

First Amendment Challenges to Economic Regulation in the Jehovah's Witness Cases

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[Dear conference participants: what follows is an early draft of an article on the historical context and contemporary significance of the license tax cases of 1942-1943. In these cases, Jehovah's Witness litigants challenged taxes on street and door-to-door peddling as violating their religious and press freedom. My hope is that the piece can both illuminate an old puzzle – the enormous impact that the Witnesses had on First Amendment doctrine – and re-frame contemporary anxieties about the relationship between civil liberties law and the public regulation of health, safety, and commerce. Thank you for your patience in reading, and I very much look forward to the discussion.]

INTRODUCTION

The “Lochnerization” of the First Amendment is in the news. From *Citizens United* to *McCutcheon*, from *Agency for International Development* to *Harris v. Quinn*, from *Hobby Lobby* to *Little Sisters of the Poor*, civil libertarian challenges to ostensibly economic regulation are increasingly popular and increasingly successful. In a November dissent, 7th Circuit Judge Ilana Rovner described the injunction of Obamacare’s contraception coverage requirement on religious freedom grounds 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.”¹ And in the pages of *The New Republic*, law professor Tim Wu warns of 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.”² The prevailing sense is that we are in the midst of a relatively recent and conservative counterrevolution.

Yet the worry that the First Amendment could undermine non-discriminatory efforts to regulate health, safety, and commerce has a long history, one that stretches back at least to the Supreme Court’s initial turn to robust enforcement of free speech and free exercise in the 1940s. Then, it was those members of the Court perceived as most liberal who struck down economic

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¹ *Korte v. Sebelius*, 735 F.3d 654, 693 (7th Cir. 2013) (Rovner, J., dissenting); cf. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2685 (2011) (Breyer, J. dissenting) (warning that invalidation of state medical confidentiality law on First Amendment grounds “reawakens *Lochner*’s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue”).

² Tim Wu, *The Right to Evade Regulation*, *New Republic* (June 3, 2013), <http://www.newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation>.

regulations on First Amendment grounds. They did so in a series of Jehovah's Witnesses cases³ that are generally overshadowed by the more famous flag salute cases.⁴ But it was in these intervening license tax cases of 1942 and 1943 that narrow majorities first identified the First Amendment as occupying a "preferred position" in the constitutional order, its textual and historical pedigree shielding speech and worship from even attenuated financial burdens.⁵

These decisions were lauded in the press but hotly debated at the Court, where several Justices warned that First Amendment absolutism repeated the mistakes of "liberty of contract" jurisprudence, threatened to undermine democratic regulation of economy and society, and risked imposing the beliefs of some on the rights of others.⁶ Such warnings are especially poignant in light of contemporary religious freedom litigation, where protections once tentatively extended to impoverished minority sects are now wielded by well-funded religious organizations that represent pluralities if not majorities of the population.⁷ Indeed, even a supporter of the Witnesses in 1943, Justice Wiley Rutledge, worried that their strong reading of the First Amendment could also "protect from taxation large accumulations of property by the more affluent religious bodies."⁸

This paper reconstructs the Supreme Court's license tax debate and the social, legal, and political forces that transformed the Jehovah's Witnesses into messengers of First Amendment Lochnerization. It argues that the tiny and much-maligned religious sect became a vehicle for First Amendment arguments largely developed by secular critics of economic regulation in the 1920s and 1930s – the American Newspaper Publishers Association (ANPA), the American

³ Jones v. City of Opelika, 319 U.S. 103 (1943) [*Opelika II*]; Murdock v. Pennsylvania, 319 U.S. 105 (1943); Martin v. Struthers, 319 U.S. 141 (1943); Douglas v. City of Jeanette, 319 U.S. 157 (1943).

⁴ Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

⁵ The first occurrence of the phrase was in Chief Justice Stone's dissent in Jones v. City of Opelika, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting) [hereinafter *Opelika I*] ("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."). Black, Murphy, and Douglas joined in this dissent, as well as issuing a memorandum, *Id.* at 623-624, repudiating their earlier support for *Gobitis*.

⁶ See, e.g., Douglas v. City of Jeanette, 319 U.S. 157, 181-182 (1943) (Jackson, J., concurring, and dissenting in Murdock, 319 U.S. 105) ("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.").

⁷ See Frederick Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 42 Harv. C. R.-C. L. L. Rev. __ (forthcoming 2014); Kara Loewentheil, *When Free Exercise Is a Burden: Protecting "Third Parties" in Religious Accommodation Law*, 62 Drake L. Rev. 432 (2014); Micah Schwartzman & Nelson Tebbe, *Obamacare and Religion and Arguing Off the Wall*, Slate (Nov. 26, 2013); Elizabeth Sepper, *Taking Conscience Seriously*, 98 Va. L. Rev. 101 (2012).

⁸ March 27, 1943 Letter from Wiley Rutledge, Assoc. Justice, to William O. Douglas, Assoc. Justice, 1, William O. Douglas Papers, Container 89, Library of Congress, Washington, D.C. [hereinafter WODP] (worrying that Douglas's Murdock opinion could "protect from taxation large accumulations of property by the more affluent religious bodies.").

Liberty League (ALL), and the American Bar Association's Bill of Rights Committee (BRC).⁹ The Witnesses did not only echo these organizations' legal ideas, including the argument that any financial condition on the exercise of expressive rights was constitutionally suspect; BRC lawyers coached the Witnesses in the flag salute cases and BRC and ANPA lawyers filed amicus briefs supporting the Witnesses in both the flag salute and the license tax cases. This collaboration proved remarkably successful in convincing pro-New-Deal lawyers and judges to adopt a vision of the First Amendment pioneered by critics of big government.

In the mid-1920s, when ANPA first launched its litigation strategy, most prominent civil libertarians were inheritors of a progressive distrust of the courts, and focused their energies on encouraging administrative and legislative enforcement of civil libertarian values.¹⁰ But in response to the progressive regulation of newspapers, the New Deal regulation of employer behavior in labor disputes, and President Roosevelt's court-packing plan, conservative lawyers in the business community began to emphasize judicial enforcement as the sine qua non of civil libertarianism. These lawyers' identification of civil liberties with judicial enforcement dovetailed with a more general critique of administrative governance growing on both sides of the Atlantic.¹¹ This critique saw judicial review of agency action as the last, best hope for the maintenance of both democracy and civil liberty within the contours of the modern state.

⁹ This argument builds on Laura Weinrib's groundbreaking work on the role that conservative proponents of judicial enforcement of the First Amendment played in the transformation of civil liberties law in the 1930s. See generally Laura Weinrib, *The Liberal Compromise: Civil Liberties, Labor, and the Limits of State Power, 1917-1940* (Ph.D. Diss., Princeton University, May 2011); see also Laura Weinrib, *From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law*, 34 *L. & Soc. Inquiry* 187, 203 (2009) ("In the 1930s . . . as the forces of government allied with labor in their struggle against employers, defending civil liberties . . . often meant alienating the Left. For the first time, pro-business, antistate conservatives appreciated the conservative implications of free speech individualism."). For further background on these conservative civil libertarians, see GERALD T. DUNNE, *GRENVILLE CLARK: PUBLIC CITIZEN* 78-118 (1986); EDWIN EMERY, *HISTORY OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION* (1970); RICHARD POLENBERG, *REORGANIZING ROOSEVELT'S GOVERNMENT: THE CONTROVERSY OVER EXECUTIVE REORGANIZATION, 1936-1939*, at 55-78 (1966). GEORGE WOLFSKILL, *THE REVOLT OF THE CONSERVATIVES: A HISTORY OF THE AMERICAN LIBERTY LEAGUE, 1934-1940* (1962); John Wertheimer, *A "Switch in Time" Beyond the Nine: Historical Memory and the Constitutional Revolution of the 1930s*, in 53 *STUDIES IN LAW, POLITICS AND SOCIETY* 3 (2010); Jared A. Goldstein, *The American Liberty League and the Rise of Constitutional Nationalism* (Aug. 8, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2126811; Jeremy K. Kessler, *The Civil Libertarian Conditions of Conscription* 6-17 (paper delivered at the American Society for Legal History, November XX, 2013).

¹⁰ See Jerold S. Auerbach, *Labor & Liberty: The La Follette Committee and the New Deal* (1966); William E. Forbath, *Law and the Shaping of the American Labor Movement* 139-66 (1991); Richard W. Steele, *Free Speech in the Good War* (1999); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties*, 114 *Columbia L. Rev.* __ (2014); Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 *Va. L. Rev.* 1 (2000); Weinrib, *From Public Interest to Private Rights*, supra note XX; Laura Weinrib, *Civil Liberties Enforcement and the New Deal State* (paper delivered at the American Society for Legal History, November XX, 2013).

