September 17, 1937, was 150 years to the day after the Constitution’s drafters signed the document they proposed to the nation. It was also one month to the day after the Senate confirmed Hugo Black’s appointment to the Supreme Court. Franklin Roosevelt used the occasion to expound his views on the Constitution, in a speech that drew on but substantially transformed a draft submitted by Felix Frankfurter and Thomas Corcoran. Beginning with references to “communistic” and “military” challenges to constitutionalism in Europe and the Far East, Roosevelt implicitly countered charges that he was pursuing a dictatorial line by emphasizing that the Constitution “was a layman’s document, not a lawyer’s contract,” designed to “meet the insistence of the great mass of our people that economic and social security and the standard of American living be raised….” He mocked “lawyers distinguished in their day” who had contended that the Louisiana Purchase, the protective tariff, the Missouri Compromise, and much more were unconstitutional. These contentions were overruled by “the Executive and the Congress” and by the “War Between the States.” Referring to the “switch in time,” Roosevelt observed that “fifty-eight of the highest priced lawyers in the land gave the Nation … a solemn and formal opinion” that the Wagner Act was unconstitutional. “And in a few months, first a national election and later the Supreme Court overruled them.” Adopting a formulation suggested by Frankfurter and Corcoran, Roosevelt observed that the Supreme Court itself was sometimes dominated by “the Odd Man” – the fifth and therefore odd vote that was simultaneously odd because divorced from the layman’s common sense.1

The Constitution Day speech was preoccupied with the Supreme Court’s doctrines that obstructed the exercise of national power to promote economic security and prosperity. It restated one of the themes of Roosevelt’s commonwealth Club address during the 1932 campaign, that “individual liberty and individual happiness mean nothing unless both are ordered in the sense that one man’s meat is not another man’s poison.” Economic security led to political security, on Roosevelt’s account.2

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Roosevelt did not omit mention of civil liberties and the Bill of Rights, but each reference was followed by a “but” that returned attention to government power. “When the Framers were dealing with what they rightly considered eternal verities,” such as the Bill of Rights, “they used specific language…. But when they considered the fundamental powers of the new national government they used generality.” Again, “No one cherishes more deeply than I the civil and religious liberties achieved by some much blood and anguish through the many centuries of Anglo-American history. But the Constitutional guarantees liberty, not license masquerading as liberty.” And again, “The present government of the United States has never taken away any liberty from any minority…. But the government of the United States refuses to forget that the Bill of Rights was put into the Constitution not only to protect minorities against intolerance of majorities, but to protect majorities against the enthronement of minorities.” Before his conclusion’s assertion that we “revere” the Constitution “because it is ever new,” Roosevelt observed:

Nothing would so surely destroy the substance of what the Bill of Rights protects than its perversion to prevent social progress. The surest protection of the individual and of minorities is that fundamental tolerance and feeling for fair play which the Bill of Rights assumes. But tolerance and fair play would disappear here as it has in some other lands if the great mass of people were denied confidence in their justice, their security and their self-respect.3

Any listener would understand the Roosevelt administration’s priorities. Civil liberties and civil liberties got appropriate lip service, and the administration was not affirmatively opposed to civil rights and civil liberties as liberals and Progressives understood them. But, the administration placed much greater weight on articulating a view of the Constitution that would support the New Deal’s economic initiatives. Each new Roosevelt appointment consolidated the modern Democrats’ control of the Supreme Court. And each reflected the administration’s priorities – economics, not civil liberties and civil rights. The new Justices were chosen for their positions because Roosevelt, his advisers, and the Senate believed that they were going to be reliable supporters of the constitutional arguments supporting New Deal’s core programs and the attendant expansion of national power.

Roosevelt nominated Black because he was a staunch New Dealer who had fought hard for a federal minimum hours law.4 Black may have joined the Ku Klux Klan simply because he was an ambitious Alabama politician, and may have concealed his membership because he was an ambitious national politician, but his stance on racial politics could hardly have been placed on the

23, 1932, in Public Papers and Address of Franklin D. Roosevelt, full citation, p. 755.

3 Ibid.

4 For a more extended discussion, see Chapter --- above.
“liberal” side of the balance sheet. Neither did his aggressive conduct of the Senate investigation into business support for organizations opposing Roosevelt demonstrate deep sympathy with claims that his tactics came close to the constitutional line. The balance sheet, though, was clear: Positive on national power, and no better than blank on civil rights and civil liberties. That was good enough for Roosevelt. The same could be said for Stanley Reed, whose nomination was a reward for his direction of the Department of Justice’s defense of the New Deal, and his mastery of the constitutional doctrines supporting the New Deal.

William O. Douglas’s nomination rested on the same ground. Born in Minnesota, Douglas moved with his family to Washington state, where he was raised by his mother after his father died when Douglas was six years old. Struggling with poverty throughout his early years, Douglas managed to work his way through Whitman College in Walla Walla, and then taught school for two years. Then he made his way east to Columbia Law School, beginning to craft the partly true, partly mythological story of his life he was to tell thereafter. At Columbia he did well enough to expect a clerkship with Harlan Fiske Stone, although he later joked with his constitutional law teacher Thomas Reed Powell that Douglas had been a valued member of the “C Club” of indifferent students in the class. After practicing law with a major Wall Street firm, Douglas began his teaching career at Columbia Law School, which he left after two years to join the Yale Law School faculty. During his short academic career, Douglas co-authored five casebooks on corporate law and bankruptcy, as well as several freestanding articles on small business and large corporate bankruptcies. These technical specialties lay near the core of some New Deal initiatives. Statutes and regulations that failed to take account of the intricate mesh of corporate law would inevitably be undermined by the perfectly lawful exploitation of loopholes by the ingenious – and well-paid – lawyers employed by major corporations. Douglas’s brilliance as a technical lawyer made him an invaluable participant in the New Deal’s restructuring of the economy, first as a member and then as chair of the Securities and Exchange Commission.5

When Justice Brandeis announced his retirement, Roosevelt wanted to nominate a Westerner. The prime candidate was Senator Lewis Schwellenbach of Washington, regarded by the business community as a dangerous radical. Douglas’s early years rather than his recent residence on the east coast were enough to make him an alternative. While observing that Douglas was “a stubborn and at times a hard man” with “strong personal prejudices” he had exhibited at the SEC, conservative Arthur Krock of the New York Times welcomed the nomination as “the most reassuring” of the possibilities. Krock publicized Joseph Kennedy’s view and those of “many of the most important men in business and finance” that Douglas was “the most practical and fair cooperator with legitimate business at present in the government, … devoted to American institutions and traditions, to the capital and profit systems.”

Liberals were even more enthusiastic, especially after Douglas gave a speech denouncing America’s financiers. Harold Laski wrote Roosevelt that he “threw up my hat with joy” over the nomination. Frankfurter told Laski that Douglas would bring “a sense of history in the service of a dynamic sociological outlook” to the Court, and wrote Charles Wyzanski that Douglas was “historic-minded about the law, but also knows that history is not a tale of dead things but part of a dynamic process.” Perhaps the “dynamic process” would include civil rights and civil liberties, but that implication, if it be there, was deeply concealed. As political scientist Walter Murphy put it, “Douglas’s views on civil rights and liberties were unknown, even to himself.” What mattered that Douglas knew corporate law backwards and forwards.

A collection of Douglas’s speeches and public statement published shortly after he took his seat on the Supreme Court consisted of long essays and testimony on business bankruptcies and the regulation of public utility holding companies. Buried in discussions of modern administrative law sounding Progressive themes one could find a nugget or two hinting at something about civil liberties. “We operate under the law,” Douglas wrote. “That means full opportunity for a hearing by the accused. It also means a fair trial and a careful weighing of the evidence by us.” More surprising from an administrator than such pabulum, and again hinting at broader possibilities, Douglas described the choice between “outright prohibition” of business practices and “a do-nothing policy” as “un-American in their philosophy.” For him, the “American tradition” was “to insist on keeping to an irreducible minimum regimentation in any form, particularly a ‘thou shalt not’

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regimentation.” Writing in 1938, Douglas referred to the “tidal waves of intense nationalism [and] the explosion of racial and class emotions,” for which the “antidote” was “[e]nlightenment. … Democracy will be as vigorous as it is informed.” Again, pabulum, but pointing in a liberal direction on what might come before the Court in the form of free speech problems.8

[discussion of Frankfurter nomination].

Only Frank Murphy was an obvious civil libertarian when nominated. After an undistinguished academic career at the University of Michigan, Murphy worked in a Detroit law firm and served as an assistant United States attorney in the early 1920s. In 1924 he was elected to a judgeship in Detroit’s criminal court, where he presided over the trial of Dr. Ossian Sweet, an African American charged with but ultimately acquitted of murder for shooting one of the rioters who were trying to force him out of his newly purchased home in a previously all-white neighborhood. Murphy’s progressive views on the bench led to a successful campaign for Detroit mayor in 1930. Roosevelt appointed him to position in the Philippines, which had traditionally been stepping stones to prominent positions in the United States as well. Returning from the Philippines in 1935, Murphy was elected Michigan’s governor in 1936. He served only one term, defeated because of the state’s labor unrest as the United Automobile Workers attempted to organize workers at the major car manufacturers. Roosevelt then appointed him Attorney General, where one of his major initiatives was the creation of a civil liberties section within the Department of Justice (later renamed the civil rights section to avoid confusion with the American Civil Liberties Union). A devout Catholic and an affable man-about-town, Murphy had an instinctive grasp of issues of civil rights and civil liberties. But, appointed in January 1940, Murphy had few opportunities before Hughes’s retirement eighteen months later to do more than sketch an approach that would reconcile the New Dealers’ skepticism about judicial review in economic matters with his support for civil liberties and civil rights.9

Taken as a group, Roosevelt’s appointees began to develop modern constitutional liberalism beyond its origins in a defense of national power, though their path was made more difficult by their predecessors’ construction of constitutional liberalism around a defense of national power by means of a

8 Democracy and Finance: The Addresses and Public Statements of William O/ Douglas as Member and Chairman of the Securities and Exchange Commission (James Allen ed., New Haven: Yale University Press, 1940), pp. 84, 243, 266. For Progressive themes, see id. at pp. 245 (“In a dynamic, fast-moving economic system responsible government must have a reserve of such powers if it is to save capitalism from its own complexities.”), 245-46 (delegations of power have “no specter of unbridled discretion, no element of dictatorship.”).

criticism of judicial review. They supported labor unions by upholding the National Labor Relations Act and giving it labor-favoring interpretations. But, their attitudes toward civil liberties and civil rights were collateral to the reasons for their appointments. Though the Roosevelt appointees were generally sympathetic to the positions taken by most of the New Deal’s long-established and emerging constituencies such as labor unions and African-Americans in the South, and to the free-speech claims asserted by political radicals, they faced a serious problem in their constitutional theory. They had a well-developed criticism of judicial decisions striking down New Deal and similar programs. Such decisions, they believed, were inconsistent with the nation’s commitment to democratic self-government. As Justice Stone put it in *United States v. Butler*, “Courts are not the only agency of government that must be assumed to have capacity to govern.”

Applied to issues of civil liberties and civil rights, the Roosevelt appointees’ constitutional theory similarly counseled against invalidating statutes seeking to advance a legislature’s understanding of the public good, even when the statutes dealt with speech or race. Their predecessors had gone along, sometimes somewhat diffidently, with the invocation of the Constitution to protect political dissidents. Notably, though, many of the decisions were written by their conservative adversaries, who saw some degree of civil libertarianism as consistent with their moderate economic libertarianism. Others were written by Chief Justice Hughes, self-consciously charting a course that would satisfy both sides of the Court he led. Justices Holmes and Brandeis had become icons for their defense of free speech in *Gitlow* and *Whitney*, but neither had a fully developed account of why courts should intervene in such cases but not in cases asserting violations of other – economic – constitutional rights. Indeed in neither case did the dissenters adequately address the claim accepted by the majority, that legislatures should be given a fair amount of deference when they invoked the police power. The Court’s liberals believed that its conservatives were inconsistent in deferring to legislatures in cases like *Gitlow* and *Whitney* while giving them little deference in the New Deal cases. They may have been correct, but inconsistency can be resolved in two ways – put overly broadly, deference across the board, or no deference in any category of cases. Simply switching deference from one to the other category would recreate the inconsistency.

The Progressives’ deeper theories about judicial review counseled against importing into constitutional law the moralism Progressive politicians brought to social policy. The basic text to which Progressive-influenced jurists reverted was Holmes’s dissent in *Lochner*. They understood that its observations that “a constitution is not intended to embody a particular economic theory,” but was “made for people of fundamentally differing views,” and that “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics*” expressed a broader skepticism about moralism in

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10 *United States v Butler*, 297 U.S. 1, 87 (Stone, J., dissenting).
constitutional adjudication.\textsuperscript{11} When their adversaries relied on the Constitution to invalidate economic legislation the Progressives favored, the Progressives would not disarm unilaterally, but would use the Constitution to protect the values they favored. This stance, though, was reactive and conditional. Their approach to constitutional adjudication pushed them in the direction of avoiding inconsistency by deference across the board. Yet, once Roosevelt’s appointees took charge on the Court, the temptation to use their new power for what they regarded as good ends was strong.

From 1937 to 1941 the Roosevelt justices tried to work out a way of dealing – or more precisely, they struggled over several ways to deal – with civil liberties cases that would allow them to rule in favor of the New Deal’s constituencies while still deferring to legislative choices about economic regulation. They sketched some lines of argument, but they disagreed among themselves about which arguments were better, and, at bottom, about whether the game was worth the candle. Perhaps deference across the board really was the position that constitutional liberals should take.

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Progressive politicians spoke a moralistic language of serving the public interest. The term “the interests,” in scare quotes and used pejoratively, pervaded David Graham Philips’s celebrated expose \textit{The Treason of the Senate}, published in 1906.\textsuperscript{12} As historian Daniel Rodgers put it, “The Interests were, by definition, alien and predatory sores on the body politic.”\textsuperscript{13} In 1908 a young journalist from Illinois published a book, \textit{“The Process of Government,”} that offered a different perspective on politics. A Progressive himself who supported Robert LaFollette in 1924, Arthur Bentley sought to banish from political analysis any concern for reason and rational argument.\textsuperscript{14} For Bentley, politics was about groups: “When the groups are adequately stated, everything is stated. When I say everything I mean everything.” Groups “push[ed]” against each other and “resist[ed]” the pressures they felt. Public policy simply was the result of these pressures, nothing more – not the expression of the

\textsuperscript{11} 198 U.S. 45, 76, 75 (1905).

