facts upon which the public must feed?”

On April 12, 1937, the Supreme Court handed down 5-4 decisions in two major challenges to the NLRB. While Chief Justice Hughes resolved the Fifth Amendment issue in his Jones & Laughlin Steel majority opinion, Justice Owen Roberts confronted Davis and Hanson’s additional First Amendment challenge in his Associated Press majority opinion. Unlike the Second Circuit, Justice Roberts squarely faced the issue, rejecting the argument that in ordering the Associated Press to re-instate an editorial employee, the NLRB had violated the company’s freedom to control the content of its publications.

The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the petitioner is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt.

In dissent, the Four Horsemen slammed the majority’s narrow view of press freedom. One year earlier, Justice Sutherland had written the Court’s unanimous decision in Grosjean, and now he once more asserted a broad vision of press freedom:

In a matter of such concern, the judgment of Congress – or, still less, the judgment of an administrative censor – cannot, under the Constitution, be substituted for that of the press management in respect of the employment or discharge of employees engaged in editorial work. The good which might come to interstate commerce or the benefit which might result to a special group, however large, must give way to that higher good of all the people so plainly contemplated by the imperative requirement that “Congress shall make no law . . . abridging the freedom . . . of the press.”

With these words, Justice Sutherland offered his own vision of bifurcated review. Even if one accepted – as the new majority effectively had – that class legislation with a rational basis was constitutionally sound, the judiciary could not defer to such political and economic calculation when it restrained the exercise of First Amendment rights. At the time Grosjean

133 IRONS, supra note XXX, at 284.
134 Each Justice also provided a necessarily fact-specific Commerce Clause analysis. See Irons, supra note XXX, at XXX-XXX.
135 Associated Press v. NLRB, 301 U. S. 103 (1937). Weinrib notes that Associated Press was the “only prior case under the NLRA in which freedom of speech had explicitly been raised.” Weinrib, The Liberal Compromise, supra note XXX, at 501 n.147.
136 Associated Press, 301 U.S., at 133.
137 Id. at 137 (Sutherland, J., dissenting).
138 See also id. at 135:
The difference between . . . [the First and Fifth Amendments] is an emphatic one, and readily apparent. Deprivation of a liberty not embraced by the First Amendment – as, for example, the liberty of contract – is qualified by the phrase "without due process of law;" but those liberties enumerated in the First Amendment are guaranteed without qualification, the object and effect of which is to put them in a
was decided, lawyers at the American Civil Liberties Union had worried that the case might authorize this type of argument, transforming labor rights into civil libertarian wrongs. The Associated Press majority opinion cut off that possibility for the time being.

C. From Associated Press to Carolene Products to the Peddling Tax Cases

Even in defeat, Sutherland’s dissent previewed the mix of formalism and functionalism that, one year later, would undergird Footnote Four of United States v. Carolene Products Co. By that time, Sutherland had retired, and the legal threat to core New Deal programs seemed to have subsided. At the same time, an increasingly aggressive Nazi regime was providing a horrifying example of the threat that majoritarian, single-party rule could pose to the rights of minorities and dissenters. This example impressed Harlan Fiske Stone deeply, and influenced his composition of what would become paragraphs two and three of Footnote Four. It was the influence of Chief Justice Charles Evans Hughes, however, that prompted Justice Stone to include the Footnote’s first, formalistic paragraph. As Hughes wrote in response to an early draft of Carolene Products:

I am somewhat disturbed by your Note 4 . . . . Is it true that “different considerations” apply in the instances you mention? Are the “considerations” different or does the difference lie not in the test but in the nature of the right involved? When we say that a statute is invalid on its face, do we not mean that, in relation to the right invoked against it, the legislative action raises no presumption in its favor and has no rational support? Thus, in dealing with freedom of speech and of the press . . . the legislative action putting the press broadly under license and censorship is directly opposed to the constitutional guaranty and for that reason has no presumption to support it . . . .

139 See LEBOVIC, supra note XXX, at XXX.
140 See 304 U.S. 144, 152 n. 4 (1938) (some citations omitted):
There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny . . . [O]n restraints upon the dissemination of information, see Near v. Minnesota ex rel. Olson; Grosjean v. American Press Co.

Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities [citing cases rejecting economic discrimination against out-of-state businesses].

141 For the impact that fascism had on Stone while drafting Carolene Products, see WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980, at XXX (2001).
142 Letter from Charles Evans Hughes to Harlan Fiske Stone (April 18, 1938), reprinted in LOUIS LUSKY, OUR NINE TRIBUNES: THE SUPREME COURT IN MODERN AMERICA 179 (1993); see also Bruce A. Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713, 743-44 (1985); Peter Linzer, The Carolene Products Footnote and the Preferred
Notably, while Hughes’s letter focused on the judicial protection of civil liberties, the “different considerations” to which Stone’s early draft referred, the logic of Hughes’s argument was broader, and entailed no necessary distinction between civil liberties and other constitutional rights. In the spring of 1938, Hughes was resisting calls from within the legal academy as well as from new Roosevelt appointees to roll back the constitutional and jurisdictional facts doctrines that had long been central pillars of his vision of limited yet active judicial review. Aimed at administrative fact-finding, these doctrines sought to ensure that even as the courts ceded a substantial degree of discretionary authority to agencies, judges would retain a crucial role in protecting individuals from unconstitutional exercises of political power.

Some New Dealers, such as Felix Frankfurter, felt that the doctrines should be eliminated altogether, lest they provide formalistic yet inherently indeterminate vehicles for future judicial encroachments on the political branches. Other New Dealers, including Justices Murphy, Black and Douglas, felt the doctrines could be safely transformed into vehicles for promoting a narrow set of privileged constitutional rights – “personal liberties” that did not include economic rights in property or contract. This suggestion had first been mooted by Justice Louis Brandeis in 1922, and was something of an idee fixe among those New Dealers who thought of themselves as representing a new breed of “liberal.” Hughes and the moderate corporate lawyers he represented, however, refused to abandon the doctrines or limit their application to non-economic rights. And Sutherland’s Grosjean opinion made clear how even the privileging of ostensibly non-economic rights could have significant economic effects, limiting the forms of political economic reconstruction in which the state could engage.

While prevailing on Stone to include a formalistic first paragraph in Footnote Four, Chief Justice Hughes was putting the finishing touches on another opinion that would raise new doubts about the degree of deference that judges should afford the New Deal state. Handed down the same day as Carolene Products, Hughes’s decision in United States v. Morgan (Morgan II) surprised many New Deal administrators by announcing that the mixing of prosecutorial and judicial functions within an agency could violate “fundamental requirements of fairness” and thus render an agency’s action unconstitutional. Since the early 20th century, the combination


143 For a thorough discussion of the legal development and political implications of these doctrines, see ERNST, supra note XX, at 35-51, 56; Thomas Merrill, Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law, 111 Columbia L. Rev. 949 (2011); and Mark Tushnet, The Story of Crowell: Grounding the Administrative State, in Federal Courts Stories 359 (Vicki C. Jackson & Judith Resnick eds. 2010).

144 See ERNST, supra note XX, at XX.

145 Robert Hale, Does the Ghost of Smyth v. Ames Still Walk?, 55 Harv. L. Rev 1116, 1132 (1942) (noting in the context of administrative fact-finding that Justices Murphy, Douglas, and Black “would retain substantive due process only in connection with protections contained in the Bill of Rights” and “civil liberties”); see also Thomas Emerson & David Helfeld, Loyalty Among Government Employees, 58 Yale L.J. 1, 112 (1948) (“[W]here rights under the First Amendment are at stake—rights to which the courts have consistently given a preferred constitutional status—the negative features of judicial review serve an especially useful purpose. In such situations the presumption of administrative legality is reversed, or at least neutral, and careful scrutiny by a second agency becomes of positive value.”).

146 See Louis Jaffe, Constitutional and Jurisdictional Fact, 70 Harv. L. Rev. 953, XXX (1957); Forbath, 147 Morgan v. United States, 304 U.S. 1 (1938). The Court first heard the Morgan case in 1936, remanding for further development of the record. 298 U.S. 468 (1936) (Morgan I).

148 304 U.S. at 19-20. See also Ernst, supra note XX, at 71-74.
of prosecutorial and judicial functions had been a distinctive feature of many agencies, including the NLRB, and Hughes had passed over this feature in silence while upholding the constitutionality of the NLRA the previous year. But now Hughes announced that, in order to protect “the liberty and property of the citizen,” courts should review administrative decision-making for its conformity with an indeterminate set of “fundamental requirements” summed up by the shibboleth “fair play.”149 “Fair play,” the Morgan II Court concluded, did not permit the degree to which the Secretary of Agriculture had mixed prosecutorial and judicial functions in setting the maximum price that stockyard agents could charge farmers for the privilege of selling their livestock. How much mixing was too much mixing remained unclear, but the substantive outcome was the invalidation of the Secretary’s economic intervention on behalf of farmers and against stockyard agents. As Morgan II demonstrated, a regulated party’s right to “fair play,” though not an economic right in itself, could serve to frustrate the government’s efforts to restructure the nation’s political economy.

Joining Chief Justice Hughes’s opinion in Morgan II, Stone also added a first paragraph to Carolene Products’ Footnote Four.150 Tracking the Chief Justice’s approach to constitutional facts, this paragraph did not distinguish between economic and non-economic rights and left it to judges to determine when legislation facially infringed upon constitutional text: “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”151 The second two paragraphs of the Footnote, as Stone explained to Hughes, aimed to “avoid the possibility of having what I have written in the body of the opinion about the presumption of constitutionality in the ordinary run of due process cases applied as a matter of course to . . . more exceptional cases,” where there arose “possible restraints on liberty and political rights which do not fall within those specific prohibitions [of the constitutional text] and are forbidden only by the general words of the due process clause of the Fourteenth Amendment.”152

Yet Stone’s inclusion of the Hughesian first paragraph in Footnote Four introduced a fundamental ambiguity into this reasoning: “the ordinary run of due process cases” marginalized by the body of the Carolene Products opinion included those cases that jurists had long seen as presenting legislative or administrative actions which “appear[ed] on [their] face to be within a specific prohibition of the Constitution, such as those of the first ten amendments” – namely, the Fifth’s protections of property.153 Similarly, the third paragraph – which raised the possibility of heightened judicial scrutiny of regulation that was “directed at” minorities or was the result of “prejudice against discrete and insular minorities” that “curtail[ed] the operation of those political processes ordinarily to be relied upon to protect minorities” – undermined the clean break with the Court’s earlier economic jurisprudence that the body of Carolene Products

149 304 U.S. at 15-16, 19-20.
150 See Linzer, supra note XXX, at XX.
151304 U.S. 144, 152 n. 4 (1938) (citations omitted).
152 Quoted in Lusky, supra note XX, at XX.
153 See Ernst, supra note XXX, at XX; Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution XXX (1998); cf. Ackerman, Beyond Carolene Products, supra note XXX, at 743-744 (“In calling the Bill of Rights ‘specific,’ Justice Stone doubtless wished to emphasize that the Court had learned its lesson in 1937 and would not use the Constitution’s grand abstractions to revive the laissez-faire capitalism of the Lochner era. Nonetheless, by framing its pledge of judicial restraint in this way, Carolene added a distortion of its own.”).
seemed to announce. The precedents on which Stone relied for heightened review of regulation affecting politically-vulnerable “discrete and insular minorities” were cases in which the Court had rejected a state’s economic “discrimination” against out-of-state businesses. Although criticism of this specific kind of “class” legislation could be nicely reconciled with the New Deal’s expansive reading of the Commerce Clause and its nationalizing ambitions, such criticism also inevitably recalled the anti-redistributionist interpretation of the equal protection clause that had long undergirded the Court’s opposition to “class” legislation that favored the interests of waged laborers over those of property owners. It was based on this economically libertarian interpretation of equal protection that Justice Sutherland had initially wished to decide Grosjean, before acquiescing to his more progressive colleagues’ preferred First Amendment approach.

In 1937, the Associated Press minority’s effort to transform Grosjean into an expansive, economically libertarian interpretation of the First Amendment had failed to carry the day. A year later, however, the ambiguity that Footnote Four’s first and third paragraphs injected into Carolene Products’ “presumption of constitutionality” re-opened the question of the relationship between economic and civil liberty. Four years after that, when the Jehovah’s Witnesses challenged a peddling tax as violating their First Amendment rights to free exercise, free speech, and press freedom, a narrow five-Justice majority, including Justice Roberts, cited Associated Press for the proposition that, “It would hardly be contended that the publication of newspapers is not subject to . . . the obligations placed by statutes on other business.” But the newly-minted Chief Justice, Harlan Fiske Stone, filed a four-Justice dissent, citing Carolene Products for the alternative proposition that the First Amendment occupied a “preferred position” in the constitutional order, a position that undermined the presumptive constitutionality of legislative acts that even minimally encroached on civil liberty.

When ANPA’s Elisha Hanson filed an amicus brief in support of the Witnesses’ petition for rehearing, he warned that “subtle encroachments on the freedom of the press to which the majority opinion . . . lends support” may have arisen from “misconceptions attributable to a dictum of this Court in Associated Press.” The “dictum” to which Hanson referred was:

The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the antitrust laws. Like others, he must pay equitable and nondiscriminatory taxes on his business.

154 304 U.S. at 152 n. 4.
155 See id. (citing “McCulloch v. Maryland, 4 Wheat. 316, 428, 4 L.Ed. 579; South Carolina State Highway Department v. Barnwell Bros., 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734, decided February 14, 1938, note 2, and cases cited.”).
158 Id. at 608 (Stone, C.J., dissenting) (“The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position. . . . They extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it.”). Justices Black, Murphy, and Douglas joined in this dissent.
159 Brief of American Newspaper Publishers Association as Amicus Curiae 8 (Sept 3., 1942).
Hanson agreed that “newspapers are not immune from the ordinary forms of taxation,” citing income taxes, capital stock taxes, social security taxes, corporate franchise taxes, property taxes, and unemployment compensation taxes as examples. But “none of these taxes,” Hanson argued had a “prohibitory or censorial quality or operates as a condition precedent to the publication or circulation of newspapers.” Dissenting in Associated Press, Justice Sutherland had characterized NLRB supervision of editorial employees as having just such a “censorial quality,” citing back Grosjean for the proposition that even “the governmental power of taxation, one of the least limitable of the powers, may not be exerted so as to abridge the freedom of the press.” Hanson similarly pushed for a broad reading of Grosjean and what counted as a regulation with a “prohibitory or censorial quality”:

The rationale of the Grosjean case was not rested upon the fact that a selected group of newspapers was singled out for attack. The Grosjean case condemns every form of restraint upon the circulation of newspapers in recognition of the fact that liberty of circulation is the very life blood of the press and that every newspaper depends upon advertising revenue. Decreased revenue resulting from taxes on newspaper advertising therefore seriously impairs the operation of the press.

The Associated Press majority had rejected this broad reading of Grosjean in 1937, at least as it applied to labor regulation. Six years later, however, when a new five-Justice majority adopted Chief Justice Stone’s position and struck down the peddling taxes, it also appeared to embrace Hanson’s arguments and, in turn, Justice Sutherland’s general objections to circulation taxes in Grosjean. There, before reviewing the “present setting” of the case and the “long history” of intentionally discriminatory circulation taxes, Sutherland had argued that since circulation taxes “curtail[ed] the amount of revenue realized from advertising” and had the “direct tendency . . . to restrict circulation,” they operated “a restraint in a double sense” on press freedom. “This is plain enough,” he continued, “when we consider that, if it were increased to a high degree, as it could be if valid, [the tax] well might result in destroying both advertising and circulation.” Citing the same line of precedent, Justice Douglas’s majority opinion in the 1943 cases reasoned that “[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance.”

In dissent, Justice Reed, joined by Roberts, Frankfurter, and Jackson, squarely confronted the economic implications of the majority’s new approach to First Amendment enforcement. Noting that the Witnesses had alleged neither that the taxes were “so excessive in amount as to be prohibitory” nor that “discrimination is practiced in the[ir] application,” Reed asked “Is subjection to nondiscriminatory, nonexcessive taxation in the distribution of religious literature a

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161 Brief of American Newspaper Publishers Association as Amicus Curiae 9 (Sept 3, 1942).
162 Id.
163 Associated Press, 301 U.S., at 135.
164 Brief of American Newspaper Publishers Association as Amicus Curiae 10 (Sept 3, 1942).
prohibition of the exercise of religion or an abridgment of the freedom of the press?"  The “free" in free press and free exercise, Reed answered, “cannot be held to be without cost, but, rather, its meaning must accord with the freedom guaranteed. ‘Free’ means a privilege to print or pray without permission and without accounting to authority for one's actions.” As for Grosjean, the four dissenters implied that Justice Sutherland’s general objections to circulation taxes were dicta: “In that case, a gross receipts tax on advertisements in papers with a circulation of more than twenty thousand copies per week was held invalid because ‘a deliberate and calculated device in the guise of a tax to limit the circulation.’” Grosjean for them – and at least initially for its celebrants at the ACLU – had been a case about intentional efforts to suppress political dissent. The new “liberal” majority’s opinion, however, seemed to be returning to that case’s roots in conservative concerns about the dangers that government regulation posed to economic freedom.

Before the Jehovah’s Witnesses could catalyze this jurisprudential reversal at the High Court in 1943, they would need financial support, public recognition, and legal advice. As it happened, they got all three from John W. Davis’s good friend from the New York Bar, Grenville Clark. Between 1937 and 1940, Clark took the lead in elaborating a vision of civil liberties law focused on the importance of judicial review and the danger that legislators and administrators posed to the rich and poor alike.

II. The Jehovah’s Witnesses and the American Bar Association

When Davis and ANPA failed to secure an expansive reading of Grosjean in Associated Press, New Deal politics were in a state of transition. On the one hand, Roosevelt had scored resounding presidential and congressional victories in the fall of 1936, making the American Liberty League’s lofty constitutional formalism a main target of abuse. On the other hand, FDR’s post-election announcements of an ambitious executive reorganization plan, followed by an even more radical judicial re-organization plan, sparked a new phase of legal, corporate, and political resistance to the New Deal regime. In the spring and summer of 1937, this growing discontent with FDR’s efforts to strengthen administrative governance coincided with a surge in German, Italian, and Japanese aggression abroad and economic collapse at home. Precisely at the moment FDR had chosen to cash in on his electoral mandate, executive rule looked both more dangerous and more ineffective than ever before. The judiciary might once more have an important role to play in safeguarding democracy.