¹¹ See generally Joanna Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal* 14-58 (2012); G. Edward White, *The Constitution and the New Deal* 94-127 (2001); Daniel R. Ernst, *Ernst Freund, Felix Frankfurter and the American Rechtsstaat: A Transatlantic Shipwreck, 1894-1932*, 23 *Stud. Am. Pol. Dev.* 171 (2009); Peter Lindseth, *Reconciling with the Past: John Willis and the Question of Judicial Review in Interwar and Postwar England*, 55 *U. Toronto L. J.* 657 (2005); Peter L. Lindseth, "The Paradox of Parliamentary Supremacy:

Zeal for judicial enforcement of civil liberties and judicial oversight of administration spread through the Bar and the press in the late 1930s.¹² Yet it was hard to see how a legal and political movement openly critical of the New Deal was going to convince the FDR stalwarts flowing into the federal judiciary to endanger the norms of judicial deference and legislative and administrative autonomy that the FDR coalition had just secured.¹³ Here, the Jehovah's Witnesses would prove enormously useful. Although their aggressive proselytizing made them deeply unpopular on the local level, at least three aspects of the Witnesses' predicament made them ideal litigants for advancing an anti-statist, judge-centered civil libertarianism before pro-New-Deal Justices.

First, the Witnesses were emphatically not "economic royalists" – the epithet FDR levelled at the American Liberty League and its sympathizers.¹⁴ Although the Witnesses followed the same anti-statist script as ALL, ANPA, and the BRC – elegies for the common law, invocations of V.A. Dacey's vision of judicial supremacy, association of administrative decision-making with Nazi and Soviet tyranny – the Witnesses themselves were impoverished outsiders, possessing neither the economic nor the cultural capital that made those other organizations threatening to the New Deal order.

Second, the Witnesses' co-religionists in Central Europe were subject to brutal and ongoing suppression at the hands of the Nazi regime. While corporate lawyers could draw only facile comparisons between New Deal administrative procedure and Nazi and Soviet governance, the American Witnesses had a direct connection to totalitarian violence. They also framed much of their dissident activity, including refusal to salute the flag, as a show of solidarity with the victims of Nazism.¹⁵ In this context, state and municipal efforts to suppress Witness activity looked less like American provincialism than the bigotry of a foreign power. The Witnesses' intimate relationship with Nazi horror also removed the taint of disloyalty from their criticisms of American power; unlike the Bundists, Communists, and some of the

Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s," 113 *Yale L. J.* 1341 (2004); George Shepherd, *Fierce Politics: The Administrative Procedure Act Emerges from New Deal Politics*, 90 *Nw. U. L. Rev.* 1557, 1592-1593, 1610-1614 (1996); Michael Taggart, "Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law," 43 *Osgoode Hall L. J.* 223 (2005); Michael Taggart, "From 'Parliamentary Powers' to Privatization: the Chequered History of Delegated Legislation in the Twentieth Century," 55 *U. Toronto L. J.* 575 (2005).

¹² Weinrib, *The Liberal Compromise*, *supra* note XX; Wertheimer, *supra* note XX.

¹³ Even the 1930s civil libertarianism espoused by future Supreme Court Justices Hugo Black and Frank Murphy involved the exercise of state power – from opening corporations' mail to initiating prosecutions of alleged fascists and abusive employers. See Auerbach, *supra* note XXX; Kessler, *Civil Libertarian Conditions*, *supra* note XXX; Weinrib, *Civil Liberties Enforcement*, *supra* note XXX.

¹⁴ See Goldstein, *supra* note XX, at 37 n.181, n.182 (quoting Franklin D. Roosevelt, Annual Message to Congress (Jan. 3, 1936), in 5 *THE PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT* 8, 13-18 (1938), and citing newspaper reports).

¹⁵ See generally SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* 19-33 (2010); SHAWN FRANCIS PETERS, *JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* (2000).

Japanese-Americans who sought relief from the federal judiciary in the 1940s,¹⁶ the Witnesses had nothing good to say about any foreign power.

If these first two aspects of the Witnesses' situation appealed to militantly pro-war, pro-New-Deal Justices such as Murphy, Black, and Douglas, the third appealed to the doctrinal ambitions of conservative civil libertarians. The Witnesses recognized little to no distinction between their religious and economic lives, arguing that their door-to-door sale and distribution of religious literature was both worship and career.¹⁷ This blurring of the boundary between expression and commerce mirrored the claim pioneered by Elisha Hanson, General Counsel of ANPA, that even incidental restrictions on newspaper revenue violated press freedom.¹⁸ Given the Witnesses' professed beliefs, even minor financial burdens on their door-to-door salesmanship could be – and would be – construed as direct restriction of their free exercise rights.

In a related vein, the Witnesses likely appealed to conservative civil libertarians because they were not part of the labor movement. At first blush, beleaguered labor organizers might seem like the most promising candidates for eliciting expansive First Amendment enforcement from pro-New-Deal judges, and indeed the first case in which the ABA's Bill of Rights Committee participated was *Hague v. CIO*.¹⁹ Yet the substantive identification of civil liberties with the rights of labor was just what conservative civil libertarians wanted to sever.²⁰ At the same time, federal courts in the late 1930s and early 1940s were coming around to the view that the Wagner Act had effectively secured workers' rights to organize, obviating the need for further First Amendment activism on labor's behalf.²¹ Devout, self-employed, and unprotected by a New Deal administrative apparatus such as the National Labor Relations Board, the Jehovah's Witnesses demanded a judicially-enforced First Amendment expansive enough to protect their fragile expressive vocation from a host of regulatory obstacles.

Part I of this paper sketches the involvement of ANPA and ALL lawyers in civil libertarian advocacy from the late 20s through 1937, when they failed to convince the Supreme Court to strike down NLRB regulations on First Amendment grounds. Part II describes the emergence of the American Bar Association's Bill of Rights Committee from the court-packing fight, the Committee's relationship to earlier conservative First Amendment advocacy, and its partnership with the Jehovah's Witnesses. Part III recovers the debate surrounding the license tax

¹⁶ See Eric L. Muller, *Free to Die for Their Country: The Story of the Japanese American Draft Resisters in World War II* (2001); Steele, *supra* note XX, at XXX-XXX;

¹⁷ Peters, *supra* note XX, at XXX-XXX.

¹⁸ See Appellee's Brief 25-33 (Dec. 31, 1935), *Grosjean v. American Press Co.* 297 U.S. 233 (1936); Emery, *supra* note XXX, at 218-227.

¹⁹ Weinrib, *The Liberal Compromise*, *supra* note XX, at XXX-XXX.

²⁰ See Dunne, *supra* note XX, at XXX-XXX; Weinrib, *The Liberal Compromise*, *supra* note XX, at 412-429.

²¹ See *id.* at 550-551; see also *NLRB v. Ford Motor Company*, 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.").

cases – a debate about the danger that judicial solicitude for the First Amendment posed to economic regulation and democratic government more generally.

I. FIRST AMENDMENT LOCHNERIZATION IN THE EARLY FREE PRESS CASES

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 1922.²² 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.²³ 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.²⁴ 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*.²⁵ *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.²⁶

While *Near* involved a classic prior restraint, ANPA’s next big litigation effort, *Grosjean v. American Press Co.*,²⁷ 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 Hanson, future ANPA general counsel, together helped to brief *Grosjean* while Hanson participated in oral arguments at the Supreme Court.²⁸

²² Emery, *supra* note XX, at 221.

²³ Paul L. Murphy, *World War I and the Origin of American Civil Liberties in the United States* 25–31 (1979).

²⁴ Emery, *supra* note XX, at 221.

²⁵ 283 U.S. 697 (1931).

²⁶ Fred W. Friendly, *Minnesota Rag: Corruption, Yellow Journalism, and the Case that Saved Freedom of the Press* 3-53 (1981).

²⁷ 297 U.S. 233 (1936).

²⁸ Emery, *supra* note XXX, at 222-223; Samuel R. Olken, *The Business of Expression: Economic Liberty, Political Factions, and the Forgotten First Amendment Legacy of Justice George Sutherland*, 10 *Wm. & Mary Bill Rts. J.* 249, 301 (2002) (describing Hanson’s role in oral argument).