\textsuperscript{12} David Graham Phillips, \textit{The Treason of the Senate} (George E. Mowry & Judson A. Grenier eds., Chicago: Quadrangle Books, 1964 [originally published 1906]). The word \textit{interests} without scare quotes on the book’s second page, followed by “interests” on the same page, and “the interests” thereafter. See id. at pp. 59, 80.


public good, not the result of reasoned argument nor of pragmatic experimentation.15

Bentley thought that he was making a contribution to the philosophy and methodology of the social sciences,16 not to political science itself, and his work had little immediate impact. As Rodgers puts it, “The Process of Government fell so far outside the conventional language of political science that the profession scarcely noticed it” because “describing the polity as, by nature, an open market of interests, as a set of factions held together only by the politics of compromise was alien to the common talk of Progressives.”17 Harold Laski, a British political theorist with a large Progressive following, introduced the term pluralism to theoretical discussions in the United States, and John Dewey used the term as well. For Laski and Dewey, though, “pluralism” was an almost metaphysical description of what political theorists referred to as the State, not a description of how groups interacted in practical politics. As intellectual historian John Gunnell observes, in the early 1930s Progressives continued to hold “the nineteenth-century image of popular sovereignty as embodied in the invisible people designated by the ‘state.’”18

Gradually, though, the idea that politics was group-based in Bentley’s sense gained traction among political theorists responding to what they saw happening in politics. John Dickinson, a leader among younger scholars of public law,19 published an article in the American Political Science Review in May 1930, criticizing a “system of democratic theology” that saw public policy as the reflection of an undifferentiated public opinion. Throughout the article Dickinson referred to interests in entirely neutral terms. “The only opinion,” he wrote, is that of “special groups.” For him, the “task of government … is … to effect adjustments among the various special wills and purposes which at any given time are pressing for realization.” Government


17 Rodgers, note --- above, at pp. 185, 186.


19 For additional discussion of Dickinson and his views, see Chapter --- below.
was “an arbitrator” among contending interests, and it should be organized so that “the conflicting interests in a community will themselves be made to bear some part of the responsibility for reaching through political action the adjustments by which they are expected to abide.” He concluded, “Government … is bound to be in the long run far more a reflection of the balance of interests in the community than an agency capable of making the community reflect the independent will and purposes of the governors.” For that reason, “the influence which the various interests … exert on government should be organized into the orderly processes of democracy [rather] than allowed to assert themselves irregularly and sporadically through the methods of absolutism.”

Dickinson did not defend interest-group bargaining, and indeed thought that it could occur only within a political setting in which effective leadership organized the competition, but his analysis stripped “interests” of its pejorative overtones, and at least offered some glimpses of pluralist bargaining as the primary mode of policy-making.

Roosevelt himself saw things in much the same way – a vision that imperfectly blended the older Progressive tradition with ideas about leadership and interest-group bargaining. In 1934 Roosevelt told a group of administrators of the NRA codes that the Depression showed that there had been “little consideration for the social point of view” and that “the operations of government had fallen into the hands of special groups.” The NRA, according to Roosevelt helped “strike the equitable balance between conflicting interests.” The first comment was Progressive, the second could become pluralist. The NRA’s proto-corporatist structure, in which the government served to organize bargaining between organized labor and organized capital, served in a weaker version as a model for interest-group bargaining throughout politics.

In law, the Legal Realist Karl Llewellyn opened his 1934 article, “The Constitution as an Institution,” by saying that “Bentley saw and said in 1908 all that should have been necessary to force constitutional law theory into total reconstruction.” Llewellyn admired Bentley mostly for Bentley’s insistence that behavior, not ideas, mattered in politics, a position obviously congenial to the Legal Realists. But, embedded in Llewellyn’s rambling essay were sections on specialists, including judges and the bureaucratic experts admired

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by Progressives, the general public, and what Llewellyn called “interested groups[,] aggregations of people more or less organized around some interest, who direct pressure upon the specialists or the general public in furtherance of their own particular desires.” A later section on those groups had only two paragraphs, which focused on “the pressure of these interested groups.” When “effectively organized,” the groups’ “organization is effectively applied where it will do them the most good.” Llewellyn catalogued what interest groups do: “persuade administrators, …lobby bills, … ‘educate’ the public, … [and] offer generous aid in framing and forcing the issues of political campaigns.” For Llewellyn, it was “hard, without them, to see how our government would govern.” Yet, Llewellyn concluded, interested groups were not mentioned in the Constitution, “save under an obsolescent clause” in the First Amendment protecting the people’s right to assemble and petition the government for redress of grievances. “And even this clause touches only that relatively ineffective fraction of the Interested Groups which has to ‘assemble’ in order to bring its grievances, or wants, to bear.”

Llewellyn was highly respected within certain legal circles, but he was unquestionably quirky, and constitutional law was outside his main area of specialty, contract and commercial law. His article, like Bentley’s work, had little immediate impact. Interest-group pluralism gained a stronger foothold in political science. E. Pendleton Herring, a young political scientist, broke the ground with his study in the 1920s of lobbying in Congress. In 1933 Herring published an article on “Special Interests and the Interstate Commerce Commission,” in which he wrote, “the public interest cannot be given concrete expression except through the compromise of special claims and demands…. Special interests cannot be banished from the picture, since they are the parts that make the whole.” After teaching at Harvard University for several years, in 1940 Herring published an enormously influential overview of the American political system, focusing on the political parties. To Herring, the parties and so the entire political system were founded on interest groups and pressure groups. Though “pressure politics” was “commonly treated” as a “grave danger[] to democracy,” he wrote in the book’s foreword, “organization” – by which he meant “[g]roups and associations of citizens” – “is essential to political party activity.” And, “The general welfare is achieved by harmonizing and adjusting group interests. Pressure groups representing the community broken up into its occupational and economic interests call attention to the forces that must be reconciled and the differences that must be compromised.” References to interest groups were scattered through the book.

23 Id. at pp. 19 (emphasis omitted), 25-26.

Herring’s most focused discussion of their role came, perhaps unsurprisingly, in his chapter on “The Limitations of Debate,” whose topic was an implicit challenge to the Progressive vision of policy-making as reasoned decision-making. For Herring, “Our elected officials are themselves the product of various group interests. … Faced with the conflicting demands of employers, farmers, industrialists, workers, veterans, and the unemployed, the politician can throw his weight to one group or the other. He can promote a combination of group interests, but he cannot greatly alter the materials with which he must work.”

John Chamberlain, a book reviewer for the New York Times passing through interest-group liberalism on his way from Progressivism to libertarianism, wrote a full-throated defense of pressure groups in 1940. “[T]he pressure group,” Chamberlain wrote, “is absolutely necessary to the functioning of an industrial democracy.” They were “the watch-dogs of democracy,” putting forth demands that the state had to compromise. There was no “Good of the Whole” independent of such compromises. For Chamberlain, politicians were brokers, “specialist[s] in estimating pressures and in ‘weighting’ their importance.” Chamberlain hinted as the implications for constitutional law of interest-group pluralism. Government would always “favor whichever group-coalition has won the election,” so the “real test” of government “is: ‘Has the way been left open for my group to fight for what it conceives to be its rights?’ If the way is still open, then we have democracy.”

By the late 1930s, interest-group liberalism was in the air though it had not crystallized into a coherent and complete alternative to Progressivism. Older justices like Stone and Hughes retained their Progressive inheritance, but the younger Roosevelt appointees began to move away from Progressivism toward interest-group liberalism. That movement affected the way they thought about civil rights and civil liberties.

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Without any serious effort to develop a general account of what it was doing, the Court in the 1920s and early 1930s began to use the Due Process Clause as the vehicle for enforcing against the states constitutional rights that were enforced against the national government through specific provisions in the Bill of Rights. Justice Sanford “assume[d]” in Gitlow that freedom of


speech was “among the fundamental personal rights … protected by the due process clause,” and Justice Holmes agreed, “in view of the scope that has been given to the word ‘liberty’ as there used.” In Whitney two years later Justice Brandeis was a bit more grudging, saying that it was “settled that the due process clause … applies to matters of substantive law,” including “all fundamental rights comprised within the term liberty” – this, “[d]espite arguments to the contrary which had seemed to me persuasive.” By the time the Court decided Near v. Minnesota, it was “no longer open to doubt that the liberty of the press … is within the liberty safeguarded by the due process clause….” The Scottsboro cases invoked a right to counsel – and more, a right to effective counsel – found in the due process clause but also in the Sixth Amendment.27

Justice Cardozo synthesized these cases for the Court, in a case arising out of a sensational murder of two police officers. But, before that Justice Cardozo had dipped his toe into the water in another murder case involving an ordinary gas station robbery gone wrong. Police focused on four suspects in the killing of James Kiley at his gas station in April 1931. Shortly after the killing they arrested James Garrick and another suspect, holding them in jail for almost a year before trial. In the meantime the police sought two other young suspects, James Donnellon and Herman “Red” Snyder. In 1932 they located Donnellon in California and Snyder in Pennsylvania, and brought them back to Boston. In April 1932 Garrick confessed after learning that his wife had died. The case against Donnellon and Snyder was straightforward. Along with Garrick’s testimony against the young men, the prosecution presented evidence that Donnellon and Snyder had both told the police that they had robbed the gas station, and the only real question was whether Donnellon or Snyder had fired the shot that killed Riley, but as a legal matter that was irrelevant under the “felony murder” rule, which made every participant in a felony liable for any deaths during the felony’s commission. Snyder’s lawyer presented an insanity defense, buttressed by some of Snyder’s behavior in the courtroom – a “rampage” in the courtroom, when he threw an inkwell at a witness and “shriek[ed]” at the prosecutor --, but the defense was undermined by Snyder’s testimony that he never had “spasms” or fits, and he appeared quite calm on the stand. The jury delivered its judgment in “the quickest first degree murder verdicts ever returned in Middlesex County, and Donnellon and Snyder were sentenced to death.28


The events that brought the case to the Supreme Court took place on the trial’s first day. The judge allowed the jury to take a “view” of the gas station. Frank A. Volpe, the prosecutor, pointed out various features at the scene, as did Snyder’s lawyer Abraham Webber, a former assistant district attorney in Boston. The judge denied Snyder’s request that he himself be taken to the scene, to observe what the jury saw. From Snyder’s perspective, the “view” was simply evidence presented during his trial; just as he had the right to be present when a witness testified, his lawyers argued, so he had the right to be present when the jury obtained evidence in a different way. The state courts, Snyder’s lawyer had argued, had recognized a defendant’s right to attend a view in such famous cases as that involving Lizzie Borden and, more recently, in the Sacco-Vanzetti case. Massachusetts’s highest court rejected the argument, saying that “the view is not a part of the trial, it being suspended while the view is taken,” and that the decision to allow a defendant to attend a view was left to the trial judge’s discretion. Snyder’s lawyers repeatedly filed requests for stays of execution. When all other paths had been exhausted, they went to Justice Brandeis at his summer home on Cape Cod, and Brandeis entered a stay on July 5, 1933.29

With the assistance of several other lawyers, Webber presented Snyder’s case to the entire Court.30 The argument was straightforward. Defendants in criminal cases had a fundamental right to be present during their trials. The jury view took place during the trial, and the judge told them that “the view was evidence” they could use as they considered the case. Ever since jury views had been allowed in criminal cases, starting in the mid-1800s, nearly every court that had considered the question had concluded that defendants had a right to attend a view, though some held that the right could be waived. Webber appended a list of cases from twenty-four states holding that defendants had a right to attend a view, and another appendix distinguished a handful of cases seeming to say that defendants did not have that right. This long-standing and “unbroken practice” coupled with the timing of the view meant that Snyder had a right under the due process clause to

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30 Among the others was Lewis H. Weinstein, who went on to become a prominent litigator at the Boston law firm Foley, Hoag & Eliot after working as general counsel to the Boston Housing Authority. “L.H. Weinstein, 91, Advocate for Jews,” New York Times, Oct. 27, 1998, p. ---.
attend the view: “A most fundamental requirement of a fair and just trial … is the necessity of the personal presence of an accused in a capital case at every stage of the trial.”31 Notably absent from the argument was anything about what the defendant could do at the view. And probably for good reason. Webber himself was at the view, and he could see everything that Snyder might have seen. Perhaps a guilty defendant could tell his lawyer how the scene differed from the way it was when the crime was committed, but that is not an argument a defense lawyer would want to deploy.

Volpe responded for the state that the state supreme court’s position “is supported by respectable authority and is maintained by many state courts.” Those courts held that “the view is not a part of the trial,” which was “suspended” while the view was taken, a proposition confirmed by the fact that under Massachusetts law the judge was not required to be present at the view (although the judge in Snyder’s case had voluntarily attended the view). Unlike Webber, Volpe did discuss practical matters: “The chief purpose of a view is to enable a jury to understand better the testimony” they would hear, and defense attorneys could “point out” features of the scene that the jury might not notice and otherwise ensure that “nothing irregular was done,” but the defendant himself had nothing to add. Volpe asked, “How could the place viewed by cross-examined?” A defendant who thought that he could help his lawyer understand what the jury had seen could “visit the scene” himself. Quoting the Supreme Court’s precedents, Volpe argued that the right to attend a view was not ‘fundamentally ingrained in the ‘principles of liberty and justice which inhere in the very idea of free government.’” Probably his most effective precedent was one in which the Supreme Court had found no due process violation when a judge gave supplemental instructions to a jury while the defendant was absent. Volpe blamed Webber for failing to ask the judge to let Snyder view the gas station at some other time, and wrapped up his presentation with an effective summary of why it made sense to keep Snyder away from the scene while the jury was there: “there was considerable public feeling in the community” against Snyder, “a crowd of onlookers might well gather around the premises,” and in the jury’s presence the crowd might express its “animosity or disfavor” toward Snyder.”32

According to one report, the Justices at the oral argument “showed keen interest” and “asked counsel on both sides numerous questions concerning the facts.”33 Two months after argument, a divided Court upheld


33 “Snyder Pleas in Supreme Court,” Daily Boston Globe, Nov. 8, 1933, p. 15.
Snyder’s conviction. According to his biographer, Justice Cardozo had initially voted to reverse Snyder’s conviction, but changed his mind as he worked on the opinion, converting a narrow majority to overturn the conviction to a narrow majority to uphold it. Cardozo’s opinion for a five-judge majority began by restating the standard for determining whether due process was violated: Did the denial of the right to attend the view “offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”? A state’s procedure “does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser….”

