SCORPIONS

The Battles and Triumphs of FDR's Great Supreme Court Justices

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TWELVE

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The Supreme Court is nine scorpions in a bottle.

—ALEXANDER BICKEL, LAW CLERK TO
JUSTICE FELIX FRANKFURTER,
1952–53
INTRODUCTION

A tiny, ebullient Jew who started as America's leading liberal and ended as its most famous judicial conservative. A Ku Klux Klansman who became an absolutist advocate of free speech and civil rights. A backcountry lawyer who started off trying cases about cows and went on to conduct the most important international trial ever. A self-invented, tall-tale Westerner who narrowly missed the presidency but expanded individual freedom beyond what anyone before had dreamed.

Four more different men could hardly be imagined. Yet they had certain things in common. Each was a self-made man who came from humble beginnings on the edge of poverty. Each had driving ambition and a will to succeed. Each was, in his own way, a genius.

They began as close allies and friends of Franklin Delano Roosevelt, who appointed them to the Supreme Court in order to shape a new, liberal view of the Constitution that could live up to the challenges of economic depression and war. Within months, their alliance had fragmented. Friends became enemies. In competition and sometimes outright warfare, the men struggled with one another to define the Constitution—and through it the idea of America itself.

This book tells the story of these four great justices: their relationship with Roosevelt, with each other, and with the turbulent world of the Great Depression, World War II, and the Cold War. At the same time, another story emerges from the vicissitudes of
their battles, victories, and defeats: a history of the modern Constitution itself. These four men reinvented the Constitution; and they did so along four divergent paths. The triumph of our Constitution is a story of controversy and competition—and of the greatness that can emerge from them in the realm of ideas.
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Faith

In the spring of 1943, with the war raging in Europe and the Pacific, Felix Frankfurter found himself delivering an impassioned lecture to his colleagues in the privacy of the Supreme Court's conference room. The topic was one very close to Frankfurter's heart. He was explaining the difference between a true immigrant patriot—someone who had become a citizen and loved his country above all else; and a fundamentally disloyal immigrant—one who subscribed fully to the beliefs of the Communist Party, and took the oath of naturalization in bad faith, in the hopes of undermining the country that had welcomed him to its shores.

The villain of the piece was one William Schneiderman, whose case was being heard by the Court for a second time. Schneiderman, a Jew by birth, had come to the United States from Russia as a boy of two, and had been raised in Chicago and later Los Angeles in circumstances of dire poverty. He had joined the Young Workers League at sixteen and the Workers Party—predecessor to the Communist Party U.S.A.—at eighteen. At twenty-one he had been naturalized as a citizen. By that time he had become a committed Communist, rising to the rank of secretary of the Party in California. Schneiderman believed U.S. citizenship was perfectly consistent with Communist belief; but the government disagreed. After a disgruntled former Communist denounced him to the House Un-American Activities Committee, the federal government tried to strip Schneiderman of his citizenship. He had been a citizen for twelve years. But the government reasoned that, as a Communist, he could not have taken the oath of naturalization.
Faith

without lying, since he must logically be a "disbeliever in organized government" who was devoted to the overthrow of the U.S. government by force and violence.44

The foil to Schneiderman was Frankfurter himself. Frankfurter was the only justice who had immigrated. He was the only one to have had his citizenship impugned at his confirmation hearings. And he was the only one to have been asked at those hearings whether he was or ever had been a Communist. The superficial similarities between his experiences and Schneiderman's impelled him to differentiate the two of them. He had known innocent fellow travelers, Frankfurter told the other justices—and Schneiderman was no innocent. He was the real thing: a dangerous traitor, whose citizenship should be revoked.45

Frankfurter had special competence on the subject, he maintained, not only because he had known many radicals in his lifetime, but because he, too, was an immigrant. He spoke of his own naturalization as a conversion. Loyalty to the Constitution, he said, was his religion—and "it is well known that a convert is more zealous than one born to the faith."46

Indeed, Frankfurter suggested, Americanism had replaced Judaism in his spiritual life: "As one who has no ties with any formal religion, perhaps the feelings that underlie religious forms for me run into intensification of my feelings about American citizenship." Such citizenship was, he said, a "fellowship which binds people together by devotion to certain feelings and ideals." These could be "summarized as a requirement that they be attached to the principles of the Constitution."47 Schneiderman was not attached to those principles. Therefore, he was no true citizen. The conditions of loyalty had not been met.

Ultimately, Frankfurter's colleagues did not agree with his assessment of Schneiderman. The Soviet Union was by then allied with the United States against Hitler; and although the Court's opinion protested that there was no connection, it was not an opportune time for the country to be stripping Communists of their citizenship. The Court held that because Schneiderman had been a law-abiding citizen for five years after taking the oath, his
citizenship remained valid; and Frankfurter joined a dissenting opinion by Chief Justice Stone.48

But the significance of Frankfurter's protestations on the subject of loyalty were important for another reason: he was being subjected to almost unbearable pressure to admit that he had been wrong in the case of the Jehovah's Witnesses and their refusal to salute the flag. The claim was being based not simply on the principles of liberalism, but on the basis of his Jewish origin. When Frankfurter had written the opinion ruling that towns could require children to salute, it had seemed like a patriotic decision. As a Jew, he had been especially concerned that children not be treated differently in schools on the basis of religion.

Since then, the politics had shifted. The United States was now at war with Nazi Germany—a country whose policies were aimed precisely at suppressing a religious minority. To liberals, tolerance, not saluting, had become the American form of patriotism. Even the previously innocuous-seeming form of the salute, with the right arm extended straight ahead, palm up, was now perceived as too similar to the Nazis' straight armed, palm--down, "Heil Hitler."491

In the spring of 1942, in a case that involved the Jehovah's Witnesses' right to be exempt from a tax on the distribution of pamphlets, Black, Douglas, and Frank Murphy had filed a highly unusual dissent openly regretting their earlier votes in the flag-salute case.50 Then, a year later, the Court overturned Frankfurter's earlier judgment—the first time the Roosevelt Court had reversed itself.

The opinion, elegantly written by Justice Jackson, became an instant classic, famous as much for its aphorisms as its holding. Jackson had not been on the Court when the first flag-salute case was decided, but he had told Frankfurter that he strongly disagreed with his opinion.51 Now he embraced Stone's argument in his original dissent that the goal of judicial review was to protect minorities. "The very purpose of the Bill of Rights," he wrote, "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts....
Fundamental rights may not be submitted to a vote; they depend on the outcome of no elections."52

Jackson's opinion also made it clear that he understood the political symbolism involved in protecting free speech for all—not just the religious liberty of the Witnesses. In particular, Jackson wrote, the children were being protected against having to declare a belief which they did not hold: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."53

Frankfurter took the reversal of his Gobitis opinion as a professional and personal calamity. It was bad enough that the Court had rejected the philosophy of judicial restraint on which he had built his reputation. But it was much worse that the Court was using the flag salute as a metaphor for the Nazis' oppression of Jews. Frankfurter's birthplace and childhood home were now under Nazi control. He believed that he had voted in favor of equal treatment for all, regardless of religion. Now he was being told that, as a Jew, he had made a mistake. Not only his jurisprudence but his selfhood was on the line.

Frankfurter responded with the most agonized and agonizing opinion recorded anywhere in the U.S. reports. Over weeks, Frankfurter compiled pages upon pages of disjointed arguments in his barely decipherable longhand. When circulating a draft could no longer be avoided, his law clerk, Philip Elman—who would later play a key role in the famous desegregation decision, Brown v. Board of Education—strung Frankfurter's notes together over a single long night at the typewriter. In the morning, Frankfurter circulated the unedited draft to the other justices.54

To his colleagues' horror, the opinion began with an excursus into Frankfurter's own identity as a Jew: "One who belongs to the most vilified and persecuted minority in history," he wrote, "is not likely to be insensible to the freedoms guaranteed by our Constitution." He went on to refer to his career as defender of civil liberties: "Were my purely personal attitude relevant I should
wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime."  

Several justices begged Frankfurter not to publish the opening lines of his opinion. Frank Murphy, closely identified with the Catholic Church—and the only other non-Protestant on the Court—told Frankfurter that his opinion was "too personal" and that his words "would be 'catapulting a personal issue into the arena.'  

Frankfurter replied to Murphy that his self-reference would be personal if he were using his identity as a basis for his decision. But in fact, Frankfurter insisted, he was doing just the opposite by asserting that the Constitution required the judge to put aside his particularity. "As judges," he had written, "we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores."  

Owen Roberts also came to Frankfurter, telling him that on reflection he considered the words "more and more a mistake." Frankfurter gave Roberts a lengthier explanation. He had, he said, been "flooded" with letters criticizing his original opinion in the flag-salute case on the ground that "I, as a Jew, ought particularly to protect minorities." Since the issue had come back to the Supreme Court, he had received "a new trickle of letters" telling him that as "a Jew and an immigrant" his duty was to reverse his vote. The letters, said Frankfurter, convinced him that he needed to tell the world that background was irrelevant to the business of the Supreme Court. Frankfurter was trying to express his own tortuous identity: the more anyone told him that he had judicial obligations "as a Jew," the more crucial it became to insist that as a judge he was no more or less than an American.  

Roberts said that he accepted the answer—what else could he say? As he brooded about it, though, Frankfurter found that he was unsatisfied with the exchange. Murphy's concerns about Frankfurter's opening lines could be explained by his desire to deflect attention away from his own Catholic identity. But Roberts was an
ordinary white, Republican Protestant who had no particular stake in such matters, and who was easily influenced by others. Why had he asked Frankfurter to change the text of his opinion?

In his diary—written with future biographers in mind—Frankfurter surmised that Roberts had been put up to it by Black. Although Roberts and Black would later split violently, they were, at the time, good friends; Black and his wife, Josephine, regularly visited Roberts at his Pennsylvania farm.

Black's motives for trying to stop Frankfurter from drawing attention to the personal domain would have been complex. As a former Klansman, he had a reason to want the justices' personal backgrounds to be kept out of Supreme Court opinions. Frankfurter made the point obliquely if ungenerously: "What moved Black I do not know except his general philosophy about not mentioning such things—he is a great fellow for keeping things under cover." This was a reference to Black's hiding his Klan membership from Roosevelt (and everyone else) before becoming a justice. Then Frankfurter pushed it still further: "To me, on the contrary, to keep all reference to anti-Semitism and anti-Catholicism hidden is the best kind of cover under which evil can operate." Anti-Catholicism was, alongside racism and anti-Semitism, a mainstay of the Klan's worldview. In the interests of posterity, Frankfurter was justifying his very public reference to his own Jewishness as a blow against the secret bias he was ascribing to Black.