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.²⁹ 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.³⁰

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 an 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.³¹ Sutherland eventually, however, rewrote the opinion on First Amendment grounds in order to avoid a concurrence from Justices Cardozo, Brandeis, and Stone.³² Because of this compromise, which combined a general aversion to regulatory taxation with a specific defense of press freedom,³³ *Grosjean* would later provide ammunition for Elisha Hanson and ANPA in the Jehovah's Witness license tax cases. There, as we will see, Hanson's amicus brief insisted:

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.³⁴

By analogy, Hanson would argue in 1942, the Witnesses only had to show that a tax on street or door-to-door vending impaired their expressive livelihood in order to invalidate it.³⁵

²⁹ *Grosjean*, 297 U.S. at 250.

³⁰ *Id.* at 244-245 (citing *Magnano Co. v. Hamilton*, 292 U.S. 40 (1934)). Samuel Olken suggests that this part of Sutherland's opinion closely followed Elisha Hanson's oral argument. Olken, *supra* note XX, at 301.

³¹ Olken, *supra* note XX, at 296.

³² *Id.* at 299-300.

³³ *Id.* at 300 ("Although much of Sutherland's published opinion in *Grosjean* seemingly relied upon the First Amendment, it also contained several oblique references to economic liberty, which the author probably muted in order to appease Cardozo and maintain what was otherwise a fragile consensus.").

³⁴ Brief of American Newspaper Publishers Association as Amicus Curiae 10 (Sept 3., 1942).

³⁵ *Id.*

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.”³⁶ For instance, after the passage of the National Industrial Recovery Act in 1933, ANPA took charge of drafting the voluntary code for daily newspapers. Under Hanson’s leadership, the drafting committee included open-shop provisions and exemptions from child labor laws; it 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.”³⁷ After knocking out the open-shop and child labor provisions, the Roosevelt administration accepted the code.³⁸ But FDR insisted on issuing a statement announcing that the freedom of the press clause was “pure surplussage”: “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.”³⁹

B. The American Liberty League, ANPA, and Associated Press v. United States

As the relationship between FDR and the press deteriorated in the spring of 1934,⁴⁰ 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.”⁴¹ That same month, two of Davis’s old political allies, John Raskob and Jouett Shouse, were discussing what to do in the wake their successful campaign to repeal prohibition.⁴² 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 1932.⁴³ Like Davis, Raskob and Shouse had seen prohibition as an affront to the free market and a harbinger of an expanding federal police power.⁴⁴ 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

³⁶ Emery, *supra* note XXX, at 223.

³⁷ *Id.* at 224-225.

³⁸ *Id.*

³⁹ 1 Alfred McClung Lee, *The Daily Newspaper in America* 243 (1937) (quoting March 12, 1934 order).

⁴⁰ See Graham White, *FDR and the Press* 49-66 (1979).

⁴¹ Dec. 7, 1933 Letter from Davis to Herbert Brookes, Box 176, John W. Davis Papers, Yale University [hereinafter JWDP].

⁴² Wolfskill, *supra* note XXX, at 54.

⁴³ *Id.* at 39, 55.

⁴⁴ Goldstein, *supra* note XX, at 15 n.62.

“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.”⁴⁵

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 of “the basic American doctrine of a limitation on the powers of government.”⁴⁶ 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.”⁴⁷ 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.”⁴⁸

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 “Association Asserting the Rights of Property,” Shouse the “National Property League,” and E.F. Hutton the “American Federation of Businesses.”⁴⁹ But it was Davis’s idea to call the new group the far more capacious “American Liberty League.”⁵⁰ 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.”⁵¹

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.”⁵² 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).⁵³

⁴⁵ Wolfskill, *supra* note XX, at 54.

⁴⁶ John W. Davis, *The Old Order*, Series IX, Box 176, JWDP.

⁴⁷ *Id.*

⁴⁸ Goldstein, *supra* note XXX, at 17; Wolfskill, *supra* note XX, at 25/

⁴⁹ ROBERT F. BURK, *THE CORPORATE STATE AND THE BROKER STATE: THE DUPONTS AND AMERICAN POLITICS, 1925-1940*, at 137-138 (1990).

⁵⁰ *Id.* at 141-142.

⁵¹ Goldstein, *supra* note XXX, at 17; see also Shouse Elected by Libery League, *N.Y. TIMES*, Sept. 7, 1934.

⁵² HARBAUGH, *supra* note XXX, at 346.

⁵³ *Id.*

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."⁵⁴ 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.⁵⁵ FDR went on to report 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."⁵⁶ 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."⁵⁷ 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 which [you] violently disapprove – for Communists, for instance? . . . Will you insist upon the right of a free press in the same sense?"⁵⁸

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.⁵⁹ 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.⁶⁰ The meaning of civil liberties in this period was truly up for grabs,⁶¹ 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

⁵⁴ WOLFSKILL, *supra* note XXX, at 29.

⁵⁵ Roosevelt Twits Liberty League as Lover of Property, N.Y. TIMES, Aug. 25, 1934.

⁵⁶ *Id.*

⁵⁷ Pledges Pour in at Liberty League, N.Y. TIMES, Aug. 29, 1934.

⁵⁸ *Id.*

⁵⁹ *United States v. Macintosh*, 283 U.S. 605 (1931). The ACLU had wanted the case, and one of its founders, Felix Frankfurter, provided advice and encouragement throughout the proceedings. See Jeremy K. Kessler, "Calculations of Liberalism": John W. Davis and the Crisis of Civil Libertarianism in the 1930s (paper presented at the International Security Studies Colloquium, Yale University, Feb. 26, 2013); see also RONALD B. FLOWERS, *TO DEFEND THE CONSTITUTION, RELIGION, CONSCIENTIOUS OBJECTION, NATURALIZATION, AND THE SUPREME COURT XXX-XXX* (2003).

⁶⁰ Nov. 21, 1931 Letter from Theodore Dreiser to Davis, Series IV, Box 162, JWDP.

⁶¹ See generally Weinrib, *Civil Liberties Enforcement*, *supra* note XXX.

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.⁶² 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. NLRB*⁶³ 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.*⁶⁴ – and fifty-six other prominent attorneys to establish the American Liberty League’s “Lawyer’s Vigilance Committee.”⁶⁵ 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.⁶⁶ Soon, John Davis’s role as outside counsel for the Associated Press presented him with perfect opportunity to make good on the Vigilance Committee’s denunciation of the NLRA.⁶⁷

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.⁶⁸ 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.⁶⁹ 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

⁶² Pledges Pour in at Liberty League, N.Y. TIMES, Aug. 29, 1934.

⁶³ 301 U.S. 103 (1937)

⁶⁴ 301 U.S. 1 (1937)

⁶⁵ PETER H. IRONS, THE NEW DEAL LAWYERS 244 (1982); WOLFSKILL, supra note XXX, at 70-71.

⁶⁶ NATIONAL LAWYERS COMMITTEE OF THE AMERICAN LIBERTY LEAGUE, REPORT ON THE CONSTITUTIONALITY OF THE NATIONAL LABOR RELATIONS ACT (Sept. 5, 1935).

⁶⁷ WILLIAM H. HARBAUGH, LAWYER’S LAWYER: THE LIFE OF JOHN W. DAVIS 374 (1990).

⁶⁸ IRONS, supra note XXX, at 265.

⁶⁹ HARBAUGH, supra note XXX, at 373.

we need especially their loyalty and best performance.”⁷⁰ 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.⁷¹ 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.⁷² 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 withdrew, challenging Clark’s jurisdiction to hear the case.⁷³

While Davis was preparing for the Second Circuit Court of Appeals, 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.⁷⁴ Some of them had even been suggesting in their own editorials that Watson had been fired for “deliberately color[ing] the news reports.”⁷⁵ As far back as December 1935, Cooper had himself argued that at stake in the case was the question whether the news would remain “‘unsullied’ by the bias of self-interested employees.”⁷⁶ These views echoed those of ANPA and its General Counsel, Elisha Hanson, who had been arguing since at least 1933 that closed shops infringed on press freedom.⁷⁷ In December 1936, 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.”⁷⁸ And when *Associated Press* reached the Supreme Court a few months later, Hanson filed an amicus brief making these same arguments.

Back in the spring of 1936, however, Davis, remained unconvinced: “Let us keep clearly in mind what this case is about,” he wrote to the AP’s Kent Cooper.⁷⁹ “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.”⁸⁰ The seasoned litigator was truly skeptical that “employee-employer relations fell under the purview of the First Amendment.”⁸¹ He nonetheless asked his associate on the case, Paschall Davis, to “work up a

⁷⁰ 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.

⁷¹ Id. at 266.

⁷² HARBAUGH, supra note XXX, at 374.