Justice Cardozo then “assume[d] in aid of” Snyder that he had a right “to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” That explained why the Court had held, or assumed, that defendants had a right to be present at various specific moments in a trial: during cross-examination of witnesses, during examination of jurors, during counsel’s closing arguments. At those times the defendant could “give advice or suggestion or even … supersede his lawyers….” But, Cardozo continued, there was nothing in the cases to suggest that Snyder had a right to be present “when presence would be useless, or the benefit but a shadow.” Justice Cardozo’s discussion explained the focus during oral argument on the facts, to which his opinion turned. Cardozo explained that “[t]here is nothing [Snyder] could do if he were there, and almost nothing he could gain.” The fact that the lawyers at the view were allowed to “point out particular features of the scene” introduce a minor “difference … of degree, and nothing more.” Cardozo relied on centuries of practice in civil cases allowing views directed by official “showers,” who could explain the scene to the jurors. “The situation is not changed … because the showers in this instance were the counsel for the parties.”

According to Justice Cardozo, “the viewpoint of history … clarifies the prospect.” It revealed that “a view is not … any part of a trial…..” The judge did not have to be present, and the historic practice was to have “a committee of the jurors,” not all of them, attend the view. Cardozo’s discussion of history ended with a caution: “To transfer to a view the constitutional privileges applicable to a trial is to be forgetful of our history.” That introduced a more general jurisprudential observation, compatible with his broader views.

A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation


\[35\] Id. at 105-6, 106-7, 110, 113.
is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence. … Let the words ‘evidence’ and ‘trial’ be extended but a little, and the privilege will apply to stages of the cause at which the function of counsel is mechanical or formal and at which a scene not a witness is to deliver up its message. In such circumstances the solution of the problem is not to be found in dictionary definitions … [or] in judgments … in other circumstances.36

Where then was the answer to be found? Cardozo offered a three-fold classification. Sometimes constitutional rights were “conferred so explicitly as to leave no room for an inquiry whether prejudice … has been wrought through their denial.” And, some “privileges, even though not explicit, may be so obviously fundamental as to bring us to the same result.” As to the rest, Cardozo said, the question was “whether in the particular conditions … the enforced absence of the defendant is so flagrantly unjust that the Constitution of the United States steps in to forbid it.” On the facts in Snyder, Snyder’s absence from the view did not cause him any harm, much less flagrant injustice. Cardozo’s concluding words recalled his celebrated phrase written as a state judge when he denied that evidence should be suppressed when a police officer violated the law in obtaining it: “The criminal is to go free because the constable has blundered.” Snyder ended with a sentence indicating that the Court should be careful to avoid decisions that might produce similar disrepute: “There is danger that the criminal law will be brought into contempt – that discredit will even touch the great immunities assured by the Fourteenth Amendment – if gossamer possibilities of prejudice … are to nullify a sentence … and set the guilty free.”37

Justice Roberts wrote a dissent that Justices Brandeis, Sutherland, and Butler joined. That the dissenters were one liberal, one centrist, and two conservatives indicates the complexity, or inaccuracy, of the classifications, at least as applied to the problem at hand. Justice Roberts offered a formulation similar to Cardozo’s: Due process required “the observance of that standard of common fairness, the failure to observe which would offend men’s sense of the decencies and proprieties of civilized life.” “Our traditions,” state constitutions and legislation, and decisions by state courts, Justice Roberts wrote, “unite in testimony that the privilege of the accused to be present throughout his trial is of the very essence of due process.” The functional reasons Justice Cardozo offered to explain why Snyder’s presence at the view would not have helped him were irrelevant to Justice Roberts. A defendant could not cross-examine his own witnesses, but no one would “suggest[] that, for this reason, he may be excluded from the court room while they give their evidence.” The right to be present “exists at every step of the trial.” And,

36 Id. at 113, 114-15, 122; People v. Defore, 242 N.Y. 13, 21 (1926).

37 Id. at 115, 116, 122. Cardozo mopped up by going through the state court cases and distinguishing those on which Snyder had relied.
contrary to Justice Cardozo’s conclusion, “[t]he great weight of authority” was that a view “forms a part of the trial.” Justice Roberts criticized the majority’s approach for using the lack of prejudice to Snyder as a reason for saying that he had no right to be present in the first place: The court should not “convert the inquiry from one as to the denial of the right into one as to the prejudice suffered by the denial.” In criminal trials, “the guarantee … is not that a just result shall have obtained, but that the result, whatever it shall be, shall be reached in a fair way.” Justice Roberts concluded with a powerful rhetorical point: “Little wonder .. that the court felt it right to appoint the defendants’ counsel to accompany the jury to the view. If the prisoners were entitled to this protection, by the same token they were entitled themselves to be present.”

Writing to Cardozo a few days before Snyder was executed, Felix Frankfurter objected to Cardozo’s use of the Fourteenth Amendment. For Frankfurter, the due process clause set the broad outlines of procedural fairness, but should not be given more precise content by importing into it ideas more specifically articulated in the Bill of Rights. This transferred Frankfurter’s objections to the idea of substantive due process into a purely procedural context. Cardozo replied, “The criminal must have a square deal,” and told Frankfurter that Frankfurter’s concerns about substantive due process were misplaced: “I protest against the idea that I must change my conclusion as a sort of penance for the wrongs of other judges…”

By 1937 the Court had completely ignored Frankfurter’s objection to using the due process clause as a vehicle for making Bill of Rights guarantees applicable to the states. The cases had accumulated to the point where criminal defense attorneys were ready to argue that every constitutional right given defendants in the Bill of Rights was also given to defendants in the Fourteenth Amendment. Justice Cardozo’s opinion in *Snyder* sketched an approach to determining when a right guaranteed against the federal government in the Bill of Rights was also guaranteed against the states under the Fourteenth Amendment’s due process clause. The approach combined attention to history with concern for basic fairness. But, it was too narrowly focused to solve the general problem the cases presented. For Justice Cardozo in *Snyder*, prejudice to defendants determined not whether their rights had been violated but whether they had the right in the first place. That was going to help in some cases, but probably not many, because the escape hatch of “no prejudice” might not be available to the Court.

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38 Id. at 127, 128, 132, 133, 134, 136, 137 (Roberts, J., dissenting).
39 “Garrick Given 18-20 Years,” Daily Boston Globe, April 21, 1934, p. 1 (referring to Snyder’s execution on February 22); *Frankfurter to Cardozo, Feb. 19, 1934*; *Cardozo to Frankfurter, March 2, 1934*, Felix Frankfurter Papers (LC), Reel 70.
The Court elaborated on Snyder’s approach when it received a case raising a question of double jeopardy, where the escape hatch was clearly closed. Frank Palka was convicted of murdering two police officers. The officers were patrolling in downtown Bridgeport, Connecticut, early on the morning of September 30, 1935, when they got word that someone had broken the front window of a radio store a few blocks from the police station, by holding a revolver by its barrel and using the handle to break the window. The grips fell off the handle and were found at the scene. On arriving at the store the officers were told that two young men had taken a couple of radios from the store. Sergeant Thomas Kearney and officer Wilfred Walker drove their car down the street and saw a young man “carrying a cheap portable radio set.” According to trial testimony, after the officers stopped him the young man pulled out a gun and fired twice. As another police car approached, the man fired another shot, and ran off. Walker died shortly after arriving at the hospital, Kearney the next day. The Bridgeport police department engaged in “the greatest manhunt in the city’s history,” but failed to find a suspect until several weeks later when they got a tip about suspicious behavior by Frank Burke. Burke told the police that his roommate Frank Palka had shot the police officers and then fled to Buffalo, New York. Bridgeport police officers when to Buffalo and arrested Palka, whose name was misspelled throughout the proceedings. Twenty-three years old and on parole for statutory rape, Palka gave an oral confession and was returned to Bridgeport for trial.40

Although his lawyers suggested that Palka’s roommates had made up a story to frame him, Palka did not vigorously deny that he had shot the officers. He testified that he had been drunk, too drunk to remember anything about the events on September 29 and too drunk to have formed the “premeditation” required to convict him of first-degree murder. The prosecution presented evidence from a resident of the apartment where Palka lived that Palka had been completely sober less than an hour after the shootings. The trial judge made several rulings dealing with evidence. He prevented the prosecution from cross-examining Palka about how he had come by the revolver; the prosecutor intended to ask whether he had stolen it, not – the prosecutor said – to show that Palka was a thief but to undermine Palka’s general credibility. The judge also excluded Palka’s confession because the police had told him, falsely, that Burke had given them “the entire story,” and that Palka “had better tell the truth.” These statements, the judge said, made Palka’s confession involuntary. Finally, the judge instructed the jury that premeditation required “an interval of time” between thinking about shooting and actually doing so, and that there could be no premeditation when “a man suddenly makes up his

mind to kill another and instantly shoots” him. The prosecution, in contrast, wanted the jury to consider whether the shooting was “the outcome of a formed design to shoot anyone who might interfere with his escape.” According to the Connecticut Supreme Court the judge’s comments to the jury made it clear that the judge thought that the jury should focus on “the brief interval of time between the moment when the officer accosted the defendant and the shooting,” rejecting the prosecution’s approach. Palka was convicted of second-degree murder.41

Invoking long-standing Connecticut rules the prosecution appealed the conviction, arguing that the rulings about the evidence and the premeditation instruction were mistaken. The Connecticut Supreme Court agreed, and sent the case back for a new trial. This time Palka was convicted of first-degree murder and sentenced to death. Now he appealed, arguing that putting him on trial the second time violated his constitutional right against being “twice put in jeopardy” for the same offense. The Double Jeopardy Clause appears in those terms in the Sixth Amendment, and Palka’s lawyers argued that the protection against double jeopardy was so fundamental that states bound by the Fourteenth Amendment had to honor the right, just as they had to honor the right of free speech in Stromberg and the right against the use of coerced confessions in Brown.

The Connecticut Supreme Court rejected the double jeopardy claim, for two reasons. It relied on a theory known as continuing jeopardy to hold that Palko – to use the name that thereafter appeared in all the opinions – had not in fact been placed twice in jeopardy. The continuing jeopardy theory began with the incontestable point that a defendant who successfully appealed a conviction on the ground that the jury instructions were legally erroneous or that evidence favorable to the defendant had been erroneously excluded could be placed on trial again. The second trial was not a second “jeopardy,” the theory held, because the defendant was simply in jeopardy pursuant to the initial charge. Or, put another way, the defendant continued in the initial jeopardy until all the appellate procedures authorized by law, and their consequences for retrial, had been completed. The continuing jeopardy theory applied the same idea to appeals by the prosecution, authorized by law: The defendant’s initial jeopardy continued until all appeals, defense and prosecution, were completed. As Justice Oliver Wendell Holmes put it, “The jeopardy is one continuing jeopardy from its beginning to the end of the cause. … [The defendant] no more would be put in jeopardy a second time when retried because of a mistake of law in his favor than he would be when retried for a mistake that did him harm.”42

In addition, observing that the statute allowing the state to appeal had been adopted in 1886 and surveying the U.S. Supreme Court’s decisions, the

41 State v. Palko, 121 Conn. 669, 186 A. 657 (1936), at pp. 658-60.
42 Kepner v. United States, 195 U.S. 100, 134, 135 (Holmes, J., dissenting).
Connecticut Supreme Court concluded that the Fourteenth Amendment required no more than compliance with “the settled course of judicial proceedings,” and did not impose on the states all the protections afforded defendants in criminal cases in the federal courts.43

Palko’s lawyers David Goldstein and George Saden appealed his case to the U.S. Supreme Court.44 Their brief had some flaws, most notably repetition and some difficulty in coming to focus on the real issue, but in the end they offered a rather powerful argument. They started with the “continuing jeopardy” theory. Relying on Kepner v. United States, decided in 1904, where Justice Holmes’s dissent endorsed that theory, they argued that the Court had already rejected it.45 Kepner involved a procedure used in the occupied Philippine Islands, which did allow prosecutors to appeal. Thomas Kepner was a lawyer who was acquitted by a jury of a charge of embezzlement. The prosecution appealed to the Philippine Supreme Court, which reversed the acquittal. The U.S. Supreme Court in turn reversed, rejecting the government’s reliance on the “continuing jeopardy” theory. Notably, Justice William Day’s opinion for the Court cited a Connecticut case upholding its system of prosecution appeals, but described the decision as “exceptional.” Kepner was not precisely the same as Palko’s, because a complete acquittal is different from a conviction on a lesser offense such as Palko’s conviction for second-degree murder. Palko’s lawyers treated his conviction for second-degree murder as an implied acquittal of the first-degree murder charge, and no one made anything of this distinction.46

After a long and irrelevant section on Connecticut law, characteristic of lawyers familiar with local law but not with the Supreme Court, Palko’s lawyers turned to the Fourteenth Amendment. Their task was shaped by the Court’s decisions. They could rely on Stromberg and Powell for the proposition that the Fourteenth Amendment protected some fundamental rights that were also protected against infringement by the national government in the


44 Goldstein was a Yale Law School graduate who had served as a state senator from Bridgeport. Saden was a long-time Bridgeport resident who graduated from Yale College in 1931 and from Harvard Law School in 1934. He practiced law in Bridgeport, and was appointed a judge of the trial court there in 1971, where he served until shortly before his death in 2003. See Polenberg, note --- above, at p. 219; http://www.yale.planyourlegacy.org/donor-saden.php (visited ---).