If Frankfurter's opening was driven by the challenges of his innermost identity, the rest of his opinion sought, furtively, to defend the principle of judicial restraint. Although he sensed it only incompletely, Frankfurter was facing the most important crossroads of his judicial career. For more than a quarter of a century, while conservatives controlled the Supreme Court, Frankfurter had argued that judges must allow democratic majorities to act as they pleased, even when their decisions were fundamentally flawed. Now liberals had a majority on the Supreme Court—and they were arguing that the Court should intervene to protect the rights of minorities. Frankfurter realized that if he remained a stalwart of judicial restraint, he would be condemned by the liberals
whom he had hoped to lead. But having made a career arguing against judicial interference in the majority's decisions, Frankfurter chose to stick to his guns.

The beauty and also the tragedy of Frankfurter's constitutional vision were captured in this stance. Consistency was, for him, the hallmark of good judging. The error of the Court in the *Lochner* era had been to overturn legislation when it served the interests of property owners and capitalists; and Frankfurter had criticized the majority for following its economic and class interests. Now, he felt, he had to show commitment to a principle, regardless of whether he liked the consequences. If judicial restraint had been appropriate when conservatives controlled the Court, it must still be the right doctrine now that the liberals had the votes. Having articulated the theory of judicial restraint echoed by other liberals when they did not control the Supreme Court, Frankfurter found himself the sole liberal advocate of keeping to that theory when it was no longer politically expedient.61

For other liberals, judicial restraint had been simply the right idea for the right moment—a powerful way to criticize a conservative Court that stood in the way of progressive reforms. Now that the conservatives were out of power, the liberals saw good arguments for treating civil liberties as very different from property rights. They already believed the Court should not impose its economic values on the majority. But for the Court to protect religious or racial minorities was different from protecting the minority made up of property owners. These minorities, the liberals came to believe, needed the protection of the courts.

As the other liberals on the Court shifted ground, Frankfurter—to his astonishment—found himself transformed into a conservative. Frankfurter's critics, then and later, have tried to explain how it could be that the country's best-known liberal became its leading judicial conservative. But the source of the change was not Frankfurter, whose constitutional philosophy remained remarkably consistent throughout his career. It was the rest of liberalism that abandoned him and moved on once judicial restraint was no longer a useful tool to advance liberal objectives.62
The question remains, of course, why Frankfurter chose consistency once the writing was on the wall. He was not an ideologue in the years before he went on the Court. If Frankfurter's liberalism was open to revision, why did he not revise the ideal of judicial restraint?

The answer lay in what Frankfurter had told his colleagues during the *Schneiderman* case: that the Constitution had replaced Judaism as his religion. The obligation of the judge was to demonstrate loyalty not to any one particular identity, but to the Constitution itself. When Frankfurter said that “as judges we are neither Jew nor Gentile, neither Catholic nor agnostic,” he was using the language of religion (and a reference to St. Paul) to say that “attachment to the Constitution” was his overarching religious commitment.\(^{65}\)

All religions put their adherents to the test and require sacrifice. Frankfurter’s constitutional religion demanded that a judge reach results that contradict his political preferences. Only then could he be certain that his allegiance was to the Constitution, not the false idols of partisanship. Disinterest could be proven only by way of sacrifice—the sacrifice of voting against one’s political preferences.

To Frankfurter, Holmes personified judicial disinterest. But Holmes’s disinterest derived from world-weary acceptance of the inevitable victory of whatever social forces were destined to prevail. “If in the long run,” he once wrote, beliefs “in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”\(^{66}\) From this it followed that the judge’s job was to stand by and allow social processes to run their course. “If the people want to go to Hell, I will help them,” Holmes liked to say. “It’s my job.”\(^{65}\)

By contrast, Frankfurter’s judicial restraint was driven by a deeply romantic conception of the nature and tendencies of the American people living under conditions of democracy. For Frankfurter, the most astonishing fact about the United States was the liberalism of its people—a liberalism manifested not simply in the public’s embrace of progressive ideals, but also in toleration and a commitment to basic rights. His deep loyalty to the country that
Loyalties

had taken him as an immigrant led him to downplay the racism, prejudice, and other types of illiberalism that could be found in America.

Frankfurter worried that assigning to the Supreme Court the job of protecting liberal rights would relieve the public of the responsibility to protect basic rights on its own, through influencing the legislature. If the Courts should become the institution charged with protecting rights, he feared, the public would cease to care about protecting rights itself. Legislators might pass laws that they knew to be unconstitutional, passing the buck to the courts in the expectation they would strike those laws down. What was more, the courts might eventually lose their legitimacy, since they would be seen as acting against the public, not in fulfillment of its most deeply held values. The right thing to do, therefore, under our basic constitutional structure, was to rely on democratic polity to preserve rights, not for the courts to intervene. In his dissent in the second flag-salute case, he laid out this argument for judicial restraint as explicitly as he ever would again in his career.66

Ultimately, Frankfurter’s loyalty to the American people as he imagined them to be trumped the concern he had for the Jehovah’s Witnesses whose loyalty was being impugned—just as it trumped any concern he might have had for Schneiderman. Frankfurter preferred to wait for the historical moment to pass and for the public to realize the error of its ways. To the extent he believed that loyalty to American values was itself a condition of liberalism, he may even have felt that the Witnesses’ children would be better served by saluting the flag than by abstaining from that ritual. The alternative, he feared, was for the Courts to assume a new role, one that he had rejected when his political views were not those of the majority of the Court. Loyalty to the Constitution was the transcendent principle here—and the sacrifice was proof of that loyalty above all else.
CHAPTER 31

Things Fall Apart

Nineteen forty-six should have been a year of triumph for the followers of Franklin Roosevelt, whose liberalism had led them to victory over the Depression and the Nazis. With the war over and the economy rebounding, the time had come to fulfill the promises of peace. Instead they found themselves beleaguered. From the left, the labor unions, tired of compromise, were aggressively demanding a greater share of the postwar bounty. In the fall, John L. Lewis, president of the United Mine Workers of America, closed every coal mine in the nation for nearly three weeks. From the right, the Republicans were rising. In a sign of the times, Robert La Follette, a Roosevelt supporter who had served Wisconsin in the Senate for twenty years, was defeated by Joe McCarthy, an unknown, thirty-eight-year-old Republican. "This thing isn't running right," Tommy Corcoran observed, as the election returns started to come in.¹ The Republicans took the House and the Senate back from the Democrats for the first time since 1930. A few years later, La Follette would kill himself in the shadow of one of his successor's investigations.

To the liberals who saw themselves as keepers of Roosevelt's flame, the source of the decline was Truman, a mediocrity surrounded by mediocrities. "We've got to have some brains in there," said Lyndon Baines Johnson, in the course of a thwarted effort to bring Douglas into the Truman administration as secretary of the interior. Corcoran, with the assassination of Caesar on his mind, remarked that Truman's motto seemed to be, "Let me have about me men who are not too smart."²
Meanwhile the Soviets' grip over much of Europe was growing stronger. Winston Churchill gave his "Iron Curtain" speech in March 1946. Not until the next year would Truman settle on the doctrine of containing the Soviet Union. Douglas, who considered Truman a "pygmy" when it came to foreign policy, summed up the contemporary view: "Truman was a very ignorant man about world affairs. He was a precinct politician.... What he knew about the world you could put into a peanut shell."

The dispirited feeling extended to Roosevelt's justices. Frankfurter, who had no relationship with Truman, had lost the access to the highest level of power that he had enjoyed uninterruptedly since 1933. Jackson was trying to recover from his self-inflicted humiliation over the chief justiceship. Douglas and Black, too, were out of the loop. "I was out at Bill Douglas' with Hugo... and some others," Corcoran told a friend, "and I couldn't help saying to myself, 'Well, here's a bunch of guys... that had the world in their hands last year, and now they're just a bunch of political refugees... a helpless bunch of sheep.'"

Frustration bred contempt. From allies sipping champagne to celebrate one another's joining the Court, Black, Frankfurter, Douglas, and Jackson had formed camps and become bitter enemies. Frankfurter despised Douglas, whom he called one of the "two completely evil men I have ever met." Reflecting the language of wartime, Frankfurter called Douglas, Black, and Murphy "the Axis." One-upping Frankfurter, Douglas called him "Der Fuehrer." The hatred between Black and Jackson ran so deep that it threatened to ruin the reputations of both men. The friendship between Frankfurter and Jackson seemed to depend more on disdain for Douglas and Black than any closer connection. Douglas and Black voted together but were not intimate friends. For them, common ground meant revulsion for Frankfurter and Jackson.

As their mutual distrust grew, differences of constitutional opinion began to emerge among the liberals. In most of the important wartime cases that came before the Court, these four had managed to pull together. Now the bonds that connected them were broken. The constitutional visions that each had begun to develop would
diverge into four distinct types, each claiming to be the true liberal position.

Alone among the justices, Black viewed the collapse of liberal consensus as an opportunity. Frankfurter's intransigence in the second flag-salute case meant that he had forfeited his natural position of leadership among the liberal justices. Jackson had been soundly defeated after his Nuremberg outburst. Douglas, his attention focused on politics, would provide a reliable vote for almost any position Black wanted to advance. So Black decided it was time to make his mark on the Constitution itself. He would set out to do what Frankfurter had done as a law professor and what Jackson and Douglas, each for different reasons, were predisposed not to do: lay out a comprehensive theory of how the Constitution should be interpreted, and get it into the law books for the ages.

Black’s early efforts at originalist constitutional interpretation were the work of an inspired amateur. After nearly a decade on the Court, he had developed the intellectual discipline and rigor to expound his theory. In 1947, he found an appropriate case in which to do so. On July 24, 1944, someone had broken into the apartment of Stella Blauvelt, a sixty-four-year-old widow in Los Angeles, California. Mrs. Blauvelt was at home when the break-in occurred. The intruder beat her badly, then strangled her with a lamp cord. Her purse was stolen, as were the diamond rings she wore on her left hand. Although she was not sexually assaulted, the top of one of her stockings had disappeared. The police concluded they were looking for a burglar with a stocking fetish.

