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The Early Years of First Amendment Lochnerism

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ARTICLES

THE EARLY YEARS OF FIRST AMENDMENT LOCHNERISM

*Jeremy K. Kessler**

From Citizens United to Hobby Lobby, civil libertarian challenges to the regulation of economic activity are increasingly prevalent. Critics of this trend invoke the specter of Lochner v. New York. They suggest that the First Amendment, the Religious Freedom Restoration Act, and other legislative “conscience clauses” are being used to resurrect the economically libertarian substantive due process jurisprudence of the early twentieth century. Yet the worry that aggressive judicial enforcement of the First Amendment might erode democratic regulation of the economy and enhance the economic power of private actors has a long history. As this Article demonstrates, anxieties about such “First Amendment Lochnerism” date back to the federal judiciary’s initial turn to robust protection of free exercise and free expression in the 1930s and 1940s.

Then, it was those members of the Supreme Court perceived as most liberal who struck down economic regulations on First Amendment grounds. They did so in a series of contentious cases involving the Jehovah’s Witnesses, who challenged local peddling taxes as burdening a central aspect of their missionary faith—the mass sale and distribution of religious literature. In dissent, Justice Robert Jackson warned that the new “liberal” majority’s expansive conception of First

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Amendment enforcement repeated the mistakes of the “liberty of contract” jurisprudence of the Lochner era, undermined democratic regulation of the economy, and imposed the beliefs of some on “the rights of others.”

Justice Jackson’s warnings sound strikingly similar to contemporary critiques of First Amendment Lochnerism. Yet today’s critics treat recent case law as a novel, economically libertarian co-option of an otherwise progressive project: the judicial enforcement of civil liberties. In contrast, the Justices and scholars who objected to the 1940s peddling-tax decisions perceived an inextricable relationship between judicial civil libertarianism and judicial interference with economic regulation. By recovering the origins and sketching the aftermath of the peddling-tax debate, this Article argues that contemporary critics of First Amendment Lochnerism tend to overstate the phenomenon’s novelty and underestimate the difficulty of curing judicial civil libertarianism of its “Lochnerian” tendencies. This argument, in turn, counsels a reorientation of contemporary advocacy. Rather than defending an illusory tradition of economically neutral First Amendment enforcement, critics of today’s First Amendment Lochnerism might more accurately and persuasively position themselves as reformers. They could then set to work breaking with a legal tradition long insensitive to the deleterious effects of judicial civil libertarianism on political regulation of the economy.

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INTRODUCTION

From *Citizens United* to *Hobby Lobby*, civil libertarian challenges to the regulation of economic activity are increasingly prevalent.¹ Critics of this trend invoke the specter of *Lochner v. New York*.² They suggest that the First Amendment, the federal Religious Freedom Restoration Act, and other legislative “conscience clauses” are being used as doctrinal substitutes for the economically libertarian substantive due process jurisprudence of the early twentieth century.³ As campaign financiers, food and drug companies, right-to-work activists, and religious employers defend their economic autonomy on civil libertarian grounds, the discourse of “First Amendment Lochnerism” has become widespread among dissenting judges and legal scholars.⁴ In 2011, for example, Justice Stephen Breyer warned that the Supreme Court’s First Amendment invalidation of a state law restricting the sale of medical information had “reawaken[ed] *Lochner*’s pre–New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue.”⁵ Five years later, such comparisons fill

1. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Citizens United v. FEC*, 558 U.S. 310 (2010). Other recent examples include: *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam); *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016) (per curiam); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015); *Dwyer v. Cappell*, 762 F.3d 275 (3d Cir. 2014); *Eternal Word Television Network, Inc. v. Sec’y, U.S. Dep’t of Health & Human Servs.*, 756 F.3d 1339 (11th Cir. 2014); *Evergreen Ass’n v. City of New York*, 740 F.3d 233 (2d Cir. 2014); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *Newland v. Sebelius*, 542 F. App’x 706 (10th Cir. 2013); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012); *CTIA-Wireless Ass’n v. City & County of San Francisco*, 494 F. App’x 752 (9th Cir. 2012); *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199 (E.D. Cal. 2015); *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013).

2. 198 U.S. 45 (1905). For the symbolic power of *Lochner* in constitutional argument, see Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 417–22 (2011).

3. See *infra* notes 5–6 and accompanying text (citing recent judicial and scholarly examples).

4. For earlier instances of this discourse, see J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L.J. 375, 384; Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 Mich. L. Rev. 281, 286–88 (2000); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 30–32 (1979); Frederick Schauer, *First Amendment Opportunism*, in *Eternally Vigilant: Free Speech in the Modern Era* 175, 178 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); Cass R. Sunstein, *Lochner’s Legacy*, 87 Colum. L. Rev. 873, 883–84 (1987) [hereinafter Sunstein, *Lochner’s Legacy*]; Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363, 1387 (1984) [hereinafter Tushnet, *Rights*]; Howard M. Wasserman, *Bartnicki as Lochner: Some Thoughts on First Amendment Lochnerism*, 33 N. Ky. L. Rev. 421, 458 (2006).

5. *Sorrell*, 131 S. Ct. at 2685 (Breyer, J., dissenting); see also *Korte*, 735 F.3d at 693 (Rovner, J., dissenting) (describing the invalidation of the Affordable Care Act’s contraceptive-coverage mandate on religious liberty grounds as “reminiscent of the *Lochner* era”).

the law reviews.⁶ “Today,” one scholar remarks, judicial “interpretations of the First Amendment and the Religious Freedom Restoration Act . . . replicate the commitment to private ordering and resistance to redistribution that were at the heart of *Lochner*.”⁷

The prevailing sense among these critics is that we are in the midst of a relatively recent, economically libertarian “hijacking”⁸ of civil liberties law. Yet the worry that aggressive judicial enforcement of the First Amendment might enhance the economic power of some private actors at the expense of other private and public interests has a long history. As this Article demonstrates, anxieties about such First Amendment *Lochnerism* date back to the Supreme Court’s *initial* turn to robust protection of free exercise and free expression in the 1930s and 1940s. Then, it was those Justices perceived as most liberal who struck down economic regulations on First Amendment grounds. They did so in a series of contentious cases involving the Jehovah’s Witnesses, who challenged local peddling taxes as burdening a central aspect of their missionary faith—the mass sale and distribution of religious literature.⁹

In June 1942, soon after the Supreme Court declared commercial speech unprotected by the First Amendment,¹⁰ it also rejected the Witnesses’ peddling-tax challenge.¹¹ But less than a year later, a new “liberal”¹² majority—Chief Justice Stone along with Justices Douglas, Black, Murphy, and the recently appointed Rutledge—reversed the earlier peddling-tax decision. In doing so, this majority held for the first time that the First Amendment occupied a “preferred position” in the

6. E.g., Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 *Stan. L. Rev.* 1205 (2014); Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines: Hobby Lobby’s Puzzling Footnote 37, in The Rise of Corporate Religious Liberty* 323 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016) [hereinafter Gedicks & Van Tassell, *Burdens and Baselines*]; Leslie Kendrick, *First Amendment Expansionism*, 56 *Wm. & Mary L. Rev.* 1199 (2015); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 *Colum. L. Rev.* 1453 (2015); Amanda Shanor, *The New Lochner*, 2016 *Wis. L. Rev.* 133; Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 *Harv. L. & Pol’y Rev.* 25 (2015); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 *Law & Contemp. Probs.*, no. 4, 2014, at 195; Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, *New Republic* (June 3, 2013), <http://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation> [<http://perma.cc/CMM6-UPJY>].

7. Sepper, *supra* note 6, at 1453.

8. Wu, *supra* note 6.

9. *Marsh v. Alabama*, 326 U.S. 501 (1946); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Douglas v. City of Jeanette*, 319 U.S. 157 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Jones v. City of Opelika (Opelika II)*, 319 U.S. 103 (1943) (mem.) (per curiam).

10. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

11. *Jones v. Opelika (Opelika I)*, 316 U.S. 584, 598–99 (1942).