45 195 U.S. 100 (1904). Technically the case involved the interpretation of statutes and regulations adopted for the occupation of the Philippines, but the Court held that those statutes and regulations were meant to track the Constitution’s protection against double jeopardy.

46 Brief for the Appellant, Palko v. Connecticut, No. 135, October Term 1937, pp. 11-12.
Bill of Rights. But, they faced a major hurdle from other older cases. The most notable were *Hurtado v. California*, which held that the Fourteenth Amendment did not require states to use indictments as the method for beginning criminal prosecutions even though the Fifth Amendment imposed that requirement on the national government,\(^{47}\) and *Twining v. New Jersey*, which held that states could allow prosecutors to comment on a defendant’s failure to testify even though such comment by a federal prosecutor might violate the Fifth Amendment’s guarantee against self-incrimination.\(^{48}\) Where was the line to be drawn between fundamental Bill of Right protections that applied to the states through the Fourteenth Amendment, and other rights that did not?

Goldstein and Saden proposed a test of consensus: When nearly all states agreed as a matter of their own local law that a right was fundamental, the right “can accurately be described as national in its scope and which should be recognized and enforced as such by this court in order to prevent straying from the fold by one or two states.” As they put it, the “[c]rushing weight of authority” in the states treated the right against double jeopardy as “a fundamental and immutable principle of law.”\(^{49}\)

They also relied on recent scholarship that, they said, showed the earlier Court’s mistakes in failing to apply the entire Bill of Rights to the states, as the Fourteenth Amendment’s framers had intended. The Court could “disregard the facts adduced” in this scholarship, it could reverse its prior decisions, or it could “choose a middle course tending to liberalize the construction of the Amendment….”\(^{50}\) The middle course, they suggested, was supported by powerful dissents in earlier cases by respected justices including Joseph Bradley and John Marshall Harlan. The brief’s repeated reliance on dissents and suggestions that some older cases had already been implicitly overruled strongly hinted that its authors really wanted the Court to pursue the second course of action.

Goldstein and Saden invoked the traditional justification for the ban on double jeopardy, familiar to trial lawyers: A second trial gave the prosecution’s witnesses a chance to improve their testimony. Having been cross-examined once, they would know where the pitfalls were and could “polish the rough edges of their story.” They then escalated their rhetoric, describing the right against double jeopardy as protecting against being “harassed by the state

\(^{47}\) 110 U.S. 516 (1884).

\(^{48}\) 211 U.S. 78 (1908).


\(^{50}\) Id., pp. 34-35. The work they referred to was Horace Flack, *The Adoption of the Fourteenth Amendment* (Baltimore: Johns Hopkins University Press, 1908).
through constant prosecutions,” which was “a despotic power” characteristic of “state tyranny.” Evoking real tyrannies, they wrote, “We frown upon the cancerous conditions now existing in various countries of Europe and boastfully predict our perpetual immunity from them.” But, “are we becoming so overconfident in our democratic traditions that we feel we can begin to cast aside some of its fundamental safeguards?” It was a forceful conclusion.

The state’s disjointed brief was barely adequate. It relied heavily on Justice Holmes’s dissent in Kepner, an odd choice, enumerated the cases in which the Court had upheld state procedures that it would have found unconstitutional if adopted by federal statutes, and quarreled with its opponents’ characterization of some cases. Buried near the end of the brief was the observation that basic notions of notice and fairness, not the double jeopardy principle, could guard against the tyranny of oppressive repeated prosecutions. At one point it almost undermined its own position by saying, “The idea that one rule of the English common law was more fundamental than another has no place in English jurisprudence.” If so, Powell in particular would provide powerful support for Palko’s position, and the earlier cases on which the state relied would now seem inconsistent with the “no distinctions among rights” principle. The brief made a passing and almost hidden allusion to a strong argument based on federalism: “The statute … is but another instance that the public policy of one generation may not, under changed conditions, be the public policy of another.” Later the brief referred to “strong” legislative “support for the allowance of an appeal” by prosecutors, which the brief described as an effort to “progress.” Substitute “location or state” for “generation,” and a decent argument emerges.

The brief’s strongest argument as a matter of sheer legal analysis was that states could refuse to allow any appeals from criminal convictions – the federal government had done so for the first century of its existence – so they could condition the creation of a defendant’s right to appeal on allowing the prosecution to appeal when it chose. This was a good analytic point, but it floated in the air of abstractions that even the Court’s most formalist members had abandoned. As Justice Cardozo had recently written for a five-member majority including Hughes, McReynolds, Van Devanter, and Stone, “A fertile source of perversion in constitutional theory is the tyranny of labels.” The state’s brief quoted that language, but its analytically sharpest point relied precisely on labels rather than the realities of litigation.

51 Id., pp. 69, 70, 73-74.
53 Snyder v. Massachusetts, 291 U.S. 97, 114 (1934).
The Court rejected Palko’s claim, with Justice Butler noting his dissent but not offering an opinion. Justice Cardozo’s opinion for the Court ignored the historical evidence Palko’s lawyers had provided to support the proposition that the Fourteenth Amendment made all of the first eight amendments applicable against the states with a brusque, “There is no such general rule.” For support, he relied on *Hurtado* and *Twining* as well as a number of other precedents. Yet, though there was no “general” rule applying the Bill of Rights to the states, cases like *DeJonge* and *Herndon* showed that the Fourteenth Amendment did require states to comply with the First Amendment. “In these and other situations,” Cardozo wrote, “immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty,” which “become valid as against the States” “through the Fourteenth Amendment.”55

The issue, then, was to define the “line of division” between rights “implicit in the concept of ordered liberty.” The “rationalizing principle” Justice Cardozo located was that rights that were “of the very essence of a scheme of ordered liberty” were applicable to the states. The right to be tried only after an indictment, at issue in *Hurtado*, was not of that sort. Eliminating indictments would not “violate a ‘principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” A “fair and enlightened system of justice” was possible without indictments or “the immunity from compulsory self-incrimination,” at issue in *Twining*. “Indeed,” Cardozo continued, “there are students of our penal system who look upon the immunity as a mischief, rather than a benefit.” The Bill of Rights protections that states had to honor, in contrast, were on “a different plane of social and moral values.” In insisting on that compliance, the Court had concluded that “neither liberty nor justice would exist if [those rights] were sacrificed.” Freedom of thought and speech, for example, was “the matrix, the indispensable condition, of nearly every other form of freedom.”56

On which side of the line did the protection against double jeopardy lie? Here Justice Cardozo reverted to points he had made at the outset of his opinion, which began by observing that *Kepner*, the case on which Palko most heavily relied, had been “decided … by a closely divided court,” with the “dissenting opinions show[ing] how much was to be said in favor of a different ruling.” These disagreements demonstrated that “[r]ight-minded men … could

54 Almost thirty years after the oral argument, Goldstein recalled that at the argument Butler “was ‘very tough’ on the state’s attorney, at one point shouting ‘What do you want? Blood?’” Henry J. Abraham, Freedom and the Court: Civil Rights and Civil Liberties in the United States (New York: Oxford University Press, 1967), p. 55 n. 7.
56 *Id.* at 325-26, 326-27.
reasonably, even if mistakenly, believe that a second trial was lawful” under the continuing-jeopardy theory. “Even more plainly, right-minded men could reasonably believe that, in expressing that conclusion, they were not favoring a practice repugnant to the conscience of mankind.” This showed that Palko’s claim had to fail. There was no “cruelty … nor even vexation in any immoderate degree” in seeking that a case “shall go on until there shall be a trial free from the corrosion of substantial legal error.” Connecticut’s system was “no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.”

Justice Cardozo’s final sentence hints at two not entirely latent themes in his opinion. It reflected some standard Progressive criticisms of what they saw as the criminal process’s cumbersome procedures. The critique of the privilege against self-incrimination was longstanding; Cardozo cited Jeremy Bentham, who wrote in the 1820s, and John Wigmore’s treatise on evidence, published in 1904. Cardozo also cited the legal realist Max Radin’s survey of legal history to support the proposition that “[d]ouble jeopardy … is not everywhere forbidden.” Cardozo’s presentation of Kepner expressed more than a little sympathy for the dissent’s views. The “edifice of justice,” it seems, might be “greater” were these Progressive views of criminal procedure adopted. But, Cardozo could do no more than gesture in the Progressive direction because some of the justices in the majority were hardly sympathetic to Progressivism. The Court’s conservatives might have wanted to make it easier for governments to convict accused defendants, but their libertarian impulses meant that they understood that securing more convictions by lessening procedural safeguards came at a cost to liberty.

In addition, federalism lurks below the surface, in Justice Cardozo’s reference to reasonable though differing, even mistaken, beliefs of “right-minded men.” For, federalism was designed precisely to allow states to pursue reasonable though different policies, even policies implicating constitutional values. Here too, Cardozo’s opinion was no more than suggestive, perhaps because of its almost-express discomfort with the Kepner rule as an interpretation of the Fifth Amendment’s double jeopardy clause. Justice Cardozo apparently believed that, were the Fourteenth Amendment to require that states comply with the constitutional ban on double jeopardy, the states would have to follow precisely the rules applicable in the federal courts. But, if Kepner was misguided, applying double jeopardy to the states would force them to follow a bad decision. The only way to prevent that, it seemed,

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57 Id. at 322, 323, 328. Palka was executed on April 12, 1938. Polenberg, note --- above, at p. 231.

58 Id. at 326 n. 3.
Justice Cardozo’s opinion looked both backward and forward, as was perhaps appropriate given the breadth of the group for which it spoke. The standard, “of the very essence of a scheme of ordered liberty,” looked backward to see what traditionally had been regarded as fundamental to a fair trial. It also looked forward, as Cardozo’s hints at Progressive-inspired reforms of criminal procedure suggested. Even more, the reference to free speech as “the indispensable condition” of other freedoms suggested a “case-by-case, issue-by-issue” path toward more robust and innovative protections of civil rights and civil liberties. A year later Justice Harlan Fiske Stone marked out that path.

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South Carolina limited the use of its highways to trucks weighing less than ten tons, to protect the highways from wear-and-tear. Barnwell Brothers operated a company that typically used heavier trucks. It challenged the state’s regulation as a violation of the Constitution’s Commerce Clause. That clause gave Congress the power to regulate interstate commerce. From the outset, though, the Supreme Court had found in the grant of power to Congress a prohibition of some sort on state power. The Court never did a good job of articulating a theory justifying this “dormant” commerce power. Early on the Court used a conceptual scheme in which the regulatory spheres of Congress and the states were mutually exclusive: If something was within the power of Congress to regulate, it was outside the power of the states to do so. As the scope of the national economy grew, and with it the scope of national power to regulate interstate commerce, this “exclusive power” view proved far too restrictive of state power. There were simply too many things that needed regulating, and too little time or concern in Congress to exercise the regulatory power. The Court groped toward another solution, saying that perhaps there were some subjects that “imperatively required” uniform national regulation, others where diverse regulations emanating from the states were consistent with the operation of an integrated national economy.

59 Two generations later the second Justice John Marshall Harlan suggested, to no avail, that states might be bound by the general principles in the Bill of Rights, including double jeopardy, but would not have to follow “jot-for-jot” the rules the Court held required by those principles in the national courts. Duncan v. Louisiana, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting).

60 Andrew Kaufman, Cardozo (Cambridge: Harvard University Press, 1998), p. 553. Kaufman observes that Palko “did not attract much attention either inside or outside the Court.” Id. at p. 552.

61 For the exclusive power view, see Gibbons v. Ogden, --- U.S. --- (1824), and Justice William Johnson’s concurring opinion; for the “imperatively
By 1938, when the Barnwell Brothers’ case reached the Supreme Court, doctrine had stabilized even without a well-articulated theory underlying it. States could not impose regulations that discriminated against out-of-state commerce, though sometimes determining when a regulation was discriminatory was a tricky enterprise. And, states could not impose evenhanded regulations that imposed too large a burden on interstate commerce in light of the local benefits flowing from the regulation. Barnwell Brothers invoked this second aspect of the doctrine. It argued that South Carolina’s weight limit would severely inhibit trucking to deliver goods in the state and to pass through it to other destinations. And, the benefits to South Carolina’s highways, the company said, were slight, because heavy trucks actually did not damage well-designed concrete roads all that much.

The Supreme Court had little trouble disposing of the case. Justice Stone wrote for a unanimous Court that the record showed that heavy trucks really did harm roads, and that was enough to justify the state’s regulation. But, along the way, Stone picked up on a theme that had sometimes been sounded in the earlier cases, and gave it clear expression. In a footnote, he offered a justification for non-discrimination strand of the doctrine: “Underlying the stated rule has been the thought … that, when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.”

Generalizing, a legislature could be trusted if everyone affected by its actions had a fair chance to influence the rules the legislature adopted. Courts should step in, though, were there reason to think that the legislative process was unfair. A paradigm case of unfairness arose when the legislature’s policies inflicted harm on people who had not had a chance to argue against the policies before they were adopted. In the dormant commerce clause setting, had South Carolina adopted a policy that discriminated against commerce originating in North Carolina, North Carolinians would not have had a chance to defend themselves in the South Carolina legislature because they could not vote against the legislators who supported the policy.

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demanding national regulation” view, see Willson v. Black Bird Creek Marsh Co., ---.

62 South Carolina State Highway Dep’t v. Barnwell Bros., Inc., 303 U.S. 177, 184 n.2 (1938).

63 Later generations of scholars introduced great complexity into this basic insight, seeking to preserve it while acknowledging that some South Carolinians were adversely affected even by discriminatory regulations, because they would have to pay higher prices, and that North Carolinians could try to get Congress to override South Carolina’s discriminatory regulation.
As Stone and his law clerk Louis Lusky realized, this argument had quite substantial implications for judicial protection of civil rights and civil liberties. Two months later the Court heard a routine case of economic regulation that gave them the opportunity to expand on the argument. The case involved a constitutional challenge to the Filled Milk Act of 1923. Filled milk was a type of canned milk. Canned milk provided a way of storing the otherwise highly perishable good for a long period, making milk available to those who did not live near commercial dairies or who could not afford the sometimes high price of fresh milk. Canned milk did not taste like fresh milk, but it could be used for cooking. It came in two forms, condensed and evaporated milk, which differing mainly in that condensed milk contained added sugar. Filled milk was a variant of evaporated milk. Instead of using whole milk, filled milk used skim milk. The milk fats were drawn off and converted into butter and other milk-fat products. Those fats were replaced by coconut or vegetable oil. Some filled milk producers added vitamins to their product to replace the vitamins lost when the butterfat was extracted. Filled milk sold at a significantly lower price than evaporated milk; testimony provided in 1921 indicated that filled milk sold for 7 ½ cents per can, compared to 10 cents per can for evaporated milk. And, at least when vitamins were added to filled milk, consuming filled milk instead of evaporated milk appeared to have no significant consequences for the users' health.