⁷³ IRONS, supra note XXX, at 266.

⁷⁴ See June 11, 1936 Letter from Cooper to Davis, Series IV, Box 102, JWDP.

⁷⁵ Id.

⁷⁶ Dec. 13, 1935 Letter from Cooper to Frank Noyes, Series IX, Box 176, JWDP.

⁷⁷ See supra notes XXX and accompanying text.

⁷⁸ Emery, supra note XXX, at 235.

⁷⁹ June 12, 1936 Letter from Davis to Cooper, Series IV, Box 102, JWDP.

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⁸¹ HARBAUGH, supra note XXX, at 377.

First Amendment argument for him to consider.”⁸² 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.”⁸³

Davis did make the First Amendment point in his oral arguments at the Second Circuit but he still spent most of his time on the Fifth Amendment and the Commerce Clause.⁸⁴ On July 13, Judge Manton wrote for a unanimous three-judge panel rejecting the AP’s constitutional challenge.⁸⁵ Manton did not even address the First Amendment argument by name.⁸⁶ Yet following this defeat, the AP board became even more insistent that Davis foreground a 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.”⁸⁷

Filed in January 1937, Davis’s Supreme Court brief included a six-page First Amendment argument.⁸⁸ 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.⁸⁹ 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.”⁹⁰ “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.”⁹¹ 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.”⁹²

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

⁸² Id.

⁸³ Id.

⁸⁴ Id.

⁸⁵ NLRB v. Associated Press, 85 F.2d 56 (1936).

⁸⁶ Id. at 61.

⁸⁷ July 17, 1936 Letter from Bissell to Davis, at 1, Series IV, Box 102, JWDP.

⁸⁸ Brief for Petitioners, Associated Press v. NLRB, Jan. 22, 1937.

⁸⁹ Id. at 99.

⁹⁰ Id.

⁹¹ Id.

⁹² Id. at 100.

general expression of opinion or circulation of news.”⁹³ But, he continued, the NLRA “is not concerned with this right” and “is not legislation directed to the press as such.”⁹⁴ “What it does do,” Fahy concluded, “is to prevent the petitioner from destroying the freedom of its employees.”⁹⁵ 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.⁹⁶ 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.”⁹⁷

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.⁹⁸ 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.”⁹⁹

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.¹⁰⁰ 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

⁹³ Charles Fahy, Draft of Reply Brief, “Freedom of the Press,” 1, Charles Fahy Papers, Box 50, FDR Presidential Library, Hyde Park, NY.

⁹⁴ *Id.*

⁹⁵ *Id.* at 2.

⁹⁶ *Allgeyer v. Louisiana* (1897); *Lochner v. New York* (1905); *Adair v. United States* (1908); *Coppage v. Kansas* (1915). See generally William E. Forbath, *Caste, Class, and Citizenship*, 98 *Mich. L. Rev.* 1, 25-64 (1999); Jamal Greene, *The Anticanon*, 125 *Harv. L. Rev.* 379, 417-422, 446-456 (2011).

⁹⁷ Charles Fahy, Draft of Reply Brief, “Freedom of the Press,” *supra* note XX, at 2.

⁹⁸ HARBAUGH, *supra* note XXX, at 378.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 379.

of the press.”¹⁰¹ 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.”¹⁰² “[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.”¹⁰³ Presaging the anti-totalitarianism that 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?”¹⁰⁴

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.¹⁰⁵ Unlike Judge Manton, 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.¹⁰⁶

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.¹⁰⁷

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

¹⁰¹ IRONS, supra note XXX, at 284; HARBAUGH, supra note XXX, at 379.

¹⁰² Olken, supra note XXX, at 313-314.

¹⁰³ Quoted in HARBAUGH, supra note XX, at 380.

¹⁰⁴ IRONS, supra note XXX, at 284.

¹⁰⁵ Each Justice also provided a necessarily fact-specific Commerce Clause analysis. See Irons, supra note XXX, at XXX-XXX.

¹⁰⁶ *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, supra note XXX, at 501 n.147.

¹⁰⁷ *Associated Press*, 301 U.S., at 133.

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.”¹⁰⁸

With these words, Justice Sutherland offered his own vision of bifurcated review. Even if one accepted – as the new majority effectively had – the contention 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.¹⁰⁹ Sutherland’s dissent previewed the mix of formalism and functionalism that, one year later, would undergird the first two paragraphs of Footnote 4 of *United States v. Carolene Products Co.*¹¹⁰ By that time, Sutherland had retired.

The conservative minority’s expansive interpretation of what counted as a restraint on the exercise of press freedom did not carry the day in *Associated Press*. Five years later, when the Jehovah’s Witnesses challenged a license tax on street and door-to-door vending as violating their First Amendment rights to free exercise, free speech, and press freedom, another 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.”¹¹¹ But 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 in the present case

¹⁰⁸ Id. at 137 (Sutherland, J., dissenting).

¹⁰⁹ 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 category apart and make them incapable of abridgment by any process of law. . . . Legislation which contravenes the liberties of the First Amendment might not contravene liberties of another kind falling only within the terms of the Fifth Amendment. Thus, we have held that 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 (*Grosjean v. American Press Co.*, supra), albeit the same tax might be entirely valid if challenged under the “liberty” guaranty of the Fifth Amendment, apart from those liberties embraced by the First.

¹¹⁰ 304 U.S. 144, 152 (1938) (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.*

¹¹¹ *Jones v. City of Opelika*, 316 U.S. 584, 597 (1942).

lends support” may have arisen from “misconceptions attributable to a dictum of this Court in *Associated Press*.”¹¹² 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.¹¹³

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.¹¹⁴ 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.”¹¹⁵ Dissenting in *Associated Press*, Justice Sutherland had characterized NLRB supervision of editorial employees as having just such a “censorial quality,” citing back to *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.”¹¹⁶ Hanson similarly pushed for a broad reading of *Grosjean* and what might count as a regulation with a “prohibitory or censorial quality,” arguing that even “taxes on newspaper advertising” which “[d]ecreased revenue” and thus “seriously impair[ed] the operation of the press” were unconstitutional.¹¹⁷ The *Associated Press* majority had rejected this broad reading of *Grosjean* and its applicability to labor regulation.

Yet in 1943, when a new five-Justice majority overturned the 1942 decision and struck down the license taxes, it appeared to embrace Hanson’s arguments, echoing 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 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.¹¹⁸ “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 to the same line of precedent, Justice Douglas’s majority opinion reasoned that “The power to tax the exercise of a privilege is the power to

¹¹² Brief of American Newspaper Publishers Association as Amicus Curiae 8 (Sept 3., 1942).

¹¹³ *Associated Press*, 301 U.S., at 132-133.

¹¹⁴ Brief of American Newspaper Publishers Association as Amicus Curiae 9 (Sept 3., 1942).

¹¹⁵ *Id.*

¹¹⁶ *Associated Press*, 301 U.S., at 135.

¹¹⁷ Brief of American Newspaper Publishers Association as Amicus Curiae 10 (Sept 3., 1942).

¹¹⁸ *Grosjean v. American Press Co.*, 297 U. S. 233, 244-245 (1936) (citing to *Magnano Co. v. Hamilton*, 292 U. S. 40, 45).

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.”¹¹⁹

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 prohibition of the exercise of religion or an abridgment of the freedom of the press?”¹²⁰ 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.”¹²¹ 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.’”¹²² *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 economic regulation posed to freedom.

Before the Jehovah’s Witnesses could occasion this jurisprudential reversal at the High Court in 1943, they needed financial support, public recognition, and legal advice. They would get all three from John W. Davis’s good friend from the New York Bar, Grenville Clark. Between 1937 and 1940, Clark would take 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.¹²³ For him, compulsory flag salute laws came to exemplify the way in which majoritarian processes unchecked by judicial review could threaten individual freedom.

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

¹¹⁹ *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943) (citing to *Magnano Co. v. Hamilton*, 292 U.S. 40, 45, 54 S. Ct. 599, and cases cited).

¹²⁰ *Murdock*, 319 U.S., at 118, 121.

¹²¹ *Id.* at 122.

¹²² *Id.* at 128.

¹²³ See generally Dunne, *supra* note XX, at XXX-XXX; Weinrib, *The Liberal Compromise*, *supra* note XXX, at 412-417.