It was within this legal and political context that the Jehovah’s Witnesses confronted a particularly painful period in their own history, both domestically and internationally. Shortly after Hitler’s rise to power, an administrative order made the Nazi salute compulsory during the singing of the National Anthem and by 1934 the regime had established special tribunals to try
violators.\textsuperscript{174} German Witnesses systematically refused to salute, and whole families were imprisoned or sent to the earliest concentration camps.\textsuperscript{175} Things only got worse when Hitler re-instituted conscription in 1935. Most draft-eligible Witnesses refused to serve, in keeping with their commitment to fight only for the Lord.\textsuperscript{176} German authorities summarily imprisoned all resisters, and shot some of them.\textsuperscript{177}

In the summer of 1935, Joseph Rutherford, the leader of the American Witnesses, called on his congregation to stand in solidarity with their German brethren.\textsuperscript{178} Witnesses across the country responded, launching a campaign of massive resistance to compulsory flag salute laws in the public schools.\textsuperscript{179} Although the American Witnesses could not help their German co-religionists directly, they could at least bear witness to their persecution. Between the summer of 1935 and June 1940 when 	extit{Minersville School Dist. v. Gobitis} was decided, “the public school flag-salute ceremony became an issue in at least twenty states, leading to actual or imminent expulsions in sixteen.”\textsuperscript{180}

The Witnesses would not, however, be satisfied with mere martyrdom. Confrontation with secular and religious governments, from school boards to Catholic churches, was a core part of the sect’s mission.\textsuperscript{181} Joseph Rutherford, himself a lawyer fond of mixing biblical and constitutional argument, wanted to overturn the flag salute laws, not just reveal their oppressive nature.\textsuperscript{182} Working out of their Brooklyn headquarters, Rutherford and his general counsel, Olin Moyle, spearheaded a legal campaign to challenge the expulsion of Witness students.\textsuperscript{183}

This campaign met with defeat after defeat in the courts.\textsuperscript{184} Between 1937 and 1939, the Supreme Court rejected four Witness appeals from adverse flag-salute decisions, dismissing three state court appeals for want of a substantial federal question,\textsuperscript{185} and affirming one federal court decision.\textsuperscript{186} In finding no substantial federal question, the Court consistently cited its 1934 decision in 	extit{Hamilton v. Regents},\textsuperscript{187} a unanimous opinion holding that a state could require all public university students, even those religiously opposed to war, to take classes in military training without violating 14th Amendment due process. Although the Court would not incorporate First Amendment free exercise until May 1940,\textsuperscript{188} Justices Cardozo, Brandeis and Stone filed a concurrence “assum[ing] for the present purposes” that it was so incorporated and

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  \item[176] Peter Brock, Against the Draft: Essays on Conscientious Objection from the Radical Reformation to the Second World War 426 (2006); Peters, supra note XXX, at XXX-XXX.
  \item[177] Id. at 371-372. When war broke out in September 1939, execution became the standard punishment for draft resistance and hundreds of Witnesses died. Id.
  \item[178] Peters, supra note XX, at 24-25.
  \item[179] Id. at 26-28, 260. At the time, the American flag salute, like the “Heil Hitler,” incorporated an outstretched right arm. See Richard Primus, \textit{The American Language of Rights} 198-200 (1999).
  \item[180] See David Manwaring, \textit{Render Unto Caesar: The Flag-Salute Controversy} 79 (1962).
  \item[181] Gordon, supra note XXX, at XX; Peters, supra note XXX, at XX.
  \item[182] Gordon, supra note XXX, at XX.
  \item[183] Id. at XXX; Manwaring, supra note XXX, at 84; Peters, supra note XX, at 38.
  \item[184] Manwaring, supra note XXX, at 56-80.
  \item[187] 293 U.S. 245 (1934).
  \item[188] Cantwell v. Connecticut, 310 U.S. 296 (1940).
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that the First Amendment right was no bar to compulsory military training in the public university. 189

It was the Witnesses’ first effort to challenge a flag salute regulation in a federal district court – Johnson v. Deerfield 190 – that brought their plight to the attention of the American Bar Association’s Special Committee on the Bill of Rights. 191 The Committee was only six months old in January 1939 when it decided to intervene in Johnson, and it had only recently filed its first amicus brief, in Hague v. CIO, supporting union activists’ right to assemble and distribute literature. 192 That January, as the Hague brief was making the rounds in elite legal circles, 193 George K. Gardner, a Harvard Law School professor and ACLU member, was closely following the saga of three Jehovah’s Witness schoolchildren who had been expelled from a public school in western Massachusetts. 194 When the Supreme Court declined to consider the Witnesses’ appeal from a district court order upholding the expulsion, Gardner wrote to his colleague Zechariah Chafee, the leading First Amendment scholar of his generation, a member of the Bill of Rights Committee, and one of the authors of the Hague brief. 195 The next day, Chafee wrote to Grenville Clark, the ABA Committee’s Chair and his Hague co-author. 196 Enclosing Gardner’s letters summarizing the entrenched anti-Witness legal situation, Chafee concluded, “it is clear that the Court will not act unless some new factor enters. I feel strongly we ought to be that new factor and hope that the rest of the Committee will agree.” 197 In the event, the Committee’s members could only agree to file a jurisdictional brief supporting a re-hearing on the cert petition, but taking no position on the merits. 198 Nonetheless, Johnson put the flag-salute issue on the Committee’s radar and established a connection between the beleaguered Witness legal team and the new crown jewel of the public interest bar.

Formed in September 1938, the ABA’s Bill of Rights Committee was the brainchild of the well-connected corporate lawyer Grenville Clark, who became its first Chair. 199 Clark conceived of the Committee as a way of both popularizing the cause of civil liberties and wresting their promotion from the precincts of the labor movement and the legal left – the American Civil Liberties Union and the National Lawyers Guild. 200 As he explained to fellow

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189 Hamilton, 293 U.S., at 265 (Cardozo, J., concurring).
191 See Zechariah Chafee to Grenville Clark (Jan. 17, 1939), Series VIII, Box 2, Grenville Clark Papers, Rainer Library, Dartmouth College [hereinafter GCP].
192 Dunne, supra note XXX, at 103-109.
193 The Hague brief elicited early praise from across the political spectrum, applauded by former Liberty Leaguer John W. Davis as well as New Deal die-hards William O. Douglas and Felix Frankfurter. See John W. Davis to Grenville Clark (Jan. 1, 1939), Series VIII, Box 2, GCP (“It is well done and I am glad the Bar Assn. under your leadership has taken this stand.”); William O. Douglas, Chairman, Securities and Exchange Comm’n, to Grenville Clark (Dec. 31, 1938), 1, Series VIII, Box 2, GCP (“It’s a very good brief, intrinsically, and of course its symbolic significance makes it a document of first importance.”)
194 George K. Gardner to Zechariah Chafee (Jan. 12, 1939), Series VIII, Box 3, GCP.
195 George K. Gardner to Zechariah Chafee (Jan. 12, 1939), supra note XX.
196 Zechariah Chafee to Grenville Clark (Jan. 17, 1939), supra note XXX, at 1.
197 Id. at 2.
198 See Grenville Clark to Louis Lusky (Mar. 28, 1939), Series VIII, Box 4, GCP.
199 GERALD T. DUNNE, GRENVILLE CLARK: PUBLIC CITIZEN 105-106 (1986); American Bar Association, “The American Bar Association’s Committee on the Bill of Rights,” Bill of Rights Review 1 (Summer 1940), 64, Series XXI, Box 11, GCP.
200 For an early statement of his vision, see Grenville Clark to Arthur Garfield Hays (Jan. 22, 1938), 1-2, Series VI, Box 1, GCP (“I have been talking to Roger Baldwin about the possibility of having eight or ten people who would
leaders of the corporate bar in a June 1938 call-to-arms, “conservative and moderate elements” had “a tremendous stake in the maintenance of civil liberty” and “the maintenance of civil liberty [would], in the long run, mainly depend” upon them.201

Clark’s discovery of the “tremendous stake” that he and his colleagues had in “the maintenance of civil liberty” was a quite recent development, dating to President Roosevelt’s February 1937 effort to re-design the Supreme Court.202 A moderate Republican, Clark had supported Roosevelt’s reelection bid in 1936 but became incensed months later when the victorious President announced his court-packing plan.203 Over the next six months, Clark spearheaded elite legal resistance to the President’s vision.204 After initial stop-gap lobbying in Congress, Clark formed the National Committee for Independent Courts with Alabaman attorney Douglas Arant to coordinate anti-court-packing efforts.205

Like so many of his colleagues, Clark interpreted FDR’s plan as an all-out assault on the rule of law. But Clark’s reaction was distinct in two respects. First, he insisted on the bi-partisan nature of the anti-court-packing cause, going so far as to subtitle initial fliers for the NCIC, “A Committee of Citizens, All of Whom Favored the President’s Election in 1936, and All of Whom Are Opposed to the President’s Supreme Court Proposal.”206 Opposition to court-packing did not mean opposition to Roosevelt or the Democratic Party – it meant defense of a pre-political legal order. Second, Clark would go farther than perhaps any lawyer of his generation in synthesizing the defense of judicial review with the defense of civil rights and civil liberties. In the summer of 1937, as the court-packing bill went down to defeat, Clark’s advocacy transitioned almost seamlessly into a more general campaign for civil libertarian reform.207

An early indication of Clark’s pivot to civil liberties came in an article he wrote for the

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201 Clark, Memorandum, supra note XX, at 2. Clark forwarded this planning memorandum to leading New York attorneys, including Henry Shattuck, Elihu Root, Jr., and C. C. Burlingham. See Grenville Clark, Cover Sheet (Jun. 27, 1938), Series VI, Box 1, GCP. See also Grenville Clark, “Conservatism and Civil Liberty,” Address at Annual Meeting of the Nassau County Bar Association, 11 June 1938, Series XXI, Box 5, GCP.

202 DUNNE, supra note XX, at 97 (“Prior to his confrontation with the President, Clark had given little to the specific subject of Bill of Rights guarantees, aside from some collaboration with [President James] Conant of Harvard in opposing teachers’ oaths.”).

203 Id. at 78-80

204 Id.

205 Id. at 80-81. Arant would some years later succeed Clark as Chair of the Bill of Rights Committee. See, e.g., Hayden Covington to Douglas Arant, Chairman, Special Committee on Bill of Rights (Dec. 3, 1941), Series VIII, Box 2, GCP.

206 DUNNE, supra note XX, at 81.

207 Id. at 98 (“[T]actical defense of the Supreme Court led necessarily in Clark’s mind to defense of the Constitution in general terms and constitutional guarantees in particular.”).
May 1937 “Supreme Court” issue of *The Yale Review*. In his contribution, Clark took up the court-packing debate, and sought to show that the Court being assailed as irredeemably backward had actually been “reasonably flexible in construing the Constitution to enable both federal and state action to meet new needs . . . .” The ultimate target of the Court’s detractors, Clark implied, was not the pace of policy but constitutionalism itself – and its vital adjunct, judicial review. Salient to this argument was the Hughes Court’s civil libertarian record. Noting liberal criticisms of the Court for “unduly magnifying the scope of the ‘due process’ clause so as unduly to restrict government regulation,” Clark insisted on the “important fact” that not all due process cases were about economic regulation. Due process jurisprudence also encompassed “the decisions involving civil liberties – the personal rights of the individual guaranteed by the First Amendment and other provisions of the Bill of Rights.” When it came to “free press,” “free speech and the right of assembly,” and cases involving “the right to a fair trial,” the Hughes Court was a liberal court and “little reasonable criticism” could be leveled at it. Surely, the Court’s detractors did not wish to check this important work?

Upon reading his *Yale Review* piece, Clark’s old friend Felix Frankfurter, who had refused to condemn court-packing, responded that “your view of the Supreme Court, as the great safe-guard of those democratic institutions that you and I so passionately care about, is much too romantic and too simplified. . . .” To Frankfurter’s dismay, Clark would spend the next year publicly celebrating robust judicial review as the cornerstone of civil liberties and American democracy. His first major campaign stop, in January 1938, was a series of lectures at the New School for Social Research on “The Bill of Right.” These lectures laid out Clark’s vision of the federal judiciary as privileged guardian of the Bill of Rights – both against the federal government and against the states. When Clark reached out to Zechariah Chafee for some advice, Chafee cautioned him that the first eight amendments of the Constitution were far from fully incorporated by way of the Fourteenth Amendment against the states. While sounding a note of deference to Chafee’s expertise, Clark demurred, writing that “virtually everything in the first eight amendments is protected against state infringement . . . .” While Chafee’s understanding of the case law was more accurate than Clark’s, he and Clark would soon be working together to make the latter’s vision a reality.

It was also around this time that Clark began to discuss assembling a small group of “pretty cautious and conservative” lawyers to promote the cause of civil liberties. In an early January letter to Walter Lippmann, Clark explained that he thought FDR “was simply ignorant as to the history of the doctrine of judicial review,” and that he was “just starting a negotiation” to form a united front between the “rather extreme Left” at the ACLU and more mainstream

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208 Grenville Clark, The Supreme Court Issue, *Yale Rev.* 26 (May 1937), 669, Series XXI, Box 1, GCP.
209 Id. at 669.
210 Id. at 681.
211 Felix Frankfurter to Grenville Clark (Jul. 1, 1937), Series VI, Box 1, GCP. For Clark and Frankfurter’s court-packing correspondence see Dunne, supra note XX, at 84-88.
212 Grenville Clark, The Constitution: The Bill of Rights, Six Lectures Delivered at the New School For Social Research (Jan.-Feb. 1938), Series XXI, Box 5, GCP.
213 Grenville Clark to Zechariah Chafee (Jan. 25, 1938), Series VI, Box 1, GCP; Zechariah Chafee to Grenville Clark (Jan. 29, 1938), Series VI, Box 1, GCP.
214 Grenville Clark to Zechariah Chafee (Jan. 31, 1938), 1-2, Series VI, Box 1, GCP.
215 See Grenville Clark to Arthur Garfield Hays (Jan. 22, 1938), supra note XX.
216 Grenville Clark to Walter Lippmann (Jan. 11, 1938), 1, Series VI, Box 1, GCP.

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defenders of judicial enforcement of civil liberties.\textsuperscript{217} Yet while Clark reached out to civil libertarians on his left, he also sought to consolidate pre-existing right-wing support for civil libertarian activism. To this end, two months after concluding his New School lectures, he gave a speech to the American Newspaper Publishers Association (ANPA).\textsuperscript{218}

As discussed in Part I, ANPA and its crusading general counsel Elisha Hanson were early innovators in using the language and law of civil liberties to critique federal regulation, even when such regulation primarily targeted economic activity. They cast considerable constitutional doubt on circulation taxes in the 1936 \textit{Grosjean} case and in 1937, in concert with John W. Davis, challenged the NLRB on First Amendment grounds. A year after the Court turned back this challenge in \textit{Associated Press}, Clark gave ANPA the red meat it wanted, endorsing the employer’s right to free speech as against the NLRB’s pro-labor machinations.\textsuperscript{219}

Clark also identified the Senate’s investigation of corporate lobbying – launched by Hugo Black – as a paradigmatic offense to civil liberties.\textsuperscript{220} In recent days, the Senate committee had been investigating opponents of the President’s executive reorganization plan, a target of ANPA’s scorn. Indeed, the previous month, Elisha Hanson had appeared before the anti-lobbying committee to represent the leadership of the National Committee to Uphold Constitutional Government (NCUCG).\textsuperscript{221} The NCUCG, like the future ABA Bill of Rights Committee, was an effort to organize a bi-partisan front against the perceived excesses of New Deal administration, and it focused on opposing executive reorganization. Launched in the wake of FDR’s reelection by Frank Gannett, one of the leading newspapermen in the country and a powerful player in ANPA, the NCUCG counted among its members and supporters progressive reformer Amos Pinchot, pacifist minister John Haynes Holmes, and Senator William Borah, whose anti-court-packing amendment Clark had praised a year earlier.\textsuperscript{222}

When Clark attacked the lobbying investigation as a prime danger to civil libertarianism, he was thus associating the cause of civil liberties with a particular critique of New Deal administration, one to which ANPA’s members were deeply committed. Declaiming the “notorious and unconstitutional inspection of private telegrams” conducted by Black and his successor Sherman Minton, Clark equated civil liberties with the “reign of law” as against “arbitrary action by the government.”\textsuperscript{223} While the \textit{New York Times} praised Clark’s call for “Liberty and Tolerance,” Felix Frankfurter tried to resist what he saw as a conservative cooptation of the civil libertarian agenda, “fir[ing] out a defense of Hugo Black’s investigatory activities.”\textsuperscript{224}

Clark’s campaign for a moderate-to-conservative civil libertarian front against New Deal threats to the rule of law reached its climax in a June speech before the Nassau County Bar Association. Titled “Conservatism and Civil Liberty,” the speech linked Clark’s call for a neutral

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\item [217] Id. at 1-2. Lippmann himself had just published a book-length indictment of the New Deal that praised the common law for fostering spontaneity and diversity in society. Walter Lippmann, \textit{The Good Society} (1937).
\item [218] Grenville Clark, \textit{The Relation of the Press to the Maintenance of Civil Liberty, An Address Before the American Newspaper Publishers Association} (Apr. 27, 1938), Series XXI, Box, GCP; see also DUNNE, supra note XXX, at 99.
\item [219] Grenville Clark, \textit{The Relation of the Press to the Maintenance of Civil Liberty}, supra note XX, at XX.
\item [220] Id. at XX. See also GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 151-160 (1977).
\item [222] Id. at 56. For Clark’s praise of Borah’s amendment, see Grenville Clark, \textit{The Supreme Court Issue}, \textit{YALE REV.} 26 (May 1937), 669, 685, Series XXI, Box 1, GCP.
\item [223] Grenville Clark, \textit{The Relation of the Press to the Maintenance of Civil Liberty}, supra note XXX.
\item [224] DUNNE, supra note XX, at 101.
\end{thebibliography}
civil libertarianism that protected rich and poor, employee and employer alike, to the previous year’s court-packing fight.\textsuperscript{225} The Bar had managed to defeat FDR’s designs then, Clark explained, because of the “conviction, arrived at both by reason and instinct, that the proposal . . . was fundamentally a threat to our civil liberties.” He argued that the same “zeal and power that manifested itself in the crisis of a year ago . . . should be better organized for opposition to other attacks on civil liberty that are constantly occurring.” The success of this speech spurred the ABA into action. In August, the \textit{Journal of the American Bar Association} reprinted the speech and the House of Delegates approved the formation of a new Special Committee on the Bill of Rights, a committee that Clark had been envisioning, in one form or another, for the past, frantic year.\textsuperscript{226}

On the cusp of becoming Chairman of the new venture, Clark wrote to Douglas Arant, co-founder of the previous year’s National Committee for Independent Courts and future member of the Bill of Rights Committee. Clark mused about writing a short book on this “civil liberties business,” and explained that the two interests that had occupied him and Arant for some time now – “independence of the courts” and “sound national finance” – were “aspects . . . of the broader subject.”\textsuperscript{227} Like ANPA’s civil libertarian advocacy on behalf of an independent and financially-viable press, Clark and Arant’s vision of strong judicial enforcement of civil libertarian rights was inextricably bound up with a political economic outlook increasingly anxious about New Deal experiment.\textsuperscript{228} While more moderate on this point than Elisha Hanson or John W. Davis, Clark’s appeal to a conservative Bar to embrace civil liberties in order to save itself was far from politically or economically neutral.