Borden and Nestle controlled about half of the canned milk industry, which expanded significantly during World War I because of European demand for milk. When the war ended, the dairy industry faced serious economic stress. Farmers worried that the butter produced in the filled-milk process depressed prices for butter, and the larger canned-milk producers sought to protect their markets by excluding competition from filled milk. They pressed state legislatures and Congress to adopt laws making it illegal to market filled milk. The 1923 federal statute declared that filled milk was “an adulterated article of food, injurious to the public health,” whose “sale constitutes a fraud upon the public,” and made it a crime to ship filled milk

The most substantial critique is Bruce Ackerman, Beyond Carolene Products, 98 Harvard Law Review 713 (Feb. 1985).


66 For a discussion of the dairy industry and regulation more generally, see Chapter --- above.
across state lines.67 State prohibitions coupled with the federal statute came close to destroying the filled-milk industry, but one manufacturer, Carolene Products, soldiered on. In 1931 the Illinois Supreme Court invalidated that state’s ban on filled milk.

Three years later the federal government indicted Carolene Products for violating the 1923 statute. The case came before Judge Louis FitzHenry, who had served as a Democratic member of Congress from Illinois for one term and had been appointed to the federal bench by Woodrow Wilson; shortly before the case was filed President Roosevelt named Judge FitzHenry to the court of appeals. Judge FitzHenry held that the 1923 statute was unconstitutional. He found something odd in the fact that “when the well-known articles of skimmed milk has had some harmless vegetable oil or fat added to it, then it becomes adulterated [and] injurious to the public health,” especially because filled milk was not “adulterated” in the sense that that term was used in the federal Food and Drug Act. Nor was filled milk marketed in ways that concealed what it was, which is what ordinarily would be required to call it a “fraud.” Relying on *Hammer v. Dagenhart*, which had held unconstitutional a federal ban on shipping across state lines goods made by child labor, a decision that remained good law in 1934, Judge FitzHenry held that the Filled Milk Act similarly invaded a regulatory domain reserved to the states. Filled milk was legal in Illinois, illegal in Ohio, and the federal system required that each state be allowed to pursue its own policy about filled milk.68

Invoking a special statute laying out the route to the Supreme Court when a lower court held a federal criminal statute unconstitutional, the government appealed directly to the Supreme Court. Justice Reed could not participate in the Court’s decision because he had been Solicitor General when the appeal was filed, and Justice Cardozo was absent because of illness. Justice Stone wrote the Court’s opinion reversing Judge FitzHenry. The opinion’s core was straightforward and, after 1937, simple. It took Stone a single paragraph stringing citations together to conclude that “Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, moral or welfare.” The opinion then asked whether filled milk was indeed healthful. Justice Stone observed that twenty years earlier the Court had upheld a state law prohibiting the sale of filled milk, even assuming that it was “wholesome and nutritive,” because a legislature could try to “secure a minimum of particular nutritive elements in a widely used article of food.” The ensuing years had produced “steadily accumulate[ing]” evidence “of the

68 United States v. Carolene Products Co., 7 F. Supp. 500 (S.D. Ill., 1934). This opinion was issued in a different case from the one that reached the Supreme Court, but Judge FitzHenry relied on it sustaining the objection to the indictment in the case the Court heard.
danger to the public health from the general consumption of foods which have been stripped of elements essential to the maintenance of health.” Consumers could not readily distinguish between ordinary evaporated milk and filled milk, and Congress could reasonably think that labeling might not be enough to prevent some fraud on consumers.  

Justice Stone then moved to a section headed “Third.” He began with a syntactically contorted sentence. Carolene Products had argued that there was something wrong – unconstitutional – about using the words “fraud” and “adulterated” in the statute, and Stone “assume[d] for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition … by applying opprobrious epithets to the prohibited act.” All that meant, though, was that Carolene Products had to have a chance to show, in court, that the statute did not have “a rational basis.” Calling filled milk “adulterated” was just a “declaration of the legislative findings,” not an attempt to bar courts from deciding whether banning filled milk had a rational basis. Including the words in the statute “is no more prejudicial than surplusage.” Litigants like Carolene Products could introduce evidence of facts bearing on the rational basis for legislation if those facts were “beyond the sphere of judicial notice,” and could present facts “tending to show that the statute as applied … is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition.” But, Stone concluded, “it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be … wholly prohibited.” That was enough to sustain the statute’s constitutionality.  

Justices Butler and Black concurred only in the result, for almost exactly opposite reasons. Justice Butler said that Carolene Products could introduce evidence at trial to show that the statute’s references to fraud and health were “without any substantial foundation.” And, he suggested, Carolene Products should be acquitted if it showed that its filled milk was entirely healthful because, for example, it had vitamins added, and was marketed with full disclosure of its content. Justice Stone’s opinion suggested that Carolene Products’ constitutional challenge “as applied” might succeed with such a showing; Justice Butler suggested, more sensibly, that such a showing would establish that the products were not covered by the statutory prohibition. Justice Black simply noted that he concurred in the result but did

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69 304 U.S. at 147, 148, 151.

70 Id. at 152, 153-54. In 1971 a federal district court held the Filled Milk Act unconstitutional because developments in milk technology since 1944 had led to the interstate marketing of milk products indistinguishable in any way relevant to health and fraud from filled milk. Milnot Co. v. Richardson, 350 F. Supp. 221 (S.D. Ill. 1972). Carolene Products changed its name to Milnot in 1950. Id. at p. 223.
not join the opinion’s third part. He wrote Stone that it was “contrary to my conception of the extent” of judicial review to allow “submission of proof to a jury or a court … to determine whether the legislature was justified in the policy it adopted.” He did not agree that Carolene Products could use the criminal trial to get a court to reconsider whether there was enough evidence to support Congress’s conclusion that filled milk was unhealthy and selling it potentially fraudulent.71

Everything in the Carolene Products opinion, even the third part, was humdrum stuff in 1938. But, embedded in the third part was a footnote restating Justice Stone’s theory of civil rights and civil liberties, for which the otherwise unremarkable opinion became famous. The footnote was attached to a sentence reading, “[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.” Then came the footnote:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California; Lovell v. Griffin.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see Nixon v. Herndon; Nixon v. Condon; on restraints upon the dissemination of information, see Near v. Minnesota; Grosjean v. American Press Co.; on interferences with political organizations, see Stromberg v. California; Fiske v. Kansas; Whitney v. California; Herndon v. Lowry, and see Holmes, J., in Gitlow v. New York; as to prohibition of peaceable assembly, see De Jonge v. Oregon.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, or national, Meyer v. Nebraska, or racial minorities, Nixon v. Herndon; Nixon v. Condon; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied

upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare *McCulloch v. Maryland; South Carolina v. Barnwell Bros.*, and cases cited.\(^\text{72}\)

The string of citations was designed to show that Justice Stone’s account of the structure of constitutional rights was no innovation – and to show that civil liberties decisions survived the Revolution of 1937.

Getting footnote 4 into shape took some effort. Justice Stone drafted the bulk of the opinion, and sent it to Lusky “for final polishing.” As Lusky later put it, “it occurred to me” that *Barnwell Brothers* “suggested an approach to the problem of salvaging civil liberties precedents from the wreckage of substantive due process.” Lusky drafted the first version of footnote 4 by hand and considered inserting it into the printed draft as within the scope of the charge to polish the opinion. He spoke with Harold Leventhal, who had graduated from Columbia – also first in his class – in 1936 and was clerking for Stanley Reed, who told him to show the draft footnote to Stone first.\(^\text{73}\)

Although the core argument remained unimpaired, the footnote underwent some subtle but significant changes before it emerged from Stone’s chambers. Lusky’s draft read:

Perhaps the attacking party bears a lighter burden where the effect of the statute may be to hamper the corrective political processes which can ordinarily be expected to bring about repeal of unwise legislation. So, statutory interferences with political organization, and with the dissemination of information, have been subjected to a test more exacting than has been applied in other types of cases. Like considerations may be relevant in similar situations, as perhaps when the right to vote or peacably to assemble is involved. It may be too that when a statute is directed at a religious, a national, or a racial minority, the usual corrective processes will be hampered to an intolerable extent by unreasoning prejudice on the part of the majority, which cannot be expected to yield to rational argument in the political forum. In such situations this Court may scrutinize more closely than in the present case the questioned governmental action.\(^\text{74}\)

Stone struck the first sentence and the “perhaps” prefacing the reference to the right to vote. More important, Stone rewrote the sentence referring to “unreasonable prejudice” and “rational argument,” replacing it with this: “The special conditions obtaining in such situations, which tend seriously to curtail the operation of those political processes which normally are exerted to protect minorities. …” When he got the draft back from Stone, Lusky tinkered with the phrasing and, again more important, gave Stone’s

\(^{72}\) 304 U.S. at 152, 152-53 n.4 (some citations omitted).

\(^{73}\) Lusky, note --- above, at p. 177.

\(^{74}\) Id. at pp. 183-84 (reproducing Lusky’s handwritten first draft).
phrase “the special conditions obtaining” a more concrete referent: “Prejudice against discrete and insular minorities may be a special condition. . . .” Stone’s emendation might be taken to mark the transition from a Progressive account of the legislative process, which ought to be guided by “rational argument,” to a liberal pluralist account, in which only political processes matter. As Lusky later put it, the footnote “spoke . . . in the language of governmental dynamics,” not in the language of “wisdom” and “reason.”

Stone then circulated the draft to the Court. Justices Brandeis and Roberts joined, but with a seven-person Court Justice Stone needed the Chief Justice’s vote. And, Hughes was “somewhat disturbed” by footnote 4. He suggested that it was inaccurate to say that “different considerations” applied in the cases Stone mentioned. Rather, the difference lay “not in the test but in the nature of the right invoked.” In the free speech cases Stone cited, Hughes wrote, “the legislative action . . . is directly opposed to the constitutional guaranty . . . and for that reason has no presumption to support it.” Hughes diplomatically suggested that “the distinction between the two forms of statement may be only a verbal one,” but worried that “the phrasing of your note [might] lead to some misunderstanding.” Stone responded the next day with a draft in which the footnote had been revised. He took Hughes to be “saying that the specific prohibitions of the first ten amendments and the same prohibitions when adopted by the Fourteenth Amendment leave no opportunity for presumptions of constitutionality,” and agreed with that proposition. But, Stone continued, there were “possible restraints on liberty and political rights which do not fall within those specific prohibitions and are forbidden only by the general words of the due process clause . . . . The note was a “caveat” to “avoid the possibility of having what I have written in the body of the opinion . . . applied to those other more exceptional cases,” and did not intend to “commit[] the Court to any proposition contained in it.” Stone’s revision added the first paragraph to footnote 4, referring to “specific prohibitions” and the Bill of Rights.

In the long run Stone’s observation that footnote 4 was only a “caveat,” not a proposition to which the Court was committed, proved erroneous. Footnote 4 provided one foundation for whatever protection the Court gave to many civil rights and civil liberties, and Lusky’s phrase “discrete and insular

75 Id. at pp. 185 (reproducing the typewritten draft Stone received, with Stone’s handwritten notes), 186 (reproducing Stone’s typewritten draft, with Lusky’s handwritten notes).
76 Id. at p. 123.
77 Id. at pp. 179 (reproducing Hughes’s letter to Stone, April 18, 1938), 180-81 (reproducing Stone’s letter to Hughes, April 19, 1938).
78 Lusky observes that Stone was able to accept Hughes’s suggested revision so easily precisely because the footnote was “offered not as a settled theorem of government . . . but as a starting point for debate.” Id. at p. 125.
minorities” became one of the tag-lines of liberal jurisprudence. In the short run, though, the footnote’s influence was limited – or perhaps more precisely, neither the justices nor commentators grasped the substantial potential contained within the footnote. In Lusky’s words, in the four years following *Carolene Products*, “not one legal scholar … accepted the invitation that it extended for further analysis and discussion.” Frankfurter’s former clerk Willard Hurst did call the footnote “suggestive,” describing it as “a tie-up of the rationale of the presumption of constitutionality and Mr. Justice Brandeis’s analysis of varying due process demands re personal and property rights in the St. Joseph case.” While accurate, this does not take as central the footnote’s discussion of the political process, and in fact hints at a somewhat different analysis, toward what soon would be called the “preferred position” given free speech.79

The Hughes Court rarely cited Footnote 4. In *American Federation of Labor v. Swing*, dealing with a state restriction on labor picketing, Justice Frankfurter used it to support the proposition that “the right to free discussion … is to be guarded with a jealous eye.” In another picketing case, *Thornhill v. Alabama*, Justice Frank Murphy actually used the political process theory of Footnote 4 in writing, “Abridgement of freedom of speech … impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.”80 And, Stone himself relied on his theory in his sole dissent in the *Gobitis* case, where the Court upheld a state requirement that students salute the flag.81

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Scant citation does not mean that Footnote 4 was not an integral part of the constitutional revolution of 1937 and after. The Roosevelt Court dealt with a series of cases involving public demonstrations and picketing, which forced it to address the question that had triggered Lusky’s concern: How could the Court explain why it justifiably withdrew from reviewing economic legislation while maintaining the role it had carved out in civil rights and civil liberties cases? The justices of the Hughes Court did not come up with a single answer, but Footnote 4 was one of several they offered.

79 Id. at p. 126; J. Willard Hurst to Frankfurter, May 18, 1938, Frankfurter Papers, Library of Congress, reel 42, General Correspondence, Willard Hurst, 1937-1950.

80 American Federal of Labor v. Swing, 312 U.S. 321, 325 (1941); Thornhill v. Alabama, 310 U.S. 88, 95 (1940). On these cases, see Chapter --- below.