Liberty League's lofty constitutional formalism a main target of abuse.¹²⁴ 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.¹²⁵ 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.¹²⁶ 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.¹²⁷ German Witnesses systematically refused to salute, and whole families were imprisoned or sent to the earliest concentration camps.¹²⁸ 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.¹²⁹ German authorities summarily imprisoned all resisters, and shot some of them.¹³⁰

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.¹³¹ Witnesses across the country responded, launching a campaign of massive resistance to compulsory flag salute laws in the public schools.¹³² 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 *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."¹³³

¹²⁴ Wolfskill, *supra* note XX, at XXX; Goldstein, *supra* note XX, at XX.

¹²⁵ Brinkley; Cushman; Jenner; Polenberg; White.

¹²⁶ Jenner; Katznelson; Kennedy; Patterson; Tooze.

¹²⁷ Ian Kershaw, *The "Hitler myth": image and reality in the Third Reich* 60 (2d ed. 2001); Allert Tillman, *The Hitler Salute: On the Meaning of a Gesture* 61 (Jefferson Chase trans., 2009).

¹²⁸ Brock, "Conscientious Objectors in Nazi Germany," in Peter Brock & Thomas P. Socknat, *Challenge to Mars: Essays on Pacifism from 1918 to 1945*, at 370-371 (1999).

¹²⁹ 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.

¹³⁰ *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.*

¹³¹ PETERS, *supra* note XX, at 24-25.

¹³² *Id.* at 26-28, 260. At the time, the American flag salute, like the "Heil Hitler," incorporated an outstretched right arm. See RICHARD PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 198-200 (1999).

¹³³ See DAVID MANWARING, *RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY* 79 (1962).

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.¹³⁴ 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.¹³⁵ Working out of their Brooklyn headquarters, Rutherford and his general counsel, Olin Moyle, spearheaded a legal campaign to challenge the expulsion of Witness students.¹³⁶

This campaign met with defeat after defeat in the courts.¹³⁷ 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,¹³⁸ and affirming one federal court decision.¹³⁹ In finding no substantial federal question, the Court consistently cited its 1934 decision in *Hamilton v. Regents*,¹⁴⁰ 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 1940,¹⁴¹ Justices Cardozo, Brandeis and Stone filed a concurrence "assum[ing] for the present purposes" that it was so incorporated and that the First Amendment right was no bar to compulsory military training in the public university.¹⁴²

It was the Witnesses' first effort to challenge a flag salute regulation in a federal district court – *Johnson v. Deerfield*¹⁴³ – that brought their plight to the attention of the American Bar Association's Special Committee on the Bill of Rights.¹⁴⁴ 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.¹⁴⁵ That January, as the *Hague* brief was making the rounds in elite legal circles,¹⁴⁶

¹³⁴ Gordon, supra note XXX, at XX; Peters, supra note XXX, at XX.

¹³⁵ Gordon, supra note XXX, at XX.

¹³⁶ Id. at XXX; MANWARING, supra note XXX, at 84; Peters, supra note XX, at 38.

¹³⁷ MANWARING, supra note XXX, at 56-80.

¹³⁸ *Leoles v. Landers*, 302 U.S. 656 (1937); *Hering v. State Board of Education*, 303 U.S. 624 (1938); *Gabrielli v. Knickerbocker*, 306 U.S. 621 (1939).

¹³⁹ *Johnson v. Deerfield*, 306 U.S. 621 (1939); petition for rehearing denied 306 U.S. 650 (1939).

¹⁴⁰ 293 U.S. 245 (1934).

¹⁴¹ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

¹⁴² *Hamilton*, 293 U.S., at 265 (Cardozo, J., concurring).

¹⁴³ 25 F. Supp. 918 (D. Mass. 1939).

¹⁴⁴ See Zechariah Chafee to Grenville Clark (Jan. 17, 1939), Series VIII, Box 2, Grenville Clark Papers, Rainer Library, Dartmouth College [hereinafter GCP].

¹⁴⁵ Dunne, supra note XXX, at 103-109.

¹⁴⁶ 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 (Jan. 5, 1939), Series VIII, Box 2, GCP ("[T]his contribution to civilized government is memorable . . ."); Felix Frankfurter 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.")

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.¹⁴⁷ 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.¹⁴⁸ The next day, Chafee wrote to Grenville Clark, the ABA Committee's Chair and his *Hague* co-author.¹⁴⁹ 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."¹⁵⁰ 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.¹⁵¹ 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.¹⁵² 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.¹⁵³ As he explained to fellow 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

¹⁴⁷ George K. Gardner to Zechariah Chafee (Jan. 12, 1939), Series VIII, Box 3, GCP.

¹⁴⁸ George K. Gardner to Zechariah Chafee (Jan. 12, 1939), supra note XX.

¹⁴⁹ Zechariah Chafee to Grenville Clark (Jan. 17, 1939), supra note XXX, at 1.

¹⁵⁰ Id. at 2.

¹⁵¹ See Grenville Clark to Louis Lusky (Mar. 28, 1939), Series VIII, Box 4, GCP.

¹⁵² 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.

¹⁵³ 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 be commonly thought of as pretty cautious and conservative, but who are in fact genuine liberals in matters of civil liberty, go on the publicly announced committees of the Civil Liberties Union. There is no doubt in my mind that the work of the Civil Liberties Union is weakened by the public impression, whether or not fully justified, that the policies of the Union are formed by a group mainly composed of people of extreme 'leftist' economic and social ideas. There is equally no doubt in my mind that it is a bad thing from the point of view of the conservatives to take so little active part in the defense of civil liberties. Finally, I believe that from the general public point of view, it is dividing and highly unfortunate not to have a united front on all kinds of economic and social thought on this fundamental question that all Americans ought to be united on."). By June of that year, Clark's vision had evolved – rather than seeking to get conservatives on the ACLU's committees, he would form an autonomous group of conservatives and moderates both to act in "an advisory capacity" to the ACLU and "to consider on their own initiative crucial issues affecting civil liberties and occasionally to act by the issuance of a public statement or otherwise." Grenville Clark, Memorandum (Jun. 21, 1938), 2, Series VI, Box 1, GCP. See also Weinrib, *The Liberal Compromise*, supra note XXX, at 412-429.

[would], in the long run, mainly depend” upon them.¹⁵⁴

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.¹⁵⁵ 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.¹⁵⁶ Over the next six months, Clark spearheaded elite legal resistance to the President’s vision.¹⁵⁷ 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.¹⁵⁸

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.”¹⁵⁹ 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.¹⁶⁰

An early indication of Clark’s pivot to civil liberties came in an article he wrote for the May 1937 “Supreme Court” issue of *The Yale Review*.¹⁶¹ 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”¹⁶² The ultimate target of the Court’s detractors,

¹⁵⁴ 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.

¹⁵⁵ 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.”).

¹⁵⁶ Id. at 78-80

¹⁵⁷ Id.

¹⁵⁸ 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.

¹⁵⁹ DUNNE, supra note XX, at 81.

¹⁶⁰ 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.”).

¹⁶¹ Grenville Clark, The Supreme Court Issue, *YALE REV.* 26 (May 1937), 669, Series XXI, Box 1, GCP.

¹⁶² Id. at 669.

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 magnif[y]ing] 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.¹⁶³ 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. . . .”¹⁶⁴ 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.”¹⁶⁵ 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.¹⁶⁶ 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”¹⁶⁷ 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.¹⁶⁸ 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,”¹⁶⁹ and that he was “just starting a negotiation” to form a united front between the “rather extreme Left” at the ACLU and more mainstream

¹⁶³ Id. at 681.

¹⁶⁴ 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.

¹⁶⁵ 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.

¹⁶⁶ 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.

¹⁶⁷ Grenville Clark to Zechariah Chafee (Jan. 31, 1938), 1-2, Series VI, Box 1, GCP.

¹⁶⁸ See Grenville Clark to Arthur Garfield Hays (Jan. 22, 1938), *supra* note XX.

¹⁶⁹ Grenville Clark to Walter Lippmann (Jan. 11, 1938), 1, Series VI, Box 1, GCP.

defenders of judicial enforcement of civil liberties.¹⁷⁰ 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).¹⁷¹

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 *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 *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.¹⁷²

Clark also identified the Senate's investigation of corporate lobbying – launched by Hugo Black – as a paradigmatic offense to civil liberties.¹⁷³ 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).¹⁷⁴ 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.¹⁷⁵

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.”¹⁷⁶ While the *New York Times* praised Clark's call for

¹⁷⁰ 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, *The Good Society* (1937).

¹⁷¹ Grenville Clark, *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.

¹⁷² Grenville Clark, *The Relation of the Press to the Maintenance of Civil Liberty*, supra note XX, at XX.

¹⁷³ Id. at XX. See also GERALD T. DUNNE, *HUGO BLACK AND THE JUDICIAL REVOLUTION 151-160* (1977).