Where Clark and the ABA Committee really differed from earlier civil libertarian critiques of New Deal administration was in terms of tactics. While the Committee would not operate as part of the ACLU – Clark’s initial plan – it would choose to limit its actual legal work to the representation of underdogs. To be sure, the plight of labor groups and religious minorities was far from Clark’s exclusive or even primary concern. In an October 26 planning memorandum, when Clark suggested that the Committee research emerging civil liberties problems, the two he singled out for attention were the “regulation of the radio and the screen” and the “procedure of administrative tribunals.”\textsuperscript{229} Noting the Bar’s increasing impatience with New Deal agency procedures, Clark wrote that, “There is widespread and serious complaint that the practice of permitting a tribunal to make an investigation, file a complaint, prosecute the complaint, and also try it and pronounce on it, violates principles of justice and is contrary to the spirit if not the letter of the Bill of Rights.”\textsuperscript{230}

\textsuperscript{225} Grenville Clark, “Conservatism and Civil Liberty,” Address at Annual Meeting of the Nassau County Bar Association (Jun. 11, 1938), Series XXI, Box 5, GCP. For an analysis of the speech, see Weinrib, The Liberal Compromise, supra note XXX, at 412-414.

\textsuperscript{226} Grenville Clark, Conservatism and Civil Liberty, AM. BAR ASSOC. J. 24 (Aug. 1938), 640-644; Arthur Vanderbilt, ABA President, to Grenville Clerk (July 6, 1938), Series VI, Box 2, GCP (describing praise for the speech among the Nassau bar and saying he hoped “to have something to say along the same line in my Annual Address”); Weinrib, The Liberal Compromise, supra note XXX, at 412-417.

\textsuperscript{227} Grenville Clark to Douglas Arant (July 15, 1938), Series XXI, Box 5, GCP.

\textsuperscript{228} Clark’s 1938 civil libertarian campaign coincided with the trough of the “1937” recession. See Patterson; Polenberg; Jenner.

\textsuperscript{229} Grenville Clark, Memorandum to Committee Members as to Meeting in New York, November 17-18, 1938 (Oct. 26, 1938), 8-9, Series VIII, Box 2, GCP.

\textsuperscript{230} Id. at 9. That same fall, Roscoe Pound of the ABA’s Special Committee on Administrative Law denounced such “administrative absolutism.” Report of the Special Committee on Administrative Law, ANN. REP. OF THE AM. BAR ASSOC. 63 (1938), 331–68, 343.
Yet when it came to selecting cases, Clark sought to build common ground with a wide range of civil libertarians and to articulate general principles. As he explained to Douglas Arant, the goal was to establish a:

line of thought . . . one of firm resistance to authoritarian ideas, - whether in suppressing assembly, or censoring the radio or unnecessarily regimenting the children or intimidating employers from speaking their minds or impairing the independence of the courts or in any other way tending towards the undue subordination of the individual to the State.231

The first opportunity to so “educat[e] the opinion of the Bar and public” arose in the fall of 1938, when a federal district court held that the potential threat of disorder from pro-union rallies was sufficient reason for Jersey City to deny CIO organizers a permit. On November 14, Clark wrote to Felix Frankfurter asking him whether he thought the ABA Committee should apply for leave to file an amicus in the appeal, and Frankfurter encouraged them to do so.232

Two months later, when ACLU member George Gardner reached out to Zechariah Chafee about the plight of the Jehovah’s Witnesses, Clark recognized another opportunity. As Clark explained to Gardner in April 1939, after the Supreme Court rejected the ABA-supported petition for rehearing in Johnson v. Deerfield, the “flag salute problem” raised “deep questions of the conflict between liberty and authority.”233 During the summer and fall of 1939, Clark kept in touch with Gardner about developments in Massachusetts.

It was through this correspondence that he first learned of the Jehovah’s Witnesses’ new counsel, “a big breezy young man from Texas,” the thirty-two-year-old Hayden Covington, who split time with Gardner arguing the later stages of the Deerfield case.234 Covington would soon become involved in a parallel litigation in Pennsylvania – the case of Walter, Lillian, and Billy Gobitas.235 He was, however, still in Massachusetts that November when the 3rd Circuit affirmed a district court order rescinding the Gobitas children’s expulsion from the Minersville public school.236 At a Bill of Rights Committee meeting in Chicago that January, the members agreed to file an amicus brief in Minersville School Dist. v. Gobitis if the Court decided to hear the school district’s appeal.237

A few weeks before the Court did in fact grant cert, Gardner met with Covington in New York. The young Texan had just replaced Olin Moyle as the Jehovah’s Witnesses’ general counsel, and Gardner reported that “it was just beginning to dawn on [Covington] that the issues in the Gobitis case were controlled by four earlier decisions of the United States Supreme Court. Mr. Covington has no legal assistance, and at the moment is a rather lonely, harassed and anxious young man.”238 Gardner offered to assist Covington directly, but the lawyer felt bound to respect the wishes of the Witness leader, Joseph Rutherford, who wanted to argue the case

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231 Grenville Clark to Douglas Arant (Mar. 31, 1939), 2 Series VIII, Box 1, GCP.
232 Grenville Clark to Felix Frankfurter (Nov. 14, 1938), Series VIII, Box 2, GCP; Felix Frankfurter to Grenville Clark (Nov. 16, 1938), id.
233 Grenville Clark to George Gardner (Apr. 19, 1939), Series VIII, Box 3, GCP.
234 George Gardner to Grenville Clark (Sept. 22, 1939), Series VIII, Box 3, GCP.
235 The court reporter misspelled the Gobitas’ name. See GORDON, supra note XX, at 227 n.76.
236 108 F.2d 683 (3rd Cir. 1939).
237 Grenville Clark to George Gardner (Jan. 4, 1940), Series VIII, Box 3, GCP; Id. (Feb. 16, 1940).
238 George Gardner to William Fennell (Feb. 29, 1939), Series VIII, Box 3, GCP.
himself. On March 4, the Court granted cert, and two days later Grenville Clark took matters into his own hands, inviting Gardner to a New York luncheon with Covington, William G. Fennell (another Witness attorney) and Louis Lusky, an associate at Clark’s law firm, to coordinate legal strategy. Usefully, Lusky had clerked for Justice Harlan Fiske Stone two years earlier, and had helped him draft Footnote Four of Carolene Products.

By March 21, Lusky and Clark sent a first draft of their amicus brief to Covington, and on March 28, Zechariah Chafee sent Clark edits. Chafee was particularly impressed with one point that “carries on our argument in the Hague case”:

At a time when governmental functions are expanding rapidly, it seems to me essential to impress officials with a concept rather novel to them, namely, that the government resembles a public utility and is under obligations to give reasonable service to all. The frequent claim that the government may impose any conditions it pleases on what it does for the public is too often echoed by courts.

Although Chafee’s reference to utilities law sounded in old progressive preoccupations, he was right that his rhetorical reconfiguration of that jurisprudence was quite novel. While the fight over public utilities had involved legislative and administrative regulation of putatively private service providers, Chafee’s rhetoric envisioned government as the service provider and courts as the regulator. It was this vision that Justice Frankfurter would reject two months later in his Gobitis majority opinion when he wrote:

It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances. So to hold would, in effect, make us the school board for the country. That authority has not been given to this Court, nor should we assume it.

While the ABA Committee’s defense of civil liberties derived from a commitment to the “independence of the courts” and the expansion of judicial review, Frankfurter insisted that “to the legislature no less than to courts is committed the guardianship of deeply cherished liberties.” In this regard, government was not a public utility, but a public: “To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies, rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.”

239 Id.
240 Grenville Clark to George Gardner (Mar. 6, 1939), Series VIII, Box 3, GCP.
241 See Lusky, Footnote Four Redux, supra note XXX; Linzer, supra note XXX.
242 Grenville Clark to Hayden Covington (Mar. 21, 1938), Series VIII, Box 3, GCP; Zechariah Chafee to Grenville Clark (Mar. 28, 1938), Series VIII, Box 3, GCP.
243 Zechariah Chafee to Grenville Clark (Mar. 28, 1938), Series VIII, Box 3, GCP.
244 310 U.S. 586, 598 (1940).
245 Grenville Clark to Douglas Arant (July 15, 1938), Series XXI, Box 5, GCP.
246 310 U.S., at 600.
247 Id. For Frankfurter’s defense of the constitutional authority of the political branches, see Brad Snyder, Frankfurter and Popular Constitutionalism, 47 UC Davis L. Rev. 343 (2013).
Many of Frankfurter’s old civil libertarian comrades were shocked and disappointed by his apparent insensitivity to the Jehovah’s Witnesses’ plight – surely the “forum of public opinion” was cruelly stacked against a minuscule religious minority! Just as historians do today, contemporary critics of *Gobitis* attributed Frankfurter’s betrayal to the deteriorating situation in Europe, hysteria about national security and sympathy for his Jewish brethren overcoming the Justice’s civil libertarian instincts. Yet Frankfurter’s correspondence with Clark in the three years between the court-packing crisis and *Gobitis* suggests that Frankfurter’s opinion grew out of a political and legal struggle both longer-running and closer to home.

As Frankfurter had written to Clark time and again, while he celebrated his old friend’s recent discovery of civil liberties, he did not think that civil liberties necessitated a commitment to robust judicial review. Going back to Frankfurter’s experience in the WWI War Department, where he successfully argued for an accommodating approach to conscientious objectors, Frankfurter saw reasonable administration and legislation as the best hope for both democracy and civil liberty. While Clark resisted court-packing and assailed the threat that administrative tribunals posed to the Bill of Rights, Frankfurter defended the New Deal’s erosion of judicial power through legislative and administrative action. And he emphatically rejected the idea that a special carve out for judicial protection of civil liberties was sustainable.

Indeed, when Frankfurter first read the draft of Stone’s dissent in *Gobitis*, he warned his fellow Justice of its dangerous implications, invoking an earlier era of aggressive judicial protection of property rights:

> Just as *Adkins v. Children’s Hospital* had consequences not merely as to the minimum wage laws but in its radiations and in its psychological effects, so this case would have a tail of implications as to legislative power that is certainly debatable and might easily be invoked far beyond the size of the immediate kitie [sic], were it to deny the very minimum exaction, however foolish as to the Gobitis children, of an expression of faith in the heritage and purposes of our country.

248 Peters XXX; Manwaring XXX; White XXX.
249 See, e.g., Felix Frankfurter to Grenville Clark (Jul. 1, 1937), Series VI, Box 1, GCP; Felix Frankfurter to Grenville Clark (Nov. 16, 1938), Series VIII, Box 2, GCP; Felix Frankfurter to Grenville Clark (Dec. 31, 1938), 1, Series VIII, Box 2, GCP; see also DUNNE, supra note XXX, at 84-88.
250 See Kessler, *Administrative Origins*, supra note XX. See also Richard Danzig’s perceptive analysis of Frankfurter’s understanding of the relationship between reason, democracy, and pluralism, an understanding forged during his own time as a law student and young lawyer:

Felix Frankfurter interpreted his experience as demonstrating that prejudice fell away over the long term when minorities confronted it – that rational persuasion was a reliable vehicle for assimilation. In the flag salute cases, he seems to have unselfconsciously conceived the Jehovah's Witnesses and the world in which they functioned – persons and arenas he did not know – in the image of his own experience. For Justice Frankfurter, the political processes created the appropriate forum for resolving these cases. From *Gobitis*, his first major constitutional opinion, through *Baker v. Carr*, his last, this view remained a central tenet of Felix Frankfurter's “democratic faith.” Thus, his inclination to restrain legislative action was slight: ‘Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling submission to a general law.’

On top of his reference to *Adkins*, a case that Frankfurter himself had argued and lost, the Justice appealed to Stone’s own dissent in the 1936 case *United States v. Butler*, where he taxed the majority for imperiously interposing its own judgment in a complex matter of social and economic policy. Praising that dissent as “a lodestar of due regard between legislative and judicial powers,” Frankfurter emphasized how narrow a ruling his *Gobitis* opinion really was. Frankfurter worried that a judicial overreaction to the poor treatment of a religious minority threatened to upset the fragile balance between political and judicial power that the New Deal had struck.

For Frankfurter the political branches, not the courts, were the “primary resolvers” of “the clash of rights,” even when that clash involved “ultimate civil liberties”: “For resolving such clash we have no calculus,” he wrote to Stone. “But there is for me, and I know also for you, a great makeweight for dealing with this problem, namely, that we are not the primary resolvers of the clash. We are not exercising an independent judgment; we are sitting in judgment upon the judgment of the legislatures.” For this reason, Frankfurter explained, he regarded “as basic” Footnote 4 of *Carolene Products*, “particularly the second paragraph of it” – proposing heightened judicial scrutiny of regulations interfering with the political process. Explicitly downplaying the first paragraph (about formally enumerated constitutional rights) and the third paragraph (about discrete and insular minorities), Frankfurter sought to narrow the doctrine lest it lead down the slope he feared – the slope that ended in a return to Adkins, Butler, and the judicial restraint of public power in the name of private rights. Compulsory flag salute laws in no way impeded the Witnesses’ ability to participate in politics. What’s more, the sect’s refusal to salute the flag looked to Frankfurter like a rejection of political participation, an exercise of exit rather than voice.

Although selective, Frankfurter’s narrow reading of Footnote 4 was not outlandish at the time. A month earlier, Justice Murphy’s 8-1 majority decision in *Thornhill v. Alabama*, the first Supreme Court opinion to cite Footnote 4, had clearly invoked it for Paragraph 2 reasons. Striking down a law that prohibited labor picketing, Justice Murphy wrote that “Abridgment of freedom of speech and of the press impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.” Where a regulation threatened “the effective exercise of rights so necessary to the maintenance of democratic institutions,” “courts should ‘weigh the circumstances’ and ‘appraise the substantiality of the reasons advanced’ in support of the challenged regulations.” And a week before Frankfurter wrote his letter to Stone, a unanimous Court had struck down a facial restriction on religious solicitation without mentioning Footnote 4.

Justice Stone’s dissent in *Gobitis* was the second opinion, after *Thornhill*, to cite to Footnote 4, and the first to refer to the Paragraph 3 argument about minority protection. Yet even here, Stone acknowledged that Paragraph 3 was concerned with prejudice to the extent that it

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252 Id.
253 Id. at 1-2.
254 Id. at 2.
255 Id.
256 301 U.S. 88 (1940)
257 Id. at 95.
258 Id. at 96. The quoted test was from *Schneider v. State*, 308 U.S. 147 (1939), which struck down a blanket prohibition on street and door-to-door distribution of literature making no reference to Footnote 4.
“tend[ed] to curtail the operation of those political processes ordinarily to be relied on to protect minorities.”

For the authority to “scrutinize legislation restricting the civil liberty of racial and religious minorities although no political process was affected,” Stone cited not Footnote 4, but the string of 1920s substantive due process decisions striking down prohibitions on foreign language instruction and private school attendance, decisions rooted in the economic liberty of educators and parents.

Richard Danzig has argued that Frankfurter “inflated” the stakes in Gobitis, needlessly insisting that a school board’s post facto adoption of a compulsory flag salute regulation be given the same deference “as though the legislature of Pennsylvania had itself formally directed the flag-salute,” almost as though the U.S. Congress itself had done so. Yet, as we have seen, Grenville Clark’s strategy for the ABA Committee was itself inflationary, using “test cases” to roll back the “undue subordination of the individual to the State.” For Clark, no less than for Frankfurter, the flag salutes cases raised the question whether “the legislative and administrative branches may override an admitted religious scruple in the interest of the supposed general welfare.” And as Frankfurter knew from his correspondence with Clark throughout the late 1930s, the goal of the ABA and its allies, if not the Witnesses themselves, was to use the language of civil liberties to resuscitate judicial review and roll back the political branches’ newfound autonomy.

Two years later, Justices Murphy, Black, and Douglas would use the first Jehovah’s Witness peddling tax decisions to announce their repudiation of Gobitis. In the intervening years, the press’s coverage of the continuing abuse of Witnesses at the hands of local governments helped to cement a new social consensus that such treatment was unacceptably at odds with the

261 Id.
263 Danzig, supra note XXX, at 262 (citing 310 U.S., at 597). Frankfurter – joined by Stone – would make a similarly inflationary gesture eighteen months later in Bridges v. United States, this time in response to a civil libertarian attack on a state court’s contempt proceeding:

While the immediate question is that of determining the power of the courts of California to deal with attempts to coerce their judgments in litigation immediately before them, the consequence of the Court’s ruling today is a denial to the people of the forty-eight states of a right which they have always regarded as essential for the effective exercise of the judicial process, as well as a denial to the Congress of powers which were exercised from the very beginning even by the framers of the Constitution themselves. To be sure, the majority do not, in so many words, hold that trial by newspapers has constitutional sanctity. But the atmosphere of their opinion and several of its phrases mean that, or they mean nothing.

314 U.S. 252, 279-280 (1941) (Frankfurter, J., dissenting). Bridges was another victory for Elisha Hanson and ANPA in their campaign to secure newspapers’ autonomy from a host of generally-applicable state and federal laws. See Emery, supra note XXX, at 243; Brief of American Newspaper Publishers Association as Amicus Curiae, Times Mirror Co. v. Superior Court, No. 972 (May 4, 1940).
264 Grenville Clark to Douglas Arant (Mar 31, 1939), 2 Series VIII, Box 1, GCP.
265 Grenville Clark, Memorandum for the Committee on the Bill of Rights (Mar. 20, 1939), 4, Series VIII, Box 2, GCP.
goals of the war. Yet a slender five-Justice majority, which included the future author of *West Virginia Board of Education v. Barnette*, maintained that the license tax cases were not about state oppression of minority beliefs. Instead, the Justices insisted, to strike down the license taxes at issue would be to undermine the authority of democratic institutions to regulate the economy.

III. FIRST AMENDMENT LOCHNERISM IN THE 1940S

A. The 1942 Peddling Tax Cases

The reaction to *Gobitis* in the press and much of the progressive legal community must have been hard for avowed civil libertarians like Murphy and Douglas to bear. While the *Washington Post* agreed that “the Bill of Rights did not license ‘any group to interfere with legitimate functions of the state under the guise of practicing their religion,’” at least 170 other newspapers celebrated Stone’s lone dissent for resisting “hysteria” in the name of fundamental American values. The *Christian Century* opined that, “Courts that will not protect even Jehovah’s Witnesses will not long protect anybody.” ACLU Director Roger Baldwin published an open letter to Witness leader Joseph Rutherford describing the Court as having “brush[ed] aside the traditional right of religious conscience in favor of a compulsory conformity to a patriotic ritual.” And in an editorial titled simply “Frankfurter v. Stone,” The *New Republic* warned that that the country was “in great danger of adopting Hitler’s philosophy in the effort to oppose Hitler’s legions,” the Supreme Court “dangerously close to being a victim of that hysteria.”