The Revolution of 1937 meant that, as the Court now understood it, the Constitution left the development of public policy to the political process. Footnote 4 could be integrated into that understanding. The courts were no longer to use the Constitution to identify policies protected against politics. Progressivism defended public policies on the ground that they resulted from the deployment of pragmatic reason in politics, not merely economic or political power. The on-going transformation of Progressivism into interest-group liberalism took that defense away from liberals by denying them substantive criteria for identifying good public policies. The transformation, incomplete by the early 1940s, forced them to shift from substance to process. Now, the sheer fact that politics produced policies was enough to justify the policies.

How did an interest-group based political process work? Prior to 1937 the Court used the Constitution to guarantee property rights. That had implications for the political process. People could use the property they had as a resource in politics. Newspaper owners could stand up to Huey Long because Long could not take their property away from them. The Revolution of 1937 put all property rights up for grabs, and in doing so it brought into the light the obvious, that relying on property rights to ensure that people could exercise political power meant almost nothing to people without much property. The press critic A.J. Liebling put it well after the problem had become apparent, “Freedom of the press is guaranteed only to those who own one.”

Those with few resources could not do much in politics, and the Constitution as interpreted after 1937 seemed to bar them from claiming such resources as constitutional rights. Franklin Roosevelt’s State of the Union address to Congress in January 1941 offered a vision of a peaceful world. Roosevelt identified “four essential human freedoms”: freedom of speech and expression, religious freedom, freedom from fear of war, and “freedom from want, which … means economic understandings which will secure … a healthy peacetime life. …” The U.S. tradition placed the first two in the hands of the courts, the third in the hands of the executive branch. The Revolution of 1937 placed the fourth in the hands of the legislature. Interest-group liberalism and Footnote 4 suggested a connection between the first essential human freedom and the fourth. People could not secure freedom from want unless they could act effectively in politics. The Court could not re-constitutionalize property rights to protect the political process and thereby to guarantee freedom from want, but it could use other constitutional provisions to that end. Footnote 4 replaced property rights as the buttress of politics by 

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translating claims about a constitutional right to resources into claims about constitutional rights of access to the political process.

Yet, there was a problem lurking here, to which Footnote 4 provided only an incomplete response. The politics that generated policy had to function well: An interest group affected by some public policy had to have a chance to have its voice heard and its votes counted. But, characterizing political processes as operating well or badly was just the kind of judgment that the Revolution of 1937 tried to keep out of the courts’ hands. Stone’s deletion of Lusky’s phrase “rational argument” and substitution of “those political process which normally are exerted to protect minorities” hinted at the shift from Progressivism to interest-group liberalism. But, once the props of Progressivism had been undermined, policies regulating politics – punishing political dissidents, defining who was allowed to vote, and the like – were indistinguishable from policies regulating the economy. The theory of interest-group liberalism had no conceptual resources with which to address policies regulating politics, different from the resources it had to deal with economic regulation. Footnote 4 implicitly called on the courts to define the contours of a well-functioning political process, but the Revolution of 1937 seemed to deny that courts could say anything about the merits of public policy – including making judgments about when the political process was functioning well or badly. Justice Stone was able to write Footnote 4 only because the full implications of the Revolution of 1937 had not sunk in. As they did in the succeeding years, the Court faced a difficulty. The Hughes Court’s treatment of picketing and demonstrations were pervaded by the tension between the Revolution of 1937 and the Court’s interest in continuing to play a role in enforcing civil rights and civil liberties.

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SEVERAL CHAPTERS OMITTED

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Writing in 1941, Zechariah Chafee found “three reasons for hope” that the U.S. involvement in war would not produce the pathologies of civil liberty that he thought characterized its reaction to World War I. “[T]he very mistakes of 1917-1920 serve to warn us against repeating them.” Europe – by which he meant Nazi Germany and perhaps fascist Italy – offered “a terrible warning against the evils of intolerance.” And, finally, the Supreme Court had developed a robust constitutional doctrine protecting civil liberties: “in decision after decision the Justices … have mapped the territory for us,” offering “a new philosophy of the importance of open discussion in America life. …” He relied on an observation by “[a] German refugee lawyer of distinction” comparing “American thought to the harmonies of an orchestra of many diverse instruments, whereas totalitarian Germany is like the Indianapolis concert a few years ago with two hundred pianos.” Yet, Chafee’s observation was premature. The Supreme Court was soon to endorse one form
in which governments sought to transform the dissonant sounds of the Jehovah’s Witnesses into the bland uniformity of all the other pianos.  

During the 1892 celebrations of Columbus’s arrival in the Americas, Francis Bellamy, a Baptist minister writing for the magazine *Youth’s Companion*, composed a pledge of allegiance to the United States flag. Over the next two decades a handful of states adopted statutes incorporating a flag salute into their school curricula. After World War I another group of states adopted statutes requiring that teachers lead a flag salute, with criminal penalties attached. According to one study, by the late 1930s flag salutes were in place in schools in twenty-four states.

As the use of the flag salute spread, so did resistance, particularly among some small religious sects, including the traditionalist Mennonites. The suppression of Jehovah’s Witnesses in Hitler’s Germany provoked a development in the group’s doctrine that led them into conflict with school authorities. Judge Rutherford denounced the Nazis for requiring Germans to salute Hitler as a symbol of national salvation. One student in Massachusetts concluded from Rutherford’s speech that he could no longer salute the U.S. flag, which was, like all national symbols, “the Devil’s emblem.” Rutherford then endorsed that position, calling the flag salute “the deification of the flag,” leading the Witnesses throughout the country to oppose compulsory flag-salute statutes. Young church members were expelled from schools in Georgia, New Jersey, Massachusetts, and New York, and the Witnesses’ challenges, typically supported by lawyers from the American Civil Liberties Union, were rejected, with the Supreme Court refusing to review several of the decisions because of the *Hamilton* precedent.

School boards in small towns such as Minersville, Pennsylvania, a coal-mining town in the state’s east, were more likely than those in larger cities to make saluting the flag compulsory. Superintendent of Schools Charles Roudabush, who had worked in the Minersville schools for decades, asked for and received a legal opinion from the state’s education officials that confirmed his authority to suspend students who refused to salute the flag if the school

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84 Chafee, note --- above, at pp. 437-38.


86 Shawn Francis Peters, *Judging Jehovah’s Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (Lawrence: University Press of Kansas, 2000), p. 27; Leoles v. Landers, 184 Ga. 580, 192 S.E. 2d 218 (1937); Hering v. State Board of Education, 17 N.J.L. 455, 189 A. 629 (1937); Nicholls v. Mayor and School Committee of Lynn, Mass., 7 N.E.2d 577 (1937); People v. Sandstrom, 279 N.Y. 523, 18 N.E.2d 840 (1939) (upholding the flag-salute statues but reversing the convictions of a student’s parents for failing to send their daughter to the school from which she was expelled for refusing to salute the flag). Manwaring, note --- above, at Chapter Four, summarizes the first group of Jehovah’s Witness flag-salute cases.
board adopted a resolution requiring the flag salute. On November 6, 1935, the Minersville board did so.\(^{87}\)

Roudabush had been provoked into action by the refusal of two Jehovah’s Witnesses to salute the flag. In 1931, Walter Gobitas, a lifelong resident of Minersville who ran a corner grocery store, converted from Minersville’s predominant Roman Catholic faith, and became an active proselytizer for the Witnesses. His children, eleven-year-old Lillian Gobitas and her younger brother William, went with Walter to the convention at which Judge Rutherford announced that Witnesses could not in good conscience salute the flag, although apparently they did not hear Judge Rutherford’s speech. On October 22 and 23, 1935, William first, then Lillian, refused to salute the flag. Two weeks later, with the school board’s new resolution in hand, Roudabush began proceedings to suspend them from school. After waiting over a year, Walter sued on his children’s behalf.\(^{88}\)

Albert Maris, a lawyer in Philadelphia’s suburbs before his appointment to the federal trial court in 1936, heard the Gobitis family’s challenge to William and Lillian’s expulsion.\(^ {89}\) Waiting for Judge Maris to decide, William and Lillian attended a private school run by the Witnesses. Shortly after their lawsuit was filed, Judge Maris rejected the school board’s motion to dismiss the case. Freedom of religion, he wrote, was “one of the fundamental bases upon which our nation was founded,” and included “the right not only to entertain any religious belief but also to do or refrain from doing any act on conscientious grounds, which does not prejudice the safety, morals, property or personal rights of the people.” And, he thought it “obvious that their refusal to salute the flag … could not in any way” do so. Judge Maris rejected contrary decisions from several courts, in which the courts mistakenly, in his view, determined that the practice of saluting the flag was not itself a religious exercise. For Maris, the vice in that position was that it was “pernicious and alien” for the courts to determine whether the Witnesses’ objections to saluting the flag were truly religious, not whether other people did not think that saluting the flag was a religious practice. And, again rejecting the position taken by some other courts that attending a public school was a privilege like attending a public university – because the government’s requirement that children receive an elementary education could be satisfied by sending them to private schools – Judge Maris emphasized that the cost of private school attendance meant that treating public school attendance as a privilege imposed real hardships on them and their families, hardships that college students did not have to bear. For him, the case was *Hamilton* in reverse: The school board used “[o]ur beloved flag … as an instrument to impose a religious test as a condition of receiving the benefits of public

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\(^{87}\) Manwaring, note --- above, p. 82; Peters, note --- above, p. 36.

\(^{88}\) Manwaring, note --- above, p. 81; Peters, note --- above, at pp. 21-22, 25-26. The Gobitas family name was misspelled throughout the litigation, and I use the misspelled name hereafter.

education.” Referring to William Penn’s expulsion from Oxford University in the seventeenth century and religious intolerance … rearing its ugly head in other parts of the world” in the 1930s, Judge Maris concluded that the Gobitises had indeed stated a claim that their constitutional rights had been violated.90

For all practical purposes that ruling disposed of the case, but it took Judge Maris another six months to enter an order directing the school board to readmit the children. He had to hear evidence on whether the children had a sincere religious belief against the flag salute. Superintendent Roudabush’s testimony sounded a theme that the flag salute’s defenders regularly asserted, that no one could reasonably think that saluting the flag was a religious exercise – the implication being that no one could actually have a religious objection to the practice. But, after hearing William and Lillian testify, Judge Maris observed, “No one who heard the testimony of the plaintiffs and observed their demeanor upon the witness stand could have failed to be impressed with the earnestness and sincerity of their convictions.” Because Judge Maris’s first ruling indicated that the flag-salute requirement might be upheld if the school board had a strong justification for infringing on religious liberty, Roudabush also asserted that exempting anyone from the flag-salute requirement would undermine the effectiveness of the promotion of patriotism that the salute was designed to advance. Seemingly confirming Chaffee’s observations about civil liberties in the late 1930s, Judge Maris again referred to “the current world scene,” where “the preservation of individual liberty is more important today than ever it was in the past.”

The safety of our nation largely depends upon the extent to which we foster in each individual citizen that sturdy independence of thought and action which is essential in a democracy. The loyalty of our people is to be judged not so much by their words as by the part they play in the body politic. Our country's safety surely does not depend upon the totalitarian idea of forcing all citizens into one common mold of thinking and acting or requiring them to render a lip service of loyalty in a manner which conflicts with their sincere religious convictions. Such a doctrine seems to me utterly alien to the genius and spirit of our nation and destructive of that personal liberty of which our flag itself is the symbol.91

Judge Maris’s eloquent endorsement of the Gobitises’ position placed him at odds with many other courts that had dealt with similar cases, and the

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90 Gobitis v. Minersville School Dist., 21 F. Supp. 581, 584, 585, 586 (E.D. Pa. 1937). For a summary of the lower court decisions, see Elmer M. Million, “Validity of Compulsory Flag Salutes in Public Schools,” 28 Kentucky Law Journal 306 (1939), at pp. 316-17. Judge Maris also disposed of the school board’s argument that he did not have jurisdiction to decide the case, finding that the cost of sending the children to private schools would be greater than the $3,000 required to support jurisdiction. Hamilton is discussed in Chapter --- above, and aspects of the jurisdictional question in Chapter --- below.

school board decided to appeal. The case was heard by Judge Clark, who had recently taken his seat on the court of appeals after his decision in *Hague v. C.I.O.*, Judge Biggs, who had heard the appeal in the Jersey City case, and district Judge Harry Kalodner, another recent Roosevelt appointee to the federal bench. Judge Clark’s opinion upholding the order requiring the Gobitis children’s readmission was characteristically flamboyant and pompous, filled as his opinion in *Hague v. C.I.O.* had been with long quotations from authorities of various provenance. It opened, “Eighteen big states have seen fit to exert their power over a small number of little children (‘and forbid them not’)” and cited Hitler’s decree dissolving the Jehovah’s Witnesses. It referred to the schools’ “delicate, but surely not difficult, task” of teaching civics. It quoted the current position of Colonel Moss, whose manuals were the “staff of life” for those at World War I training camps, who disparage the “false patriotism” of “blind and excessive adulation of the Flag as an emblem or image.” With that in the opinion’s first few paragraphs, the end could be no surprise. Judge Clark rejected the position he attributed to the school board, that “no one could conceivably appraise non-flag saluting in theological terms,” drawing on scholarship in law and religious studies and quoting Thomas Jefferson, Daniel Webster, and Chief Justice Hughes’s dissent in the *Macintosh* case to show that the Witnesses’s belief satisfied the Constitution’s minimum requirement that their actions be motivated by religious belief.