¹⁷⁴ See RICHARD POLENBERG, *REORGANIZING ROOSEVELT'S GOVERNMENT: THE CONTROVERSY OVER EXECUTIVE REORGANIZATION, 1936-1939*, at 74-75 (1966).

¹⁷⁵ Id. at 56. For Clark's praise of Borah's amendment, see Grenville Clark, *The Supreme Court Issue*, *YALE REV.* 26 (May 1937), 669, 685, Series XXI, Box 1, GCP.

¹⁷⁶ Grenville Clark, *The Relation of the Press to the Maintenance of Civil Liberty*, supra note XXX.

“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.”¹⁷⁷

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 civil libertarianism that protected rich and poor, employee and employer alike, to the previous year’s court-packing fight.¹⁷⁸ 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 *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.¹⁷⁹

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.”¹⁸⁰ 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.¹⁸¹ 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

¹⁷⁷ DUNNE, *supra* note XX, at 101.

¹⁷⁸ 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.

¹⁷⁹ 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.

¹⁸⁰ Grenville Clark to Douglas Arant (July 15, 1938), Series XXI, Box 5, GCP.

¹⁸¹ Clark’s 1938 civil libertarian campaign coincided with the trough of the “1937” recession. See Patterson; Polenberg; Jenner.

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.”¹⁸² 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.”¹⁸³

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.¹⁸⁴

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.¹⁸⁵

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.”¹⁸⁶ During the summer and fall of 1939, Clark kept in touch with Gardner about developments in Massachusetts.

¹⁸² 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.

¹⁸³ 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.

¹⁸⁴ Grenville Clark to Douglas Arant (Mar. 31, 1939), 2 Series VIII, Box 1, GCP.

¹⁸⁵ Grenville Clark to Felix Frankfurter (Nov. 14, 1938), Series VIII, Box 2, GCP; Felix Frankfurter to Grenville Clark (Nov. 16, 1938), id.

¹⁸⁶ Grenville Clark to George Gardner (Apr. 19, 1939), Series VIII, Box 3, GCP.

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.¹⁸⁷ Covington would soon become involved in a parallel litigation in Pennsylvania – the case of Walter, Lillian, and Billy Gobitas.¹⁸⁸ 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.¹⁸⁹ 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.¹⁹⁰

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."¹⁹¹ 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 himself.¹⁹² 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, Justice Harlan Fiske Stone's former law clerk and an associate at Clark's law firm, to coordinate their legal strategy.¹⁹³

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.¹⁹⁴ 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.¹⁹⁵

¹⁸⁷ George Gardner to Grenville Clark (Sept. 22, 1939), Series VIII, Box 3, GCP.

¹⁸⁸ The court reporter misspelled the Gobitas' name. See GORDON, *supra* note XX, at 227 n.76.

¹⁸⁹ 108 F.2d 683 (3rd Cir. 1939).

¹⁹⁰ Grenville Clark to George Gardner (Jan. 4, 1940), Series VIII, Box 3, GCP; *Id.* (Feb. 16, 1940).

¹⁹¹ George Gardner to William Fennell (Feb. 29, 1939), Series VIII, Box 3, GCP.

¹⁹² *Id.*

¹⁹³ Grenville Clark to George Gardner (Mar. 6, 1939), Series VIII, Box 3, GCP.

¹⁹⁴ 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.

¹⁹⁵ Zechariah Chafee to Grenville Clark (Mar. 28, 1938), Series VIII, Box 3, GCP.

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.¹⁹⁶

While the ABA Committee's defense of civil liberties derived from a commitment to the "independence of the courts"¹⁹⁷ 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."¹⁹⁸ 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."¹⁹⁹

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!²⁰⁰ 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.²⁰¹ Going back to Frankfurter's experience in the WWI War

¹⁹⁶ 310 U.S. 586, 598 (1940).

¹⁹⁷ Grenville Clark to Douglas Arant (July 15, 1938), Series XXI, Box 5, GCP.

¹⁹⁸ 310 U.S., at 600.

¹⁹⁹ Id.

²⁰⁰ Peters; Manwaring; White.

²⁰¹ 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.

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.²⁰² 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.²⁰³

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.²⁰⁴ Frankfurter worried that a judicial overreaction to the poor treatment of a religious minority

²⁰² 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."

Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salutes Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675, 705 (1984) (citing *West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 651 (1943) (Frankfurter, J., dissenting)).

²⁰³ Felix Frankfurter to Harlan Fiske Stone (May 27, 1940), 4, Container 65, Harlan Fiske Stone Papers, Library of Congress [hereinafter HFSP].

²⁰⁴ *Id.*

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.²⁰⁵ “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.”²⁰⁶ 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.²⁰⁷ 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*,²⁰⁸ 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.”²⁰⁹ 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.”²¹⁰ 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 4.²¹¹

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

²⁰⁵ Id. at 1-2.

²⁰⁶ Id. at 2.

²⁰⁷ Id.

²⁰⁸ 301 U.S. 88 (1940)

²⁰⁹ Id. at 95.

²¹⁰ 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.

²¹¹ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

“tend[ed] to curtail the operation of those political processes ordinarily to be relied on to protect minorities.”²¹² For the authority to “scrutinize legislation restricting the civil liberty of racial and religious minorities although no political process was affected,”²¹³ 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.²¹⁴

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.²¹⁵ 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.”²¹⁶ 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.”²¹⁷ 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 license tax cases 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

²¹² 310 U.S. 586, 606 (1940) (Stone, J., dissenting).

²¹³ *Id.*

²¹⁴ *Meyer v. Nebraska*, 262 U. S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Farrington v. Tokushige*, 273 U. S. 284 (1927). See generally Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 *Boston U. L. Rev.* 1489 (1998).

²¹⁵ 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).

²¹⁶ Grenville Clark to Douglas Arant (Mar 31, 1939), 2 Series VIII, Box 1, GCP.

²¹⁷ Grenville Clark, Memorandum for the Committee on the Bill of Rights (Mar. 20, 1939), 4, Series VIII, Box 2, GCP.

to cement a new social consensus that such treatment was unacceptably at odds with the goals of the war.²¹⁸ 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. THE LICENSE TAX CASES AND LIBERAL LOCHNERIZATION

A. The 1942 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.²¹⁹ *The Christian Century* opined that, “Courts that will not protect even Jehovah’s Witnesses will not long protect anybody.”²²⁰ 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.”²²¹ And in an editorial titled simply “Frankfurter v. Stone,” *The New Republic* warned 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.”²²²

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.”²²³ Yet if some members of the *Gobitis* majority were shaken by press criticism, 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 in North Windham, Maine.²²⁴ Local newspapers interpreted the murder as evidence of the real dangers those “disloyal” to the flag posed to law-abiding Americans.²²⁵

²¹⁸ Gordon, *supra* note XXX, at XXX; Manwaring, *supra* note XXX, at XXX; Peters, *supra* note XXX, at XXX-XXX; Tsai XXX.

²¹⁹ *Id.* at 67-68.

²²⁰ The Court Abdicates, *Christian Century* (Jul. 3, 1940), 845-846.

²²¹ Peters, *supra* note XXX, at 69.

²²² Frankfurter v. Stone, *New Republic* (June 24, 1940), 843.

²²³ Sidney Fine, *Frank Murphy: The Washington Years 187* (1984).

²²⁴ Peters, *supra* note XXX, at 217.

²²⁵ *Id.* at 217-219.

In any event, 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.²²⁶ 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.²²⁷ And he rejected the claim that a sliding-scale fee as opposed to a flat tax was inherently discriminatory.²²⁸ The following March, *Chaplinsky*, presented an easier set of questions and, in another unanimous opinion, Justice Murphy canonized the “fighting words” exception to free speech protection.²²⁹

Yet even as Murphy was drafting *Chaplinsky*, the Court heard oral arguments in *Jones v. City of Opelika*, the first Witness license tax case.²³⁰ 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;²³¹ 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.”²³² To make the stakes as vivid as possible, he asked the Justices to imagine how the license taxes would function in a Nazi invasion:

²²⁶ *Cox v. New Hampshire*, 312 U.S. 569 (1941)

²²⁷ *Id.* at 578.

²²⁸ *Id.* at 577.

²²⁹ 315 U.S. 568, 572 (1942) (citing Zechariah Chafee, *Free Speech in the United States* 149 (1941)).

²³⁰ 316 U.S. 584 (1942). For the timing, see Peters, *supra* note XXX, at 230.

²³¹ 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.

²³² Petitioner’s Brief, *Jones v. Opelika*, No. 280, at 32 (Nov. 11, 1941).