12. Wallace Mendelson, *Clear and Present Danger—from Schenck to Dennis*, 52 *Colum. L. Rev.* 313, 332 (1952).

constitutional order.¹³ Coined by Chief Justice Stone, the “preferred position” doctrine was understood by contemporaries to be a gloss on Footnote Four of *Carolene Products*,¹⁴ another Stone innovation.¹⁵ In Footnote Four, then-Justice Stone had suggested several circumstances in which the “presumption of constitutionality” that generally applied to “ordinary commercial” regulation might be “narrow[ed],” including when such regulation “appear[ed] on its face to be within a specific prohibition of . . . the first ten amendments” to the Constitution.¹⁶ The “preferred position” doctrine struck many jurists as a dangerously broad interpretation of the Footnote’s ambiguous language, capable of subjecting a great deal of “ordinary commercial” regulation to heightened judicial scrutiny on First Amendment grounds. In the May 1943 peddling-tax decisions, the Court’s five most “liberal” Justices confirmed the danger, declaring that the First Amendment’s “preferred” constitutional status meant that even an indirect and attenuated financial burden on free exercise or free expression—even when that exercise or expression took the form of commercial activity—was forbidden.¹⁷

Hailed at the time as “one of the most notable acts” in the Supreme Court’s history,¹⁸ the 1943 peddling-tax decisions occasioned fierce dissents from four Justices who considered themselves every bit as “civil libertarian” as the new majority. The problem, the dissenters explained, was that prohibiting indirect regulatory burdens on activities that were both expressive and commercial in nature threatened to reverse the New Deal’s victory over judicial meddling in the economy, while transforming the First Amendment into a tool of economic libertarianism.¹⁹ The majority’s First Amendment “transcendentalism,” Justice Jackson warned, repeated the mistakes of the “liberty of contract” jurisprudence of the *Lochner* era, threatened to undermine political regulation of the economy, and risked imposing the beliefs of some on “the rights of

13. *Murdock*, 319 U.S. at 115.

14. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

15. For contemporaneous understandings of the relationship between Footnote Four and the “preferred position” doctrine, see Samuel J. Konefsky, Chief Justice Stone and the Supreme Court 215–34 (1945); Alpheus Thomas Mason, *The Core of Free Government*, 1938–40: Mr. Justice Stone and “Preferred Freedoms,” 65 *Yale L.J.* 597, 625–26 (1956); Herbert Wechsler, *Stone and the Constitution*, 46 *Colum. L. Rev.* 764, 795–99 (1946); Edwin Borchard, *Book Review*, 46 *Colum. L. Rev.* 334, 336 (1946) (reviewing Konefsky, *supra*). For later commentary on this relationship, see G. Edward White, *The Constitution and the New Deal* 128–63 (2000); Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 *S. Tex. L. Rev.* 163, 202–10 (2004); Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusk and John Hart Ely vs. Harlan Fiske Stone*, 12 *Const. Comment.* 277, 277, 301 (1995).

16. *Carolene Prods.*, 304 U.S. at 148, 152 n.4.

17. See *infra* section III.B. (discussing the debate surrounding the 1943 decisions).

18. Irving Dilliard, *About-Face to Freedom*, *New Republic*, May 24, 1943, at 693, 693 [hereinafter Dilliard, *About-Face*].

19. See *infra* section III.B (discussing the dissenting opinions of Justices Roberts, Reed, Frankfurter, and Jackson).

others.”²⁰ Justice Frankfurter agreed, insisting that “[t]here is nothing in the Constitution which exempts persons engaged in [expressive] activities from sharing equally in the costs of benefits to all . . . provided by government.”²¹ Similarly, Justice Reed lamented that the “liberal” majority’s “late withdrawal of the power of taxation over the distribution activities of those covered by the First Amendment fixes what seems to us an unfortunate principle . . . capable of indefinite extension.”²²

These seventy-year-old dissents sound strikingly similar to contemporary liberal critiques of First Amendment *Lochner*ism.²³ Today’s critics, however, tend to treat recent “*Lochnerian*” case law as an economically libertarian perversion of an otherwise commendable project—aggressive judicial enforcement of civil liberties. In doing so, many rely on Professor Cass Sunstein’s strikingly narrow interpretation of *Lochner*’s error. This interpretation traces the ills of the *Lochner* era to a judicial worldview in which common law property and contract rights provided a politically “neutral” regulatory “baseline.”²⁴ Statutory departures from this baseline were thus inherently suspect. By narrowly identifying “*Lochnerism*” with the commitment of individual judges to such an outdated, economically libertarian worldview, however, legal liberals may overlook—or seek to evade—tensions between their critique of First Amendment *Lochnerism* and their own commitment to the

20. *Douglas v. City of Jeanette*, 319 U.S. 157, 179, 181–82 (Jackson, J., concurring in part and dissenting in part).

21. *Murdock v. Pennsylvania*, 319 U.S. 105, 140 (1943) (Frankfurter, J., dissenting).

22. *Id.* at 133 (Reed, J., dissenting).

23. See *supra* notes 5–6 (collecting contemporary liberal critiques); see also Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 *Harv. C.R.-C.L. L. Rev.* 343, 379 (2014); Kara Loewentheil, *When Free Exercise Is a Burden: Protecting “Third Parties” in Religious Accommodation Law*, 62 *Drake L. Rev.* 433, 454–55 (2014); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *Yale L.J.* 2516, 2587 (2015); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 *U. Chi. L. Rev.* 393, 423–27 (2015).

24. Sunstein, *Lochner’s Legacy*, *supra* note 4, at 874; cf. Gedicks & Van Tassell, *Burdens and Baselines*, *supra* note 6, at 332 (describing *Hobby Lobby’s* “adoption of a negative-liberty or libertarian baseline for assessing whether religious exemptions impose third-party burdens” as “the very baseline that underwrote the justly maligned ‘liberty of contract’ jurisprudence enshrined in *Lochner v. New York*”); Sepper, *supra* note 6, at 1456–57 (identifying “free exercise *Lochnerism*” with the judicial belief that “the existing market forms a legally and economically neutral baseline”); Tebbe, *supra* note 6, at 57–58 (arguing that religious exemptions from antidiscrimination law for businesses that decline to serve same-sex couples privilege a “common law baseline” in the tradition of *Lochner*). For a critique of Professor Sunstein’s historical analysis and its adoption by progressive legal scholars, see generally David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 *Tex. L. Rev.* 1 (2003). For an overview of competing interpretations of *Lochner*-era case law, see Luke P. Norris, *Constitutional Economics: Lochner, Labor, and the Battle for Liberty*, *Yale J.L. & Human.* (forthcoming 2016) (manuscript at 10–14) (on file with the *Columbia Law Review*).

judicial enforcement of expansively defined, constitutionally privileged civil liberties.²⁵

In contrast, the Justices who dissented from the 1943 peddling-tax decisions perceived an inextricable relationship between judicial civil libertarianism and judicial interference with economic regulation. They worried that judicial enforcement of civil liberties risked reinstalling courts in their pre–New Deal role as antidemocratic arbiters of economic life.²⁶ Prescient voices in the legal academy agreed, pointing out that neither Footnote Four nor the “preferred position” doctrine contained any principle that prevented courts from scrutinizing economic regulation for incidental civil libertarian burdens; nor did these doctrines provide courts with a template for distinguishing clearly between “preferred” civil libertarian activity and unprotected economic activity.²⁷

These structural and doctrinal diagnoses of the relationship between judicial civil libertarianism and First Amendment Lochnerism contrast with the latter-day, Sunsteinian explanation, which identifies Lochnerism with the subjective judicial preference for common law modes of economic regulation. Such a subjectivist explanation, however, was implausible at the dawn of First Amendment Lochnerism precisely because the liberal Justices who struck down the peddling taxes and protected the Witnesses’ commercial activity were themselves veteran New Dealers. They had little love for economic libertarianism or patience with the idea of the common law’s political neutrality. The initial controversy over the economically libertarian tendencies of Footnote Four and the “preferred position” doctrine thus played out among jurists who all dispensed with “Lochnerism” as Professor Sunstein and his successors define it. These jurists nonetheless disagreed over the question as to whether aggressive judicial civil libertarianism could coexist—as a matter of legal structure, not judicial subjectivity—with

25. See, e.g., Sepper, *supra* note 6, at 1460 (explaining her critique of “Free Exercise Lochnerism” does not “seek to criticize the endeavor of judicial review of legislation or examine the role of unenumerated rights in the constitutional system”); Sunstein, *Lochner’s Legacy*, *supra* note 4, at 874, 904, 906 (focusing on “an important element in the *Lochner* Court’s approach . . . that has little to do with an aggressive judicial role in general” and rejecting the conclusion that “constitutional courts ought to play little or no role” in changing “the existing distribution of wealth and entitlements”). For two important, if partial, exceptions to the Sunsteinian approach, see Kendrick, *supra* note 6, at 1210–19 (arguing the “opportunistic” use of free speech to protect business interests is dependent on the inherent expansiveness of the category of “speech” and the unstable nature of legal rules); Shanor, *supra* note 6, at 137–38, 164, 188 (arguing the “libertarian turn in commercial speech doctrine” differs from the “old” *Lochner* in that it emphasizes the “naturalization of speech” rather than the “naturalization” of the common law).