That fall, when Justice Douglas told Frankfurter that Hugo Black was reconsidering his position in *Gobitis*, Frankfurter asked if the Justice had been reading the Constitution over the summer. Douglas responded, “No – he has been reading the papers.” It could not have helped that these papers were reporting not only legal and political criticisms of the decision, but also a wave of violent attacks on Witnesses. In the summer of 1940, the Witnesses responded to the flag salute decision and the seemingly apocalyptic war in Europe with increasingly aggressive proselytizing. Local mobs, in turn, responded with vigilantism, and chauvinist groups such as the American Legion declared the Witnesses a “subversive” sect, along with allegedly pro-Nazi and pro-Soviet ethnic and political groups.

Yet if some members of the *Gobitis* majority were shaken by the ugly spectacle of anti-Witness violence and the criticism of legal and media elites, they did not immediately search out an opportunity to side with the Witnesses. One mitigating factor may have been that in August 1940, a Jehovah’s Witness gunned down a sheriff’s deputy in North Windham, Maine.

266 Gordon, supra note XXX, at XXX; Manwaring, supra note XXX, at XXX; Peters, supra note XXX, at XXX-XXX; Tsai XXX.
267 Id. at 67-68.
269 Peters, supra note XXX, at 69.
270 Frankfurter v. Stone, New Republic (June 24, 1940), 843.
272 Gordon, The Spirit of the Law, supra note XX; Peters, supra note XX, at 72-99.
273 Many scholars have argued that the negative press and anti-Witness violence that followed *Gobitis* were the pivotal factors in the Court’s about-face in *Barnette* three years later. As discussed below, however, the Court’s behavior in Witness cases between 1940 and 1943 tells a more complex story, one that cannot be reduced to the Court’s backlash to the *Gobitis* backlash. Cf. Klarman on backlash.
274 Peters, supra note XXX, at 217.
Local newspapers interpreted the murder as evidence of the real dangers those “disloyal” to the flag posed to law-abiding Americans.275

When the next Witness case came up in the early spring of 1941, Chief Justice Hughes, writing for a unanimous court, turned it aside. In Cox v. New Hampshire, the Court upheld the conviction of Jehovah’s Witnesses who had held a parade without securing a permit.276 The Witnesses’ challenged both the bare requirement of the permit, and the sliding-scale fee that it would have cost them. Hughes rejected the claim that the Witnesses’ “information march” was a form of religious practice on which the permit and fee requirements directly impinged.277 And he rejected the claim that a sliding-scale fee as opposed to a flat tax was inherently discriminatory.278 The following March, Chaplinsky v. New Hampshire presented an easier set of questions, involving a Witness’s especially aggressive “proselytizing” and his calling the town marshal “a damned Fascist.”279 In another unanimous opinion, Justice Murphy canonized the “fighting words” exception to free speech protection.280

Yet even as Murphy was drafting Chaplinsky, the Court heard oral arguments in Jones v. City of Opelika, the first Witness license tax case.281 While Cox and Chaplinsky had involved activities that looked like relatively traditional breaches of the peace – unpermitted parades and lewd or libelous speech – the Witnesses’ street and door-to-door distribution and sale of literature seemed to merit both more and less judicial regard. More regard for two reasons: first, the Witnesses’ characterized the distribution and sale of religious pamphlets as their faith’s particular mode of ministry, itself an act of worship;282 second, the distribution and sale of literature could well be an exercise of press freedom, a jurisprudential zone that since Grosjean had looked potentially expansive. On the other hand, the Witnesses’ sale of literature, arguably a form of commercial activity, might be less protected than parades or insults or, for that matter, refusals to salute the flag.

Jones v. City of Opelika was only the Witnesses’ second time before the Court since Pearl Harbor (the first being the unsympathetic Chaplinsky case), and Hayden Covington framed the license tax issue in world historical terms: “In today’s perilous hours men’s hearts are failing them for fear of what they see coming upon the human family. This great fear has driven rulers and judges of every land into desperation and perplexity, resulting in a breaking down of justice and morality.”283 To make the stakes as vivid as possible, he asked the Justices to imagine how the license taxes would function in a Nazi invasion:

Let us assume that the Nazis and Fascists were moving in secret to invade the Gulf shore of Alabama, and some good citizen learning this fact printed millions

275 Id. at 217-219.
276 Cox v. New Hampshire, 312 U.S. 569 (1941)
277 Id. at 578.
278 Id. at 577.
279 315 U.S. 568, 569 (1942).
280 Id. at 572 (citing Zechariah Chafee, Free Speech in the United States 149 (1941)).
281 316 U.S. 584 (1942). For the timing, see Peters, supra note XXX, at 230.
282 See Petitioner’s Brief, Jones v. Opelika, No. 280, at 5 (Nov. 11, 1941). Although the Witnesses had also tried to defend the Cox parade and the Chaplinsky imprecations as religious exercise, their characterization of the sale and distribution of literature as ministerial was systematic and well-attested. See Nathan Elliff, Jehovah’s Witnesses and the Selective Service Act, 31 VA. L. REV. 811, 813-818 (1945); Deputy Director Hershey, Vol. III, Op. 14, Ministerial Status of Jehovah’s Witnesses (June 12, 1941), Container 7, RG 147, National Archives, College Park, MD.
283 Petitioner’s Brief, Jones v. Opelika, No. 280, at 32 (Nov. 11, 1941).
of pamphlets or leaflets for distribution throughout Alabama. In Opelika, under this ordinance both he and every loyal citizen aiding him to distribute such printed matter could be convicted for their failure to pay the tax and secure a license.284

While this thought experiment might suggest that the Witnesses’ primary objection to the license taxes was process-based – that it blocked avenues of democratic deliberation and defense – the brief’s conclusion articulated a more formalist and absolute stance: “The only factor which distinguishes this country as a republic with a democratic form of government . . . is that American heritage epitomized as the Bill of Rights. Once the freedom anchored and secure thereby is gone, the reason is lost for fighting Nazism and allied totalitarian tyranny.”285 According to this logic, if the Court upheld the license taxes, the difficulties they posed to the defense of Opelika from Nazi attack would be irrelevant, as there would be nothing worthy left to defend.

The first half of Covington’s brief focused on the Witnesses’ free exercise claim, arguing that literature distribution was, for the sect’s members, a ministerial activity and that the work of ministers of other religions was not so taxed.286 The second half developed a press freedom claim largely reliant on Grosjean. Noting that “[t]he right and liberty [of freedom of the press] . . . embrace the right to distribute, to circulate printed informative matter, to disseminate ideas in recorded form,” Covington argued that, as in Grosjean, the taxes here restricted circulation and threatened the viability of the Witnesses’ informative enterprise.287 Covington copied almost verbatim from Sutherland’s Grosjean opinion in concluding that the license tax impermissibly “encumbers and smothers distribution and circulation of literature: “This is plain enough when we consider that, if [the tax] were increased to a high degree, as it could be, it well might result in completely suppressing both distribution and even publishing to point of destruction.”288 Covington also concluded by recommending a passage from Justice Sutherland’s dissent in Associated Press:

Do the people of this land – in the providence of God, favored as they sometime boast, above all others in the plenitude of their liberties – desire to preserve those so carefully protected by the First Amendment: liberty of religious worship . . . ? If so, let them withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time.289

Even as Covington drew on Sutherland’s synthesis of economic and civil libertarianism in Grosjean and Associated Press, he also insisted that the Witnesses’ distribution and sale of literature was not in fact a form of commerce: while the money the Witnesses received from pamphlet distribution defrayed the cost of their enterprise, this financial exchange was not

284 Id. at 32.
285 Id. at 38-39.
286 See Petitioner’s Brief, supra note XXX, at 5-10.
287 Id. at 25-27.
289 Petitioner’s Brief, supra note XXX, at 38 (citing Associated Press v. NLRB, 301 U. S. 103, 141 (1937) (Sutherland, J., dissenting)).

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commercial, being in aid of “a benevolent, non-profit, non-competitive enterprise for others’ welfare.”

The ACLU’s amicus brief, however, put little emphasis on this point, arguing that press freedom could not be restricted to pro-bono publication and distribution: “We believe that this Court should make it clear that the constitutional protection extends to all forms of distribution of opinion and information, that the same cannot be prohibited or taxed, that the circumstance that money is asked whether directly or otherwise, is entirely immaterial.” As Laura Weinrib has shown, by this point in the ACLU’s history, the organization had shifted to an increasingly absolute and content-neutral vision of the First Amendment, a vision that was also endorsed by conservative civil libertarians at ANPA and the ABA’s Bill of Rights Committee. Earlier in the ACLU’s history, the organization might have been more reluctant to downplay the significance of the profit motive. It did not, for instance, participate in 1937’s Associated Press case, where the First Amendment argument clearly subordinated employees’ to employers’ rights. In its Opelika brief, the ACLU was silent on the merits of Associated Press, only noting that respondents relied on it. The organization instead commended a broad reading of Justice Sutherland’s 1936 Grosjean opinion – that it stood for the proposition that “the imposition of a license fee was a restraint upon circulation.”

At the same time, the ACLU placed more emphasis than the Witnesses on the putatively discriminatory nature of the license taxes at issue, opening its brief by characterizing the “basic question” as “whether a municipality, under the guise of collecting license fees for carrying on of various occupations, may require the taking out of such a license and the payment of a fee by any person who, even on a single occasion, offers for sale a pamphlet containing an expression of opinion.” The phrase “under the guise” echoed what was arguably the actual holding in Grosjean: “The tax here involved is not bad because it takes money from the . . . appellees . . . . It is bad because, in light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information.”

Writing for Byrnes, Frankfurter, Jackson, and Roberts, Justice Reed argued that the question of discrimination was critical, insisting on a fundamental “distinction between nondiscriminatory regulation of operations which are incidental to the exercise of religion or the freedom of speech or the press and those which are imposed upon the religious rite itself or the unmixed dissemination of information.” Given that petitioners had not even alleged discrimination, this distinction resolved the press freedom issue outright. Citing to Associated Press among other precedents, Reed wrote:

It would hardly be contended that the publication of newspapers is not subject to the usual governmental fiscal exactions, or the obligations placed by statutes on other business. The Constitution draws no line between a payment from gross receipts or a net

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290 Petitioner’s Brief, supra note XXX, at 25 and passim.
291 Brief on Behalf of the American Civil Liberties Union as Amicus Curiae, Jones v. Opelika, No. 280, at 8 (Jan. 22, 1942).
292 See Weinrib, The Liberal Compromise, supra note XX, at XXX.
293 Brief on Behalf of the American Civil Liberties Union, supra note XXX, at 6-7
294 Id. at 6.
295 Brief on Behalf of the American Civil Liberties Union as Amicus Curiae, Jones v. Opelika, No. 280, at 81 (Jan. 22, 1942) (emphasis added).
296 Grosjean, 297 U.S., at 250 (emphasis added).
297 Jones v. Opelika, 316 U.S. 584, 596 (1942) [hereinafter Opelika I].
income tax and a suitably calculated occupational license. Commercial advertising cannot escape control by the simple expedient of printing matter of public interest on the same sheet or handbill.\footnote{298}

As for the free exercise issue, Reed conceded that if the “licensed activities” were themselves “religious rites, a different question would be presented.”\footnote{299} But the majority refused to distinguish between the Witnesses’ sale of literature and a teacher or preacher’s “need to receive support for themselves”:

[W]hen, as in these cases, the practitioners of these noble callings choose to utilize the vending of their religious books and tracts as a source of funds, the financial aspects of their transactions need not be wholly disregarded. To subject any religious or didactic group to a reasonable fee for their money-making activities does not require a finding that the licensed acts are purely commercial. It is enough that money is earned by the sale of articles... It may well be that the wisdom of American communities will persuade them to permit the poor and weak to draw support from the petty sales of religious books without contributing anything for the privilege of using the streets and conveniences of the municipality. Such an exemption, however, would be a voluntary, not a constitutionally enforced, contribution.\footnote{300}

On both the religious and press freedom questions, then, the majority saw an inescapable nexus between the financial side of pamphlet sales and a state’s “right to employ the sovereign power explicitly reserved... by the Tenth Amendment to ensure orderly living, without which constitutional guarantees of civil liberties would be a mockery.”\footnote{301} Reed’s invocation of the Tenth Amendment was a pointed reminder that there was more to the Bill of Rights than individual protections from state interference. He combined this bit of counter-formalism with a call for New Deal deference to political reason in the realm of economy: “When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the state to charge reasonable fees for the privilege of canvassing.”\footnote{302}

[TK: discuss Roberts’ opinion in Valentine v. Christensen, 316 U.S. 52, 54-55 (1942) (declaring commercial speech unprotected by the First Amendment), decided on April 13, 1942, less than two months before Opelika I (June 8), and Labor Board v. Virginia Electric & Power Co., 314 U.S. 469 (1941), recognizing employer free speech rights in union context for first time. Tensions in the doctrine.]

The Washington Post, which at the time had lauded the Gobitis majority for preventing “any group [from] interfere[ing] with legitimate functions of the state under the guise of practicing their religion,” saw Opelika’s deference to state economic regulation in a very different light:

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\footnote{298 Id. at 597.}
\footnote{299 Id. at 598.}
\footnote{300 Id.}
\footnote{301 Id. at 593.}
\footnote{302 Id. at 597.}
It is plain that far more than the rights of a few sectaries are involved in the decision. Under the reasoning followed by Mr. Justice Reed and his colleagues the numerous municipal ordinances against mendicancy could be enforced, for example, against those religious orders of the Roman Catholic Church whose rule prescribes mendicancy. It would also seem to be an opening wedge for the long mooted proposal for the taxation of ecclesiastical and academic property, which, in the opinion of many, would, if adopted, have the ultimate effect of bringing all education under the control of the state, and thus of placing in the hands of the state the most potent of all instruments of regimentation and indoctrination.\(^{303}\)

The Post went on to praise Justice Stone and Murphy’s dissents – in which all four dissenting Justices joined – as antidotes to the totalitarian implications of the majority opinion. Both dissents rejected the majority’s emphasis on the non-discriminatory nature of the taxes. Facial neutrality, Stone announced, meant nothing where First Amendment freedoms were concerned:

The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position. Their commands . . . extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it.\(^{304}\)

According to the dissenters, the Witnesses did not have to show that the taxes at issue were discriminatory in intent or impact, or that they imposed prohibitive burdens on the expression of ideas or religious beliefs. Rather, it was up to the respondents to “show that the instant activities of Jehovah’s Witnesses create special problems causing a drain on the municipal coffers, or that these taxes are commensurate with any expenses entailed by the presence of the Witnesses.”\(^{305}\) Only a narrowly tailored regulatory tax could pass constitutional muster. “In the absence of such a showing,” Murphy and his brethren argued, “no tax whatever can be levied on petitioners’ activities in distributing their literature or disseminating their ideas.”\(^{306}\)

In addition to the two dissents, Justices Black, Douglas, and Murphy appended what the Washington Post called an “extraordinary memorandum”\(^{307}\) that repudiated their earlier position in Gobitis. Describing the majority opinion in Opelika as “a logical extension of the principles upon which [Gobitis] rested,” the three converts announced that “this is an appropriate occasion to state that we now believe that it also was wrongly decided.”\(^{308}\) Mirroring Covington’s call for democracy to submit to the dictates of liberty, they concluded that “our democratic form of government, functioning under the historic Bill of Rights, has a high responsibility to accommodate itself to the religious views of minorities, however unpopular and unorthodox

\(^{303}\) Religion and Taxation, Wash. Post (June 10, 1942).
\(^{304}\) Opelika I, 316 U.S., at 608 (Stone, J., dissenting).
\(^{305}\) Id. at 620 (Murphy, J., dissenting).
\(^{306}\) Id. Only Murphy’s dissent faced squarely the question of whether the Witnesses’ distribution and sale of literature were themselves religious rites. Id. at 620-622. He concluded that they were, but was clearly prepared to strike down the taxes on free speech and free press grounds alone.
\(^{307}\) Religion and Taxation, Wash. Post (June 10, 1942).
\(^{308}\) Opelika I, 316 U.S., at 623 (Black, Douglas, Murphy, J.J.).
those views may be.”\textsuperscript{309} To do otherwise would place “the right freely to exercise religion” not in a preferred but in a “subordinate” position to democratic decision-making.\textsuperscript{310}

G. Edward White has argued that the \textit{Jones v. Opelika} dissenters deftly combined an older progressive justification of free speech as democracy-enhancing with a new formalistic emphasis on textually-enumerated rights, synthesizes Paragraphs 1 and 2 of Footnote 4 of \textit{Carolene Products}. He writes that “Stone was suggesting that speech rights reinforced democracy in a way that economic rights did not,”\textsuperscript{311} and that in the Black-Douglas-Murphy memorandum “the textually protected status and the democratic status of speech rights were once again intertwined.”\textsuperscript{312} Yet throughout the “extraordinary memorandum” and both \textit{Opelika} dissents, the dissenting Justices emphasized the absolute limits that the First Amendment placed on government regulation and the status of the Witnesses as a beleaguered sect. They did not characterize the Witnesses as seeking to influence the political process and did not cite to \textit{Carolene Products} at all – indeed, up until that point, Footnote 4 had only once been cited outside the context of a political process argument, by Stone earlier that spring in \textit{Skinner v. Oklahoma}.\textsuperscript{313}

With few exceptions, the press praised the dissenters and condemned the majority opinion in \textit{Opelika}.\textsuperscript{314} The \textit{St. Louis Post-Dispatch} published both dissents and the memorandum, a three-column header shouting “How Four Supreme Court Justices Upheld Religious Freedom Against the Vote of Their Five Colleagues,” and a subhead announcing that “Justices Black, Douglas and Murphy Reverse Themselves.”\textsuperscript{315} Meanwhile, the \textit{New York Times} called the majority opinion an “ominous decision” and a \textit{Yale Law Journal} case note worried that “with the exception of the West Coast Japanese Americans, the Witnesses are already the most persecuted minority in America.”\textsuperscript{316} As for the \textit{Gobitis} reversal, the \textit{Washington Post} hailed Black, Douglas, and Murphy’s “singular humility and intellectual honesty.”\textsuperscript{317}

Even before Wiley Rutledge replaced James Byrnes on the Court the following February, Black, Douglas, and Murphy’s self-reversal in \textit{Opelika I} probably doomed \textit{Gobitis}. In 1941, Robert Jackson’s \textit{The Struggle for Judicial Supremacy} singled out the first flag salute case as departing from the Supreme Court’s strong track record of “stamping out attempts by local authorities to suppress the free dissemination of ideas, upon which the system of responsible democratic government rests.”\textsuperscript{318} And Robert Tsai has shown that Jackson was already convinced during his tenure as Attorney General that \textit{Gobitis} was a boon to local malcontents and a threat to the war effort.\textsuperscript{319} What’s more, the evidence suggests that most in the executive branch agreed with him.\textsuperscript{320}

\begin{footnotesize}
\begin{itemize}
\item[309] Id. at 624.
\item[310] Id.
\item[311] White, supra note XXX, at 147.
\item[312] Id. at 148.
\item[314] Peters, supra note XX, at 232.
\item[316] Peters, supra note XXX, at 232-233.
\item[317] Religion and Taxation, Wash. Post (June 10, 1942).
\item[318] Robert Jackson, The Struggle for Judicial Supremacy 284 (1941).
\item[320] Id. at 382-414.
\end{itemize}
\end{footnotesize}
Yet *Barnette* was one of the few cases in Jackson’s tenure on the Court in which he would side with the Witnesses. Indeed, of the five Jehovah’s Witness decisions issued in the spring of 1943, *Barnette* was the only one in which Jackson did not reject the majority’s pro-Witness views.\(^321\) The close jurisprudential question in the wake of *Opelika* was not whether Witness school children should be compelled to salute the American flag, but whether Witnesses should be exempt from neutral health, safety, and commercial regulations on free press, free speech, and free exercise grounds. The authors of both *Gobitis* and *Barnette* were in agreement that the answer to this question had to be “no.” But on May 3, 1943, newly-appointed Justice Wiley Rutledge “tipped the scales on the side of the cherished freedoms of the Bill of Rights,”\(^322\) and a five-Justice majority struck down a host of license taxes, vacating *Jones v. Opelika* less than a year after it had been decided. *The New Republic* described the 1943 license tax cases as an “outright about-face . . . one of the most notable acts in the entire span of the 154 years of Supreme Court history.”\(^323\)

**B. The 1943 Peddling Tax Cases**

On August 31, 1942, Hayden Covington and the Witnesses moved for a rehearing in *Opelika*, supported by an amicus brief from the American Newspaper Publishers Association. The motion called the Court’s June upholding of the license taxes “the most serious denial of liberty within history of the nation,” and warned that “Liberty is destroyed by people who do not know they are destroying it.”\(^324\) Covington attacked several aspects of the majority opinion, including its determination that the Witnesses’ sale and distribution of literature was not itself a “religious rite.” But core of his central argument was a more expansive one: “Taxed speech is not free speech. It is silence for persons unable to pay the tax. Nor is taxed distribution of literature a free press (*Grosjean v. American Press Co.*, 297 U.S. 233). Nor is taxed dissemination of Bible literature freedom of worship.”\(^325\)

Notably, the only case the Witnesses’ cited for these propositions was *Grosjean*.\(^326\) More notably, this entire passage was lifted without attribution from Judge Wiley Rutledge’s D.C. Circuit dissent in *Busey v. District of Columbia*, an April 1942 decision upholding a similar tax levied by the District of Columbia.\(^327\) Justice Murphy had cited Rutledge’s dissent in his own dissent in *Opelika*, and now Rutledge’s language was before the Court, months before his own arrival.