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 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.²³³

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.”²³⁴ 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.²³⁵ 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.²³⁶ 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.”²³⁷ 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

²³³ Id. at 32.

²³⁴ Id. at 38-39.

²³⁵ See Petitioner's Brief, *supra* note XXX, at 5-10.

²³⁶ Id. at 25-27.

²³⁷ Id. at 32; cf. *Grosjean v. American Press Co.*, 297 U.S. 233, 245 (1936).

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.²³⁸

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 commercial, being in aid of “a benevolent, non-profit, non-competitive enterprise for others’ welfare.”²³⁹

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.”²⁴⁰ 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.²⁴¹ 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.²⁴² 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.”²⁴³

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.”²⁴⁴ The phrase “under the guise” echoed what was arguably the actual holding in

²³⁸ Petitioner’s Brief, *supra* note XXX, at 38 (citing *Associated Press v. NLRB*, 301 U. S. 103, 141 (1937) (Sutherland, J., dissenting)).

²³⁹ Petitioner’s Brief, *supra* note XXX, at 25 and *passim*.

²⁴⁰ Brief on Behalf of the American Civil Liberties Union as Amicus Curiae, *Jones v. Opelika*, No. 280, at 8 (Jan. 22, 1942).

²⁴¹ See Weinrib, *The Liberal Compromise*, *supra* note XX, at XXX.

²⁴² Brief on Behalf of the American Civil Liberties Union, *supra* note XXX, at 6-7

²⁴³ *Id.* at 6.

²⁴⁴ Brief on Behalf of the American Civil Liberties Union as Amicus Curiae, *Jones v. Opelika*, No. 280, at 81 (Jan. 22, 1942) (emphasis added).

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.”²⁴⁵

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.”²⁴⁶ 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 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.²⁴⁷

As for the free exercise issue, Reed conceded that if the “licensed activities” were themselves “religious rites, a different question would be presented.”²⁴⁸ 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.²⁴⁹

²⁴⁵ *Grosjean*, 297 U.S., at 250 (emphasis added).

²⁴⁶ *Jones v. Opelika*, 316 U.S. 584, 596 (1942) [hereinafter *Opelika I*].

²⁴⁷ *Id.* at 597.

²⁴⁸ *Id.* at 598

²⁴⁹ *Id.*

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."²⁵⁰ 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."²⁵¹

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:

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.²⁵²

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.²⁵³

²⁵⁰ Id. at 593.

²⁵¹ Id. at 597.

²⁵² Religion and Taxation, Wash. Post (June 10, 1942).

²⁵³ *Opelika* I, 316 U.S., at 608(Stone, J., dissenting).

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.”²⁵⁴ 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.”²⁵⁵

In addition to the two dissents, Justices Black, Douglas, and Murphy appended what the *Washington Post* called an “extraordinary memorandum”²⁵⁶ 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.”²⁵⁷ 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 those views may be.”²⁵⁸ To do otherwise would place “the right freely to exercise religion” not in a preferred but in a “subordinate” position to democratic decision-making.²⁵⁹

Ted White has argued that the *Jones v. Opelika* dissents deftly combined an older progressive justification of free speech as democracy-enhancing with a new formalistic emphasis on textually-enumerated rights, synthesizing Paragraphs 1 and 2 of Footnote 4 of *Carolene Products*. He writes that “Stone was suggesting that speech rights reinforced democracy in a way that economic rights did not”²⁶⁰ and that in the Black-Douglas-Murphy memorandum “the textually protected status and the democratic status of speech rights were once again intertwined.”²⁶¹ Yet throughout the “extraordinary memorandum” and both *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 *Carolene Products* at all – indeed, up until that point, Footnote 4 had only once been cited

²⁵⁴ Id. at 620 (Murphy, J., dissenting).

²⁵⁵ 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.

²⁵⁶ Religion and Taxation, Wash. Post (June 10, 1942).

²⁵⁷ *Opelika I*, 316 U.S., at 623 (Black, Douglas, Murphy, JJ.).

²⁵⁸ Id. at 624.

²⁵⁹ Id.

²⁶⁰ White, *supra* note XXX, at 147.

²⁶¹ Id. at 148.

outside the context of a political process argument, by Stone earlier that spring in *Skinner v. Oklahoma*.²⁶²

With few exceptions, the press praised the dissenters and condemned the majority opinion in *Opelika*.²⁶³ The *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.”²⁶⁴ Meanwhile, the *New York Times* called the majority opinion an “ominous decision” and a *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.”²⁶⁵ As for the *Gobitis* reversal, the *Washington Post* hailed Black, Douglas, and Murphy’s “singular humility and intellectual honesty.”²⁶⁶

Even before Wiley Rutledge replaced James Byrnes on the Court the following February, Black, Douglas, and Murphy’s self-reversal in *Opelika I* probably doomed *Gobitis*. In 1941, Robert Jackson’s *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.”²⁶⁷ And Robert Tsai has shown that Jackson was already convinced during his tenure as Attorney General that *Gobitis* was a boon to local malcontents and a threat to the war effort.²⁶⁸ What’s more, the evidence suggests that most in the executive branch agreed with him.²⁶⁹

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.²⁷⁰ 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 and free

²⁶² See Felix Gilman, The Famous Footnote Four: A History of the Carolene Products Footnote, 46 S. Tex. L. Rev. 163, 185-186 (2004)

²⁶³ Peters, supra note XX, at 232.

²⁶⁴ Container 65, William O. Douglas Papers, Library of Congress, Washington, D.C.

²⁶⁵ Peters, supra note XXX, at 232-233.

²⁶⁶ Religion and Taxation, Wash. Post (June 10, 1942).

²⁶⁷ Robert Jackson, *The Struggle for Judicial Supremacy* 284 (1941).

²⁶⁸ Robert L. Tsai, Reconsidering *Gobitis*: An Exercise in Presidential Leadership, 86 Wash. U. L. Rev. 363, 397-399 (2008).

²⁶⁹ Id. at 382-414.

²⁷⁰ 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).

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,”²⁷¹ 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.”²⁷²

B. The 1943 License Tax Cases and Beyond

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.”²⁷³ 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.”²⁷⁴

Notably, the only case the Witnesses’ cited for these propositions was *Grosjean*.²⁷⁵ 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.²⁷⁶ 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 his petition for rehearing – as he had the *Opelika* merits brief – with Sutherland’s *Associated*

²⁷¹ St. Louis Post Dispatch, May 5, 1943.

²⁷² 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.

²⁷³ Petitioner’s Motion for Rehearing, Nos. 280, 314, 966, at 3 (Aug. 31, 1942).

²⁷⁴ *Id.* at 18.

²⁷⁵ 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.

²⁷⁶ See 129 F. 2d 24, 37 (D.C. Cir. 1942) (Rutledge, J., dissenting).

Press dissent.²⁷⁷ 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,²⁷⁸ 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 Maddison would have been 'shocked' to discover what the Court was doing in the name of freedom of religion."²⁷⁹ 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.²⁸⁰

²⁷⁷ *Id.* at 36.

²⁷⁸ 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)

²⁷⁹ Fine, *supra* note XXX, at 379 (quoting Justice Murphy's conference notes).

²⁸⁰ April 9, 1943 Memorandum from Assoc. Justice Frankfurter to Assoc. Justice Reed (with Roberts and Jackson copied), Robert Jackson Papers, Container 127, Library of Congress, Washington, D.C. [hereinafter RHJP].

Justice Jackson's law clerk, 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:

[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.²⁸¹

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 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.²⁸²

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.²⁸³

²⁸¹ [April] Memorandum #2 from John F. Costelloe, Clerk, to Assoc. Justice Jackson 2, Container 127, RHJP.

²⁸² Id. at 3.

²⁸³ [April] Memorandum #1 from John F. Costelloe, Clerk, to Assoc. Justice Jackson 2-3, Container 127, RHJP.

Costelloe assured Jackson that “[o]f course I maintain no sentiment for exempting Catholics.”²⁸⁴ “But,” he predicted, “there will be a whole lot of people who will, and will be pretty noisy about the matter.”²⁸⁵ Cosetelloe’s concern about the relationship between Witness accommodation and the Catholic community was not simply an example. The communities in which the Witnesses operated tended to be majority Catholic, and Witnesses were themselves famously anti-papist in their theology.²⁸⁶ 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,²⁸⁷ and the aggressively anti-Catholic nature of tracts the Witnesses distributed throughout the town.²⁸⁸ 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?

²⁸⁴ *Id.* at 3.