26. See *infra* sections III.B, IV.A (discussing judicial and scholarly responses to the 1943 peddling-tax decisions).

27. See *infra* section IV.B (discussing early interpretations of Footnote Four and the “preferred position” doctrine).

judicial deference to political regulation of the economy. This disagreement would haunt the Supreme Court for decades to come.²⁸

Today, as the ghost of the peddling-tax cases seems to have taken on newly ghoulish proportions, there is much to learn from the history of earlier, failed exorcisms. By recovering that history, this Article argues that contemporary critics of First Amendment Lochnerism have overstated the phenomenon's novelty and understated the economically libertarian tendencies that may be intrinsic to judicial enforcement of civil liberties, regardless of the politics of individual judges. Insistence on the novelty and political contingency of today's First Amendment Lochnerism allows progressive critics to cast themselves as the traditionalist defenders of a civil libertarian status quo dating back to the 1940s. The history of the peddling-tax cases, however, suggests that the creation of a truly non-Lochnerian First Amendment would require a fundamental break with that status quo.

Part I of this Article traces the emergence of our judge-centered vision of civil libertarianism to the 1930s. Before that time, most civil libertarians were political leftists who saw courts as the guardians of private property; accordingly, they focused their energies on encouraging administrative and legislative enforcement of civil liberties, especially the civil liberties of labor activists.²⁹ But in response to progressive and New Deal regulation of corporations, probusiness lawyers offered an alternative account that linked civil liberties to the rights of employers and reframed the judiciary as a civil libertarian check on a potentially totalitarian New Deal state. Although the anti-New Dealers' litigation campaign stalled in 1937,³⁰ elements of their civil libertarian vision became embedded in Footnote Four of *Carolene Products*.³¹

Part II describes how the initially conservative celebration of judicial civil libertarianism gained bipartisan support among lawyers and judges.³² When President Roosevelt launched his plan to pack the

28. See *infra* section IV.C (discussing the legacy of the peddling-tax cases).

29. See generally Jerold S. Auerbach, *Labor and Liberty* (1966); William E. Forbath, *Law and the Shaping of the American Labor Movement* 139–66 (1991); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties*, 114 *Colum. L. Rev.* 1083 (2014) [hereinafter Kessler, *Administrative Origins*]; Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 *Va. L. Rev.* 1 (2000); Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 *Sup. Ct. Rev.* 297 [hereinafter Weinrib, *Civil Liberties*]; Emily Zackin, *Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU Turned to the Courts*, 42 *Law & Soc'y Rev.* 367, 371–75 (2008).

30. See *Associated Press v. NLRB*, 301 U.S. 103, 128–30 (1937); see also *infra* notes 127–129 and accompanying text (describing the Court's rejection of the anti-New Dealers' argument).

31. See *infra* section I.B (detailing the origins of Footnote Four).

32. This argument builds on Professor Laura Weinrib's work on the role that conservative proponents of judicial enforcement of the First Amendment played in the transformation of the American Civil Liberties Union (ACLU) in the 1930s. See Laura M.

Supreme Court in 1937, Wall Street lawyer (and former Roosevelt supporter) Grenville Clark took the lead in framing court packing as a threat to the institution that could best defend the civil liberties of rich and poor alike—the judiciary. After the defeat of President Roosevelt’s plan, Clark and the American Bar Association (ABA) continued to press this vision of judicial civil libertarianism, joining forces with a group that ostensibly exemplified the sort of Americans most in need of judicial protection: the Jehovah’s Witnesses. The Witnesses’ eccentric expressive practices—their refusal to salute the American flag, their aggressive, door-to-door peddling of apocalyptic tracts—led to a fierce, and sometimes violent, backlash.³³ This backlash bore a faint but ominous resemblance to the contemporaneous suppression of German Jehovah’s Witnesses at the hands of the Nazi regime. Emphasizing this dark parallel, Clark and the ABA helped Witness lawyers develop their argument for aggressive judicial enforcement of an expansive First Amendment.

Part III recounts how the Witnesses gradually overcame the resistance of President Roosevelt’s Supreme Court, helping to constitute a new “liberal” majority in the process. With the powerful American Newspaper Publishers Association (ANPA) at their side and the rhetoric of antitotalitarianism on their lips, Witness lawyers persuaded five Justices that taxes on the door-to-door sale of goods and services impermissibly burdened the Witnesses’ ability to distribute and sell religious literature. It did not matter that these taxes were nondiscriminatory, financially nonprohibitive, and levied on all forms of peddling. Nor did it matter, as the four dissenting Justices loudly protested, that the use of the First Amendment to shield commercial activity from economic regulation seemed to work the same economically libertarian effects as the substantive due process jurisprudence of the *Lochner* era. Because First Amendment rights occupied a “preferred position” in the constitutional order, the new liberal majority reasoned, their exercise was shielded from even incidental economic obstacles.

Weinrib, *The Liberal Compromise: Civil Liberties, Labor, and the Limits of State Power, 1917–1940*, at 408–56 (May 2011) [hereinafter Weinrib, *Liberal Compromise*] (unpublished Ph.D. dissertation, Princeton University) (on file with the *Columbia Law Review*). For further background on these conservative civil libertarians, see Gerald T. Dunne, *Grenville Clark: Public Citizen* 78–118 (1986); Edwin Emery, *History of the American Newspaper Publishers Association* (1970); Richard Polenber, *Reorganizing Roosevelt’s Government* 55–78 (1966); George Wolfskill, *The Revolt of the Conservatives* (1962); Jared A. Goldstein, *The American Liberty League and the Rise of Constitutional Nationalism*, 86 *Temple L. Rev.* 287 (2014); Jeremy K. Kessler, *A War for Liberty: On the Law of Conscientious Objection*, in 3 *The Cambridge History of the Second World War* 447, 459–61 (Michael Geyer & Adam Tooze eds., 2015); John W. Wertheimer, *A “Switch in Time” Beyond the Nine: Historical Memory and the Constitutional Revolution of the 1930s*, 53 *Stud. L. Pol. & Soc’y* 3 (2010).

33. See Sarah Barringer Gordon, *The Spirit of the Law: Religious Voices and the Constitution in Modern America* 19–33 (2010); Shawn Francis Peters, *Judging Jehovah’s Witnesses: Religious Persecution and the Dawn of the Rights Revolution* 18–45 (2000).

Part IV sketches the aftermath of the peddling-tax cases at the Supreme Court and within the legal academy. Almost immediately, the liberal majority began to struggle with the implications of victory, disturbed to find the 1943 peddling-tax decisions invoked to justify ever more extravagant First Amendment attacks on government regulation of health, safety, and commerce.³⁴ When three of the five members of the liberal bloc died between 1946 and 1949, however, this tumultuous period looked like it might come to a quick end. In the late 1940s and early 1950s, former dissenters worked to marginalize the peddling-tax decisions, the “preferred position” doctrine, and the entire *Carolene Products* framework of bifurcated review.³⁵ In doing so, they followed the lead of legal scholars who had spent the past decade warning of the economically libertarian tendencies of the Court’s civil liberties jurisprudence.³⁶ But judicial and scholarly efforts to put the peddling-tax era to rest met with only partial success. During the 1950s and 1960s, the peddling-tax precedents intermittently reemerged in politically liberal Supreme Court decisions invalidating economic regulations or protecting the economic autonomy of private actors on First Amendment grounds.³⁷ Then, in the 1970s, the liberal wing of the Burger Court invoked the authority of the peddling-tax cases to extend robust First Amendment protection to “commercial speech,” precipitating a second generation of First Amendment Lochnerism scholarship.³⁸ We are now living through a *third* generation of crisis and critique concerning the relationship between judicial civil libertarianism and judicial supervision of economic regulation.