A month later, the LAPD arrested Admiral Dewey Adamson, an African-American named for the hero of the 1898 Battle of Manila Bay. Adamson, forty-three, had been overheard in a bar offering to sell a diamond ring. In the dresser drawer of his apartment, the police found women’s stocking tops—though none belonging to the victim. A police expert then matched Adamson’s fingerprints with several latent prints found on the door to the apartment, which had been removed from its hinges so that the burglar could enter.

Adamson protested his innocence and insisted he had an alibi
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Fracture

for the night of the murder. Yet at trial he chose not to take the stand. He had served time for two old convictions, one for burglary in 1920, and one for robbery in 1927. Adamson and his lawyer knew that if he testified, the jury of eleven women and one man would find out about his criminal record, which might well prejudice them against him. The stocking tops were admitted into evidence, over the objections of Adamson’s lawyer.

In his summation to the jury, the prosecutor focused on the fact that Adamson had not testified on his own behalf. “He does not have to take the stand,” the district attorney explained. “But it would take about twenty or fifty horses to keep someone off the stand if he was not afraid.” The inference from Adamson’s silence was clear. “If he wasn’t there, where was he? Where was he? . . . He could explain how his prints got on there,” the prosecutor went on. Adamson could have testified, “and he did not do it. You can consider that with all the testimony in this case, and I ask you to consider it.” The jury wasted no time in convicting Adamson of murder and burglary. Adamson was sentenced to death. His attorney appealed.9

In most states, a prosecutor was not allowed to tell the jury that a defendant’s refusal to testify should count as evidence of his guilt. In a federal court, the inference would almost certainly have violated the right against self-incrimination that was contained in the Fifth Amendment.10 In California, however, the rules were different: The prosecutor was allowed to draw the inference. The important question raised by Adamson’s case was whether the Fifth Amendment applied in state court. If it did, Adamson’s conviction would be reversed. If not, he would be executed.

The Supreme Court decided against Adamson. The Bill of Rights had been added to the Constitution as a check on the federal government, not the states.11 The only way one of those rights could be applied in state court would be if it were “fundamental to the concept of ordered liberty”—so basic that no system could be considered just if that right were not recognized. According to the opinion in Adamson’s case, written by Justice Stanley Reed, there was nothing fundamental about the right not to have a prosecutor
tell the jury it could infer guilt from the defendant's silence. Several
years later, after exhausting every avenue of appeal, Adamson was
executed in California's gas chamber.

Black filed a dissent in Adamson's favor. He maintained that the
Fifth Amendment should be applied in state court as well. Adam-
son should get a new trial, one in which the prosecutor would not
be allowed to tell the jury that the defendant's silence was proof
of his guilt. It was not that Black thought the self-incrimination
right was more fundamental than the majority did. The Constitu-
tion, Black argued, demanded that all the guarantees in the Bill of
Rights be applied against the states. Black was doing much more
than calling for a reversal of Adamson's conviction. He was pro-
posing to transform the whole face of constitutional law. If the Bill
of Rights applied to the states, then every action by a state govern-
ment, including every conviction in a state court, would have to be
reviewed to see if it complied with the Constitution.

Black's position flew in the face of precedent dating back to
1873. To back it up, he needed what every good constitutional
theory demands if it is to gain followers: he needed a story. Draw-
ing on months of historical research undertaken completely on his
own, Black provided one.
CHAPTER 32

Originalism

Black's story began in a postwar era not so different from the one in which he was living. The war that had just ended was the Civil War. The defeated enemy was not the Axis powers, but the American South, Black's native soil. As the United States was doing in Germany and Japan, the victorious Union had imposed a military occupation on its defeated foes. As part of the occupation, it aimed to rid the occupied people of their practices of racial discrimination. And just as the United States in Black's own day would impose new constitutions on Japan and Germany, part of the project of Reconstruction was to create a new Constitution that would maintain racial equality in the Southern states—and give the federal government the authority to enforce it in perpetuity.

Black's story had a protagonist: Congressman John Bingham, who represented northern Ohio from 1865 until 1872. For a Southerner like Black, Bingham was an unlikely hero. He had made his reputation as a prosecutor in the military tribunal that convicted eight Confederate sympathizers for conspiracy in the assassination of Abraham Lincoln and hanged four of them, including a woman. Elected to Congress, Bingham became a member of the Republican majority. Although not a radical Republican who believed that the Union should reconstruct the South's entire political, economic, and social system from the ground up, Bingham supported Reconstruction in its essentials. To most white Southerners, from the nineteenth century to the middle of the twentieth, Reconstruction was itself a conspiratorial plot, and the Republicans were
the would-be dictators who had tried unsuccessfully to force it down their throats.

To Black, Bingham and his fellow Republicans were not villains. They were a second set of Founding Fathers. The amendments that they proposed in Congress—and that they insisted the Southern states ratify if they were to be readmitted to the Union—were, in effect, a new Constitution layered on top of the old one. The so-called Reconstruction amendments—numbers Thirteen, Fourteen, and Fifteen—had two purposes, according to Black. One was to “make colored people citizens entitled to full equal rights as citizens.” The other was to turn the Constitution into a truly national document by making the Bill of Rights apply to the states.\(^\text{13}\)

John Bingham had been the principal draftsman of the Fourteenth Amendment. As Black told the story, Bingham had introduced language into Congress that was very similar to the language finally adopted and ratified. It prohibited the states from depriving any person of life, liberty, or property without due process of law, or from abridging the privileges or immunities of citizens. Bingham had explained that his proposal was intended to extend the freedoms of the Bill of Rights so that they applied against state governments. When the amendments were ratified, Black insisted, contemporaries understood that this was the system they were putting into place.

Then Black’s story took a dramatic turn. In 1868, the Fourteenth Amendment was ratified. But just four years later, the Supreme Court took up the first in a series of cases that would strip the amendment of its original meaning. Instead of acknowledging that the words “privileges or immunities” and the concept of “due process” were intended to incorporate the Bill of Rights by reference, the Court began to develop a new, deviant approach. It refused to apply the specific guarantees of the Bill of Rights to the state courts. Instead it began, slowly but surely, to invent different rights—rights protecting property—that appeared nowhere in the Bill of Rights but were attributed to the vague words “due process of law.” This trend, Black hinted, led directly to \textit{Lochner v. New York}, and the hated doctrine of the liberty of contract.
Black never said exactly why the Supreme Court had suppressed the original meaning of the Fourteenth Amendment. But his implication was clear enough. During the presidency of Andrew Johnson, the process of Reconstruction had been abandoned. Segregation had replaced integration. At the same time, in the industrialized Northern states, big business had started to dominate the institutions of government. The Supreme Court had gone along with Congress's abandonment of Southern blacks. And it had happily become an instrument of capitalism, using the Fourteenth Amendment to protect the property rights of corporations.

Black's story included one man who had seen it happening at the time—Justice Joseph Bradley, who in 1873 had written a dissent arguing that the "privileges or immunities" guaranteed in the Fourteenth Amendment must include those found in the Bill of Rights. For Black, Bradley was his frustrated forerunner. His 1873 opinion proved that Black was right about the outrage that had happened several generations before.

Having laid out his tale, Black had to explain why the Court had never told it before. The reason, he said, was ignorance. The Fourteenth Amendment's true "historical purpose," he said, "has never received full consideration or exposition in any opinion of this Court." Before Black, no one had carefully studied the history of how the Fourteenth Amendment was drafted. "The Court had never had that kind of original research before," he proudly told his clerks later.

In support of his claims, Black provided a thirty-page historical appendix. Prepared over the summer of 1946 in anticipation of a case like Adamson's, it cited numerous original sources, speeches taken from the Congressional record and given context by Black's explanation. For a self-taught justice whose first Supreme Court opinions had been subject to derision, the appendix was a powerful vindication. With it, Hugo Black established himself as both a justice in command of a major theory of constitutional interpretation and also as a constitutional historian of the first importance.

It was paradoxical that Black, who believed that any ordinary person should be able to understand the words of the Constitution,
was now relying on unknown history to find out what the words originally meant. In Black’s mind, however, his theory elevated the text of the Constitution over judicial speculation and invention. By showing that the Fourteenth Amendment’s references to “due process” and “privileges or immunities” were really pointing to the words of the Bill of Rights, Black believed he could avoid Lochner’s error of inventing new rights that were not actually contained in the Constitution. At the same time, Black’s approach would expand constitutional rights for defendants like Adamson—a result that liberals badly wanted to reach. By discovering the original meaning of the Fourteenth Amendment, Black thought, he had solved the conundrum of liberal constitutional interpretation.

Frankfurter understood Black’s historical foray in the Adamson case for what it was: a bid for intellectual leadership of the Court. Frankfurter would never stop thinking that Douglas was entirely unprincipled, pursuing his presidential ambitions from the bench and deciding cases solely on the basis of how they would play politically. He had once considered Black as little more than Douglas’s henchman. Now Frankfurter saw that Black was actually a serious intellectual adversary—the only one he recognized on the Court.

Since the second flag-salute case, Frankfurter had understood that his intellectual leadership of the Court was in doubt. His diaries from 1946 to 1947 reflect the doldrums in which he found himself. He wrote regularly about long conversations with his old friend Dean Acheson, who was back in government as deputy secretary of state under Jimmy Byrnes. Looking for a judicial father figure, Frankfurter went regularly to visit the retired chief justice Charles Evans Hughes, with whom he discussed the rising threat from Russia as well as a mutual favorite topic: the great justices of the Supreme Court, their personalities, work, and reputations.