Then the opinion turned to the task of “balance[ing] the two intangibles salus [the people’s will] and religio.” Examining the precedents, Judge Clark worried that courts had failed to be sufficiently sensitive to religious claims when national defense was said to be at stake. He called the “necessity for [a] choice between conscience and country … tragic,” but thought that “[i]t must be made.” Analogizing the case to ones upholding compulsory vaccination against claims of religious liberty, Judge Clark described the compulsory flag salute as an “inoculation … against a spiritual indifference or disloyalty to country,” but the disease against which it protected was “only para at most,” an obscure phrase that he tried to explain by saying, “patriotism is an added advantage rather than an essential whose absence is dangerous in the clear and present sense.” There was a “general connection between the emblem and the virtue” of patriotism but the former was not “indispensable” for the latter. Indeed, Judge Clark said, educational psychologists warned that compelling children to salute the flag might generate resentment and undermine the goal of promoting patriotism. He “summarize[d]” the conclusions he reached, using the language of religiosity to characterize both the Witnesses’s and the school board’s understanding of what was at stake: “Compulsion rather than protection should be sparingly exercised. Harm usually comes from doing

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92 The Atlanta Constitution, in a story relating the Third Circuit’s decision to a similar controversy in Georgia, noted that Judges Clark and Biggs were Episcopalians, Judge Kalodner a Jew. “Void Flag Salute in Pennsylvania,” Atlanta Constitution, Nov. 11, 1939, p. 1.

rather than leaving undone, and refraining is generally not sacrilege. We do not
find the essential relationship between infant patriotism and the martial spirit.”
The court’s opinion was serviceable once its rhetorical excesses were set aside,
although those excesses might have alerted the judges to the fact that they were
inevitably making some judgments, as Judge Clark put it, about the accuracy
of the school board’s understanding of educational “fundamentals.” An
appendix to Judge Clark’s opinion lamented the absence of social-science
evidence in the record about “the problems in educational psychology” but
concluded that “criticism” of the courts for making judgments on matters of
fact was inapplicable because “[t]he matter here can hardly be reduced to
statistics.” This hinted at the possibility that in the post-1937 constitutional
dispensation such judgments of social policy might have been regarded as
outside the courts’ proper domain. 94

Judge Clark’s opinion observed that legal commentary on prior flag-
salute cases said “hardly a kind word” about the decisions upholding
compulsion against claims of religious liberty. 95 Again that did not deter the
school board, which appealed to the Supreme Court. In addition to making
largely irrelevant arguments that the school board’s decision to expel William
and Lillian was authorized by state law and consistent with the state
constitution, the board’s briefs repeated the widespread observation by lower
court judges that the flag salute “has no religious significance whatsoever” and
the children’s refusal rested on a “mistaken interpretation of the Bible.” More
substantially, like the lower courts, the board’s lawyers looked abroad. “In
these days of social, economic and political unrest, the preservation of the state
is dependent upon the maintenance of a proper morale. … Any break-down in
the esprit de corps or morale of this country may conceivably have a more
disastrous effect upon the nation than a catastrophe resulting from … an
invasion of the realm.” Requiring the flag salute was just one of many ways the
schools “instructed in patriotism.” The brief referred to Superintendent
Roudabush’s testimony that any student’s refusal to salute the flag “would
have a demoralizing effect on the entire school group.” The refusal was a
“demonstration of disrespect to our government, and would ultimately ‘affect
the other pupils in the schools, and the morale of their respective communities,
and ultimately of the nation itself, will be shaken and demoralized.’” 96

Covington’s brief for the Gobitis family was filled with the biblical
quotations he had made familiar to the Court in prior cases. The word
“totalitarian” was spread throughout the brief as well. Covington blended his
religious and constitutional themes: “Modern-day compulsory flag saluting is a
retrograde movement to return to the totalitarian rule and to put the State above
Jehovah God and ultimately to turn the nations and the people against Jehovah

94 108 F. 2d at 688 (3d Cir 1939).
95 108 F. 2d. at 690, 691, 692-93, 694.
God.” Referring to the “Hitler régime” and its requirement that citizens “‘heil’ Hitler,” and thereby impute to him supreme rulership, protection, worship and salvation,” Covington inferred that the flag salute was “a form of religious worship” that “attribut[ed] to the State protection and salvation.” An appendix to the brief reprinted a recent German decision upholding the expulsion of Jehovah’s Witness children form schools there for “obstinately … refus[ing] … to take part in the German salute.” Perhaps more cogently, Covington emphasized that “the individual alone is privileged to determine what he shall or shall not believe.” And, directly responding to the school board, Covington asked, “Will any court attempt to say that respondents mistakenly believe what is set forth in the twentieth chapter of Exodus in the Bible?” Covington agreed that citizens should be loyal to their country, but only on matters to which it properly claimed authority and not when its laws “conflict[ed] with the law of Almighty God.” The compulsory flag salute was, he concluded, an example of “false patriotism.”

The Witnesses’s claims were supported by amicus briefs from the American Civil Liberties Union, written by Harvard law professor George Gardner, and from the ABA’s Committee on the Bill of Rights, written by Grenville Clark. Coordinated with each other, both briefs spent some time dealing with arguments popular among supporters of the compulsory flag salute. Against the argument that saluting the flag was not in fact a religious practice, the ABA Committee’s brief said that no one had “any power to declare that a given practice does not and cannot carry a religious significance, in the face of an individual’s sincere and honest determination that for him a religious significance exists.” It bolstered the argument with historical examples in which “the scruple of the religious objector must have seemed unreasonable” and “unusual and cantankerous,” but that seemed in the 1930s to be entirely religious. And, against the argument that the children could have attended private school, Gardner pointed out that tuition was “the practical equivalent of a substantial fine.”

After making these points, the ACLU brief then turned to the real issues. The flag salute, Gardner wrote, was “a ceremony having no value except as a voluntary expression of sentiment and belief,” so that compulsion rendered it meaningless as a vehicle for promoting morale and patriotism. Gardner made a clever but perhaps outdated argument that the school board’s position committed it to treating as delinquents any children who refused to salute the flag and whose parents could not afford to send them to private


98 Brief of the Committee on the Bill of Rights, of the American Bar Association, as Friends of the Court, Minersville School District v. Gobitis, No. 690, Oct. Term 1939, pp. 5, 11-12, 14; Brief for the American Civil Liberties Union, Amicus Curiae, Minersville School District v. Gobitis, No. 690, Oct. Term 1939, p. 18. On the “privilege” argument, Clark used the phrase “a heavy pecuniary loss.” ABA Committee Brief, at p. 40. The ACLU brief, filed on April 22, refers to the ABA brief, filed two days later. ACLU Brief, pp. 19-20.
schools, by citing the pre-1937 decision in *Meyers v. Nebraska* and *Pierce v. Society of Sisters*, which invoked the Due Process Clause to support the parents’ rights to control their children’s education so that the children would not be, as *Meyers* put it, “the mere creature[s] of the state.” Ending the brief with a quotation from Judge Irving Lehman of New York’s highest court, Gardner wrote, “no practical consideration justifies soiling our national flag ‘with the tears of a little child’ … in the absence of overwhelming public necessity.”

The ABA Committee’s brief stressed that point. The government, Grenville Clark wrote, cannot “override religious scruples … unless there is a clear showing that overriding the individual’s religious belief is essential in the public interest.” Clark drew that standard – phrased as a “presumption … against … the validity of any statute” abridging civil liberties – from Footnote 4. To frame his discussion of the proposition that the compulsory flag salute was not essential, Clark pointed out how recent was the widespread adoption of flag-salute statutes. And, he emphasized that a salute given under compulsion could hardly convey the same loyalty as a voluntary one. Superintendent Roudabush’s testimony did not show any actual “demoralization,” and the educational psychologists Judge Clark cited thought that there would be none. But, more important, “a proper conclusion depends on common sense and human experience – in short upon the judgment of mature and sensible men.” And the common sense of the matter was clear: “In there any common sense to the thought that the coercion of children holding views so strongly … can possible induce sentiments of loyalty in such children?” Hinting at the international environment, Clerk then wrote that the American military could of course compel obedience, but “the purpose of American schools is primarily to impart knowledge and to prepare for life under free institutions. The purpose is not to turn out a regimented group seasoned to coercive methods.” Tying the argument down, Clark then noted that there were many other ways of inducing patriotism without compelling a flag salute over religious objections – national holidays, school trips to “places of historic interest,” civic education about “the evolution of our fundamental rights.”

As Gardner had in his invocation of *Meyer*, Grenville Clark reached for larger game, a defense of conscience – not merely religious conscience – in

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99 Brief for the American Civil Liberties Union, Amicus Curiae, Minersville School District v. Gobitis, No. 690, Oct. Term 1939, pp. 20, 26-27, 29. Gardner’s brief also hinted at the possibility that states could not use the national flag as Pennsylvania did without authorization from Congress. Justice Frankfurter’s opinion for the Court later responded to the hint in a footnote observing that the case did not implicate any congressional action. Minersville School Dist. v. Gobitis, 310 U.S. 586, 600 (1940) (“It is to be noted that the Congress has not entered the field of legislation here under consideration.”). For a discussion of *Meyers* and *Pierce*, see Chapter --- above.

arguing that governments actually lacked the power to compel the flag salute as a means of promoting patriotism. Here he returned to older ways of thinking about constitutional doctrine. After 1937, governments had plenary regulatory power unless they were limited by constitutional provisions protecting individual rights. Before then, though, lawyers could argue that, even in the absence of some specific constitutional limitation, the Constitution embodied a general preference for liberty expressed through limiting definitions of the state’s police powers. Clark then used the anti-totalitarian trope: “In Germany, it is the Fuehrer rather than the swastika … that is the usual subject of a gesture of loyalty; in Italy it is the same with the Duce, and in Russia, with Stalin.” It was unthinkable, Clark suggested, “to require school children to salute a portrait of a national hero … or a picture of the President during his term, whoever he might be[.]” A requirement that everyone, “young and old (except young infants, the infirm and the sick),” salute the flag, would similarly infringe on the general liberty of all.

Rutherford and Gardner divided the time for oral argument. Rutherford objected when one of the justices referred to the Witnesses as a “cult” or a “sect,” and contended that as followers of “Almighty God … [t]hey have been in existence for at least five thousand years,” a time span that linked the Witnesses who worshiped God under the name of Jehovah. He reiterated his brief’s reference to the “totalitarian” implications of upholding the school district’s requirements. Gardner faced a host of questions from Frankfurter, who passed a note to --- during the oral argument asking whether it was “at all probable” that the First Amendment’s framers would have agreed with Rutherford and Gardner, and evaluated his own performance as “uninspired and unsatisfactory.”

In his Conference presentation, Chief Justice Hughes said that he “came up to this case like a skittish horse to a brass band.” As he saw it, the flag-salute requirement imposed “no [il]legitimate impingement on religious belief” and promoted the “legitimate object” of promoting national unity. “I don’t want to be dogmatic about this,” he said, “but I simply cannot believe that the state has not the power to inculcate this social objective.” Only Frankfurter added anything significant to the discussion, and he mostly echoed Hughes’s position, with a statement that Hughes called a “moving” expression of the importance of “instilling love of country in our pluralistic society.”

Hughes assigned the opinion to Frankfurter, who clearly cared a great deal about it. Caught up in efforts to promote U.S. involvement in the developing military conflict in Europe, Frankfurter drafted what some law

101 For a discussion of this understanding of the Constitution’s structure, see Chapter --- above.
102 ABA Committee Brief, at pp. 35-36.
103 Peters, note --- above, at pp. 49-51.
104 Id. at pp. 51-52
clerks soon came to call his “fall of France” opinion in *Gobitis*. In telling Frankfurter that he would join the opinion, Hughes noted, “You have accomplished most admirably a very difficult – and highly important – task,” and “the Court is indebted to you.” Roberts called it “among the best every prepared by a judge of this Court.” Douglas said, “This is a powerful moving document of incalculable contemporary and (I believe) historic value,” and called the opinion “a truly statesmanlike job.”

Frankfurter was so intensely concerned about the case that, perhaps with an assist from the Chief Justice, he argued Frank Murphy out of publishing a dissent. Murphy would have invoked events in Europe to show why “freedom of conscience and opinion be protected against all considered regulations that have no practical efficacy and bear no necessary or substantial relation to the maintenance of order and safety of our institutions.” In the end Murphy, while asserting that the case had been “a Gethsemane for me,” concluded that “after all the Constitution presupposes a government that will nourish and protect itself,” and joined Frankfurter’s “beautifully expressed opinion.”

Justice Stone had said nothing at the Conference on *Gobitis*, but he too felt strongly about the case, though in the other direction. Frankfurter wrote a characteristically verbose, fawning, and intransigent letter to Stone urging him not to dissent, but the lobbying effort failed. “Were [*Gobitis*] an ordinary case,” Frankfurter began, “I would let the opinion speak for itself.” But, “that you should entertain doubts has naturally stirred me to an anxious re-examination of my own views” on a case that “has weighed on my conscience” more than any other since he become a Justice. For Frankfurter, the case was one in which “constitutional power is on one side and my private notions of liberty and toleration and good sense are on the other.” The “vulgar intrusion of law in the domain of conscience is for me a very sensitive area.” Rooting his concerns in his Jewishness – described as “the old colored man’s explanation that Moses was just raised that way” --, Frankfurter said that for a “good part of my mature life” he had “thrown whatever weight” he had “against foolish and harsh manifestations of coercion and for the amplest expression of dissident views, however absurd or offensive those may have been to my own notions of rationality and decency.” But, Frankfurter continued, Stone knew better than others that “even when it comes to these ultimate civil liberties, … we are not in the domain of absolutes.” *Gobitis* involved a “tragic … clash of

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106 Hughes to Frankfurter, undated return, Frankfurter Papers, Library of Congress, Reel 1; Roberts to Frankfurter, undated return, ibid.; Douglas to Frankfurter, undated return, ibid.

107 Citation from Murphy papers; Murphy to Frankfurter, June 3, 1940, Frankfurter Papers, Library of Congress, Reel 1.

108 Frankfurter thought that Stone’s law clerk Allison Dunham had persuaded Stone to dissent, but Dunham reported that he had done no more than urge Stone to write a dissent instead of simply noting his disagreement with the majority. Citation from Mason.
rights, not the clash of wrongs.” The Court had no calculus for dealing with such a clash, but there was “a great makeweight” – not the best word choice – to help the resolution, which was that the Court was “not the primary resolver[] of the clash.” Rather, the Court was “sitting in judgment upon the judgment of the legislature.” True, he understood – and “regard[ed] it as basic” – the insight Stone had expressed in the second paragraph of Footnote 4, on the political process. He thought that his draft had “taken over” that point “by insisting on the importance of keeping open” the means for repealing the flag-salute requirement. He was concerned, though, that the Court not make themselves “legislators by holding with too tight a rein the organs of popular government, as had been done “by those whom we criticized when dealing with the control of property.” Yet, generalizing differences between liberty and property was also “inaccurate and hardly adapted to the complicated realities of an advanced society.” So, invoking the lax standard of review applicable after 1937 to claimed violations of property rights, Frankfurter wrote, “I cannot rid myself of the notion that it is not fantastic … for school authorities to believe … that to allow exemption to some of the children goes far towards disrupting the whole patriotic exercise.” This was especially true, Frankfurter told Stone, “in the particular setting of our time and circumstances” and “those that are clearly ahead of us.” He apparently could not bring himself to be explicit about what he meant here, but he alluded to the differences between the positions Justice Holmes had taken in cases decided during The Great War and those decided after it, surely enough to make the point that a new great war was looming.  