This history cautions against treating First Amendment Lochnerism as a recent corruption of an otherwise progressive project of judicial civil libertarianism. Contemporary critics are not wrong to identify a new judicial zeal for immunizing corporations from economic regulation on civil libertarian grounds. But today’s economically libertarian judicial

34. See *Marsh v. Alabama*, 326 U.S. 501 (1946); *Thomas v. Collins*, 323 U.S. 516 (1945); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *infra* section IV.A (discussing the immediate impact of the peddling-tax decisions).

35. See *Breard v. Alexandria*, 341 U.S. 622, 641–45 (1951); *Kovacs v. Cooper*, 336 U.S. 77, 90–92 (1949) (Frankfurter, J., concurring).

36. See Henry Steele Commager, *Majority Rule and Minority Rights* (1943) [hereinafter *Commager, Majority Rule and Minority Rights*]; George D. Braden, *The Search for Objectivity in Constitutional Law*, 57 *Yale L.J.* 571 (1948) [hereinafter *Braden, Search*]; Walton H. Hamilton & George D. Braden, *The Special Competence of the Supreme Court*, 50 *Yale L.J.* 1319 (1941); *infra* section IV.B (discussing scholarly critiques of Footnote Four and the Hughes Court’s First Amendment jurisprudence).

37. See *infra* section IV.C (discussing the legacy of the peddling-tax cases).

38. See Michael J. Graetz & Linda Greenhouse, *The Burger Court and the Rise of the Judicial Right* 245–55 (2016); Balkin, *supra* note 4, at 384; Jackson & Jeffries, *supra* note 4, at 30–31; Sunstein, *Lochner’s Legacy*, *supra* note 4, at 883–84; Tushnet, *Rights*, *supra* note 4, at 1387–88; *infra* section IV.C (discussing the legacy of the peddling-tax cases).

“activists” are leveraging an ambiguity that has been constitutive of judicial civil libertarianism since its inception: the ambiguity between the aggressive protection of civil liberties and the searching review of economic regulation for incidental restrictions on expressive activity. While certainly not the dominant trend in First Amendment jurisprudence, judicial suspicion of economic regulations that incidentally restrict the exercise of First Amendment rights—even when that exercise takes the form of commercial activity—has a long doctrinal pedigree, dating back to the peddling-tax cases themselves. Accordingly, contemporary critics of First Amendment Lochnerism risk underestimating the difficulty of their task when they characterize it as the *defense* of a doctrinally stable, economically neutral tradition of First Amendment rights enforcement. Contemporary critics might more accurately and persuasively position themselves as reformers, seeking to break with a legal tradition long insensitive to the deleterious impact of judicial civil libertarianism on political regulation of the economy.

I. FIRST AMENDMENT LOCHNERISM IN THE 1930S

A. *The Anti–New Deal First Amendment*

The most steadfast proponents of judicial enforcement of the First Amendment in the 1930s were corporate lawyers tasked with fending off New Deal economic regulation. The early nexus of this effort was the ANPA, a trade group controlled by the nation’s largest newspaper chains. Founded in 1887, ANPA first took an official interest in the First Amendment in 1922.³⁹ The immediate occasion for this embrace of civil libertarian advocacy was a congressional effort to criminalize the publication of news about sports betting.⁴⁰ A classic piece of Progressive-era protective legislation, the betting bill reflected the spirit of maximum-hours laws and Prohibition more than that of the Palmer Raids. Yet the time was ripe for civil libertarian critique. The American Civil Liberties Union (ACLU) had formed two years earlier and already boasted a roster of legal elites on its board, despite the organization’s commitment to the defense of labor radicals and other political extremists.⁴¹

Indeed, when ANPA finally established a Committee on the Freedom of Press in 1928, it chose as chairman Robert McCormick, the publisher of the *Chicago Tribune* who had recently distinguished himself by coming to the defense of a highly controversial, small-time paper. *The Saturday Press*, an independent Minneapolis tabloid, had dedicated its short print run to accusing public officials of conspiring on behalf of

39. Emery, *supra* note 32, at 221.

40. *Id.*

41. See Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* 25–31 (1979) (noting the emergence of new civil liberties groups).

Jewish gangs who “practically rul[ed]” the city.⁴² After one of the named officials brought suit under a public-nuisance law, the Minnesota state courts permanently enjoined the *Press* for its defamatory and antisemitic content. At that point, McCormick stepped in, offering to fund an appeal to the Supreme Court. There, the *Press*’s publisher, J.M. Near, won a momentous victory. For the first time in history, the Court struck down a law on First Amendment grounds.⁴³

If *Near v. Minnesota* proved that McCormick was willing to look out for the unpopular (antisemitic) little guy, ANPA’s first major litigation effort under his stewardship suggested a different focus. Having established the presumptive unconstitutionality of content-based prior restraints in *Near*, McCormick sought to vindicate a more expansive vision of press freedom in *Grosjean v. American Press Co.*⁴⁴ With the help of ANPA’s general counsel, Elisha Hanson, McCormick argued that Louisiana’s license tax on all newspapers with a circulation of over 20,000 copies violated the First and Fourteenth Amendments.⁴⁵ The factual circumstances of *Grosjean* made it quite clear that the tax was discriminatory in intent, aimed by Governor Huey Long at his press critics.⁴⁶ Yet ANPA wanted to strike a more general blow against public regulation of the increasingly consolidated newspaper industry and thus pursued a facial challenge. Justice Sutherland was willing to oblige.⁴⁷

In holding that the circulation tax violated the American Press Corporation’s press freedom, Justice Sutherland’s unanimous opinion did allude to the case’s “present setting” and a “long history” of intentionally discriminatory circulation taxes.⁴⁸ But the heart of the opinion argued that a tax on high circulation was unconstitutional on its face:

[Such a tax] . . . operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid . . . it well might result in destroying both advertising and circulation.⁴⁹

42. Fred W. Friendly, *Minnesota Rag: The Dramatic Story of the Landmark Supreme Court Case that Gave New Meaning to Freedom of the Press* 40–54 (1981).

43. *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 735–38 (1931).

44. 297 U.S. 233 (1936).

45. Emery, *supra* note 32, at 222–23; Samuel R. Olken, *The Business of Expression: Economic Liberty, Political Factions, and the Forgotten First Amendment Legacy of Justice George Sutherland*, 10 *Wm. & Mary Bill Rts. J.* 249, 301 (2002).

46. Emery, *supra* note 32, at 222–23.

47. Olken, *supra* note 45, at 301.

48. *Grosjean*, 297 U.S. at 250.

49. *Id.* at 244–45 (citing *Magnano Co. v. Hamilton*, 292 U.S. 40 (1934)). Professor Samuel Olken suggests that this part of Justice Sutherland’s opinion closely followed Hanson’s oral argument. Olken, *supra* note 45, at 301.