Frankfurter wrote an opinion of his own in the Adamson case, devoted specifically to refuting Black’s claims. He pointed out that the Fourteenth Amendment never actually said it was incorporating the Bill of Rights by reference. And he argued that the framers of the Fourteenth Amendment could not have meant to incorporate by reference the minor guarantees of the Bill of Rights, like
the twelve-man jury, or the availability of a jury trial whenever the amount in controversy exceeded twenty dollars.18

But his separate, anti-Black concurrence, Frankfurter knew, was not enough of a counterpunch. According to Black’s law clerk at the time, Yale Law School graduate and later judge Louis Oberdorfer, upon reading Black’s Adamson opinion, “Frankfurter threw the dissent across the desk to Oberdorfer, scattering the pages on the floor and dismissing Oberdorfer with the words, ‘At Yale they call this scholarship?’”19

The reference to Yale was no more an accident than Frankfurter’s outburst itself. For Frankfurter, the former academic, the law schools were the real audience for Supreme Court opinions—and the primary venue for the making and breaking of judicial reputations. Black had neither attended a famous law school nor taught at one. But with Douglas as his conduit, Black was beginning to develop ties to Yale Law School that would eventually become his answer to Frankfurter’s power base at Harvard.

Frankfurter’s outburst at Black’s historical work reflected the reality that Black had now done more important historical research on the Fourteenth Amendment than he had. Frankfurter liked to present himself as a great expert on the Fourteenth Amendment. In 1943, as Black was beginning to develop the theory of incorporation—by-reference that would emerge full-blown in Adamson, Frankfurter wrote to him a bit condescendingly:

Dear Hugo:

For nearly twenty years I was at work on what was to be as comprehensive and as scholarly a book on the Fourteenth Amendment as I could make it. That book was aborted when I came down here, and now there is nothing to show for those twenty years except the poor things in my head and the mass of largely illegible notes.20

Whether Frankfurter’s book in progress ever really existed outside his mind is doubtful. If it had, he would have been better acquainted with the historical materials connected to the drafting
and ratification of the Fourteenth Amendment than he actually was. To his chagrin, despite his scholarly credentials, Frankfurter was not in a position to disprove Black's story on his own.

What Frankfurter needed was a surrogate who could provide a scholarly refutation of Black's historical claims. Frankfurter turned to Professor Charles Fairman, then of Stanford Law School and later of Harvard. Fairman had been Frankfurter's doctoral student at Harvard. He had written a book on Supreme Court justice Samuel Miller, author of the key 1873 decision rejecting the idea that the Fourteenth Amendment incorporated the Bill of Rights.21 That expertise made Fairman the right man for the job.

Fairman understood that Frankfurter wanted him not only to refute Black's views, but also to deal a blow to an increasingly serious rival for intellectual dominance. He told Frankfurter a story about the nineteenth-century justice Miller, one that Frankfurter liked so much he repeated it to the retired chief justice Hughes. Miller had been complaining about one of his most distinguished colleagues—Justice Joseph Bradley, the man whom Black, in his story, had depicted as his own precursor. "The trouble with Bradley," Miller had said, "is that he does not recognize my intellectual preeminence."22 The parallel to Frankfurter and Black was not lost on anyone.

Working for nearly two years, Fairman produced a lengthy article intended to show that Black's story was wrong.23 He demonstrated that John Bingham, Black's hero, had wavered considerably over the precise effect he intended the Fourteenth Amendment to have. Then, collecting a much wider range of sources than Black had used, Fairman showed that supporters of the amendment said virtually nothing about incorporating the Bill of Rights by reference. In one particularly critical passage, Fairman maintained that Black had drawn unwarranted conclusions from an obscure 1908 book he had used as part his research.24 Black's reliance on the book was perfectly natural, but the blow was effectively placed. To academic readers already inclined to doubt Black's unconventional conclusions, Fairman made Black seem once again like an amateur, corrected by a professional.
Black was frustrated and outflanked. Unlike Frankfurter, who had an army of professors he had been training for a quarter of a century, he did not yet have a large group of professional academics to defend him. He wrote to the one law professor with whom he was close, former clerk John Frank (then at Indiana Law School but soon to be at Yale): “I would thoroughly enjoy engaging in this debate with Mr. Fairman and his associates were I free to do so. I must say that Mr. Fairman’s article reminds me of those advocates who come into court believing that strained inferences conclusively settle a matter.... By my agreeing with the conclusions of [Horace Edgar Flack, author of a 1908 text on the Fourteenth Amendment] in his nearly 300 page argument, it appears that I have committed an unpardonable sin.”

Frankfurter’s recourse to a professional academic historian had worked—for the moment. He did not anticipate that just five years later, when the question of desegregation would come before the Court, that kind of history would become a much greater problem for him than it would ever be for Black.
CHAPTER 33

Crisis and Rebirth

Black had made great progress consolidating his position as an intellectual force on the Court. Yet he still harbored the fantasy of a return to political life. Truman was weak—extraordinarily so. By the end of 1947, talk of a rebellion from within the Democratic Party was rampant.

The source of the frustration was the liberals. New Dealers, Black among them, believed Truman had failed them. Roosevelt's legacy was on the line. Both Eleanor Roosevelt and Franklin Jr. were active in Americans for Democratic Action, a small but significant group aimed at rejuvenating the liberal cause within the Democratic Party. At their convention in February 1948, the ADA members made their insurgency public. They called for open primaries and a chance to unseat Truman.

In this environment, Black traveled back to Birmingham—where he had not lived full-time in fifteen years—to gauge whether he would have any sort of support were he to run for president. The reaction from his confidants was negative. As Black should have realized, he no longer had a base in Alabama. Indeed, it is more a reflection on Black’s ego than his political judgment that he even bothered to ask. The reason it was on Black’s mind was that one of his colleagues had an altogether better chance at the job. As 1948 dawned, Douglas was gathering his forces for what would turn out to be his last crack at the one office he really wanted.

Douglas’s political ambition had not dimmed since he fell just short of the vice presidency in 1944. Now the prospect of either the vice presidency or, if Truman continued to falter, perhaps
the presidency itself seemed entirely realistic. His friend Eliot
Janeway wrote to him that "an army of people... has welded
itself to you as a leader... The momentum of this army will accel-
erate at an increasing rate the next few years. Nothing you do can
stop it."27

The ADA's plan for a revolt against Truman was tailor-made for
Douglas. The liberals might have preferred Dwight D. Eisenhower,
a national hero of unparalleled stature whose political affiliations
were still unknown. But when Eisenhower officially dropped out,
Douglas appeared to be the liberals' natural choice. He had, after
all, been Roosevelt's own preference four years before; and since
then, no other liberal with comparable New Deal credentials had
emerged at the national level.

Frankfurter and Jackson had believed for years that every judi-
cial decision that came from Douglas's pen was calculated solely to
advance his political career.28 If this was so, Douglas's strategy had
apparently worked. When the ADA issued a pamphlet promoting
Douglas, it featured copious citations from his judicial opinions as
evidence of his liberalism.29 From the Supreme Court, Douglas had
succeeded in keeping his political prospects alive.

But challenging Truman was exceedingly difficult. Whether a
failure or not, he was still president, with a strong influence over
his party. In the days before open primaries, the chances of displac-
ing an incumbent as closely connected to the political machine as
Truman were slim. Either Truman would have to step aside, or a
miracle would have to happen at the convention. And as Douglas
should have known from his experience in 1944, the convention
was the worst possible place for a man with no substantial regional
constituency to mount a challenge.

To a rational observer—which Truman certainly was—it must
have seemed that in flirting with the ADA, Douglas was not run-
ning against him but was trying to become vice president, the spot
he had narrowly missed the last time. If this was his goal, it made
perfect sense for Douglas to welcome the sponsorship of the insur-
gen ADA. Truman badly needed support from the liberal wing
of his party, for which the ADA could plausibly claim to speak. If
the ADA wanted Douglas, then Truman could bring the liberals onboard by offering Douglas the vice presidency.

That is precisely what Truman did. In July 1948, with the Democratic convention approaching, Truman sent a series of messengers to offer Douglas the number two spot on the ticket. Douglas rebuffed Robert Hannegan, Clark Clifford, and even Eleanor Roosevelt. Hat in hand, Truman called Douglas himself. Douglas equivocated, taking several days to make up his mind. But finally he declined. Truman settled on Senator Alben Barkley of Kentucky, a staunch supporter of Roosevelt as Senate majority leader and the closest thing Truman could find to a New Deal liberal.

It is puzzling that Douglas turned down the chance of becoming vice president of the United States when the overarching goal of his life had been the presidency. One possible reason is that he was relying too heavily on the advice of Tommy Corcoran, who was still trying to get back into power and still saw Douglas as the man who would bring him there. Corcoran wanted Douglas to defeat Truman, not join the Truman administration. Truman hated Corcoran, and he knew it. Even if Douglas became vice president, Corcoran would not have real influence in the White House.

Corcoran therefore had reason to convince Douglas that it was worth taking a shot at the presidency, but not worth signing on with Truman. His method was to appeal to Douglas's ego. "Bill," he told Douglas in a phone conversation, "you don't want to play second fiddle to a second fiddle." Douglas, who had repeatedly resisted efforts to co-opt him into the Truman administration, could see Corcoran's point. Pretty soon Corcoran's line, often attributed to Douglas himself, was making its way around Washington.30

Truman knew all about it. Hating Corcoran even more intensely than Corcoran suspected, Truman had personally ordered a "national security" wiretap on Corcoran's phone. Three times a week, J. Edgar Hoover would send a special messenger to the White House with transcripts of Corcoran's phone calls.31 The fact that Truman went on to offer Douglas the vice presidency despite knowing about the "second fiddle" crack was a mark of the president's humility—and his desperation.
Beyond Douglas's desire not to be subordinated to a man he considered inferior, there was also the question of whether Truman had a chance of winning. Some of Douglas's comments at the time suggest that he wanted Truman to lose so that he would be left as the party's standard-bearer in 1952. If so, the reason Douglas did not want to accept the nomination for vice president was that he feared Truman might win. Then he would be stuck with an association to Truman instead of being well-positioned to run the next time as his own man.32

At the same time, Douglas also seems to have feared that if he resigned from the bench to run and Truman then lost, he would find himself jobless. Joe Kennedy, his old mentor, reinforced this fear by asking him, "If you ran for vice president, and got licked, as you will, who will provide for your wife and children?"33 Kennedy, of course, had the means at his disposal to promise Douglas the soft landing he needed. A lucrative corporate job would not have been hard to arrange. But by 1948, Joe Kennedy had other reasons for discouraging a vice presidential run by his former protégé. John F. Kennedy was serving in the House of Representatives and would try for a Senate seat in 1952. Counting ahead, Joe could see that putting the charismatic Douglas at the front of the Democratic Party might not serve his son's interests.