²⁸⁵ *Id.* In his *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?” *Barnette*, 319 U.S. 624, 660 (1943) (Frankfurter, J., dissenting).

²⁸⁶ See Fine, *supra* note XX, at 372-373; Peters, *supra* note XXX, at XXX-XX.

²⁸⁷ *Douglas v. Jeanette*, 319 U.S. 157, 167 (1943) (Jackson, J., concurring).

²⁸⁸ *Id.* at 167-173.

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.²⁸⁹

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.²⁹⁰

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:

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.²⁹¹

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."²⁹² 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."²⁹³ 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."²⁹⁴ 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

²⁸⁹ Id. at 178-180.

²⁹⁰ Id. at 179, 181-182.

²⁹¹ Nov. 24, 1943 Letter from Donald R. Richberg to Robert H. Jackson, Assoc. Justice, Container 127, RHJP.

²⁹² *Barnette*, 319 U.S. 624, 630 (1943)

²⁹³ Id.

²⁹⁴ Id.

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.²⁹⁵

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.²⁹⁶

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 pressing imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity," merited the restraint of free exercise.²⁹⁷ 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."²⁹⁸

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."²⁹⁹ 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."³⁰⁰

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.³⁰¹ 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

²⁹⁵ Id. at 630-631.

²⁹⁶ 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).

²⁹⁷ Id. at 643.

²⁹⁸ Id. at 645.

²⁹⁹ April 22, 1943 Memorandum from Assoc. Justice Roberts to Assoc. Justice Frankfurter 1, Frankfurter Papers, Reel 7, Harvard Law School.

³⁰⁰ Id.

³⁰¹ March 27, 1943 Memorandum from Assoc. Justice Rutledge to Assoc. Justice Douglas 1, Container 89, WODP.

question whether the [Witnesses are] subject to any particular form of taxation.”³⁰² 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.³⁰³

Rutledge worried that that “[t]he former theory is perhaps too narrow and may be vulnerable both to attack and to abuse.”³⁰⁴ 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.”³⁰⁵ 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 no house publishing religious literature, on however wide a scale, can be taxed in a non-discriminatory manner.”³⁰⁶ 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.”³⁰⁷

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 their activities.”³⁰⁸ 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.”³⁰⁹

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

³⁰² Id.

³⁰³ Id.

³⁰⁴ Id.

³⁰⁵ Id.

³⁰⁶ Id. at 1-2.

³⁰⁷ Id. at 2.

³⁰⁸ *Murdock v. Pennsylvania*, 319 U.S. 105, 109-110 (1943)

³⁰⁹ Id. at 110.

of religion are available to all, not merely to those who can pay their own way” and, consequently, that the license tax “restrains in advance those constitutional liberties of press and religion, and inevitably tends to suppress their exercise.”³¹⁰ 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.”³¹¹

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.”³¹² Echoing Rutledge’s own worries about the ruling’s “too extensive application,”³¹³ 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.”³¹⁴

On June 17, 1943, three days after the Court decided *Barnette*, Justice Jackson received a congratulatory letter from an acquaintance, Francis Hill.³¹⁵ 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.”³¹⁶ “[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”³¹⁷ 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 opinion.”³¹⁸ He would have lost, had Jackson accepted. As the Justice wrote in reply, “One is always surprised to find out that things that are so clear to him are not clear to others.”³¹⁹

Less than a year after Justice Rutledge joined the Court, providing the crucial fifth vote in the 1943 license tax cases, he placed a limiting condition on the expansive First Amendment doctrine they announced. In *Prince v. Massachusetts*, the Witnesses challenged a state’s child

³¹⁰ Id. at 111, 114.

³¹¹ Id. at 112 (citing *Magnano Co. v. Hamilton*, 292 U. S. 40, 45 (1934)); cf. *Grosjean v. American Press Co.*, 297 U. S. 233, 244-245 (1936) (citing to *Magnano Co. v. Hamilton*, 292 U. S. 40, 45).

³¹² *Murdock*, 319 U.S., at 133 (Reed, J., dissenting).

³¹³ March 27, 1943 Memorandum from Assoc. Justice Rutledge to Assoc. Justice Douglas 1, Container 89, WODP.

³¹⁴ *Murdock*, 319 U.S., at 133 (Reed, J., dissenting).

³¹⁵ June 17, 1943 Letter from Francis W. Hill, Jr. to Robert Jackson, Assoc. Justice, Container 127, RHJP.

³¹⁶ Id.

³¹⁷ Id.

³¹⁸ Id.

³¹⁹ June 21, 1943 Letter from Robert Jackson, Assoc. Justice, to Francis W. Hill, Jr., Container 127, RHJP.

labor law that prevented a Witness child from participating with her mother in the sale and distribution of religious literature.³²⁰ 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.”³²¹

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.”³²² 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.”³²³ 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.”³²⁴

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.”³²⁵ This *reductio*, Jackson reasoned, revealed “the real basis of disagreement among members of this Court in previous Jehovah’s Witness cases.”³²⁶ 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 *Douglas*: “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.”³²⁷

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 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 little evidence that itinerant Witnesses could support themselves from the intermittent sale of pamphlets, in *Follett v. Town of McCormick*, the Witness petitioner was a resident of the town and admitted that book-selling was his sole

³²⁰ 321 U.S. 158 (1944).

³²¹ *Id.* at 167-168.

³²² *Id.* at 173 (Murphy, J., dissenting).

³²³ *Id.*

³²⁴ Fine, *supra* note XXX, at 384.

³²⁵ *Prince*, 321 U.S., at 177 (Jackson, J., dissenting)

³²⁶ *Id.*

³²⁷ *Id.*

occupation.³²⁸ 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.”³²⁹

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.³³⁰

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.³³¹

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. . . . It

³²⁸ *Follett v. Town of McCormick*, 321 U.S. 573 (1944)

³²⁹ *Id.* at 577.

³³⁰ *Id.* at 580-581 (Roberts, Frankfurter, Jackson, JJ., dissenting).

³³¹ *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.³³²

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.”³³³ 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.”³³⁴

The final case involving Witness literature distribution, *Marsh v. Alabama*, provided a peculiar coda to the New Deal politics that had simmered in the background of the Court’s wartime First Amendment jurisprudence.³³⁵ 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.³³⁶ 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.”³³⁷

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,³³⁸ but it also promised to vindicate what had been, during the interwar period, the paradigmatic civil libertarian right – the right to organize.³³⁹ Thanks to *Marsh*, the editors explained, union organizers could now freely enter and operate in a company-town under the banner of the Constitution.³⁴⁰

³³² Id. at 582-583.

³³³ Nov. 24, 1943 Letter from Donald R. Richberg to Robert H. Jackson, Assoc. Justice, Container 127, RHJP.

³³⁴ *Follett*, 321 U.S., at 583 (Roberts, Frankfurter, Jackson, JJ., dissenting).

³³⁵ 326 U.S. 501 (1946).

³³⁶ 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.”).

³³⁷ Id. at 510 (Frankfurter, J., concurring).

³³⁸ *Civil Rights v. Property*, *New Republic* (Jan. 21, 1946), 9.

³³⁹ See Weinrib, *The Liberal Compromise*, *supra* note XXX, at XXX.

³⁴⁰ *Civil Rights v. Property*, *supra* note XXX, at 9.

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.”³⁴¹ 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.³⁴²

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.³⁴³

In any event, Stone’s and Reed’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.³⁴⁴ 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.

CONCLUSION

[To come: Aggressive judicial enforcement of the First Amendment was from the beginning embedded in a critique of economic regulation. This genealogy suggests that there may be real yet under-examined tradeoffs between civil libertarianism and democratic regulation of the economy. The authors of both Gobitis and Barnette thought so, but their concerns went unheeded at the time. The takeaway is not that, beginning in the 1940s, First Amendment jurisprudence constrained economic regulation to the degree that it does so today. We are certainly witnessing both political and doctrinal innovations in the use of civil libertarian argument. Nonetheless, the history of the 1940s license tax cases suggests some limits to the logic of bifurcated review, limits that legal liberalism failed to acknowledge, let alone resolve, in the intervening decades.]

³⁴¹ *Marsh*, 326 U.S., at 512 (Reed, J., dissenting).

³⁴² *Id.* at 516.

³⁴³ *Douglas v. Jeanette*, 319 U.S. 157, 180 (1943) (Jackson, J., concurring).

³⁴⁴ See *Hudgens v. NLRB*, 424 U.S. 507 (1976); Timothy Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places* XXX (2009); Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 *Wm. & Mary Bill Rts. J.* 767, 794-795 (2009).