The logic of Justice Sutherland's second sentence was striking in that it could potentially apply to any regulatory tax levied on a particular mode of commercial activity. In fact, Sutherland's original opinion treated *Grosjean* as a pure economic liberty case, one of many in which he and the Court's conservatives saw "unequal taxation of similarly situated persons" as an unconstitutional form of class legislation.⁵⁰ Justice Sutherland eventually, however, rewrote the opinion to emphasize its First Amendment dimensions in order to avoid a concurrence from Justices Cardozo, Brandeis, and Stone.⁵¹ Because of this compromise, which combined a general aversion to regulatory taxation with a specific defense of press freedom,⁵² *Grosjean* would later provide ammunition for ANPA and the Jehovah's Witnesses in the peddling-tax cases.⁵³

Even at the time, some liberals warned of the danger that ANPA and Justice Sutherland's civil libertarian vision posed to New Deal economic reform.⁵⁴ Reporting on a speech that ANPA's Hanson gave in the wake of *Grosjean*, the *Nation* highlighted the lawyer's argument that "to control a newspaper's revenue through an attack on advertising or circulation constitutes a direct threat" to press freedom.⁵⁵ "By this definition," the magazine's editors worried, "any strike, not only against a publisher but against a business organization that advertised in his paper, would constitute a threat to the freedom of the press."⁵⁶ "Mr. Hanson seems to suggest," they concluded, "that when an old lady in Dubuque accepts a government pension—if she gets a chance—she too will be endangering our free press."⁵⁷

The *Nation* had good reason to doubt the purity of Hanson's civil libertarianism. Between *Near* and *Grosjean*, ANPA had developed an openly hostile stance toward New Deal regulation, "argu[ing] that business activities of newspapers either were exempted under the First Amendment from government regulation, or should be protected against any adverse effects of federal general business laws."⁵⁸ For instance, after the passage of the National Industrial Recovery Act in 1933, ANPA took charge of drafting a code for daily newspapers that New Deal administrators viewed as "completely out of harmony with the

50. Olken, *supra* note 45, at 296.

51. *Id.* at 299–300.

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

53. See *infra* section III.B.

54. See Sam Lebovic, *Free Speech and Unfree News: The Paradox of Press Freedom in America* 85–86 (2016).

55. Editorial Paragraphs, *Nation*, Feb. 26, 1936, at 234.

56. *Id.*

57. *Id.*

58. Emery, *supra* note 32, at 223.

intent of the entire [National Recovery Administration] system.”⁵⁹ Under Elisha Hanson’s leadership, the drafting committee made the code “the only voluntary code in the country”⁶⁰ and included open-shop provisions and exemptions from child-labor laws. Hanson also inserted a final clause stating that the adoption of the code should not “be construed as waiving, abrogating, or modifying any rights secured under the Constitution . . . or limiting the freedom of the press.”⁶¹

While most big newspaper chains cheered Hanson’s tactics,⁶² there were some revelatory dissents. The *New York Evening Post*, for instance, called Hanson’s code “a chiseling performance.”⁶³ “Big business,” the *Evening Post* argued, “has merely raised the freedom of the press issue as a smokescreen.”⁶⁴ In the end, the Roosevelt Administration accepted the voluntary code, though only after striking the open-shop and child-labor provisions.⁶⁵ President Roosevelt also insisted on issuing a statement announcing that the freedom of the press clause was “pure surplussage”: “The freedom guaranteed by the Constitution is freedom of expression and that will be scrupulously respected—but it is not freedom to work children, or to do business in a fire trap or violate the laws against obscenity, libel and lewdness.”⁶⁶

As the relationship between President Roosevelt and the newspaper industry deteriorated in the spring of 1934,⁶⁷ corporate lawyers and their clients in other industries were considering how best to attack the legitimacy of the New Deal. Although former Solicitor General and Democratic presidential candidate John W. Davis had endorsed Roosevelt in the 1932 election, by December 1933 Davis was despondent. Reflecting on the past year, he told a friend that the National Industrial Recovery Administration had “advocated things little short of a universal reign of terror.”⁶⁸ That same month, two of Davis’s old political allies, John Raskob and Jouett Shouse, were discussing what to do in the wake of their successful campaign to repeal Prohibition.⁶⁹ Like Davis, Raskob and Shouse had seen Prohibition as an affront to the free market and a harbinger of an expanding federal police power.⁷⁰ After the passage of the Twenty-First Amendment on December 5, 1933, Raskob, Shouse, the du Pont brothers, and other corporate leaders of the anti-Prohibition

59. Lebovic, *supra* note 54, at 70–71.

60. *Id.* at 70.

61. Emery, *supra* note 32, at 225.

62. Alfred McClung Lee, *The Daily Newspaper in America* 242 (1937).

63. Lebovic, *supra* note 54, at 71.

64. *Id.*

65. *Id.*

66. Lee, *supra* note 62, at 243 (quoting March 12, 1934, order).

67. See Graham J. White, *FDR and the Press* 49–66 (1979).

68. William H. Harbaugh, *Lawyer’s Lawyer: The Life of John W. Davis* 343 (1973).

69. See Wolfskill, *supra* note 32, at 54.

70. See *id.* at 39, 55; Goldstein, *supra* note 32, at 292 & nn. 31–32.

campaign agreed to “continue to meet from time to time” and consider “the formation of a group . . . which would in the event of danger to the Federal Constitution, stand ready to defend the faith of the fathers.”⁷¹

By the summer of 1934, it was clear to the corporate anti-Prohibitionists that the New Deal was just such a threat to the “faith of fathers.” In July, Davis traveled to the University of Virginia to decry the rhetoric of “emergency” that had licensed the rejection of “the basic American doctrine of a limitation on the powers of government.”⁷² The next month, he returned to New York to meet with Raskob, Shouse, former presidential candidate Al Smith, and a host of industrialists, financiers, and lawyers. The purpose of the meeting was to establish a new organization, modeled on the anti-Prohibition campaign, but with a broader goal: to challenge the “constitutional validity of the New Deal.”⁷³

In debating what to call the organization, most members proposed names reflecting the immediate financial interests that drove their opposition to the New Deal. Alfred Sloan suggested “Association Asserting the Rights of Property,” Shouse the “National Property League,” and E.F. Hutton the “American Federation of Business.”⁷⁴ But it was Davis’s idea to give the new group a more ideologically capacious and ambiguous name: “the American Liberties League.”⁷⁵ Shouse, who became the League’s president, got the point. On August 24, he convened a press conference at which he announced the formation of the American Liberty League (ALL), emphasizing that it was a nonpartisan organization and that its acronym, “ALL,” represented the fact that “the League spoke for *all* of the American people, whose liberties were under attack by the New Deal.”⁷⁶

Despite Shouse and Davis’s appeals to the liberty of all, many saw the League’s universalism as a thin veil for self-interest. *Newsweek* announced that “[t]he Tories have come out of ambush,” and the *Christian Century* considered it foolish to interpret “the stated aims of the League as implying anything less than a concerted attack upon the main features of the President’s policies.”⁷⁷ President Roosevelt himself “compared the league with a mythical organization formed to uphold strongly two of the

71. Wolfskill, *supra* note 32, at 54–55.

72. Harbaugh, *supra* note 68.

73. Goldstein, *supra* note 32, at 294; see also Wolfskill, *supra* note 32, at 25–28.

74. Robert F. Burk, *The Corporate State and the Broker State: The Du Ponts and American Politics, 1925–1940*, at 138 (1990).

75. *Id.* at 141. Davis proposed “the Liberty League” as an alternative, which the group eventually adopted in becoming “the American Liberty League.” *Id.*

76. Goldstein, *supra* note 32, at 294; see also Shouse Elected by Liberty League, *N.Y. Times* (Sept. 7, 1934), <http://query.nytimes.com/mem/archive/pdf?res=990DE1DF103CE23ABC4F53DFBF66838F629EDE> (on file with the *Columbia Law Review*) (describing the ALL as “undertaken to appraise the ‘New Deal’ for the public”).

77. Wolfskill, *supra* note 32, at 29.

Ten Commandments but disregarding the other eight.”⁷⁸ “[T]he tenets of the organization appear[] to be to ‘love thy God but forget thy neighbor,’” Roosevelt explained, only “‘God,’ in this case, appear[s] to be property.”⁷⁹ Four days later, the *Times* reported that Arthur Garfield Hays, general counsel of the ACLU, had sent the League a series of questions concerning “how far the organization would go in protecting the constitutional rights of radicals and liberal minorities.”⁸⁰ Hays asked: “Will you protect the right of assemblage for people to express views with which you violently disapprove—for Communists, for instance? Will you insist upon the right of a free press in the same sense?”⁸¹

It is tempting to share this contemporaneous skepticism about the ALL’s invocations of liberty. Yet Davis was no fair-weather civil libertarian. In 1931, he had taken to the Supreme Court the case of a Canadian theologian denied naturalization because of his pacifist beliefs.⁸² And just months after his 5-4 defeat in that case, Davis agreed to defend Theodore Dreiser, John Dos Passos, and other members of the National Committee for the Defense of Political Prisoners, who were facing potential extradition from New York to Kentucky for their role in the coal miners’ strike in Harlan County.⁸³ The meaning of civil liberties in this period was truly up for grabs,⁸⁴ and Davis’s decision to help found the ALL in 1934 was one of the many plausible paths available to a civil libertarian faced with the social, political, and economic upheaval of the Great Depression.