But for whatever reason—ego, fear, or the foolish expectation that the convention would dump Truman and draft him—Douglas turned down Truman's offer. After Truman's surprise victory, Douglas realized he had miscalculated. Although in theory he could have run again in 1952, Douglas probably sensed that having been so close to the vice presidency twice, he would not get another chance. Almost immediately, his life began to implode—and through actions of his own devising.

The first intimation of crisis had to do with romance, or what passed for it in Douglas's inner world. In common with Joe Kennedy and his sons, Douglas had for years been an inveterate womanizer. Now for the first time—though, as it would turn out, far from the last—he sought to turn one of his affairs into something more. In the summer of 1949, he proposed marriage to his mistress,
promising to divorce his wife, Mildred.\textsuperscript{34} Married herself, the mistress turned him down. But the mere fact that he had spoken seriously about getting a divorce signaled the beginnings of a personal transformation and the disintegration of his political ambitions. At midcentury the idea of a divorced president was still essentially unthinkable. No Supreme Court justice had ever been divorced. For a man who had for so long cherished hopes of the presidency, the willingness to accept a national scandal was remarkable, to say the least.

Spurned by his mistress and deeply unhappy in his marriage, Douglas traveled to rural Washington State. The trip itself was an opportunity for escape. Douglas often went to the Wallowa Mountains for personal retreat; he had been there the previous summer when he had rebuffed Truman’s advances. In October 1949, just days before he was scheduled to return to the other Washington for the new Supreme Court term, Douglas went horseback riding alone on a dangerous mountain trail.

Douglas loved the solitude of the mountains and the challenges of nature. But he was not a skilled rider, and this time he overextended himself. While climbing uphill, the horse reared, and both beast and rider began to fall down the steep incline. The horse landed on its feet, but Douglas’s injuries were severe. He broke twenty-three ribs and had to be carried off the mountain semiconscious and in shock.\textsuperscript{35} At the Court, where Douglas was not much loved, the life-threatening accident was treated as the setup to a punch line. “Douglas fell off a cliff!” one law clerk told another. “Where was Frankfurter?” went the reply.\textsuperscript{36}

Months passed before Douglas could return to work. When he did he was a changed man, at least with respect to his personal life. By 1954 he would leave his wife and file for divorce. He married his second wife in 1954, a blonde eighteen years his junior. In 1963, after divorcing her, he married his third wife, this one twenty-three years old to Douglas’s sixty-five. The marriage—this time to a brunette—lasted only two years. In 1966, now nearly sixty-eight years of age, Douglas married a twenty-three-year-old college student who was, unsurprisingly, blond as well. He never divorced
this fourth wife but he was consistently unfaithful to her. He spent most of his time with the one who got away, an artist and recent college graduate whom he met around the same time he married wife number four. With this last woman he maintained a long relationship despite (or maybe because of) her refusal to marry him.\(^{37}\)

This pattern of behavior was erratic, to say the least. And Douglas’s unusual personal decisions affected his professional activities. Burdened with multiple alimonies, he was chronically short of cash. His problems were made worse by an unusual clause in his divorce from Mildred, his first wife, according to which the more money Douglas made, the higher the percentage of his income he had to pay in support. The clause had been negotiated on Mildred’s behalf by none other than Douglas’s friend Tommy Corcoran, who called it “a hell of a deal.”\(^{38}\) At the time Corcoran had begged, cajoled, and finally ordered Douglas not to get a divorce that would end his political career. “You don’t have to marry ’em, just sleep with ’em,” he told Douglas.\(^{39}\) When Douglas refused to listen, Corcoran decided to represent Mildred in the divorce, either out of legitimate concern for her plight, as Douglas’s daughter believed, or sheer vindictiveness at Douglas for having wasted the political capital Corcoran had invested in him—the view of Eliot Janeway.\(^{40}\)

As a fluid and fast writer with some political celebrity and increasing name recognition, Douglas found that the best way to make money was by writing books. Given his wide-ranging intellectual curiosity and impatience, Douglas would have written prolifically in any case. But financial pressure dictated the tempo. Working with astonishing speed, Douglas authored more than a dozen books on topics from the pursuit of liberty to exploring the Himalayas and the Soviet Union. Increasingly his favorite topics related to the protection of the environment—a cause for which he would later become a pioneer.

Yet even as his life spiraled increasingly out of control, Douglas’s philosophy of the Constitution grew and developed. Realizing that he was going to spend his life on the Supreme Court concentrated his mind: and whatever else he may have been, Douglas
was brilliant. If fate had put him on the Court for the long haul, he would do what he could to make his mark on its work. Once a presidential future was no longer a realistic possibility, Douglas was freed to become a great justice.

According to the realist theory of the law in which Douglas had been trained and which he still espoused, judges inevitably make the law in their own image. Douglas needed a sense of who he was in order to know what the law should be. Until 1948, his self-image had been bound up in the aspiration to high office, and Douglas lacked a focused constitutional objective. If his opinions had a theme, it was trying to match popular opinion, as he had done in the Japanese-American internment cases. A constitutional realism based on the reality of judicial preference could get him nowhere so long as what he wanted as a judge was not to be a judge anymore.

Now, after 1948, Douglas’s instinct to compromise principle for political gain began to fade. He was unmoored and adrift in his own life—and that freed him to make new constitutional law. Searching painfully for fulfillment and struggling with the norms of conventional society, Douglas settled on a picture of himself as a lone figure, riding toward the Western horizon, making his own fate without the interference of others. From childhood a loner, Douglas cast himself as independent.41 Always struggling with authority, Douglas now self-defined as someone who made his own rules, governed by the philosophy of “Darest Thou.”42

This self-image gave Douglas a unifying constitutional goal: the pursuit of individual freedom. In his emerging vision, the Constitution should be interpreted to give each person the greatest room possible to shape his or her life autonomously, without the intervention of the government. The Constitution, properly understood, was a blueprint for personal liberty. In essentially every constitutional opinion he wrote from then on, Douglas sought to give individuals the maximum degree of personal freedom relative to the government. From 1948 until 1975, when he finally stepped down from the Court as the longest-serving justice ever, Douglas steadily expanded the boundaries of constitutional rights in the
crucial areas of free speech, privacy, and reproductive and sexual freedom.

For Douglas, then, breaking the bonds of personal obligation provided the ideal of rights expansion that made him a great constitutional figure instead of an also-ran. Although he never found happiness in his own life, his personal chaos gave meaning and direction to his liberal constitutional values. Douglas eventually lost the credit for his revolutionary constitutional thought because of the unconventional character of his life. But it was his revolutionary, even unhinged life that allowed him to develop that thought in the first place.

Douglas's robust conception of civil liberties could be seen emerging in a decision he wrote shortly before his fateful ride into the mountains. The case had begun on a chilly evening in February 1946, in the tranquil neighborhood of Albany Park in northwest Chicago. The area was mostly Jewish (it now houses Chicago's Koreatown), but that night an event was planned in a local auditorium that would have few Jewish attendees. Members of an organization known as the Christian Veterans of America, affiliated with Gerald L. K. Smith, the founder and onetime presidential candidate of the racist, anti-Semitic America First Party, had received mailed invitations to a special rally. The featured speaker was to be Father Arthur Terminello.

Terminiello was a Boston-born Catholic priest who had spent his pastoral career as a missionary to poor Alabama farmers. Terminello blamed Southern poverty on a Communist-Jewish conspiracy. Like Father Charles Coughlin, the popular, anti-Semitic radio priest of the 1930s, Terminello spoke and published widely on the subject of saving America from Reds and Jews. Like Coughlin and Smith, Terminello sympathized with fascism and had opposed U.S. involvement in World War II. Spokesman for an organization that claimed some forty thousand members, he was sometimes called the Father Coughlin of the South.

Father Terminello's speech for the evening was titled "Christ or Chaos—Christian Nationalism or World Communism—Which?" When he arrived at the auditorium in Albany Park, a crowd of
somewhere between two hundred and five hundred protesters—some reports said it was fifteen hundred—had gathered to express its disapproval. Its composition would have confirmed Terminiello’s worst suspicions: It was made up of labor union members, members of the Communist Party, and some of the membership of the usually said American Jewish Congress. Armed with banners, the protesters tried to block access to the auditorium. Police escorted attendees as they tried to enter, and some of them had their clothing torn on the way in.43

As Terminiello began to speak, the protest outside turned violent. The crowd threw rocks, bricks, and ice picks, breaking twenty-eight windows in the auditorium. A phalanx of forty boys rushed at the police, knocking some of them down. The door to the auditorium was forced opened. Many people were injured in the mêlée, and nineteen protesters were arrested.44

Inside the auditorium, Terminiello soldiered on, connecting his remarks to the riot that was taking place outside. “I am going to whisper my greetings to you, Fellow Christians,” he began. “I said, ‘Fellow Christians,’ and I suppose there are some of the scum got in by mistake...nothing I could say tonight could begin to express the contempt I have for the slimy scum that got in by mistake.”45 Terminiello then moved on to his subject: “the attempt that is going on right outside this hall tonight, the attempt that is going on to destroy America by revolution.” That revolution, he said, was imminent. “My friends, it is no longer true that it can’t happen here. It is happening here, and it only depends upon you, good people, who are here tonight....The tide is changing, and if you and I turn and run from that tide, we will all be drowned in this tidal wave of Communism which is going over the world.” The crowd inside the auditorium was cheering. According to some reports, shouts of “Kill the Jews” could be heard.46

After the speech was over and protest had wound down, Ira Latimer, the head of the Chicago Civil Liberties Committee, took the action that would lead to a Supreme Court case. Latimer walked to the nearest police station and, with the help of a judge whom he had met at the protest, rounded up a judge, a bailiff, and
a court clerk. At 11:30 p.m., Latimer swore out warrants for the arrest of Terminiello and two of the meeting’s organizers on the charge of breach of the peace. It was an unusual choice for a civil libertarian to seek the arrest of an unpopular speaker. The Chicago Civil Liberties Committee, however, was not a regular affiliate of the ACLU. The previous year it had withdrawn from the national organization after being threatened with expulsion for Communist tendencies.\(^7\) Latimer wanted to deflect attention away from the violence of the protest and focus on Terminiello as the person who had provoked it.