As discussed in Part I, Elisha Hanson’s brief for ANPA also pushed for an expansive reading of Justice Sutherland’s majority opinion in *Grosjean* and narrow reading of Justice Roberts’ First Amendment ruling in *Associated Press*. Closing the circle, Covington concluded

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321 Although he concurred in the unanimous result in *Douglas v. Jeanette*, denying equity relief for want of jurisdiction, Jackson appended a fiery quasi-dissent, joined by Frankfurter, that argued that the factual circumstances revealed in the *Douglas* record demonstrated the error of the three other license tax decisions issued that day. 319 U.S. 157, 166 (1943) (Jackson, J., concurring).
322 St. Louis Post Dispatch, May 5, 1943.
323 Irving Dilliard, *About-Face to Freedom*, New Republic (May 24, 1943), 693-694. Dilliard was a frequent correspondent of Grenville Clark’s and wrote a profile of him for *The American Scholar* shortly before his death. See Dilliard, *Grenville Clark, Public Citizen*, American Scholar, Series I, Box 1, GCP.
324 Petitioner’s Motion for Rehearing, Nos. 280, 314, 966, at 3 (Aug. 31, 1942).
325 Id. at 18.
326 Later in the brief, Covington wondered “Just how this Court can avoid the impact of the holding in [Grosjean] is not clear.” Id. at 26.
327 See 129 F. 2d 24, 37 (D.C. Cir. 1942) (Rutledge, J., dissenting).
his petition for rehearing – as he had the Opelika merits brief – with Sutherland’s Associated Press dissent.\(^{328}\) That dissent had agreed with ANPA and John W. Davis that the NLRB’s reinstatement of an editorial employee was a violation of the First Amendment.

In addition to the rehearing petition, the Witnesses also filed a new set of cert petitions that fall involving similar license fees in Pennsylvania,\(^ {329}\) and a prohibition on door-to-door solicitation in Ohio. The cases were argued in March, shortly after Justice Rutledge’s arrival on the Court. At conference, Frankfurter reiterated that the license taxes at issue in Opelika, Murdock, and Jeanette were “a generalized imposition not [directed] against anybody and suggested that “Jefferson and Madison would have been ‘shocked’ to discover what the Court was doing in the name of freedom of religion.”\(^ {330}\) In the initial vote, Rutledge, who had already made his views clear in Busey, joined the dissenters from Opelika I, and Chief Justice Stone assigned the new majority’s opinion to Douglas.

Meanwhile, the dissenters huddled. On April 9, Frankfurter wrote to Roberts, Reed, and Jackson emphasizing the long-term implications of the license tax cases and encouraging as many dissents as possible:

> [T]hese cases are probably but the curtain raisers of future problems of such range and importance that the usual objections to multiplicity of opinions are outweighed by the advantages of shedding as much light as we are capable of for the wisest unfolding of the subject in the future. . . . in this field we are in the realm which not only touches the liberties of our people, but we are in a field in which, through large, uncritical, congenial abstractions, opinions are going out to the people of a miseducative nature. The dissenting Justices, therefore, have a duty within the bounds of judicial restraint to make it as clear as they can they care as much about the freedom of the Bill of Rights as those who profess to be their special guardians and true interpreters.\(^ {331}\)

Justice Jackson’s law clerk John Costelloe, using language that Jackson would adopt in his own dissent, also emphasized the potential impact of the majority’s expansive interpretation of the First Amendment, and its relationship to the Court’s earlier substantive due process jurisprudence:

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328 Id. at 36.
329 The ordinance challenged in Murdock and Jeanette was forty years old and read:

That all persons canvassing for or soliciting within said Borough, orders for goods, paintings, pictures, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the Burgess a license to transact said business and shall pay to the Treasurer of said Borough therefore the following sums according to the time for which said license shall be granted.

For one day $1.50, for one week seven dollars ($7.00), for two weeks twelve dollars ($12.00), for three weeks twenty dollars ($20.00), provided that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers doing business in said Borough of Jeannette.

Murdock v. Pennsylvania, 319 U.S. 105, 106 (1943)
330 Fine, supra note XXX, at 379 (quoting Justice Murphy’s conference notes).

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[T]he difference between the activities here revealed and the usual sort of religious activity should be pointed out. . . . This Court is forever adding new stories to the temples of the law, and the temples have a way of collapsing in toto when one story too many is added to them. Thus, the liberty of contract stuff got built up too far, and it is now completely collapsed.\footnote{332}

Costelloe worried that the majority’s emerging approach to the First Amendment represented a return to an earlier era of formalism, blind to the social and economic impact of aggressive yet narrow rights protection:

[Y]ou can do a real service by pointing out that if a measure is not valid as a tax the Court should not decide cases by some abstract concept of ‘religious liberty,’ to the exclusion of consideration of the facts. Murphy in \textit{Thornhill} repeated the error of the old liberty of contract people . . . . These peddling ordinances may be primarily revenue measures but their purpose usually is largely regulatory. They are aimed at the crews of magazine salesmen who swoop into a small town and swarm over it before the town has a chance to rally its forces, then depart, leaving a trail of angry, frightened, seduced, or assaulted people.\footnote{333}

In another memorandum, Costelloe, himself a Catholic, warned that the majority’s demand for total exemption of the Witnesses from occupational taxes on peddling would inevitably require further, more expansive, accommodations – or anger those who did not receive them:

Something that may have been overlooked by the writers of the pro-Jehovah’s Witness opinions is the situation in reference to Catholic parochial schools. . . . The Catholic doesn’t believe in sending his children to secular schools, so he wants to establish his own. Many times this is not feasible because starting your own school doesn’t give you an exemption from maintaining the public schools. . . . So far the Catholics have had to work and pay for their crochets or go without them. I suppose, though, that it is more vital to the maintenance of the Church that her members be exempt from supporting schools they will put no stock in than for the Witnesses to be exempt from sales taxes.\footnote{334}

Costelloe assured Jackson that “[o]f course I maintain no sentiment for exempting Catholics.”\footnote{335} “But,” he predicted, “there will be a whole lot of people who will, and will be pretty noisy about the matter.”\footnote{336} Costelloe’s concern about the relationship between Witness accommodation and the Catholic community was not simply an example. The communities in

\footnote{332 [April] Memorandum #2 from John F. Costelloe, Clerk, to Assoc. Justice Jackson 2, Container 127, RHJP.}

\footnote{333 Id. at 3.}

\footnote{334 [April] Memorandum #1 from John F. Costelloe, Clerk, to Assoc. Justice Jackson 2-3, Container 127, RHJP.}

\footnote{335 Id. at 3.}

\footnote{336 In his \textit{Barnette} dissent later that spring, Frankfurter would make Costelloe’s point about the slippery slope of accommodation, using the same parochial school example: “All citizens are taxed for the support of public schools, although this Court has denied the right of a state to compel all children to go to such schools, and has recognized the right of parents to send children to privately maintained schools. Parents who are dissatisfied with the public schools thus carry a double educational burden. Children who go to public school enjoy in many states derivative advantages, such as free textbooks, free lunch, and free transportation in going to and from school. What of the claims for equality of treatment of those parents who, because of religious scruples, cannot send their children to public schools?” \textit{Barnette}, 319 U.S. 624, 660 (1943) (Frankfurter, J., dissenting).}
which the Witnesses operated tended to be majority Catholic, and Witnesses were themselves famously anti-papist in their theology. Striking down the license taxes would thus deprive majority Catholic communities – whose own religious practices were arguably burdened by general fiscal policy – from using fiscal policy to regulate the Witnesses’ activities.

On May 3, Justice Jackson made this point both empirically and doctrinally in his *Douglas* dissent. Empirically, he documented the majority Catholic population of Jeanette, Pennsylvania, and the aggressively anti-Catholic nature of tracts the Witnesses distributed throughout the town. Doctrinally, he argued that the question of First Amendment enforcement in the license tax cases was unavoidably a distributional question, in which the granting of expansive rights to some necessarily eroded the rights of others.

These Witnesses, in common with all others, have extensive rights to proselyte and propagandize. These of course include the right to oppose and criticize the Roman Catholic Church or any other denomination. . . . The real question is where their rights end and the rights of others begin. The real task of determining the extent of their rights on balance with the rights of others is not met by pronouncement of general propositions with which there is no disagreement. . . .

A common-sense test as to whether the Court has struck a proper balance of these rights is to ask what the effect would be if the right given to these Witnesses should be exercised by all sects and denominations. If each competing sect in the United States went after the householder by the same methods, I should think it intolerable. If a minority can put on this kind of drive in a community, what can a majority resorting to the same tactics do to individuals and minorities? Can we give to one sect a privilege that we could not give to all, merely in the hope that most of them will not resort to it? Religious freedom in the long run does not come from this kind of license to each sect to fix its own limits, but comes of hard-headed fixing of those limits by neutral authority with an eye to the widest freedom to proselyte compatible with the freedom of those subject to proselyting pressures.

Borrowing his clerk’s insight and metaphor, Jackson likened the majority’s disregard for the third-party consequences of First Amendment “transcendentalism” to a previous generation’s overzealous enforcement of economic liberty:

This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added. So it was with liberty of contract, which was discredited by being overdone. The Court is adding a new privilege to override . . . . the rights of others to what has before been regarded as religious liberty.

For Donald Richberg, architect of the National Industrial Recovery Act, Jackson’s license tax dissent was a perfect expression of the New Deal’s credo:

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337 See Fine, *supra* note XX, at 372-373; Peters, *supra* note XXX, at XXX-XX.
339 Id. at 167-173.
340 Id. at 178-180.
341 Id. at 179, 181-182.
I like particularly your metaphor regarding the addition by the Court of new stories to the temples of constitutional law and the resulting likelihood of collapse. It seems difficult for some people to understand the fundamental fact that liberty is only preserved by restraints on liberty, and that therefore the imposition of restraints is an essential part of preserving freedom . . . . I am glad we are of the same faith.  

Just over a month after issuing his dissent in the license tax cases, Jackson would invoke its distributional theory of the First Amendment in his Barnette majority opinion. There, “[b]efore turning to the Gobitis case,” Jackson wrote that it was “desirable to notice certain characteristics by which this controversy is distinguished.” These “certain characteristics” were that “[t]he freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual.” Echoing his insistence in Douglas that “[t]he real question is where [Witnesses’] rights end and the rights of others begin,” Jackson explained that it was “conflicts” in which individual rights collided that “most frequently require intervention of the State to determine where the rights of one end and those of another begin.” But the flag salute challenge was not that kind of case:

[T]he refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. . . . The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

According to Jackson’s logic, not all “intervention[s] of the State” in the First Amendment context are equally suspect. Such interventions should, in fact, be expected in contexts where an individual’s exercise of First Amendment rights limits the rights of others.

In their Barnette concurrences, Black, Douglas, and Murphy all went further than Jackson in describing the limits of state power. For Black and Douglas, only those state interventions that “are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity,” merited the restraint of free exercise. For Murphy, only “essential operations of government [required] for the preservation of an orderly society,” such as “the compulsion to give evidence in court,” could validly limit the “right of freedom of thought and of religion.”

343 Barnette, 319 U.S. 624, 630 (1943)  
344 Id.  
345 Id. at 630-631.  
346 Id. at 630-631.  
347 Cf. John Dewey, The Public and Its Problems 15-16 (1927) (defining a “public” – the proper object of state administration – as “all those who are affected by the indirect consequences of transactions to such an extent that it is deemed necessary to have those consequences systematically cared for”); Kara Loewentheil, When Free Exercise Is a Burden: Protecting ‘Third Parties’ in Religious Accommodation Law, 62 Drake L. Rev. 432 (2014).  
348 Id. at 643.  
349 Id. at 645.
Yet earlier that spring, even some in the new license tax majority worried about the impact their decisions could have on government’s general regulatory power. Justice Roberts reported to Frankfurter that Douglas was “very much troubled about these Jehovah’s Witnesses.”350 In fact, Douglas had told Roberts, “I am afraid that our decisions in these cases may lead them to believe that they can violate any law simply because their religious convictions sanction such violation. And I wish we would say somewhere, somehow that people cannot break laws simply because their consciences tell them to do so.”351

And despite his earlier strong language on the D.C. Circuit, Rutledge himself was unclear about the majority’s theory and anxious about its extent. On March 27, he wrote to Douglas with several suggestions.352 Rutledge first recommended making clear that the Court did not approve of the Witnesses’ “phonographic attacks on other religions” and that it did not decide “the question whether the [Witnesses are] subject to any particular form of taxation.”353 He then proposed two possible theories motivating First Amendment critique of the license taxes:

(a) That ‘selling’ the literature is itself a religious practice – like taking communion – and therefore free from any taxation.

(b) That ‘selling’ the literature, while not necessary itself a religious practice, is so necessary for the exercise of the rituals and practices of the religion (because it furnishes the group with funds) that it is protected from taxation.354

Rutledge worried that that “[t]he former theory is perhaps too narrow and may be vulnerable both to attack and to abuse.”355 If salesmanship could be a sacrament, the scope of free exercise threatened to swallow the marketplace itself. “The latter,” Rutledge went on, “if it is the basis of the opinion, should be articulated more clearly – and, if so, in such a manner as not to protect from taxation large accumulations of property by the more affluent religious bodies.”356 Here, Rutledge mirrored Jackson’s clerk’s concerns about the relationship between an expansive accommodation of Witnesses and the government’s treatment of a much larger American Catholic community. Indeed, Rutledge was “not sure the opinion as it stands will not be taken to imply that any house publishing religious literature, on however wide a scale, can be taxed in a non-discriminatory manner.”357 Accordingly, Rutledge recommended that “both theories, (a) and (b) . . . be used, but probably should be separately stated, and each then somewhat more specifically guarded against possible too extensive application.”358

In the event, Douglas did try to set some limits on the majority’s decision, noting that “we do not intimate or suggest in respecting their sincerity that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment”, and insisting that “[t]he cases present a single issue – the constitutionality of an ordinance which, as construed and applied, requires religious colporteurs to pay a license tax as a condition to the pursuit of

351 Id.
352 March 27, 1943 Memorandum from Assoc. Justice Rutledge to Assoc. Justice Douglas 1, Container 89, WODP.
353 Id.
354 Id.
355 Id.
356 Id.
357 Id. at 1-2.
358 Id. at 2.
their activities.”\(^{359}\) As for Rutledge’s “a” and “b” theories, Douglas appeared to stick mainly with “a,” holding that “spreading one’s religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types.”\(^{360}\)

Yet elsewhere in the opinion, Douglas was much more expansive. He invoked press and religious freedom side by side, insisting that “[f]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way” and, consequently, that the license tax “restraints in advance those constitutional liberties of press and religion, and inevitably tends to suppress their exercise.”\(^{361}\) Douglas also repeated the argument first mooted by Sutherland in *Grosjean* and trumpeted time and again in ANPA, ACLU, and Witness briefs, that the mere potential for a tax to become prohibitive constituted an impermissible restraint on press and religious freedom: “The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance.”\(^{362}\)

[TK: As the Burger Court would have to distinguish it decades later when extending limited First Amendment protection to commercial speech, the *Murdock* majority also had to confront the court's unanimous decision the year before in *Valentine* holding commercial speech unprotected by the first amendment. XXX]

Writing for all four dissenters, Reed lamented the breadth of Douglas’s holding: “The Court now holds that the First Amendment wholly exempts the church and press from a privilege tax, presumably by the national, as well as the state, government.”\(^{363}\) Echoing Rutledge’s own worries about the ruling’s “too extensive application,”\(^{364}\) Reed concluded that “[t]his late withdrawal of the power of taxation over the distribution activities of those covered by the First Amendment fixes what seems to us an unfortunate principle of tax exemption, capable of indefinite extension.”\(^{365}\)

On June 17, 1943, three days after the Court decided *Barnette*, Justice Jackson received a congratulatory letter from an acquaintance, Francis Hill.\(^{366}\) Hill, a Washington tax attorney, wrote not to applaud Jackson’s majority opinion in *Barnette* but his May 3 dissent in the license tax cases. “It seems to me,” Hill wrote, “that your decision is sound as a bell, and is not in any way answered by the majority opinion.”\(^{367}\) “[T]he question,” he went on “is not really one of religious freedom, but is whether Jehovah’s witnesses have a license, free of the state’s right to tax and free of the state’s right to regulate, to enter in commercial into commercial activities under the guise of carrying on a religious work . . . .”\(^{368}\) Hill ended his letter with a bet: “I am willing to wager that in the not too distant future your dissenting opinion will become the majority


\(^{360}\) *Id.* at 110.

\(^{361}\) *Id.* at 111, 114.


\(^{363}\) *Murdock*, 319 U.S., at 133 (Reed, J., dissenting).