After a few sentences suggesting that a decision for the Gobitis children would have “a veil of implications as o legislative power that is certainly debatable,” Frankfurter described his intention to have written “a vehicle for preaching the true democratic faith of not relying on the Court for the impossible task of assuring a vigorous, mature, self-protecting and tolerant democracy by bringing the responsibility for a combination of firmness and toleration directly home where it belong – to the people and their representatives themselves.” He hoped the opinion would be “a lodestar for due regard between legislative and judicial power.” Frankfurter urged Stone to “bear in mind how very little this case authorizes and how wholly free it leaves us for the future.” The case did not involve “confinement” of the children or their parents, for example. And, “conformity is not exacted for something that you and I regard as foolish – namely, a gesture of respect for the symbol of our national being” as might be the case were students to be disciplined for failing “to partake in a school dance or other scholastic exercise that may run counter to this or that faith.” Stone was not persuaded, and adhered to his position that the case was “peculiarly one of the relative weight of imponderables,” and that

he could not “overcome the feeling that the Constitution tips the scales in favor of religion.”

Commenting on some additions Frankfurter had made to his opinion in response to Stone’s dissent, Douglas perhaps twisted the knife a bit in calling the revision “a magnificent job on a subject which defies, because of the host of intangibles, conventional legal treatment.” But it was Black who received the brunt of Frankfurter’s disdain, in part because of what Frankfurter thought was Black’s feigned originalism. Frankfurter wrote a note on Douglas’s return recounting a conversation he said took place with Douglas. When Douglas told him that Black was wavering over joining the opinion, Frankfurter asked whether Black had been “re-reading the dissent,” and Douglas replied, according to Frankfurter, “No – he has been reading the papers.”

Justice Stone’s dissent and Justice Frankfurter’s opinion for the Court offered competing visions of how to present the case and its issues. Stone began with a carefully crafted paragraph setting out the facts in pared-down prose:

Two youths, now fifteen and sixteen years of age, are by the judgment of this Court held liable to expulsion from the public schools and to denial of all publicly supported educational privileges because of their refusal to yield to the compulsion of a law which commands their participation in a school ceremony contrary to their religious convictions. They and their father are citizens and have not exhibited by any action or statement of opinion, any disloyalty to the Government of the United States. They are ready and willing to obey all its laws which do not conflict with what they sincerely believe to be the higher commandments of God.

Justice Frankfurter opened by presenting the case in abstract terms, stressing the “grave responsibility” that “confronts the Court whenever … it must reconcile the conflicting claims of liberty and authority.” He counterposed the Gobitises “liberty of conscience” to the “judicial conscience,” which was “put to its severest test” when religious conscience is set against the “authority to safeguard the nation’s fellowship.”

After describing the “[c]enturies of strife” that led to constitutional protection for religious belief, Frankfurter set out the analytic structure the Court chose. “[T]he manifold character of man’s relations may bring his conception of religious duty into conflict with the secular interests of his fellow men.” This meant that “no single principle can answer all of life’s complexities” and that the court had “to reconcile two rights in order to prevent either from destroying the other,” while giving “every possible leeway … to

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110 Ibid.; Stone to Frankfurter, undated return, ibid.
111 Douglas to Frankfurter, undated return, Frankfurter Papers, Reel 1 (with Frankfurter’s note on the conversation with Douglas).
the claims of religious faith.” Continuing to speak in generalities, Frankfurter observed, “The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.” Here those responsibilities — “the promotion of national cohesion” — served “an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security.” Legislatures, he continued, had to have “the right to select appropriate means for its attainment,” a right different in kind from, for example, the right to keep streets clear of litter in *Schneider*.113

Prior cases, according to Frankfurter, involved legislative efforts to advance “some specific need or interest of secular society,” giving examples from the traditional police power litany of health, safety, and morals. But, for Frankfurter, those specific interests “presuppose the existence of an organized political society,” whose “ultimate foundation … is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization.” The next sentences were surely meant to be quoted. Without attributing it to its source in Oliver Wendell Holmes’s tribute to John Marshall, Frankfurter placed the statement “We live by symbols” in quotation marks, and continued, “The flag is the symbol of our national unity, transcending all individual differences, however large, with the framework of the Constitution.”114

Having erected this scaffolding, Frankfurter turned to the Gobitis case itself. First he said that the decision to expel the children had to be treated as a decision authorized and endorsed by Pennsylvania’s legislature, an analytically correct observation that allowed him to describe the issue before the Court as implicating a legislative choice of a method “to evoke that unifying sentiment without which there can be ultimately no liberties, civil or religious.” He then described a judicial decision in favor of the Gobitises as “stigmatiz[ing]” the “legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects.” Frankfurter devoted several paragraphs wandering around the point that the decision to use a compulsory flag salute as a means of promoting national unity was one of educational policy and psychology. Ruling in favor of the children “would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence.” Though the justices themselves “might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crochety beliefs,” that was a question of “educational policy,” and it was not the “province” of courts “to choose among

113 310 U.S. at 593-94, 595.

114 310 U.S. at 596.
competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncracies among a people so diversified in racial origins and religious allegiances.” The “end” of promoting national unity was a “legitimate” one, and “the effective means for its attainment are still so uncertain and so unauthenticated by science as to preclude us from putting the widely prevalent belief in flag saluting beyond the pale of legislative power.” Again, “Great diversity of psychological and ethical opinion exists among us concerning the best way to train children for their place in society.” Pierce had held that the Constitution prevented governments from creating “a single, iron-cast system of education to be imposed upon a nation of so many strains,” and, Frankfurter suggested, the Gobitises were seeking just that in their effort to rule out the possibility of some pedagogical choices states might make if they chose to.115

Frankfurter then suggested a more profitable line of analysis, observing that “the school authorities are really asserting … the right to awaken in the child’s mind considerations as to the significance of the flag contrary to those implanted by the parent.” Religious tolerance required that the parents be allowed “to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state’s educational system is seeking to promote,” and, presumably because parents could be quite persuasive, that placed the state “at a disadvantage.” After only a few sentences, though Frankfurter abandoned the suggestion that the school system could properly be concerned that William and Lillian might be brainwashed, to use a term introduced in later years, by their parents, and ended up saying that the Court could not dismiss Superintendent Roudabush’s concerns about “school discipline” and “cast[ing] doubts in the minds of the other children which would themselves weaken the effect of the exercise.”

Frankfurter ended the opinion with two paragraphs restating its concerns, one about the scope of the police power, the other about the scope of judicial power.

The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties. …

Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no

115 310 U.S. at 597-98.
116 310 U.S. at 599-600.
less than to courts is committed the guardianship of deeply-cherished liberties. Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.¹¹⁷

Implicitly chastising the Gobitises’ defenders for their rhetorical excesses, Frankfurter said, “It mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader” – though exactly how Frankfurter could explain why the latter could be distinguished from the former in light of his analysis remained unclear. In the course of his opinion Frankfurter invoked Abraham Lincoln and, not untypically, disclaimed that individual judges could not and did not use their “personal notion[s]” to determine “what wise adjustment requires.” This escalation of rhetoric, though, was belied by the Court’s performance and indeed by Frankfurter’s own formulation that the task involved “reconcil[ing] the conflicting claims of liberty and authority.” For, even taking deference to legislative judgments into account, how could the judges reconcile the competing claims without some personal assessment of their relative importance? Frankfurter’s quotation of Holmes discussing John Marshall, “We live by symbols,” evoked another phrase associated with Charles Evans Hughes, “We live under a Constitution, but the Constitution is what the judges say it is.” The rhetorical escalation had doctrinal importance as well. Understood at the ground level, Frankfurter’s statement about the flag as a symbol of national unity amounted to a refutation of the ABA Committee’s claim that civic education would be sufficient to inculcate patriotism, but the reasons have gave for that assertion also reflected the post-1937 understanding that the police power was in fact unlimited in principle: If the police power encompassed the promotion of all that was presupposed by organized political society, what could possibly be left out?¹¹⁸

Justice Stone argued that the “unique” flag-salute requirement, which sought “to coerce these children to express a sentiment which … they do not entertain, and which violates their deepest religious convictions,” was “a long step” beyond prior decisions acknowledging the government’s “right to survive” by implementing a compulsory draft. For Stone, “[t]he very fact that we have constitutional guaranties … require[s] some accommodation of the powers which government normally exercises,” and “it is the function of the courts to determine whether such accommodation is reasonably possible.”

¹¹⁷ 310 U.S. at 600.
¹¹⁸ 310 U.S. at 598, 596.
And, for Stone, there were “other ways to teach loyalty and patriotism” than through a compulsory flag salute.119

Stone then turned to the deeper themes that concerned him. “History teaches us that that there have been but few infringements of personal liberty by the state which have not been justified … in the name of righteousness and the public good, and few which have not been directed … at politically helpless minorities.” Sentences resonant of the “fundamental rights” strand in his thinking argued that the Constitution’s framers “could [not] have left any latitude for a legislative judgment that the compulsory expression of belief which violates religious convictions would better serve the public interest than their protection.” He then proposed an analysis that was expressly put as an alternative to what he had just written. There might be “some scope” for legislative judgment, but it was insufficient to say that that judgment should be respected, as Frankfurter had put it, “as long as the remedial channels of the democratic process remain open…..” In Frankfurter’s hands, that observation implied that courts had no role to play in enforcing the Constitution when the democratic process was unobstructed. Unsurprisingly, Stone took Frankfurter’s statement as the occasion for a reassertion of his more refined Footnote 4 reconciliation of judicial review and the democratic process. Frankfurter’s version was, for Stone, “the surrender of the constitutional protection of the liberty of small minorities to the popular will.” The Jehovah’s Witnesses were a “small and helpless minority” of precisely the sort Footnote 4 contemplated. They held “a religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern.” Without citing cases, Stone said that the Court had recently given careful scrutiny to legislation it “then held to infringe the constitutional liberty of religious and racial minorities,” and that the same scrutiny should be given to the flag salute statute. “With such scrutiny,” Stone ended his opinion, “cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared, presents a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection.”120

The nation reacted strongly to the Gobitis decision. The Court’s opinion appears to have encouraged a discernable increase in harassment of Jehovah’s Witnesses, already rather substantial. 121 Two years after the decision, University of Virginia law professor Francis H. Heller compiled a list of more than fifty newspapers, from every region of the country, that criticized the decision. He concluded his list with quotations from the New York Times –

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119 310 U.S. at 602-3 (Stone, J., dissenting).
120 320 U.S. at 604-5, 606-7 (Stone, J., dissenting).
121 Francis H. Heller, “A Turning Point for Religious Liberty,” 29 Va. L. Rev. 440, 448-49 (1943) (noting “a peak” in harassment in mid-1940, with a “secondary high in the last quarter of 1940,” which he “attributed directly to the results of the Gobitis decisions.”).
“the principles for which the flag stands are by far more important than any gesture” – and the “‘far more outspoken’” St. Louis Post-Dispatch: “We think that this decision … is dead wrong. We think its decision is a violation of American principles. We think it is a surrender to popular hysteria. … We honor Justice Stone, who refused to lend himself to it.” Heller also compiled quotations from legal commentators: “Chafee, Corwin (‘no doubt the decision owes something to current excitements’), Cushman (‘a disheartening decision), Beryl H. Levy (‘a difficult case to justify’), Benjamin F. Wright (‘just how close was the connection between this decision and the crisis fervor produced by the successful march of the Nazi army into the Low Countries and France only the events and decisions, of the next few years can determine’).” Heller observed that school boards in small towns like Minersville seemed almost the only ones interested in enforcing a compulsory flag salute against religious objectors, and pointed to those towns’ disproportionate influence over state politics as a reason to be skeptical about Justice Frankfurter’s “remedy” of an appeal to those legislatures for relief. He concluded his list with a citation to a speech by the Dean of Fordham Law School, a Jesuit institution, who criticized Justice Frankfurter for suggesting that the Meyer and Pierce cases rested on “policy merely and not natural right.” 122

With the police power expanded to include “morale” and, for all practical purposes, everything else, and natural rights retaining only some modest purchase through the idea of “fundamental” rights, constitutional law was in real need of some way to account for the Court’s continuing adherence to doctrines of civil liberties. There were stray thoughts accompanied by caveats, hints, and more, but Gobitis shows that by the time Hughes left the Court, he and his colleagues had not found one.

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On November 27, 1941, a few days short of five months after Hughes retired, President Roosevelt issued a proclamation designating December 15, the sesquicentennial of the Bill of Rights’ adoption, as “Bill of Rights Day.”123 As did many invocations of the Constitution in the early 1940s, Roosevelt’s proclamation looked across the oceans: “We … have seen these privileges lost in other continents and other countries [and] can now appreciate their meaning to those people who enjoyed them once and now no longer can.” It hinted at the possibility of war in noting that “men have died to win” the rights guaranteed by the Bill of Rights. The Bill of Rights was to be remembered by “the Nation.” But, Roosevelt declared, it was “especially fitting that this anniversary should be … observed by those very institutions of a democratic


123 Proclamation 2524, Bill of Rights Day, Nov. 27, 1941, [citation].
people which owe their very existence to the guarantees of the Bill of Rights”: schools, churches, “labor unions, the religious and educational and civic organizations of all kinds which, without the guarantee of the Bill of Rights, could never have existed.” The Bill of Rights now underwrote the pluralist institutions that in turn structured the constitutional system.