The Chicago police arrested Terminiello. A local judge told the jury that a conviction for breach of the peace could occur when the accused “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance.”\(^8\) The priest was convicted and sentenced to pay a one-hundred-dollar civil fine. He appealed on the ground that his right to free speech had been abridged.

To Douglas, the case turned on the purpose of the First Amendment. The judge had told the jury that in Chicago, it was unlawful to invite dispute. It followed that the conviction should be overturned. After all, he wrote, “a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.”\(^9\)

Douglas’s analysis amounted to an aggressive expansion of the circumstances in which free speech could be used as a principle to limit government action. The Court had held several years before that a speaker’s right to provoke his audience was not absolute. A speaker who used what the Court had called “fighting words” could be prosecuted for his speech.\(^5\) All the lawyers in the Terminiello case had focused on whether or not the priest’s speech should be counted as fighting words. All assumed that the Supreme Court’s decision would depend on whether the Court thought that listeners would have been driven to use their fists when confronted by Terminiello’s invective.
Douglas, however, sidestepped the issue completely. In his opinion, all that mattered was what the judge had said to the jury; that, he insisted, was where the constitutional analysis should be focused. The legal realists had long believed that court was where the law got done. The definition of law, according to Holmes, was "what the courts will do in fact." If a court could convict you for inviting dispute, then you lacked the right to invite dispute. Such a reality was not compatible with the Constitution, Douglas thought, and there was the end of it. It did not matter whether the lawyers had made this argument. What mattered was that the First Amendment should protect debate. Black joined Douglas's opinion, as did three other justices, giving Douglas a bare 5–4 majority.

Frankfurter saw the opinion as an abdication of judicial restraint. In his dissent, he criticized Douglas for ignoring what every lawyer and judge who had been involved in the case from the outset had thought the case was about. Ordinarily, appellate courts rule only on arguments that the parties make in court. Never before in the 150-year history of the Supreme Court, Frankfurter claimed, had the Court completely ignored the parties' arguments to overturn a state-court judgment on grounds it had invented out of whole cloth. Whether Douglas's decision was entirely unprecedented or not, Frankfurter was on to something. Douglas had a constitutional objective to promote. He could not care less what the rest of the world thought about it—and that certainly included the lawyers and the judges in the state courts who had dealt with Terminiello's conviction.

Meanwhile, from the pragmatic standpoint of enabling the police to control potential riots, the Terminiello decision seemed little short of crazy. Jackson fired off a frustrated dissent. To him, the events in Albany Park were the American version of the struggle between fascists (Terminiello) and Communists (the protesters). "This was not an isolated, spontaneous and unintended collision of political, racial or ideological adversaries. It was a local manifestation of a worldwide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which their kind has devastated Europe."
Jackson's railing about revolutionary fanatics may have sounded alarmist, but he had a reason for his concerns. At the Nuremberg trials, he had made a deep study of the rise of Nazism during the Weimar Republic. The Nazis had struggled with the Socialist and Communists for control of the streets. Jackson understood that whoever controlled the streets was halfway to controlling the state. Hitler had said as much in Mein Kampf, which Jackson quoted, the only time that work appears in the Supreme Court's reports. "It is not by dagger and poison or pistol that the road can be cleared for the movement," Hitler had advised, "but by the conquest of the streets. We must teach the Marxists that the future master of the streets is National Socialism, just as it will some day be the master of the state." They laughed at Hitler, Jackson noted, but "the battle for the streets became a tragic reality when an organized Sturmabteilung [i.e., Stormtroopers] began to give practical effect to its slogan that 'possession of the streets is the key to power in the state.'" In Weimar Germany, Hitler's tactics had undeniably worked. The liberal state there had been, Jackson believed, too liberal for its own good, too fragile in the face of a fundamental challenge to its authority.

Of course postwar Chicago was not prewar Europe. Jackson was seeing an America threatened by forces whose consequences he had seen firsthand. Fascism was a spent force. As for Communism, the question of how serious the internal threat really was would preoccupy the justices in the years to come.
CHAPTER 37

Clear and Present Danger

By the time the case reached the Supreme Court under the name Dennis v. United States, the composition of the Roosevelt Court had changed substantially. Although five justices were Roosevelt appointees, Truman had by 1950 named four justices of his own. One of them, Tom Clark, could not participate in the case, because he had himself initiated the prosecution while he was attorney general. The others—Chief Justice Fred Vinson, Justice Harold Burton, and Justice Sherman Minton—all voted to affirm the convictions that were a product of Truman administration policy.

One Roosevelt holdover, Stanley Reed, joined these three Truman men. Since only eight justices were sitting on the case, these four votes guaranteed that Learned Hand’s opinion would be upheld and that the Communist leaders would stay in prison. Chief Justice Vinson’s opinion applied the “clear and present danger” test just as it had been glossed by Hand. The four very average judges who signed the opinion deemed it the best course to rely on the famous judge.

Roosevelt’s four leading justices, however, could not accept the Court’s opinion—and for four different reasons. Frankfurter and Jackson each produced concurring opinions that accepted the convictions, though not for the reasons expressed by Learned Hand and adopted by the Court. Black and Douglas each wrote important and memorable dissents. Each of the men was eager to express his distinctive constitutional philosophy—and to distance himself from Truman’s unpopular policies.

Black’s opinion was the simplest. In a ringing and concise
dissent—two pages to Frankfurter’s forty-two—Black came as close as he ever would to announcing that the right to free speech was absolute. He based his argument on the text of the First Amendment: “Congress shall make no law... abridging the freedom of speech.” Black would walk around his office reciting a catechism to himself: “What does the Constitution say?” went the question. “It says ‘no law,’” went the answer. “That means no law. It doesn’t make for any exceptions.” For Black, the key to the case was simply that the Smith Act flatly prohibited speech.

Once again, Black was defying precedent. Applying Holmes’s “clear and present danger” test, the Supreme Court had never taken the command of the First Amendment literally. As usual, he was willing to jettison precedent, even when it came from the pen of the great Holmes. If the doctrine did not match the text, then the doctrine must be wrong.

To abandon the clear and present danger test in favor of absolute free speech was an act of constitutional bravery—and like most such acts, it left the hero unguarded and alone. Even Douglas, usually friendly to Black, could not agree with him: “The freedom to speak,” he wrote in his own dissent, “is not absolute.” As Holmes had explained in formulating the “clear and present danger” test, the First Amendment could not possibly protect someone who falsely shouted fire in a crowded theater. Frankfurter charged Black with the sin of formalism: “Such literalness treats the words of the Constitution as though they were found on a piece of outworn parchment,” or as “barren words found in a dictionary.”

Frankfurter considered Dennis “a great case”—the kind that posed a fundamental conflict “of the utmost concern to the well-being of the country.” On the one hand was the inherent right of the state “to maintain its existence” against a serious threat. On the other hand was the right to free speech, which Frankfurter had supported during his long association with the ACLU. Indeed, one of the Communist leaders who had been convicted, William Z. Foster, had served with Frankfurter on the ACLU national committee—and Frankfurter had been questioned about him in his confirmation hearings.
Grasping for a solution to the conflict between self-preservation and freedom, Frankfurter turned to his master theory: judicial restraint. In the presence of a conflict of values, Frankfurter reasoned, it was not up to the Court to “balance the relevant factors and ascertain which interest is in the circumstances to prevail.”36 Courts, after all, are not “representative bodies. They are not designed to be a good reflex of a democratic society.”37 Responsibility for balancing the competing interests of self-preservation and free speech lay with Congress. Of course the Court could overturn the law if it so chose, but Frankfurter advised against it: “We must scrupulously observe the narrow limits of judicial authority even though self-restraint is alone set over us.”38

Frankfurter understood perfectly well that the CPUSA posed little threat domestically. He quoted George Kennan, the country’s most prescient student of the Soviet Union and the author of Truman’s doctrine of containment. “The American Communist party is today, by and large, an external danger,” Kennan had written in the New York Times Magazine. “It represents a tiny minority in our country; it has no real contact with the feelings of the mass of our people; and its position as the agency of a hostile foreign power is clearly recognized by the overwhelming mass of our citizens.”39

Acknowledging that the Communist leaders were basically harmless, Frankfurter wanted to duck the question of whether they belonged in jail. He could, he thought, uphold the Smith Act and the convictions without endorsing this sort of crude anti-Communism. He wanted to believe he was following Holmes, who had patented the trick of saying that a given law was a bad one while simultaneously upholding it as constitutional.

But there was a catch. In all his writing on the freedom of speech, Holmes had never said that the courts should defer to the legislature. Neither had Brandeis, Frankfurter’s other judicial hero. Frankfurter had always claimed that judicial restraint was the invention of these two great justices and of Professor James Bradley Thayer. But now he was forced to confront the one area where Holmes and Brandeis had both been activist. Both men believed that the courts should carefully review restraints on free speech,
permitting them to remain in place only when there was, in fact, a clear and present danger.

Frankfurter could not admit that he was deviating from the legacy of Holmes. As Douglas once cruelly joked, "Know why Frankfurter never had any children? Because Holmes didn't." So Frankfurter tried to claim that he was actually applying the "clear and present danger" test flexibly, as Holmes would have: "It does an ill-service" to Holmes, Frankfurter wrote, "to make him the victim of a tendency which he fought all his life, whereby phrases are made to do service for critical analysis by being turned into dogma." This was a striking piece of overreaching, especially for someone who had devoted his life to emulating Holmes. The "clear and present danger" test was designed to protect free speech from encroachment by government authorities armed with broad legislative authority. Holmes could not credibly be made into an advocate of deference to the legislature with respect to the First Amendment.

Frankfurter had allowed the theory of judicial restraint to take him outside of Holmes's legacy. In so doing, he found himself misrepresenting Holmes and Brandeis in the bargain. When forced to choose between his mentors and the theory he had invented to explain them, he went with the theory. Instead of looking principled, Frankfurter ended up looking benighted. His theory of judicial restraint itself came to seem like a cover for his tolerating violation of the most basic civil liberties. Frankfurter would pay dearly for this deviation. Black pointed out the problem in his opinion: If the Court defers to a "reasonable" judgment by Congress to abridge free speech, then the First Amendment is no longer a law, but "little more than an admonition to Congress." Although he did not know it, Frankfurter's decision in the Dennis case marked the moment that he could no longer be fairly described as a liberal.