\(^{364}\) March 27, 1943 Memorandum from Assoc. Justice Rutledge to Assoc. Justice Douglas 1, Container 89, WODP.

\(^{365}\) *Murdock*, 319 U.S., at 133 (Reed, J., dissenting).

\(^{366}\) June 17, 1943 Letter from Francis W. Hill, Jr. to Robert Jackson, Assoc. Justice, Container 127, RHJP.

\(^{367}\) *Id.*

\(^{368}\) *Id.*
C. Regretting the Peddling Tax Cases

In the wake of the 1943 peddling tax cases, the new liberal majority confronted the Lochnerian Pandora’s Box it had somewhat unwittingly opened. Less than a year after Justice Rutledge provided the crucial fifth vote in the peddling tax decisions, he was forced to place a limiting condition on the expansive First Amendment doctrine they announced. In *Prince v. Massachusetts*, the Jehovah’s Witnesses sought to extend their recent victories, challenging a state’s child labor law that prevented a Witness child from participating with her mother in the sale and distribution of religious literature. Writing for a badly divided Court, Rutledge upheld the safety regulation on the narrow ground of the state’s general responsibility to protect children: “Concededly a statute or ordinance identical in terms with [the instant one] except that it is applicable to adults or all persons generally, would be invalid . . . . The state's authority over children's activities is broader than over like actions of adults.”

Murphy dissented, arguing that “vague references to the reasonableness underlying child labor legislation in general” were not sufficient to justify a regulation impinging on “the human freedoms enumerated in the First Amendment.” Citing to Footnote 4, Murphy insisted that such a regulation was not aided by “any strong presumption of . . . constitutionality” and was, indeed, “prima facie invalid.” Rutledge himself later told Thomas Reed Powell that he almost had “to write it the other way”: the Court was “dodging . . . between points pretty closely packed . . . . [I]t was one of those situations where almost a toss of the coin could have turned the trick for me.”

Agreeing with the result as a matter of policy, Justices Jackson, joined by Roberts and Frankfurter, characterized his separate opinion as a dissent. If the *Murdock* majority had been right in equating the Witnesses’ sale and distribution of literature with “worship in the churches,” then the *Prince* majority laid the foundation “for any state intervention in the indoctrination and participation of children in religion, provided it is done in the name of their health or welfare.” This *reductio ad absurdum*, Jackson reasoned, revealed “the real basis of disagreement among members of this Court in previous Jehovah's Witness cases.” Making clear that *Barnette* had not signaled a departure from his more general approach to the relationship between public regulation and civil liberty, Jackson reiterated the analysis of the First Amendment he had first outlined in *City of Jeanette*: “I think the limits [on religious freedom] begin to operate whenever activities begin to affect or collide with liberties of others or of the public.”

Just as *Barnette* did not indicate Jackson’s retreat from balancing First Amendment claims against the state with third-party rights, *Prince* did not indicate the new majority’s retreat

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369 Id.
370 June 21, 1943 Letter from Robert Jackson, Assoc. Justice, to Francis W. Hill, Jr., Container 127, RHJP.
372 Id. at 167-168.
373 Id. at 173 (Murphy, J., dissenting).
374 Id.
375 Fine, supra note XXX, at 384.
376 *Prince*, 321 U.S., at 177 (Jackson, J., dissenting)
377 Id.
378 Id.
from striking down economic regulations on First Amendment grounds. Later that spring, Justice Douglas issued a majority opinion invalidating a town’s license tax on door-to-door peddling. Unlike in Murdock, where there was a mixed record with respect to the question whether itinerant Witnesses supported themselves by the sale of literature, in Follett v. Town of McCormick, the Witness petitioner was a resident of the town and admitted that book-selling was his sole occupation. The majority argued that these facts made no difference – so long as book-selling was an exercise of the petitioner’s religion, the First Amendment trumped the commercial regulation. Citing now to Grosjean and Murdock in tandem, Douglas wrote that “[t]he exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendments is as obnoxious as the imposition of a censorship or a previous restraint.” Justices Jackson, Roberts, and Frankfurter dissented in unison:

The present decision extends and reaches beyond what was decided in Murdock v. Pennsylvania . . . . There the community asserted the right to subject transient preachers of religion to taxation; there the court emphasized the ‘itinerant’ aspect of the activities sought to be subjected to the exaction. The emphasis there was upon the casual missionary appearances of Jehovah's Witnesses in the town and the injustice of subjecting them to a general license tax. Here, a citizen of the community, earning his living in the community by a religious activity, claims immunity from contributing to the cost of the government under which he lives.

While in Prince, the dissenters had limited themselves to assailing the majority’s religious freedom logic, they now felt it necessary to draw attention to the full scope of the First Amendment theory announced in Murdock and Follett:

We cannot ignore what this decision involves. If the First Amendment grants immunity from taxation to the exercise of religion it must equally grant a similar exemption to those who speak and to the press. . . . If exactions on the business or occupation of selling cannot be enforced against Jehovah's Witnesses they can no more be enforced against publishers or vendors of books, whether dealing with religion or other matters of information. The decision now rendered must mean that the guarantee of freedom of the press creates an immunity equal to that here upheld as to teaching or preaching religious doctrine. Thus the decision precludes nonoppressive, nondiscriminatory licensing or occupation taxes on publishers, and on news vendors as well, since, without the latter, the dissemination of views would be impossible.

Putting aside this whole new press dimension, the dissenters concluded by noting that, “even in the field of religion alone, the implications of the present decision are startling”:

Multiple activities by which citizens earn their bread may, with equal propriety, be denominated an exercise of religion as may preaching or selling religious tracts. Certainly this court cannot say that one activity is the exercise of religion and the other is not. . . .

380 Id. at 577.
381 Id. at 580-581 (Roberts, Frankfurter, Jackson, JJ., dissenting).
382 Id. at 581-582.
would be difficult to deny the claims of those who devote their lives to the healing of the sick, to the nursing of the disabled, to the betterment of social and economic conditions, and to a myriad other worthy objects, that their respective callings, albeit they earn their living by pursuing them, are, for them, the exercise of religion.  

Back in November, Donald Richberg had applauded Jackson’s dissent in *Murdock* for articulating their shared New Deal “faith” – “that liberty is only preserved by restraints on liberty, and that therefore the imposition of restraints is an essential part of preserving freedom.”  

Four months later, the *Follett* dissenters argued that the majority’s logic severed this link between liberty and the restraint of liberty by holding that the First Amendment “entitle[d] believers to be free of contribution to the cost of government, which itself guarantees them the privilege of pursuing their callings without governmental prohibition or interference.”  

The final 1940s case involving Witness peddling, *Marsh v. Alabama*, provided a peculiar coda to the New Deal politics that had simmered in the background of the Court’s early First Amendment jurisprudence. In *Marsh*, a Witness challenged his conviction for trespassing on a company-town’s property. Justice Black, who had made a name for himself in part by investigating corporate lobbyists, happily applied the Courts’ newly expansive First Amendment jurisprudence to the public enforcement of the company-town’s prohibition on solicitation. Frankfurter himself concurred in the opinion, writing that “[s]o long as the views which prevailed in *Jones v. Opelika* . . . *Murdock v. Pennsylvania* . . . [and] *Martin v. Struthers* express the law of the Constitution, I am unable to find legal significance in the fact that a town in which the Constitutional freedoms of religion and speech are invoked happens to be company-owned.”

[TK: *The New Republic* viewed *Marsh* as part of a long trajectory of left-wing civil libertarianism. Not only was it “another long step toward the permanent safeguarding of our democratic rights” in general, but it also promised to vindicate what had been, during the interwar period, the paradigmatic civil libertarian right – the right to organize. Thanks to *Marsh*, the editors explained, union organizers could now freely enter and operate in a company-town under the banner of the Constitution. From this perspective, *Marsh* looked like an ideological extension of the Court’s decision a year earlier in *Thomas v. Collins*. There, Justice Rutledge had written the plurality opinion striking down an injunction issued in Texas state court pursuant to a Texas statute that required labor organizers to register for a permit before soliciting union membership. *Marsh* saw Jackson and Stone switch votes from *Murdock* and that was the balance of the decision, indicating Jackson’s more pro-labor sentiment.]

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383 Id. at 582-583.
385 *Follett*, 321 U.S., at 583 (Roberts, Frankfurter, Jackson, JJ., dissenting).
387 Id. at 509 (“When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.”).
388 Id. at 510 (Frankfurter, J., concurring).
390 See Weinrib, *The Liberal Compromise*, supra note XXX, at XXX; Weinrib, *Civil Liberties Outside the Courts*, supra note XX, at XX; Zackin, supra note XX, at XXX.
392 *Thomas v. Collins*, 323 U.S. 516 (1945)
This time it was Stone – the author of Footnote 4 and the originator of the “preferred position” doctrine – who joined Reed and Justice Burton in repudiating the majority’s “novel Constitutional doctrine.”

Jackson himself took no part in the decision, being in Nuremberg at the time, but the dissenters offered a version of his own political economic analysis of rights. In this case, though, the analysis was invoked primarily to defend private property rather than public authority from civil libertarian attack.

Our Constitution guarantees to every man the right to express his views in an orderly fashion. An essential element of “orderly” is that the man shall also have a right to use the place he chooses for his exposition. The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech.

Of course, Jackson’s point in Douglas, Barnette, and Follett had been that almost every rights-holder will trespass to some extent on the rights of others. What was needed was “a hard-headed fixing of . . . limits by neutral authority,” by which Jackson meant, at least in the first instance, legislators and administrators, not judges.

In any event, Stone’s worst fears would not be realized – civil liberties did not vitiate property rights in the ensuing decades. Indeed, the Supreme Court gradually marginalized the Marsh doctrine. As Jackson, Frankfurter, and Roberts had intuited in Follett, the more baffling problem was and would remain those cases in which the rights of the property-holder coincided with the rights of the civil libertarian trespasser.

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Harlan Fiske Stone died a few months after his dissent in Marsh. Three years later, in Kovacs v. Cooper, Felix Frankfurter attempted to bury what he saw as the pernicious legacy of Stone’s civil liberties jurisprudence, from Carolene Products through the discourse of “preferred position.” In Kovacs, the Court upheld an ordinance prohibiting the use of sound amplification equipment in the streets. Frankfurter agreed with the result but was disturbed by the majority opinion’s invocation of the phrase “preferred position” and its citation to Footnote Four of Carolene Products. Accordingly, he filed a concurrence reconstructing the doctrinal history of both. First, Frankfurter pointed out that Footnote Four itself “did not have the concurrence of a majority of the Court,” as Justice Black did not concur in Part III of the opinion, which included

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393 Marsh, 326 U.S., at 512 (Reed, J., dissenting).
394 Id. at 516.
397 336 U.S. 77 (1949).
the famous Footnote. Frankfurter then reviewed all those cases either citing the Footnote or invoking the First Amendment’s “preferred position.”

The conclusion of Frankfurter’s review was that “the claim that any legislation is presumptively unconstitutional which touches the field of the First Amendment and the Fourteenth Amendment . . . has never commended itself to a majority of this Court.” Frankfurter was simply wrong. In Murdock, Justice Douglas had a majority for the proposition that:

A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers, and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.

Indeed, Justice Rutledge, who joined Black and Douglas in dissent in Kovacs, ended his own opinion by noting that Frankfurter’s review “demonstrates the conclusion opposite to that which he draws, namely, that the First Amendment guaranties of the freedoms of speech, press, assembly and religion occupy preferred position not only in the Bill of Rights, but also in the repeated decisions of this Court.” While the phrase “preferred position” would fade from the Court’s lexicon in the wake of Kovacs, its spirit would live on.

IV. FIRST AMENDMENT LOCHNERISM IN HISTORY AND THEORY

By recovering the early years of “First Amendment Lochnerism,” this Article does not seek to tell a simple history of continuity: First Amendment jurisprudence in the 1930s and 1940s did not constrain economic regulation to the degree that it does so today. We are witnessing both political and doctrinal innovations in the use of civil libertarian argument. Yet, as Section A argues, the condition of possibility for these innovations lies in the nearly inextricable relationship between economic libertarianism and bifurcated review first noted by the peddling tax dissenters. Section B traces how this relationship continued to trouble the Court in the decades following the peddling tax dissents. Section C concludes by proposing that a successful critique of “First Amendment Lochnerism” must contend not only with the Lochnerian political economy that appears to underlie recent civil liberties decisions, but also with the Lochnerian conception of the judicial role that undergirds judicial enforcement of civil liberties more generally.


399 Kovacs, 336 U.S., at 91-94.

400 Id. at 95.


402 Kovacs, 336 U.S., at 104 (Rutledge, J., dissenting).

403 White, supra note XX, at 152.
A. Economic Libertarianism and Bifurcated Review

Why did Justice Frankfurter go out of his way to bury Footnote Four – and efface the peddling tax majority’s endorsement of the “preferred position” doctrine – in his 1949 Kovacs v. Cooper opinion? Frankfurter’s efforts are especially puzzling in light of the extensive literature that argues that Footnote Four was little noticed or understood until the 1960s or even the 1970s. Only then, it is contended, did scholars and judges inflate the importance of the Footnote – particularly its second two paragraphs, concerning obstructions to the political process and “discrete and insular minorities” – in order to justify (or explain) the Warren Court’s jurisprudential innovations.

From one point of view, this argument about the belated invention of Footnote Four’s significance is insupportable. By 1948, legal scholars could speak matter-of-factly about Carolene Products’ “now famous footnote” and cite it as the origin of the Supreme Court’s “reject[ion], even revers[al], [of] the normal presumption of constitutionality” in cases involving civil liberties. That same year, the Supreme Court cited the Footnote for the sweeping proposition that:

[Legislative] judgment does not bear the same weight and is not entitled to the same presumption of validity, when the legislation on its face or in specific application restricts the rights of conscience, expression and assembly protected by the Amendment, as are given to other regulations having no such tendency. The presumption rather is against the legislative intrusion into these domains. For, while not absolute, the enforced surrender of those rights must be justified by the existence and immediate imminency of dangers to the public interest which clearly and not dubiously outweigh those involved in the restrictions upon the very foundation of democratic institutions, grounded as those institutions are in the freedoms of religion, conscience, expression and assembly.

Yet, from another point of view, the thesis of Footnote Four’s belated invention – or at least its re-invention – has merit. As the two previous quotes suggest, judges and scholars in the first decade of the Footnote’s existence associated it not with the principal legacy of the Warren Court – equal citizenship – but with the First Amendment, broadly defined, with the notion that some rights occupied a “preferred position” in the constitutional order (principally those rights protected the First Amendment), and with the related notion that judges should treat certain kinds of governmental action as


405 George D. Braden, The Search for Objectivity in Constitutional Law, 57 Yale L.J. 571, 579 (1948); see also Herbert Wechsler, Stone and the Constitution, 46 Colum. L. Rev. 764, 769 n.28 (1946) (citing “the famous Carolene Products footnote”).

406 Thomas I. Emerson & David M. Helfeld, Loyalty Among Government Employees, 58 Yale L.J. 1, 84 (1948)

presumptively invalid because certain kinds of rights were presumptively inviolable. In the 1940s, Footnote Four was not neglected, but it also did not represent a set of tools for building a more egalitarian democracy. Rather, it represented a set of libertarian checks on majoritarian decision-making.

In the 1940s, Footnote Four of Carolene Products, “when it was cited, stood for ‘preferred position.’”408 Furthermore, while those Justices who most fiercely endorsed the “preferred position” doctrine – Black, Douglas, Murphy, and Rutledge – “associated Carolene Products with democracy,” they did not associate it with “the modern procedural notion of democratic representation-reinforcement,” but rather “the idea that democracy involves certain substantive values and substantive freedoms.”409 As Felix Gillman has argued, “because [Footnote Four] was generally associated with preferred position,” “[i]t was not seen as an argument for the compatibility of judicial review with the democratic process, but as an argument for the necessity of judicial review from fundamental values.”410

It was for this reason that Justice Frankfurter sought to bury Footnote Four and the closely associated “preferred position” doctrine in Kovacs. Frankfurter also mocked the “casualness” of Footnote Four’s libertarianism two years later in United States v. Dennis, when he cited the body of Carolene Products – the “presumption of constitutionality” which the decision extended to legislation – to justify the conviction of members of the Communist Party under the Smith Act.411

Scholars have generally attributed Frankfurter’s interventions in these cases to an almost-mechanical dedication to judicial deference – to a formalized conception of institutional roles soon to be developed by the “legal process” school, whose members admired Frankfurter deeply.412 Yet this was not the critique of the “preferred position” doctrine that Frankfurter and the other dissenting Justices had offered in the peddling tax cases. Rather, they had attacked the majority’s endorsement of “preferred position” from the perspective of legal realism – namely, that since economic regulation invariably imposed burdens on regulated parties’ exercise of expressive rights, to say that these rights were presumptively inviolable was to say that economic regulation was presumptively invalid, and thus subject to searching judicial review whenever challenged on First Amendment grounds (or, potentially, on any of the myriad other grounds

408 Gillman, supra note XX, at 188.
409 Id. at 189.
410 Id. at 202.
411 Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).
The “preferred position” gloss of Footnote Four seemed to negate the “presumption of constitutionality” that the body of Carolene Products had announced, not simply because the gloss encouraged judicial review, but because Footnote Four itself ignored the political economic character of all rights claims.

In other words, Frankfurter and the other peddling tax dissenters had suggested that it was difficult to distinguish the libertarianism of the “preferred position” doctrine from economic libertarianism. Throughout the 1940s, legal scholars wondered at this strange predicament that Harlan Fiske Stone and a group of supposedly “left wing” Roosevelt appointees had created. As early as 1941, the Yale Law professor Walton Hamilton – a founder of legal realism and its sister discipline, “institutional economics” – effectively predicted the emergence of the “preferred position” doctrine as the destination of a jurisprudential trajectory initiated by Hughes Court’s free press decisions, codified by Footnote Four, and confirmed by the First Amendment picketing and leafleting cases that had followed it:

Although in fact the Court makes the legislature supreme in matters of policy, it has been unwilling to make definitive its presumption that a statute is constitutional. Its position may be due to a desire to keep its rule of review uniform and its reluctance to abandon its veto in issues of civil rights. A few years ago a bench headed by the present Chief Justice read “liberty of contract” out of the due process clause and promptly read freedom of speech into its place. The current bench, accentuating a trend which for a decade has been in the making, has in effect set up a presumption of unconstitutionality against all legislation which on its face strikes at freedom of speech, press, assembly, or religion.415

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414 Stanley Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation, 2 Stan. L. Rev. 140 (1949)
415 Walton H. Hamilton & George D. Braden, The Special Competence of the Supreme Court, 50 Yale L.J. 1319, 1349-1350 (1941) (; see also id. at 1352 & 1352 n. 145. For Hamilton’s intellectual and institutional significance, see Kalman, Legal Realism, supra note XX, passim. The year before Hamilton and Braden wrote, an anonymous Note in the Columbia Law Review had reached a similar conclusion in response to the Supreme Court’s decision in Schneider v. State, 308 U.S. 147 (1939), a successful Jehovah’s Witness challenge to a healthy and safety ordinance that prohibited door-to-door leafleting:

The instant decision . . . lends authoritative substance to the theory that there may be no room for the presumption of constitutionality, usually accorded state or municipal legislation, where the statute or ordinance interferes with a civil liberty as distinguished from legislative impairment of an economic privilege. This notion-rooted in conjecture, then accorded footnote recognition – has now culminated in definitive assertion . . . . As a consequence of this readiness by the Supreme Court to forego the ordinary presumption of constitutionality, the complainant is no longer burdened with the necessity of adequately demonstrating the invalidity of the statute. Although the state may not be compelled to come forward and defend its position by the introduction of facts sufficient to justify the need for the legislative act, its position is no longer protected by a presumption.