As *Grosjean* demonstrated, no issue better exemplified the slippery boundary between civil and economic liberty in the 1930s than press freedom. Unsurprisingly, then, Davis soon found himself in the midst of a major free press case, in which the Associated Press (AP) argued that the National Labor Relations Board’s (NLRB’s) oversight of newsroom

78. Roosevelt Twits Liberty League as Lover of Property, *N.Y. Times* (Aug. 25, 1934), <http://query.nytimes.com/mem/archive/pdf?res=9F07E6D6133CE23ABC4D51DFBE66838F629EDE> (on file with the *Columbia Law Review*).

79. *Id.*

80. Pledges Pour In at Liberty League, *N.Y. Times* (Aug. 29, 1934), <http://query.nytimes.com/mem/archive/pdf?res=9402E7DF123FE53ABC4151DFBE66838F629EDE> (on file with the *Columbia Law Review*).

81. *Id.*

82. *United States v. Macintosh*, 283 U.S. 605 (1931). The ACLU had wanted the case, and one of its founders, Felix Frankfurter, provided advice and encouragement throughout the proceedings. See Ronald B. Flowers, To Defend the Constitution: Religion, Conscientious Objection, Naturalization, and the Supreme Court 154–55 (2003); Letter from Charles Clark to Alan Wardwell (May 1, 1930) (on file with the *Columbia Law Review*), in John W. Davis Papers, Yale Univ., series IX, box 175 [hereinafter JWDP]; Letter from Charles Clark to Charles Poletti (May 5, 1930) (on file with the *Columbia Law Review*), in JWDP, *supra*, series IX, box 175; Letter from Charles Poletti to Felix Frankfurter (May 6, 1930) (on file with the *Columbia Law Review*), in JWDP, *supra*, series IX, box 175.

83. Letter from Theodore Dreiser to John W. Davis (Nov. 21, 1931) (on file with the *Columbia Law Review*), in JWDP, *supra* note 82, series VII, box 162.

84. See generally Weinrib, *Civil Liberties*, *supra* note 29; Zackin, *supra* note 29.

employees violated the First Amendment. Davis's path to the Supreme Court in *Associated Press v. NLRB*⁸⁵ began in June 1935 when he joined with Earl F. Reed—who would later argue the more famous NLRB case, *Jones & Laughlin Steel Corp.*⁸⁶—and fifty-six other prominent attorneys to establish the ALL's Lawyers' Vigilance Committee.⁸⁷ The purpose of the Committee was to analyze the constitutional validity of various New Deal programs and to prepare test cases to topple them. Its first action was to declare, by unanimous vote, the National Labor Relations Act (Wagner Act) an unconstitutional exercise of Congress's power to regulate interstate commerce and a violation of the Fifth Amendment rights of employers and employees to contract freely.⁸⁸

That same fall, lawyers at the NLRB were also looking for cases to test the constitutionality of the Wagner Act. In particular, they needed a case involving interstate transportation or communication, in addition to the manufacturing test cases they already had in play.⁸⁹ The Board's lawyers found one in the plight of Morris Watson, an editor as well as an American Newspaper Guild organizer at the AP.⁹⁰ Watson was fired shortly after the nearly unanimous vote of AP employees to bargain collectively under the Guild's stewardship.⁹¹ While AP General Manager Kent Cooper had written that Watson's dismissal was "*solely* on the grounds of his work not being on a basis for which he has shown capability,"⁹² the NLRB's regional director Elinor Herrick discovered a memorandum in Watson's file stating, "He is an agitator and disturbs morale of staff at a time when we need especially their loyalty and best performance."⁹³ On this basis, the NLRB initiated a proceeding against the AP for illegal labor practices in its effort to forestall unionization.⁹⁴

On January 17, 1936, Davis, as the AP's outside counsel, unsuccessfully sought a preliminary injunction against the NLRB, repeating the arguments that ALL's Vigilance Committee had outlined the previous fall.⁹⁵ Then, on April 8, the NLRB trial examiner, Yale Law School Dean Charles Clark, "denied [Davis's] motion to dismiss the case

85. 301 U.S. 103 (1937).

86. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

87. Peter H. Irons, *The New Deal Lawyers* 244 (1982); Wolfskill, *supra* note 32, at 70–71.

88. Nat'l Lawyers Comm. of the Am. Liberty League, *Report on the Constitutionality of the National Labor Relations Act* (1935).

89. Irons, *supra* note 87, at 265.

90. Harbaugh, *supra* note 68, at 373.

91. *Id.*

92. *Id.* (emphasis added).

93. Irons, *supra* note 87, at 265.

94. *Id.*

95. Harbaugh, *supra* note 68, at 374; Irons, *supra* note 87, at 266.

on constitutional grounds,” at which point Davis withdrew, claiming that Clark lacked jurisdiction to hear the case at all.⁹⁶

Pending appellate review of Clark’s decision, the AP’s General Manager Kent Cooper reported to Davis that many members of his board felt that the underlying constitutional issue was not Fifth Amendment property and contract rights but the First Amendment’s protection of press freedom.⁹⁷ Some AP members had already floated this argument in their editorial pages, suggesting that Watson had been fired for “deliberately color[ing] the news reports.”⁹⁸ Cooper himself insisted that the central question was whether the news would remain “unsullied” by the bias of self-interested employees.⁹⁹ These views echoed those of ANPA and its general counsel, Hanson, who had been arguing since 1933 that closed shops infringed on press freedom.¹⁰⁰ And in December 1936, ANPA addressed the *Associated Press* case directly: “[T]he inclusion of all editorial employees in the guild,” Hanson warned, “would lead to biased news writing and consequently to the violation of freedom of the press.”¹⁰¹ Hanson would file an amicus brief reiterating these arguments when *Associated Press* reached the Supreme Court a few months later.

Back in the spring of 1936, however, Davis remained skeptical that “employee-employer relations fell under the purview of the First Amendment.”¹⁰² He nonetheless asked an associate assigned to the case to “work up a First Amendment argument.”¹⁰³ Both men were uncertain whether the activities of the AP, which was not itself a publisher, could be characterized as exercising a “press” function.¹⁰⁴ Yet they agreed that if the court accepted that the AP was “press,” “they could properly argue that the Wagner Act violated both the First and Fifth amendments.”¹⁰⁵ At the Second Circuit oral argument, Davis did make the First Amendment point but spent most of his time on the Fifth Amendment.¹⁰⁶

On July 13, a unanimous three-judge panel rejected the AP’s appeal; the opinion did not even address the First Amendment argument by

96. Irons, *supra* note 87, at 266–67.

97. See Letter from Kent Cooper to John Davis (June 11, 1936) (on file with the *Columbia Law Review*), in JWDP, *supra* note 82, series IX, box 176.

98. *Id.*

99. Letter from Kent Cooper to Frank Noyes (Dec. 13, 1935) (on file with the *Columbia Law Review*), in JWDP, *supra* note 82, series IX, box 176.

100. See *supra* notes 61–64 and accompanying text.

101. Emery, *supra* note 32, at 235.

102. Harbaugh, *supra* note 68, at 377; see also Letter from John Davis to Kent Cooper (June 12, 1936) (on file with the *Columbia Law Review*), in JWDP, *supra* note 82, series IX, box 176.