If Frankfurter in the Dennis case was misled by his own constitutional theory, for Jackson the case was a test of whether a country lawyer turned international statesman could apply his own pragmatism correctly. His early experience with domestic anti-
Communism had left him skeptical of its efficacy. As a young man in Jamestown, he had been a member of the American Protective League, formed originally in 1917 as an auxiliary to the Department of Justice in order to ferret out pro-German sentiment across the country. Jackson considered the League's activities amateur and absurd; after the war, the League became anti-Communist and antilabor, which Jackson later called "a complete perversion of its original purpose."44

During his year at Nuremberg, however, Jackson had seen Communism from a different angle. The Soviet lawyers and judges with whom he worked were, he knew, taking their orders from Moscow. In occupied Germany, with its different zones controlled by different states, it had been obvious how the world was becoming divided between the Soviets and the Western powers. More than his colleagues, Jackson had been exposed to the ground zero of the Cold War—and he felt he understood the operation of Communism firsthand.

Jackson began his opinion by acknowledging that under the "clear and present danger" test as it had been formulated some thirty years before, the Communist leaders could not be found guilty. The test, he explained belonged to the age of "anarchist terrorism"—of Sacco and Vanzetti. Anarchists, Jackson explained, lacked coordinated plans, and so it made sense to deal with them by prohibiting their speech only when it was in danger of causing imminent harm.

Communism, on the other hand, was something entirely different. The "antithesis of anarchism," it relied on a highly disciplined cadre of leaders to coordinate the long-term takeover of the government it sought to subvert. "The Communists," Jackson wrote, "have no scruples against sabotage, terrorism, assassination, or mob disorder; but violence is not with them, as with the anarchists, an end in itself. The Communist Party advocates force only when prudent and profitable. . . . Force or violence. . . . may never be necessary, because infiltration and deception may be enough."45

With his single year of formal legal education in Albany, Jackson had not been a protégé of Holmes and had no instinct to treat
him as a legal god. Holmes was for him simply a judge of a previous generation, whose “clear and present danger” test was obsolete. If it were used, it would mean “that the Communist plotting is protected during its period of incubation,” and that “its preliminary stages of organization and preparation are immune from the law.” The government would be allowed to make arrests “only after imminent action is manifest, when it would, of course, be too late.”

Like his opinion in the case of the anti-Semitic priest Terminello, Jackson’s argument drew from what he had learned about the rise of Nazism. “Totalitarian groups,” he wrote, “perfected the technique of creating private paramilitary organizations to coerce both the public government and its citizens.” Jackson, led astray by his own experiences, concluded that what had happened in Europe could happen at home. “The Communist Party realistically is a state within a state, an authoritarian dictatorship within a republic,” he wrote. The CPUSA and its Soviet handlers might have aspired to such discipline and power, but they were very far from achieving it.

His assessment of the Communist threat was not the only part of the Dennis opinion in which Jackson was influenced by Nuremberg. He also drew on the trial for what he considered the cure. The right tool to combat the Communists’ long-term strategy, Jackson argued, was to put them on trial for conspiracy.

“The basic rationale of the law of conspiracy,” he explained, “is that a conspiracy may be an evil in itself, independently of any other evil it seeks to accomplish.” Conspiracy law made sense because Communism was itself a conspiracy—an ongoing, collective enterprise designed to accomplish the takeover of government by any expedient means. The essence of the conspiracy charge was to impose responsibility on different people within complex organizations for the actions of all. At Nuremberg, Jackson had argued that Nazism itself amounted to the greatest criminal conspiracy the world had ever known.

Douglas put no stock in Jackson’s use of conspiracy at Nuremberg. Earlier in the year, in a case involving investigation of
subversive groups, Douglas had lashed out at what he called "guilt by association." It was, he said, "one of the most odious institutions of history"—un-American and unconstitutional. "The fact that the technique of guilt by association was used in the prosecutions at Nuremberg does not make it congenial to our constitutional scheme. Guilt under our system of government is personal. When we make guilt vicarious you borrow from systems alien to ours and ape our enemies." Douglas had a point. At Nuremberg, Jackson had been participating in a trial that included the Soviets, who considered law strictly as a tool for political ends.

Now, in his Dennis dissent, Douglas went after Jackson once more. "Invoking the law of conspiracy," he charged, "makes speech do service for deeds which are dangerous to society." It turned mere words into acts of sedition: "Never until today has anyone seriously thought that the ancient law of conspiracy could constitutionally be used to turn speech into seditious conduct. Yet that is precisely what is suggested."

As Douglas took pains to demonstrate, the CPUSA defendants had been accused of nothing more than speaking. The men had taught the doctrines of four Communist texts. These books were perfectly lawful in the United States. If they could be on the shelves, Douglas asked, how could it be a crime to teach what was in them? Douglas admitted that the Communist leaders believed the teachings of the books in question, but to rely on that charge to convict them was "to make freedom of speech turn not on what is said, but on the intent with which it is said." This, in essence, was mind control.

Douglas had always claimed to be the true heir to Brandeis. Now he invoked that legacy with pride, quoting Brandeis's most trenchant free speech passage: "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears." While Jackson was pontificating about world communism and Frankfurter was flailing in a maelstrom of theory, Douglas embodied the values of Brandeis. The mantle of liberalism had passed to his shoulders.
The essence of Douglas's liberal free-speech theory was that advocating ideas was different from conduct. The state has the power to prohibit "teaching the techniques of sabotage, the assassination of the President...the planting of bombs...and the like." It did not have the authority to prohibit abstract ideas. "I repeat that we deal here with speech alone, not with speech plus acts of sabotage or unlawful conduct. Not a single seditious act is charged in the indictment." The absence of action made all the difference. In violation of liberal principle, the leaders of the CPUSA were being convicted only for their ideas.

Douglas did more than insist on the all-important difference between ideas and action. He provided an original explanation for why the liberal state must protect ideas, even those that might seem dangerous: "The airing of ideas releases pressures which otherwise might become destructive....Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart." Threatening ideas could not be suppressed without creating potentially destructive pressures on the whole system. Allowing the unspeakable to be spoken would, Douglas suggested, safeguard the civilization against destruction from within. The argument reflected Douglas's familiarity with the version of Freudian psychology that he had experienced himself when George Draper cured him of his fear of peritonitis.

Not content with abstract arguments for free speech, Douglas also gave a practical one. Jackson had emphasized the tremendous threat of Communism worldwide. But Douglas insisted that Communism was not a threat domestically, because it lacked popular support. "Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state, which the Communists could carry." And why was Communism so unpopular in United States? "Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party." Douglas was arguing that liberal democracy could only be subverted through a broad-
based popular movement. To believe that Communists "are placed in such critical positions as to endanger the Nation is to believe the incredible," Douglas wrote. In the event of war with Russia, "they will be picked up overnight as were all prospective saboteurs at the commencement of World War II." In fact, the CPUSA was "the best known, the most beset, and the least thriving of any fifth column in history."65

The upshot of Douglas's profession was that liberalism must rest itself on the will of the people. "Our faith should be that our people will never give support to these advocates of revolution, so long as we remain loyal to the purposes for which our Nation was founded."66 Seen in these terms, it would actually be unpatriotic to interpret the Communist threat as dire. True patriotism relied upon the enduring power of popular support for liberal values and ideals.

Douglas's argument effectively repudiated the paranoia that gripped even liberal anti-Communism in the early 1950s. In the face of speculation—much of it in retrospect well justified—that international Communism sought to take advantage of liberalism in order to subvert it, Douglas insisted that liberalism was more than strong enough to resist the challenge. As Jackson and Frankfurter doubted the strength of liberalism, they began to stray from the values they had once striven to protect. Douglas kept his eye on the ball, never believing that Communism could make serious inroads into American society. History vindicated his opinion. The major reason Douglas emerges as a hero of liberalism in the anti-Communist moment is simply that he was right.
1. The quotation is often attributed to Oliver Wendell Holmes Jr. See, for example, Max Lerner, Nine Scorpions in a Bottle: Great Judges and Cases of the Supreme Court (New York: Arcade, 1994). But there is no evidence Holmes ever said it or anything like it. For the attribution to Bickel, see Dennis J. Hutchinson, "The Black-Jackson Feud," *Supreme Court Review* 1988: 203, 238. Kent Olson of the University of Virginia Law School Library points out that in the July 1953 issue of *Foreign Affairs*, J. Robert Oppenheimer compared the US-USSR arms race to "two scorpions in a bottle, each capable of killing the other, but only at the risk of his own life." Oppenheimer, "Atomic Weapons and American Policy," *Foreign Affairs* 31 (1953): 525, 529. Olson writes: "This metaphor received some coverage in the newspapers at the time, and the application to the Supreme Court may well have started out as a play on Oppenheimer's phrase." Bickel was a law clerk from 1952 to 1953, and so would have been finishing his clerkship when Oppenheimer used the phrase. Kent Olson, personal communication to the author, July 22, 2009.

**Book One  CONTACTS**


4. President William McKinley was shot on September 5, 1901, and died on September 14, 1901.

5. A comparison of the membership of the Institute of 1770 and the *Crimson* editorial board for 1903, 1904, and 1905, shows that between one-third and one-half of the *Crimson* board members had been chosen for the Institute. For FDR's experiences see Karabel, *The Chosen*, 14–15.

42. White, "Felix Frankfurter's 'Soliloquy,'" 434.

43. Ibid. Here was an express statement of one component of the doctrine of judicial restraint. Constitutional questions, according to Frankfurter, should be avoided because the Court would inevitably impinge on the other branches of government in deciding them. Justice Brandeis had in fact given formal expression to this notion in a case where he suggested that the Supreme Court should not reach constitutional questions unless obligated to do so. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345–56 (1936). More than sixty years later, John Roberts, as a judge on the D.C. Circuit before his elevation to chief justice, would express essentially the same idea in the pithy formulation that "if it is not necessary to decide more, it is necessary not to decide more." PDK Laboratories Inc. v. DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

44. See Schneiderman v. United States, 320 U.S. 118 (1943); for the facts concerning his age and background I have relied on William Schneiderman, Dissent on Trial: The Story of a Political Life (Minneapolis: MEP Publications, 1983), 11–16, 84.