Note, Recent Cases, Constitutional Law – Presumption of Constitutionality Not Applicable to Statutes Dealing with Civil Liberties, 40 Colum. L. Rev. 531, 532-533(1940)
Hamilton and his student co-author George Braden, 416 argued that there was a worrisome tension between this civil libertarian trend and a parallel “revolution” 417 – the Supreme Court’s ostensible abandonment of its role as arbiter of the fairness of the nation’s political economy. President Roosevelt’s recent appointees – Black, Reed, Douglas, Frankfurter, Murphy – could each “through concrete experience . . . testify to the mischief which had been done by an attempt of the [old] Court to impose its rigid dogma upon the seething activities of society.” 418 They all appeared ready to keep “the Court well aloof from general legislation,” recognizing that “if, in nation and state, the economy is to be kept flexible enough to preserve personal opportunity, the dominant reliance must be upon the legislature.” 419 And yet, in practice, the new Court had proven “unwilling to make definitive its presumption that a statute is constitutional.” 420 Indeed, by creating a “presumption of unconstitutionality” in matters of “civil rights” as opposed to “the liberties of property,” the new Court was embracing “the very process” that had characterized the old Court’s approach to property rights: “the action of the state must be measured against the invasion of private right, and the issue becomes a matter of more or less.” Furthermore, Hamilton and Braden noted, the problem was not simply that the Court was applying a procedure once used to protect economic liberty in order to protect civil liberty. The deeper problem was the substantive ambiguity between the two kinds of liberty:

A couple of generations ago, in an America which was on the make, personal freedom was esteemed as opportunity in a land of promise. To the mind of Mr. Justice Field, liberty-and-property was a single word and he did not hesitate to read the right to get ahead into the Fourteenth Amendment. But the idiom of ultimates changes and common-sense goes along. A peaceful picketing, for which fifty years ago the law would have been hard put to find a place, is today an attribute of freedom of speech. But peace has no fixed truce with the picket line, and, as little by little violence obtrudes, all the activity it touches is put beyond the law. The Court, by its own decrees, must separate into antithetical categories when there are no certain criteria of distinction. Today there are persons, whom the members of the Court would not consider unreasonable men, who regard the matter as an aspect of a clash between economic groups which the state should regulate. And men not devoid of reason argue that when the National Labor Relations Board forbids an employer to send anti-union pamphlets to his own employees, there is no denial of the traditional freedom of the individual. 421

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416 Hamilton & Braden, supra note XXXX, at 1319.
417 Graduating from law school in 1941, Braden would go on to clerk for Sherman Minton and Charles Clark and then join the Yale Law faculty in 1947 as a late defender of legal realism. Kalman, Legal Realism, supra note XX, at 149.
418 Hamilton & Braden, supra note XXXX, at 1322.
419 Id. at 1348-1349.
420 Id. at 1349.
421 Id. at 1352.
The blurred nature of the line between economic and civil liberty created a kind of “Step Zero” question, the answer to which would embroil the Court in the same sort of economic reasoning that it had purportedly abandoned in the late 1930s. In any given case, “[t]he Court must . . . exercise its independent judgment in deciding whether an issue is one of civil rights” or one of economic liberty, and therefore whether to apply the “presumption of unconstitutionality” or the “presumption of constitutionality.” But “[t]o accept the thesis that such questions fall within the discretion of the Court, is to accord deference to an ultimate.” “[D]iscretion as to what presumptions will be indulged” meant that “the door” of judicial scrutiny was “capable of being flung wide open.

Hamilton and Braden interpreted Footnote Four of Carolene Products as an indication that “[m]embers of the Court have been bothered by their own dichotomy” between economic and civil liberty. And they found some merit in the distinction suggested by the Footnote’s second paragraph, namely that some “rights . . . have unique importance because their denial tends to restrict ‘those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.’” Echoing the interpretation of Footnote Four that Justice Frankfurter had offered to Justice Stone during their Gobitis debate, Hamilton and Braden argued that the second paragraph, on its own, might effectively synthesize judicial deference to general legislation with heightened scrutiny in cases where there was evidence that the legislative pathways had been obstructed. The second paragraph “would keep open the right of intellectual search and maintain a free forum for the interchange of ideas and the resulting action. That done, it is not of judicial concern that mistakes are made, provided the rules of the game are followed.”

While Braden and Hamilton may have been short-sighted in thinking that “[s]uch a rationale has relatively easy going so long as it is limited to the democratic process,” they were certainly correct that Justice Stone’s Footnote “encounters obstacles as soon as it leaves its procedural orbit.” Unlike Footnote Four’s second paragraph, the first and third paragraphs posited substantive categories – textually enumerated rights, “discrete and insular minorities” – that merited special judicial guardianship. Neither category suggested an obvious means of distinguishing economic from non-economic matters, or of shielding the former from heightened judicial scrutiny. As Hamilton and Braden emphasized, reasonable men could and did differ on the question whether a labor picket was a First Amendment activity to be zealously protected by the judiciary or one maneuver in a larger economic conflict to be reasonably regulated by the state.

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422 Cf. Cass Sunstein, Chevron Step Zero, XXX; arguments that the questions asked at Chevron Step Zero significantly erode the degree of judicial deference to administrative decision-making that Chevron purported to establish.
423 Hamilton & Braden, supra note XX, at 1352.
424 Id.
425 Id. at 1350.
426 Id. at 1352 (citing Carolene Products, 304 U.S. at 152 n.4).
427 Id. at 1353 (quoting 304 U.S. at 152 n.4).
428 This “political process” argument for heightened judicial scrutiny of the regulation of (publicly valuable) speech would be famously elaborated by Alexander Meiklejohn later in the decade. See Alexander Meiklejohn, Free Speech 26-27 (1948); see also Robert C. Post, Constitutional Domains XXX (1995).
429 See, e.g., Buckley v. Valeo XXX; Citizens United XX; Robert C. Post, Citizens Divided XX (2015).
430 Hamilton & Braden, supra note XX, at 1353.
The troublingly “economic” character of many “civil liberties” claims was a frequent theme in the contemporaneous writings of the historian and public intellectual Henry Steele Commager. A few months before Hamilton and Braden’s article, Commager asked the readers of the New York Times, “What is a law dealing with ‘economic problems,’ and who is to decide whether a particular act falls into this or into some other category? . . . [F]ew laws fall into neat or clear categories. . . . A law providing heavy taxes on newspaper advertising is an ‘economic’ law . . . .” Commager expanded on the point in his book Majority Rule and Minority Rights, published months after the 1943 peddling tax decisions. “The dust of confusion hangs heavily over the discussions of [Roosevelt’s court-packing plan] and the numerous Jehovah’s Witness cases,” Commager lamented. “Misunderstanding,” he went on, “is no monopoly of conservatives who celebrate judicial review as a bulwark of republicanism; it distinguishes equally liberals who for the most part deprecate judicial intervention in the economic realm but rejoice exceedingly at judicial intervention on behalf of civil liberties.” The problem for liberals, Commager explained, was that “the distinction between so-called civil-liberties laws and other laws is by no means clear-cut, that it may even be artificial and misleading”:

Was the Louisiana law imposing a heavy upon newspapers with large circulations an exercise of the taxing powers, or was it a badly concealed attempt to penalize opposition papers and thus an interference with freedom of the press? . . . Is the law forbidding doctors to give out contraceptive information a proper exercise of the police power – or an illegal interference with the rights of the medical profession?

Ambiguity between the economic and the non-economic was also rife when it came to the protection of “discrete and insular minorities.” Commager reminded his readers that it was “conservatives, fearful especially for the sanctity of property,” who first championed “the protection of minority rights” and formulated a philosophy of the ‘tyranny of the majority’ and took refuge in the denial of the majority will” through the “institution of judicial review.”

Hamilton and Braden similarly noted that a discrete and insular minority “may refuse, or be unable, to entertain commerce in ‘reason’ with the mass of persons whose will guides the state.” Was such a minority entitled to special judicial protection? Expanding on the point a few years later, George Braden asked, “What are ‘discrete and insular minorities’? Racial and religious groups, yes. Public utilities? Had Chief Justice Stone sat on the Court in the days of Granger legislation against the railroads, would he have held the railroads to be such a minority?”

The peddling tax cases exemplified the slippery boundary between “economic” and “non-economic” minorities. The Jehovah’s Witnesses were both a religious minority and an economic

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432 Henry Steele Commager, Majority Rule and Minority Rights (1st ed. Sept. 1943).
433 Id. at 39.
434 Id.
435 Id. at 68-69.
436 Id. at 79.
437 Hamilton & Braden, supra note XX, at 1353.
438 Braden, supra note XX, at 581.
minority, a socially-disfavored religious sect that engaged in an economically-disfavored mode of commerce: mass door-to-door sale and distribution. Furthermore, the Witnesses’ legal victory arose through a distinct process of interest group convergence, in which the asserted rights of a disfavored religious and economic minority achieved judicial recognition when they aligned with the asserted rights of elite economic and expressive minorities – specifically, the newspaper industry and the corporate bar.

Majoritarian accounts of minority rights enforcement hold that minority rights generally receive judicial protection only in the wake of majoritarian acquiescence. The crucial dialectic at work in the peddling tax cases, however, was not majority/minority, but disfavored-minority/elite-minority. This dialectic was immanent within the logic of Footnote Four itself: paragraph three underdetermined the social character of the minorities in need of judicial protection; and paragraph one was entirely neutral with regard to the social power of the claimant of any particular textually-enumerated right. It was the Jehovah’s Witnesses and their elite partners within the corporate bar and the newspaper lobby who first mobilized this dialectic in a concrete litigation campaign.

To an extent, then, the history of the peddling tax cases confirms Bruce Ackerman’s pluralist critique of Footnote Four – but only to the extent that we recognize both the power differential between interest groups, and the formalism that obscures this power differential. It is not that all discrete and insular minorities have outsized influence on the political process, but that powerful minorities that do have outsized influence can further secure their interests in the courts by piggy-backing on the claims of disfavored minorities.

This dialectic may be especially powerful when it comes to the judicial enforcement of religious liberty. Defenses of religious liberty, as opposed to, say, defenses of political dissent, tend to emphasize the normative importance of private ordering, an emphasis that tends to accord with the ideals and interests of economic elites. Thus, even when judicial enforcement of civil liberty appears narrowly focused on amplifying the freedom of non-profit religious actors, it takes on an especially anti-governmental form, with knock-on efforts for the general conceptualization of civil liberty claims. In the 1940s, we see these knock-on effects at work in the adoption of a “preferred position” interpretation of free speech and freedom of the press through decisions protecting the religious liberty of Jehovah’s Witnesses. Today, we see these knock-on effects at work in the convergence of aggressive enforcement of religious liberty with the enforcement of a non-interference interpretation of free speech in the campaign finance context. Beyond their much-discussed social and cultural affinities, then, there appears to be a specifically legal affinity between religious claimants and economic elites.

This is not to say that all those who seek and defend religious accommodations are economic libertarians themselves. Indeed, many of the most important litigants and lobbyists seeking expansive religious accommodations today are adherents to the tradition of Catholic Social Thought, which self-consciously presents itself as a critique of free market capitalism.

440 Bruce Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713 (1985).
441 For further discussion of the failure of pluralist theory to take disparities in economic power into account, see Sitaraman, The Puzzling Absence of Economic Power in Constitutional Theory (working paper).
442 Freedom of the press, for somewhat different reasons, also lends itself to this dialectical effect. See supra Part I; LEOVIC, supra note XXX.
443 See POST, supra note XX, at XX.
444 See Thomas C. Berg, Symposium, Religious Accommodation and the Welfare State, 38 HARV. J. L. &
Similarly, the internal structure and ideology of the Witnesses’ religious organization promoted an agenda very different from that of secular economic libertarianism.

The pursuit of religious accommodations in order to achieve a theologically informed program of communitarian social and economic policy will nonetheless converge with an economically libertarian agenda when it erodes the authority of public institutions to regulate the economy. Secular corporations may also seek to instill communitarian values in their workplaces; their commitment to such values would not render their resistance to government regulation of those workplaces any less economically libertarian. Indeed, there is a very long history of economic libertarians criticizing government regulation for the extent to which it erodes the harmony of the workplace.\(^{445}\)

\section*{B. The Doctrinal Legacy of the Peddling Tax Cases}

The questions raised by early critics of putatively “bifurcated” review were not the misplaced anxieties of backward-looking jurists. The inextricably economic nature of civil liberties claims continued to plague the Supreme Court in the twenty years following its pivotal encounter with the Jehovah’s Witnesses’ particular hybrid of expressive and economic activity. Looking back from the other end of those two decades, the Harvard political scientist Robert McCloskey concluded that bifurcated review – in its “preferred position” interpretation – was alive and well, and causing as much trouble as ever.\(^{446}\) The “modern Court,” McCloskey explained, “has fairly consistently held to the ‘dual standard’ enunciated by Stone in the \textit{Carolene Products} case.”\(^{447}\) But “[f]rom the first the modern Court has been troubled by a recurring problem: how does the dichotomy stand up when economic matters and personal rights are involved in a single governmental action?”\(^{448}\) “Examples abound,” McCloskey continued: “statutes that strike at picketing, which may be both free speech and an economic activity; state supported professional dues-paying requirements; . . . labor regulations that impinge on freedom of religion; license requirements, and other restrictions with a secular purpose, that nevertheless impose burdens on religious practice, to name only a few.”\(^{449}\) The most obvious solution to the problem would be “to hold that . . . that the law or an application of it will fall only if it was aimed at or discriminates against personal rights as such.”\(^{450}\) This is, of course, the doctrine that Justice Scalia would, nearly thirty years later, argue had always been the Court’s approach in free exercise cases.\(^{451}\) But, McCloskey explained, the Court had not been able to implement it:

Leaving aside the very real difficulty of determining what a law's primary purpose is, the trouble with this formula is that it does permit the state to impose de facto burdens on the exercise of personal rights, and this has disturbed some of the

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\item GENDER 104, 147-51 (2015); Garnett XXX; Deutsch.
\item Daniel Ernst, Common Laborers XXX; Forbath XX; Sepper’s earlier work XXX.
\item \textit{Id.} at 45.
\item \textit{Id.} at 55.
\item \textit{Id.}
\item \textit{Id.}
\end{itemize}
Justices. A Court that has resolved to protect personal rights because of their indispensability to democracy is not likely to be content with a doctrine that allows them to be frittered away, even though an otherwise legitimate secular purpose can be described.

An alternative approach, which the Court had tried, was “to filter out the personal-rights elements in the law and insist on their protection; the economic-rights residue being left, as usual, to the chance of legislative judgment.” But, as McCloskey noted, “this can involve very nettling problems of discrimination and remedy, as is demonstrated by the Sunday Law cases,” a series of 1961 decisions that turned aside religious employers and employees seeking exemptions from their states’ Sunday closing laws. A badly divided Court had struggled to distinguish the criminal penalties imposed on these religious observers for conducting business on Sundays from the peddling tax found unconstitutional as applied to a Jehovah’s Witness bookseller in *Follett v. McCormick*. In 1961, the Court also cast doubt on the constitutionality of conditioning employment on the payment of dues to state-supported railroad unions and bar associations, in the event that those organizations used the dues to advocate for political causes to which the dues-payers objected. The explicit constitutional issue avoided in these cases was the *Barnette* right against compelled speech. The Jehovah’s Witness schoolchildren in *Barnette*, however, had been compelled not just to salute the flag but also to go to school. No one was forcing railroad employees or lawyers to work, and therefore to pay dues to the requisite union or bar association. Could the right to free expression purportedly raised by the dues-payment cases get off the ground absent an implicit “right to work”? Merely asking the question, McCloskey warned, “is likely to strain the logic of the Court's position more than it can perhaps bear.” Indeed, while he did not think it likely or advisable due to an already chaotic and controversial caseload, McCloskey speculated that the Warren Court might even be inching toward granting preferred status to those “economic” right that were most frequently bound up with First Amendment claims, such as the “right to work.” It seemed difficult for an increasingly civil libertarian Court to avoid becoming an economically libertarian one, at least in certain contexts.

As McCloskey’s article cataloged, First Amendment case law during the 1940s, 1950s, and early 1960s persistently undermined the economic/non-economic distinction inherent in the concept of bifurcated review. A number of social and political developments contributed to the instability of the distinction: the expansion of public employment and publicly conferred economic benefits due to the twinned growth of the welfare and warfare states; the concomitant policing of public employees and beneficiaries due to the Cold War; the Court’s continued solicitude for the First Amendment occasioned by Cold War ideology, the excesses of anti-communism, and a growing interest in racial equality (also occasioned in part by the Cold War); the continuing efforts of economic libertarian critics of New Deal and Fair Deal regulation to attack it on First Amendment and anti-communist grounds (the “right to work” movement).

[TK: review of the cases, noting especially the use of constitutional avoidance, the development of the unconstitutional conditions doctrine, and the emergence of the “new property” jurisprudence:]

*Wieman v. Updegraff*, 344 U.S. 183, 190-192 (1952) (holding that a state could not deprive an individual of employment simply because of her membership in a particular political organization); *Dickinson v. United States*, 346 U.S. 389, 395-396 (1953) (holding that Congress could not have intended the definition of “minister” to preclude those who earned income from
secular work); Peters v. Hobby, 349 U.S. 331, 345 (1955) (holding that Congress could not have intended to allow “political appointees who perhaps might be more vulnerable to the pressures of heated public opinion” to deprive a public employee of his livelihood based on his political opinions and associations); Speiser v. Randall, 357 U.S. 513, 528-529 (1958) (holding that a state could not deprive an individual of a tax benefit simply because he refused to swear that he had not engaged in criminal forms of speech); Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961) (avoiding First Amendment question by interpreting Railway Labor Act’s authorization of union shops to prohibit a union from spending dues from an employee on a political cause to which the employee objects); E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (avoiding First Amendment question by interpreting Sherman Act not to outlaw lobbying of Congress for legislation that would have negative effects upon business competitors); Lathrop v. Donohue, 367 U.S. 820 (1961) (avoiding First Amendment question by determining that the record did not support lawyer’s contention that his state bar association dues were being used to advocate for political positions with which he disagreed); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that a state could not deprive an individual of an economic benefit because of his religious beliefs).