103. Harbaugh, *supra* note 68, at 377.

104. *Id.*

105. *Id.*

106. *Id.*

name.¹⁰⁷ Following this defeat, however, the AP board only became more convinced that Davis should foreground the First Amendment defense. On July 17, Davis got word that Cooper “still reiterates his view that their real defense . . . lies in the fact that they cannot satisfactorily maintain their standards of impartiality in news service without a free hand in the selection of their so-called editorial employees.”¹⁰⁸

Filed in January 1937, Davis’s Supreme Court brief included a six-page First Amendment argument.¹⁰⁹ In it, Davis first noted that the NLRB’s “order to reinstate Watson presupposes, and is wholly dependent upon, the power to regulate [the AP’s] gathering, production, and dissemination of news for the American press” as an aspect of interstate commerce.¹¹⁰ This being so, NLRB was treating “[n]ews and intelligence . . . as an ordinary article of commerce, subject to Federal supervision and control”—“in disregard of the First Amendment to the Constitution.”¹¹¹ “Logically, and on principle alone,” Davis concluded, “the National Labor Relations Act, as applied to The Associated Press, is thus an infringement upon that freedom of expression which is the essence of free speech and of a free press.”¹¹² He also added a First Amendment absolutist grace note: “Freedom of the press and freedom of speech, as guaranteed by the First Amendment, means more than freedom from censorship by government; it means that freedom of expression must be jealously protected from any form of governmental control or influence.”¹¹³

In drafting his response to Davis’s free press argument, Charles Fahy, the NLRB’s general counsel, acknowledged a broad free press right: “[T]he right to publish the news, without previous or subsequent restraint and without government interference with free and general expression of opinion or circulation of news.”¹¹⁴ But, he continued, the Wagner Act “is not concerned with this right” and “is not legislation directed to the press as such.”¹¹⁵ “What it does do,” Fahy concluded, “is to prevent the petitioner from destroying the freedom of its employees.”¹¹⁶ As discussed below, the tendency of expansive civil libertarian

107. NLRB v. Associated Press, 85 F.2d 56, 61 (2d. Cir. 1936).

108. Letter from Harold Bissell to John Davis (July 17, 1936) (on file with the *Columbia Law Review*), in JWDP, supra note 82, series IV, box 176.

109. Brief for Petitioners at 96–102, *Associated Press v. NLRB*, 301 U.S. 103 (1937) (No. 356), 1937 WL 40512.

110. *Id.* at 99.

111. *Id.*

112. *Id.*

113. *Id.* at 100.

114. Charles Fahy, *Freedom of the Press 1* [hereinafter *Fahy, Freedom of the Press*] (draft of reply brief) (on file with the *Columbia Law Review*), in Charles Fahy Papers 1, Franklin D. Roosevelt Presidential Library & Museum, Hyde Park, N.Y., box 50.

115. *Id.*

116. *Id.* at 2.

arguments to encroach on the rights of others would become a central issue in the Jehovah's Witness license-tax cases.¹¹⁷ Of course, this question of the just distribution of rights—the political economy of liberty—was also one of the central questions that *Lochner*-era case law raised for a generation of progressive lawyers.¹¹⁸ Fahy recognized the link. In a draft of his brief, below the final, type-written line warning of the destruction of employee freedom, Fahy noted by hand, “Whole freedom of press argument is really a due process argument.”¹¹⁹

On February 8, while heading down to Washington for oral argument, Davis remarked to an associate that he believed that they would actually win the case on freedom of the press. “It was quite possible,” he explained, “that the Jones & Laughlin Steel Corporation might lose the companion case on the commerce clause and Fifth Amendment arguments; but of all the Wagner Act appellants, the AP alone was in a position to invoke a First Amendment argument.”¹²⁰ One reason for Davis's newfound confidence in the First Amendment argument may have been President Roosevelt's announcement of the court-packing plan three days earlier.¹²¹ If moderate Justices were looking to set some outer limit on FDR's imperious designs, the First Amendment provided as “liberal” a limit as any. Davis's good friend from Wall Street, Grenville Clark, would soon make a similar calculation, turning to First Amendment advocacy as a way to relegitimize judicial review.¹²²

In any event, Davis's performance before the Supreme Court confirmed that sometime between July 1936 and February 1937, he had shed his diffidence toward the First Amendment argument. As legal scholar Peter Irons reports, “Davis ended [his oral argument] by cloaking himself with the First Amendment,” calling the NLRB's reinstatement order “a direct, palpable, undisguised attack upon the freedom of the press.”¹²³ Characterizing the editorial employee fired by the Associated Press as “the writer, the reporter, the rewriter, the composer of headlines,” Davis insisted: “The author and the product are one and inseparable. No law, no sophistry can divide them; and if you restrict the right to choose the one you have inevitably restricted the

117. See *infra* Part III.

118. See generally *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908); *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). For scholarly discussion of the progressive reaction to these cases, see William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 Mich. L. Rev. 1, 25–64 (1999); Greene, *supra* note 2, at 446–56; Norris, *supra* note 24, at 23–46.

119. Fahy, *Freedom of the Press*, *supra* note 114, at 2.

120. Harbaugh, *supra* note 68, at 378–79.

121. *Id.* at 379.

122. See *infra* notes 183–203 and accompanying text (discussing Clark's turn against the Roosevelt Administration after the introduction of the court-packing plan).

123. Harbaugh, *supra* note 68, at 379; Irons, *supra* note 87, at 284.

right to choose the other.”¹²⁴ “[I]f there is one field which, under the Constitution of the United States, escapes congressional intrusion,” Davis went on, “that field is the freedom of the press.”¹²⁵ Presaging the anti-totalitarian ideology that would soon become the normative foundation of judge-centered civil libertarianism, Davis “[i]nvok[ed] the specter of Nazi and Communist press restrictions”:¹²⁶ “What more effective engine could dictatorial power take than to name the men who shall furnish the food of facts upon which the public must feed?”¹²⁷

On April 12, 1937, the Supreme Court handed down 5-4 decisions in two major challenges to the NLRB. While Chief Justice Hughes resolved the Fifth Amendment issue in his *Jones & Laughlin Steel* majority opinion,¹²⁸ Justice Roberts confronted Davis and Hanson’s additional First Amendment challenge in *Associated Press*.¹²⁹ Unlike the Second Circuit, Justice Roberts squarely faced the issue, rejecting the argument that in ordering the Associated Press to reinstate an editorial employee, the NLRB had violated the company’s freedom to control the content of its publications:

The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the petitioner is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt.¹³⁰

In dissent, Justice Sutherland and the three other remaining “conservatives” slammed the majority’s narrow view of press freedom. One year earlier, Sutherland had written the Court’s unanimous decision in *Grosjean*, and he now doubled down on that decision’s expansive First Amendment vision:

In a matter of such concern, the judgment of Congress—or, still less, the judgment of an administrative censor—cannot, under the Constitution, be substituted for that of the press management in respect of the employment or discharge of employees engaged in editorial work. The good which might come to interstate commerce or the benefit which might result to a special group, however large, must give way to that higher good of all the people so plainly contemplated by the

124. Olken, *supra* note 45, at 313–14 (quoting *Associated Press v. NLRB*, 301 U.S. 103 app. at 734 (1937)).

125. Harbaugh, *supra* note 68, at 380 (quoting *Associated Press*, 301 U.S. app. at 734).

126. Irons, *supra* note 87, at 284.

127. *Id.* (quoting *Associated Press*, 301 U.S. app. at 733).

128. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43–49 (1937).

129. *Associated Press*, 301 U.S. 103.

130. *Id.* at 133.

imperative requirement that "Congress shall make no law . . . abridging the freedom . . . of the press."¹³¹

With these words, Sutherland offered his own, *avant la lettre* account of bifurcated review. Even if one accepted—as the new majority effectively had—that class legislation with a rational basis was constitutionally sound, the judiciary should not defer to such political and economic calculations if they interfered with the exercise of First Amendment rights.¹³² At the time *Grosjean* was decided, some liberals had worried that the case might authorize just such an argument, transforming government efforts to create a fairer economic order into civil libertarian violations.¹³³ The *Associated Press* majority cut off that possibility for the time being, but the *Associated Press* dissent—the Four Horsemen's last gambit against the New Deal order—would come to play a surprisingly important role in the peddling-tax debate of the early 1940s.¹³⁴

B. *From the Anti-New Deal First Amendment to Footnote Four*

In a strange but telling twist of fate, Justice Sutherland's *Associated Press* dissent previewed the mix of formalism and functionalism that, one year later, would undergird Footnote Four of *United States v. Carolene Products Co.*¹³⁵ By that time, Justice Sutherland had retired, and the legal

131. *Id.* at 137 (Sutherland, J., dissenting) (alterations in original).