46. Id., 211.

47. Id., 211–12.


49. In Jackson's opinion in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 627–28 (1943), the Court noted objections to the salute on these grounds—objections unmentioned in Gobitis.


51. The Secret Diary of Harold L. Ickes vol. iii, 199 (entry for June 5, 1940) ("Apparently there was a good deal of feeling between Bob Jackson and Felix" over the opinion at a dinner hosted by Archibald MacLeish.")

52. Barnette, 319 U.S. at 638.

53. Id. at 642.


55. Barnette, 319 U.S. at 646–47.

56. Frankfurter, Diaries, 254.

57. Ibid.


59. Ibid.

60. Ibid.

65. Holmes to Harold Laski, May 13, 1919, in Mark DeWolfe Howe, ed.,
*The Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J.
67. The most up-to-date scholarly work on the Japanese internment is Greg
York: Columbia University Press, 2009). See also Greg Robinson, *By Order of
the President: FDR and the Internment of Japanese Americans* (Cambridge: Harvard
University Press, 2001); and Wendy L. Ng, *Japanese American Internment During
World War II: A History and Reference Guide* (Westport, CT: Greenwood Press,
2002); Eric L. Muller, *American Inquisition: The Hunt for Japanese-American
On the legal aspects of the case, the definitive source remains Peter Irons,*Justice at War* (New York: Oxford University Press, 1983). For an overview of the
Japanese-Americans who brought the test cases, see Robinson, *A Tragedy of
Korematsu: The Japanese-American Cases,” in *Constitutional Law Stories* (see
book 2, note 74), 231, 247–251. On Yasui, see the oral history of Yasui in John
Camps* (New York: Random House, 1979), 62–93; on Yasui’s family, see Lauren
Kessler, *A Stubborn Twig: Three Generations in the Life of a Japanese Family*
69. See the oral history of Endo in Tateishi, *And Justice for All*, 60–61; see
70. Steven A. Chin, *When Justice Failed: The Fred Korematsu Story* (Austin,
TX: Raintree, 1992), 70.
71. See, for example, “Nips Work Prisoners to Death in Jumbles,” September
1, 1945; “Nip Ship Sunk Off Solomons,” March 2, 1943; “Jap Girl Awarded
Vacation Wages,” December 28, 1943 (all from the *Los Angeles Times*).
72. Attack on Pearl Harbor by Japanese Armed Forces, S. Doc. No. 77-2, at
73. Irons, *Justice at War*, 45.
Demanded on Coast Danger,” *New York Times*, Feb. 15, 1942; “Pacific Coast
78. *Hirabayashi*, 320 U.S. at 93 (quoting Charles Evans Hughes, *War Powers
resign, leading Biddle to comment in a letter to his wife that “this is not new.”
Taylor, Anatomy of the Nuremberg Trials, 359.
88. Ibid.
90. Id., 78.
91. Jackson was as well-dressed as ever in Nuremberg. In most images he
wears a suit in lieu of the tailcoat and striped flannel trousers affected by Fyfe;
but in at least one image he is sitting at the prosecution table wearing the formal
striped trousers and dark coat.
Trials Changed the Course of History (New York: Palgrave Macmillan 2007), 81;
Biddle, In Brief Authority, 385.
93. Biddle, In Brief Authority, 384-86.
95. Cf. Dennis J. Hutchinson, “The Black-Jackson Feud,” Supreme Court
96. Id., 215. Hutchinson says that there was a column, but research reveals
this is inaccurate; no such column appeared on that day—it therefore must have
been a radio broadcast.
98. Id., 341 and 680 n.7.
Washington Post, April 26, 1946, 7.
101. Jackson, Reminiscences, 1207-08. Eagleton was the father of Thomas
Eagleton, who would serve as Democratic senator from Missouri and briefly
be George McGovern’s running mate, only to lose the spot on the ticket when
revelations of his treatment for mental illness became public.
103. Frank Sher to R.HJ, May 17, 1946, cited in Hutchinson, “The Black-
Jackson Feud,” 216.
105. Lewis Wood, “Split of Jackson and Black Long Widening in Capital,”
108. Biddle, In Brief Authority, 163.
109. Id., 411.
110. Ibid.

Book Seven  FRACTURE
1. Janeway, The Fall of the House of Roosevelt, 80-81 (quoting transcripts of
Corcoran’s wiretapped phone conversations).
2. Id., 61 (LB)J, 77 (Corcoran).
5. Simon, *Independent Journey*, 217, quoting Elizabeth Peck, “The Mind of a Maverick,” *Newsweek*, November 24, 1976. I have not been able to identify the other person to whom Frankfurter may have been referring.
8. Harrison, “The Breakup of the Roosevelt Supreme Court” (see book 4, note 50), 165, deserves credit for noticing the way these allies fractured. For Harrison, the cause lay in several “lessons” the justices had learned from their experiences as liberals during the 1920s and 1930s.
10. See *Adamson v. People of State of California*, 332 U.S. 46, 55 (1947) (“Generally, comment on the failure of an accused to testify is forbidden in American jurisdictions.”); id. at 50 (assuming without deciding that the inference would violate the Fifth Amendment if the trial were held in federal court).
16. Black had been able to rely for some material on an obscure historical book, Horace Edgar Flack, *The Adoption of the Fourteenth Amendment* (Baltimore: Johns Hopkins Press, 1908). Otherwise the research was original.
17. *Adamson*, 332 U.S. at 63 (Frankfurter, J., concurring).
18. Id. at 65.
22. Frankfurter, *Diaries*, 312. In Frankfurter’s diary for April 25, 1947, when the justices were still working on their *Adamson* opinions, Frankfurter recorded his conversation with Hughes. Not only did the two men discuss Fairman,
but Frankfurter reported Justice Samuel Miller's remark about Justice Stephen Bradley, his great nineteenth-century rival. Fairman had also stuccied Bradley; see Aynes, "Charles Fairman," 1213.

23. Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," Stanford Law Review 2 (1949-1950): 5. The piece appeared as the lead article in the second-ever volume of the Stanford Law Review. In one respect, Fairman's research actually strengthened Black's case. He pointed out that one senator supporting the Fourteenth Amendment had actually said outright that it would incorporate the first eight amendments of the Constitution by reference. Black had mentioned this passage in his original appendix without fully emphasizing its significance. Id., 57-58.

24. Flack, The Adoption of the Fourteenth Amendment.


26. Newman, Hugo Black, 383. Newman emphasizes Black's personal fondness for Truman (id. at 380, 385); but this is at odds with his apparent interest in supplanting him and with his at least partial alliance to Douglas and Corcoran, who disdained Truman.


28. In his diaries, Frankfurter related an exchange with Justice Reed about the role of politics on the Supreme Court. Reed insisted that politicians like Hugo Black could not ignore their political instincts just because they joined the Court. Frankfurter's reaction was, "But what about Bill Douglas? You can have no such excuse for him. He's never been a politician, he was a professor." Reed, in Frankfurter's telling, replied, "But he is a politician now. . . . I had assumed he had put all thoughts of the Presidential nomination in '44 out of his head, but plainly not." See Frankfurter, Diaries, 184.

29. See Murphy, Wild Bill, 254.

30. Id., 255.

31. Id., 240-41.

32. Id., 258, comments to Eliot Janeway.

33. Id., 263.

34. Id., 271.

35. Id., 274.

36. Id., 276-77, citing interview with a law clerk.

37. On these peregrinations see id., chapters 24, 30, and 32.


41. Douglas, Go East, Young Man, 39; see White, The American Judicial Tradition (see book 2, note 118), 371, identifying the themes of "loneliness, fear, and the strengthening and calming effects of the wilderness."
44. Ibid.
45. *Terminiello v. Chicago*, 337 U.S. 1, 16–17 (1949)
46. Schmidt, ""The Dilemma to a Free People,"" 520.
50. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); the rule has never been directly followed by the Court afterward.
51. *Terminiello*, 337 U.S. at 23 (Jackson, J., dissenting).
52. *Terminiello*, 337 U.S. 1, 24–25, internal citations omitted.
58. Id. at 791.
60. *Johnson*, 339 U.S. at 796.
61. Id. at 797.
62. Id. at 798.
63. Id.
64. In a telling footnote, Black explained that his vision of a people who ""choose to maintain their greatness by justice rather than violence"" came from Rome. Id.

**Book Eight COMMUNISM**

3. Id., 31.
5. Benjamin Jefferson Davis, *Communist Counsellor from Harlem: Autobiographi-
Notes

7. Davis, Communist Councilman from Harlem, 222.
9. Davis, Communist Councilman from Harlem, 222.
17. Id., 323.
19. John Earl Haynes & Harvey Klehr, Venona: Decoding Soviet Espionage in America (New Haven: Yale University Press, 2000), 15. Eugene Dennis was mentioned just twice in the intercepts, without enough context to show him guilty of anything. Id. at 222. Browder, the former CPUSA general secretary who was not tried, was mentioned in twenty-six messages and implicated in espionage. Id. at 210.
24. Douglas, Go East, Young Man, 332. Francis Biddle, attorney general at the time, would also write that he “heard later that [FDR] resented what he called the ‘organized pressure’ in Hand’s behalf.” Biddle, In Brief Authority, 194.
27. United States v. Dennis, 183 F.2d 201, 213 (2d Cir. 1950).
30. Id. at 581 (Douglas, J., dissenting).
31. Id. at 521.
32. Id. at 523.
33. Id. at 519.
34. Id.
36. Dennis, 341 U.S. at 525 (Frankfurter, J., concurring).
37. Id.
38. Id. at 526.
41. Ibid.
42. Dennis, 341 U.S. 494, 580 (Black, J., dissenting).
44. Id., 121.
45. Dennis, 341 U.S. at 564–65 (Jackson, J., concurring).
46. Id. at 570.
47. Id.
48. Id. at 577.
49. Id.
50. Id. at 573.
52. Dennis, 341 U.S. at 584 (Douglas, J., dissenting).
53. Id.
54. Id. at 583.
55. Id. at 583.
56. Cf., privacy cases, On Lee v. US and streetcar case, discussed in Murphy, Wild Bill, 312.
58. Dennis, 341 U.S. at 581.
59. Id. at 584.
60. Id.
61. Id. at 588.
62. Id.
63. Id. at 589.
64. Id.
65. Id.
66. Id. at 591.