Note the interpretations of these cases provided by Sophia Lee, The Workplace Constitution 70-75, 120-131 (2014) (discussing the economically libertarian “right to work” movement’s use of First Amendment arguments in the 1950s and 1960s); Philip P. Frickey, Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court, 93 Cal. L. Rev. 397 (2005); Edward Rubin, Due Process and the Administrative State, 72 Cal. L. Rev. 1044, 1053-1060 (1984).

The year after McCloskey described the ongoing predicament caused by the judiciary’s “dual” yet unstable standard for disposing of economic and civil libertarian claims, the Court decided Sherbert v. Verner. The case that might have been as contentious as the Sunday Law cases had Justice Frankfurter not retired months earlier – it was, to some extent, a testament to the peddling tax cases’ continuing vitality. Sherbert was also a consummation of the relationship between the preferred position doctrine enunciated in those cases and the Court’s evolving treatment of publicly conferred economic benefits, what would soon be named the “new property” jurisprudence. These two jurisprudential strands accounted for a good deal of the Court’s most difficult First Amendment cases in the preceding two decades. The fact that they involved “new property” obscured their “Lochnerian” undertones, and helps to explain why commentators from the 1970s through today have been repeatedly been surprised by the “emergence” of “First Amendment Lochnerism.”

[TK: discuss Sherbert v. Verner, its reliance on 1950s First Amendment cases protecting economic rights, and Douglas’s discussion of the peddling tax cases specifically; also discuss Wisconsin v. Yoder’s handling of the peddling tax cases; contrast Charles Black’s discussion of “preferred position” in Structure and Relationship in Constitutional Law (1968) with Bickel’s process account]

[TK: In the 1970s, the Burger Court’s campaign finance and commercial speech jurisprudence deploys both the peddling tax cases and subsequent “new property” First Amendment cases in the old property context. See Bigelow v. Virginia, 421 U.S. 809 (1975)
(discussing Murdock, distinguishing Christensen); Buckley v. Valeo; 424 U.S. 1 (1976); Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748 (1976) (discussing Murdock, distinguishing Christensen); see also Archibald Cox, The Supreme Court, 1979 Term – Foreword: Free Expression in the Burger Court, 94 HARV. L. REV. 1, 30–31 (1980) ("The evolution of ‘strict review’ under the preferred rights approach to the first amendment, and later under the equal protection clause, appears to contemplate more searching judicial inquiry, but the Warren Court made no serious effort to address the question."); Jackson & Jeffries, supra note XX.

At the same time, we see the take off of legislative conscience clauses, in response to Roe, but also indicative of the emergence of conservative economic-religious “fusionism.” For the history of these conscience clauses, see Greenhouse & Siegel XX; Elizabeth B. Deutsch, Expanding Conscience, Shrinking Care: The Crisis in Access to Reproductive Care and the Affordable Care Act’s Nondiscrimination Mandate, 124 Yale L. J. 2470, 2477-2483 (2015); Jeremy K. Kessler, “Legal Origins of Catholic Conscientious Objection” (on file)]

[TK: The peddling tax cases themselves were revisited in the 1980s. Indeed, Justice Scalia’s epochal majority opinion in Employment Division v. Smith[^452] can be read as a tit-for-tat response to the previous term’s plurality opinion in Texas Monthly v. Bullock, in which Justice Brennan “disavow[ed]” the license tax decisions’ robust conception of free exercise in striking down a tax exemption for religious magazines as an Establishment Clause violation[^453]. On this interpretation, the extensive legal and political backlash to Smith looks less like a reassertion of the ambiguous and limited doctrines announced in Sherbert v. Verner[^454] and Wisconsin v. Yoder[^455] than a resurrection of the license tax decisions that were unearthed and then quickly re-buried in Texas Monthly.

The dramatic ideological character of this resurrection can be witnessed in the changing attitudes of certain Justices toward local regulations on pamphleting, a jurisprudence that directly descends from the peddling tax decisions and their precursors. First instance was even before RFRA passage:

**Int'l Soc. for Krishna Consciousness, Inc. v. Lee,** 505 U.S. 672, 693 (Kennedy, J., concurring in part) (joined by Blackmun, Stevens, and Souter): would allow pamphleting for money but not pure solicitation and receipt of funds; fascinating demonstration of the political economic structure of First Amendment exercise and the distributional consequences of First Amendment enforcement.

Then, in Watchtower Bible & Tract Soc. of N. Y., Inc. v. Village of Stratton, 536 U.S. 150, 167 (2002), Justice Breyer joined in Justice Stevens’s majority opinion which, among other reasons for invalidating a permitting requirement on pamphleteers, noted that “requiring a permit as a prior condition on the exercise of the right to speak imposes an objective burden on some speech of citizens holding religious or patriotic views. As our World War II-era cases dramatically demonstrate, there are a significant number of persons whose religious scruples will

[^453]: 489 U.S. 1, 21 (1989) (“To the extent that language in those opinions is inconsistent with our decision here, based on the evolution in our thinking about the Religion Clauses over the last 45 years, we disavow it.”). With the exception of Justice Stevens, the Justices who joined the Texas Monthly plurality opinion dissented from Smith.
prevent them from applying for such a license.” *Id.* at 167. Justices Scalia and Thomas, while concurring in the judgment, objected to this suggestion that religious objection to the requirement rendered it more constitutionally suspect, still hewing to the old *Smith* line: “If a licensing requirement is otherwise lawful, it is in my view not invalidated by the fact that some people will choose, for religious reasons, to forgo speech rather than observe it. That would convert an invalid free-exercise claim, see Employment Div., Dept. of Human Resources of Ore. v. *Smith*, 494 U. S. 872 (1990), into a valid free-speech claim – and a more destructive one at that. Whereas the free-exercise claim, if acknowledged, would merely exempt Jehovah's Witnesses from the licensing requirement, the free-speech claim exempts everybody, thanks to Jehovah's Witnesses.” *Id.* at 171 (Scalia, J., concurring).

Thirteen years later, Justice Breyer found himself concurring in the invalidation of a local regulation restricting the placement of signage advertising public events, but criticizing the Thomas majority’s First Amendment absolutist reasons for invalidation. “[V]irtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234-35 (2015) (Breyer, J., concurring). Meanwhile, Justice Thomas, in highlighting the religious purpose behind many of the signs, echoed the *Stratton* majority opinion’s emphasis on the Witnesses’ religious reasons for not wanting to apply for a license, an emphasis to which he had objected thirteen years previously. Now that the Supreme Court has begun protecting the economic autonomy of a broader range of religious actors, including large businesses, it appears that combatting the old progressive solicitude for potentially anarchic religious minorities such as the Jehovah’s Witnesses and Native American sects has become less important to Justices Thomas and Scalia.]

**C. Between “First Amendment Lochnerism” and Lochnerism**

The general instability of bifurcated review and the economically libertarian tendencies of aggressive First Amendment enforcement in particular place legal progressives in something of a double bind. Even as “First Amendment Lochnerism” threatens the New Deal synthesis from within, legal progressives also confront an overt libertarian effort to overturn the New Deal synthesis – to end bifurcated review. Every attempt to shore up bifurcation, however, may only exacerbate the economically libertarian tendencies of bifurcation itself, especially in the context of First Amendment law.

Many critics of “First Amendment Lochnerism” simply seek to avoid this double bind. Declining to question aggressive judicial review or expansive rights claims as such, they focus instead on the political economic ideology of judges. In particular, they argue that the main cause of “First Amendment Lochnerism” is particular judges’ *Lochner*-like belief in the political neutrality of the “private” market, a belief that leads these judges to view new regulations that change the market baseline as also likely to encroach on the civil liberties of those market actors disadvantaged by the change. Yet for the peddling tax dissenters and other early critics of “First Amendment Lochnerism”

456 See Sherry, supra note XX; see also Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State*, 75 U. Chi. L. Rev. 1541, 1547 (2008) (arguing that “noneconomic freedoms are parasitic on underlying economic entitlements” and that “[i]n order to give free speech rights content... the Court must shield economic entitlements from political revision, contrary to... the New Deal compromise”).
Amendment Lochnerism,” judicial deference to new political regulation – not simply judicial realism about the already-regulated nature of the status quo ante – was essential to the maintenance of egalitarian political economy.

As a technical matter, neither the text of the First Amendment itself, nor text of the first and third paragraphs of Footnote Four, ruled out the judicial protection – even the privileging – of the economically powerful. What’s more, this failure was unsurprising to the early critics of bifurcated review precisely because the conventional wisdom in the 1940s remained that judicial – as opposed to administrative – regulation always tended toward the privileging of individual economic autonomy over other forms of social welfare. [TK: Quote from Jackson's *Struggle for Judicial Supremacy* on judicial and lawyerly economic conservatism XXX; quote from Braden and Hamilton re: virtues of legislatures and common economic well-being XXX; quote from Comagger’s last chapter on the majority’s self-interest in minority rights protection XXX; quote from Emerson and Helfeld’s tortuous effort to defend administrative regulatory autonomy while at the same time re-positioning courts as the defenders of that autonomy from McCarthyism XXX.]

For similar reasons, the Sunstein-inspired effort by Sepper, Gedicks & Van Tassell, and Schwartzman, Schragger, and Tebbe to avoid questions of institutional choice (the appropriate balance between judicial and political regulation of rights) and rights definition (the appropriate categorization and relative weighting of the myriad individual rights that merit constitutional or quasi-constitutional status) seems unlikely to work in practice or in theory. To reduce the problem of “Lochnerism” to certain judges’ “commitment to private ordering and resistance to redistribution,”¹⁴⁵ is to underestimate the power and ubiquity of “First Amendment Lochnerism.” The judicial use of civil liberties law to shield the economic autonomy of certain persons (whether corporate or individual) from government regulation does not depend on – and did not originate from – a judicial commitment to the “naturalness” or normatively privileged status of the common law property and contract regime.¹⁴⁶ It is exceedingly unlikely, for instance, that any Justice involved in the original peddling tax decisions held such a commitment.

But the weakness of the “common law baseline” conception of “First Amendment Lochnerism” can be most clearly seen in its necessary marginalization, even erasure, of the public benefits cases of the 1950s and 1960s, where the regulatory baselines defended by the judiciary on civil libertarian grounds were not the product of common law doctrines but statutory schemes. While those cases generally vindicated the economic autonomy of poor, working class, and middle class individuals – not wealthy for-profit and non-profit corporations – there exists no doctrinal distinction ensuring such a distributional outcome. As Amanda Shanor rightly emphasizes, commercial speech activists today do not invoke the First Amendment simply to preserve – or to reclaim – common law regulatory baselines:

The new *Lochner* . . . occurs against the backdrop of an already robust regulatory state that is near ubiquitous in its involvement in economic affairs—from the regulation of emission standards to transfats to debt collection practices. In this way, the new *Lochner* takes an offensive rather than defensive posture and is distinctively neo-liberal. It seeks to reconfigure regulation to permit and support different forms of economic ordering—instead of attempting to prevent the state from entering theretofore private domains in the

¹⁴⁵ Sepper, *supra* note XX, at *1.
Shanor and Leslie Kendrick have drawn special attention to the utility of the free speech norm in re-wiring the administrative apparatus, as has Justice Breyer in his recent concurrence in Reed v. Gilbert. Both the ambiguity and ubiquity of speech “permit[] selective claims to deregulation,” and thus serve “the modern business community’s interest in and dependence on some forms of state intervention and regulation.”

At the same time, there seems little reason for Kendrick and Shanor to limit their analyses to free speech or, even more narrowly, commercial speech claims. While the constitutional free exercise norm currently remains cabined by Smith, the feasibility of combining free exercise with free speech, free press, or freedom of assembly claims, as the Witnesses did in their peddling tax campaign, remains a promising avenue for religious actors who seek to protect or enhance their economic autonomy through civil libertarian argument. The very “expansiveness” and “naturalness” that, according to Kendrick and Shanor, render the free speech norm a particularly potent anti-regulatory tool, is also likely to erode the boundary between free speech rights and ostensibly more limited free exercise rights. Furthermore, given the rise of statutory free exercise rights, the erosion of this boundary could also strengthen some speech claims – especially commercial speech claims – by inflecting them with religious content.

As recent challenges to the Affordable Care Act’s contraception coverage mandate demonstrate, the Religious Freedom Restoration Act has proven a powerful tool for re-shaping federal regulation. The proliferation of state RFRAs and other statutory conscience clauses now expose local government to at least the same intensity of judicial supervision. Furthermore, while the Establishment Clause might, eventually, be resurrected as a judicial tool for constraining such statutory rights, there has long existed a countervailing interest among progressives in expanding conscience exemptions to protect non-traditional and even non-religious claimants. This progressive interest in a pluralistic understanding of freedom of religion risks reproducing the ambiguity and ubiquity problems identified by Kendrick and Shanor in the free speech context.

459 Shanor, supra note XX, at 44.
460 Id. at 46-47; Kendrick, supra note XX, at 1210-1219; Reed v. Town of Gilbert, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring) (“[V]irtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity.”).
461 Shanor, supra note XXX, at 47.
465 See Gedicks & Van Tassell, supra note XX.
466 See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694, 711 (2012) (Alito & Kagan, JJ., concurring) (responding to the Court’s determination that a church employee served a ministerial function and was thus exempt from anti-discrimination protections by arguing for an even more pluralistic definition of minister); Elizabeth Sepper, Taking Conscience Seriously, 98 Va. L. Rev. 1501 (2012) (responding to the expansion of conscientious exemptions for religious health-care institutions by arguing for the recognition of individual employees’ rights of conscience to provide institutionally-forbidden care).
And yet the only fair and administrable system of pluralistic conscience protection would be one in which the enforcement of conscience rights is highly contingent on an empirical and normative evaluation of their effect on other rights and social needs. The same is true with respect to a fair and administrable system of pluralistic speech protection. The internal logic of the First Amendment does not de-select for the judicial privileging of economic autonomy over other social goods; nor does the internal logic of Footnote Four; nor does the judicial adoption of a non-common-law regulatory baseline for deciding when a new regulation unduly infringes on the exercise of a civil libertarian right. Perhaps the problem, as the peddling tax dissenters originally suggested, is with judicial review itself.

[TK: Discuss the earlier conception of the political enforcement of civil liberties. Discuss Justice Breyer’s Reed v. Gilbert concurrence and the Walker v. Texas Division, Sons of Confederate Veterans, Inc. majority opinion as models of judicial deference that encourage such political enforcement. Could critics of “First Amendment Lochnerism” live with the implications of these models – judicial deference to the political balancing of a particular civil libertarian right with competing civil libertarian rights and other social interests?]

CONCLUSION

Over seventy years ago, a coalition of corporate elites and entrepreneurial religious believers – the Jehovah’s Witnesses – convinced a Supreme Court dominated by Roosevelt appointees to strike down non-discriminatory peddling taxes on First Amendment grounds. In subsequent decades, the Court continued to struggle with the surprising, economically libertarian tendencies of bifurcated review, particularly in the First Amendment context. Because many of these decisions involved publicly conferred economic benefits, they did not evoke the specter of Lochner as obviously as the peddling tax cases. From the perspective of the legal realist critics of the original Lochner regime, however, the economic rights then at issue were also publicly conferred benefits – common law property and contract rules being creatures of the state, not natural rights.

The contemporary literature on “First Amendment Lochnerism” purports to criticize today’s civil liberties jurisprudence on similarly legal realist grounds. Critics argue that this jurisprudence fails to acknowledge the “artificiality of the market” and, in doing so, favors the free expression and religious exercise of current property-holders over the provision of new statutory and constitutional rights to socially or economically disadvantaged parties. These critics, however, are being insufficiently realist when they neglect the economic implications of the long line of First Amendment cases that have secured individuals’ “rights” to tax and regulatory exemptions, unemployment benefits, and public employment. As with both Lochner era case law and today’s “First Amendment Lochnerism,” these intervening First Amendment decisions adopted a

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467 See, e.g., MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 173 (2008) (“[I]n practical terms, only two courses are open to us: either deny accommodations altogether or allow them, on some basis that we can reasonably restrict and administer.”); William A. Galston, Should Public Law Accommodate the Claims of Conscience?, 51 San Diego L. Rev. 1, 18 (2014); Loewentheil, supra note XX, at 476-488.
468 See generally Fried, supra note XX.
469 Sepper, supra note XX, at 10.
particular regulatory “baseline”\textsuperscript{470} and treated economic departures from that baseline as presumptively unconstitutional. Yet today’s critics of “First Amendment Lochnerism” generally pass over such cases in silence.

Perhaps they do so because those cases rarely benefitted the wealthy. But if the normative goal of the “First Amendment Lochnerism” literature is not only to prevent the First Amendment from favoring “rich, powerful, and mainstream entities,”\textsuperscript{471} but also to ensure that the First Amendment does benefit “poor, vulnerable, and minority individuals,”\textsuperscript{472} then policing the boundary between judicially-enforced civil liberties and judicially-enforced economic rights will not do the trick. Rather, what would be necessary is a substantive transformation of civil liberties law into a tool that actively favors “poor, vulnerable, and minority individuals” in their struggles against concentrated economic power.

This was in fact the vision of the First Amendment that most civil libertarians embraced in the first four decades of the twentieth century.\textsuperscript{473} It was a vision that focused on the political – rather than the judicial – enforcement of the First Amendment, and that accordingly championed administrative agencies such as the National Labor Relations Board and the Justice Department’s Civil Liberties Unit as the nation’s principal First Amendment institutions.\textsuperscript{474} This was not, however, the vision that the federal judiciary adopted when it began to enforce the First Amendment in earnest in the 1940s. Rather, judicial enforcement of the First Amendment emerged in concert with the Amendment’s political economic “neutralization.”\textsuperscript{475} Judicial enforcement accompanied a new insistence that the First Amendment should offer equal protection to the rich and the poor alike, and should neither favor labor unions nor disfavor the corporations that sought to mitigate their power. This vision of a judicially enforced, ideologically “neutral” First Amendment was the invention of those corporate elites who so successfully partnered with the Jehovah’s Witnesses in the 1940s. Given this history, we should be something less than surprised if judicial enforcement of civil liberties serves the ends of the economically powerful today.

\textsuperscript{470}Id. at 8; Gedicks & Van Tassell, RFRA Exemptions, at 371-372; Sunstein, supra note XX, at 874-875; Tebbe, supra note XX, at 58.
\textsuperscript{471}Sepper, supra note XX, at 58.
\textsuperscript{472}Id.
\textsuperscript{473}See Kessler, Administrative Origins, supra note XX, at XX; Weinrib, From Public Power to Private Rights, supra note XX, at XX; Zackin, supra note XX, at XX.
\textsuperscript{474}Risa Goluboff, The Lost Promise of Civil Rights XX (2007); Weinrib, Civil Liberties Outside the Courts, supra note XX, at XX.
\textsuperscript{475}See Weinrib, The Liberal Compromise, supra note XXX, at XXX (discussing the relationship between the discourse of First Amendment “neutrality” and civil libertarians’ turn to the courts); Zackin, supra note XX, at XX.