132. See *id.* at 135.

Legislation which contravenes the liberties of the First Amendment might not contravene liberties of another kind falling only within the terms of the Fifth Amendment. Thus, we have held that the governmental power of taxation, one of the least limitable of the powers, may not be exerted so as to abridge the freedom of the press albeit the same tax might be entirely valid if challenged under the "liberty" guaranty of the Fifth Amendment, apart from those liberties embraced by the First.

Id. (citation omitted) (citing *Grosjean v. Am. Press Co.*, 297 U.S. 233, 245 (1936)).

133. See *supra* notes 57–60 and accompanying text (describing the *Nation's* critique of *Grosjean* on this basis).

134. See *infra* Part III.

135. See 304 U.S. 144, 152 n.4 (1938).

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

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

Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied

threat to core New Deal programs seemed to have subsided. An increasingly aggressive Nazi regime, however, was providing a horrifying example of the danger that majoritarian, single-party rule could pose to the rights of minorities and dissenters. This example deeply affected Justice Stone and influenced his composition of what would become paragraphs two and three of Footnote Four, suggesting heightened scrutiny of legislation interfering with the political process or motivated by “prejudice against discrete and insular minorities.”¹³⁶ It was the influence of Chief Justice Hughes, however, that prompted Justice Stone to include the Footnote’s first, most formalistic paragraph.

In April 1938, Chief Justice Hughes told Justice Stone that he was “somewhat disturbed” by an early draft of “Note 4.”¹³⁷ Was it really true that “different considerations”—different from those that gave rise to an economic regulation’s presumption of constitutionality—“apply in the instances” Justice Stone had initially singled out for heightened scrutiny?¹³⁸ “Are the ‘considerations’ different,” Hughes asked, “or does the difference lie not in the *test* but in the nature of the right invoked?”¹³⁹ The Chief Justice was suggesting that Stone’s reasons for withholding the presumption of constitutionality were really rooted in formal, constitutional rights:

When we say that a statute is invalid on its face, do we not mean that, in relation to the right invoked against it, the legislative action raises no presumption in its favor and has no rational support? Thus, in dealing with freedom of speech and of the press . . . the legislative action putting the press broadly under license and censorship is directly opposed to the constitutional guaranty and for that reason has no presumption to support it.¹⁴⁰

While Chief Justice Hughes’s letter focused on the judicial protection of the First Amendment, the logic of his argument was broader and entailed no necessary distinction between civil liberties and other constitutional rights. Notably, in the spring of 1938, Chief Justice Hughes

upon to protect minorities [citing cases rejecting economic discrimination against out-of-state businesses].

Id. (citations omitted).

136. For the impact that Nazism had on Justice Stone while drafting *Carolene Products*, see William E. Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920–1980*, at 121–37 (2001).

137. Letter from Charles Evans Hughes, Chief Justice, U.S. Supreme Court, to Harlan Fiske Stone, Assoc. Justice, U.S. Supreme Court (Apr. 18, 1938), in Louis Lusk, *Our Nine Tribunes: The Supreme Court in Modern America* 179 (1993) [hereinafter Hughes to Stone (Apr. 18, 1938)]; see also Bruce A. Ackerman, *Beyond Carolene Products*, 98 *Harv. L. Rev.* 713, 743–44 (1985); Linzer, *supra* note 15, at 282–83; Louis Lusk, *Footnote Redux: A Carolene Products Reminiscence*, 82 *Colum. L. Rev.* 1093, 1106 (1982).

138. Hughes to Stone (Apr. 18, 1938), *supra* note 137.

139. Id.

140. Id.

was resisting calls from within the legal academy as well as from new Roosevelt appointees to roll back the constitutional-fact doctrine that had long been a central pillar of his vision of limited yet active judicial review.¹⁴¹ Aimed at administrative fact-finding, this doctrine sought to ensure that even as the courts ceded a substantial degree of discretionary authority to agencies, judges would retain a crucial role in protecting individual constitutional rights from illegitimate political interference.

Some New Dealers, such as Justice Frankfurter, felt that the doctrine should be eliminated altogether, lest it provide a formalistic yet inherently indeterminate vehicle for future judicial encroachments on the political branches.¹⁴² Other New Dealers, including Justices Murphy, Black, and Douglas, felt the doctrine could be safely transformed into a tool for promoting a narrow set of privileged constitutional rights—“personal liberties” that did not include economic rights in property or contract.¹⁴³ This suggestion, often attributed to Justice Brandeis’s 1927 concurrence in *Whitney v. California*,¹⁴⁴ had become something of an *idée fixe* among those New Dealers who thought of themselves as representing a new breed of “liberal.”¹⁴⁵ Chief Justice Hughes and the moderate corporate lawyers he represented, however, refused to abandon the doctrine or limit its application to noneconomic rights.¹⁴⁶

While prevailing on Justice Stone to recognize that textually enumerated rights could negate *Carolene Products*’s “presumption of constitutionality,” Chief Justice Hughes was also putting the finishing

141. For a thorough discussion of the legal development and political implications of these doctrines, see generally Daniel R. Ernst, *Tocqueville’s Nightmare* 35–51, 56 (2014); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 *Colum. L. Rev.* 939 (2011); Mark Tushnet, *The Story of Crowell: Grounding the Administrative State*, in *Federal Courts Stories* 359 (Vicki C. Jackson & Judith Resnik eds., 2010).

142. See Ernst, *supra* note 141, at 70–71.

143. See Robert L. Hale, *Does the Ghost of Smyth v. Ames Still Walk?*, 55 *Harv. L. Rev.* 1116, 1131–32 (1942) (noting in the context of administrative fact-finding that Justices Murphy, Douglas, and Black “would retain substantive due process only in connection with protections contained in the Bill of Rights” and “civil liberties”). See also Emerson and Helfeld arguing:

[W]here rights under the First Amendment are at stake—rights to which the courts have consistently given a preferred constitutional status—the negative features of judicial review serve an especially useful purpose. In such situations the presumption of administrative legality is reversed, or at least neutral, and careful scrutiny by a second agency becomes of positive value.

Thomas I. Emerson & David M. Helfeld, *Loyalty Among Government Employees*, 58 *Yale L.J.* 1, 112 (1948).

144. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring). See generally Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 *Wm. & Mary L. Rev.* 653 (1988).

145. See Louis Jaffe, *Constitutional and Jurisdictional Fact*, 70 *Harv. L. Rev.* 953, 984 (1957).

146. See Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 *Harv. L. Rev.* 718, 767–69 (2016) (reviewing Ernst, *supra* note 141).

touches on another opinion that would raise doubts about the degree of deference that judges should afford the New Deal state. Handed down the same day as *Carolene Products*, Chief Justice Hughes's decision in *Morgan v. United States (Morgan II)*¹⁴⁷ surprised many New Deal administrators by announcing that the mixing of prosecutorial and judicial functions within an agency could violate "fundamental requirements of fairness" and thus render an agency's action unconstitutional.¹⁴⁸ Since the early twentieth century, the combination of prosecutorial and judicial functions had been a distinctive feature of many agencies, including the NLRB, and Hughes had passed over this feature in silence while upholding the constitutionality of the Wagner Act the previous year. But now Hughes announced that, in order to protect "the liberty and property of the citizen," courts should review administrative decisionmaking for its conformity with an indeterminate set of "fundamental requirements" summed up by the shibboleth "fair play."¹⁴⁹ "Fair play," Chief Justice Hughes concluded, did not permit the mixing of prosecutorial and judicial functions that the Department of Agriculture had used in determining the maximum price that stockyard agents could charge farmers for the privilege of selling their animals.¹⁵⁰ How much mixing was too much mixing remained unclear, but the substantive outcome was the invalidation of the Department's economic intervention on behalf of farmers and against stockyard agents. As *Morgan II* demonstrated, a regulated party's right to "fair play," though not an economic right in itself, could serve to frustrate the government's efforts to restructure the nation's political economy.¹⁵¹

Joining Chief Justice Hughes's opinion in *Morgan II*, Justice Stone also added a first paragraph to *Carolene Products*'s Footnote Four.¹⁵² Tracking the Chief Justice's approach to constitutional facts, this paragraph did not distinguish between economic and noneconomic rights and left it to judges to determine when legislation facially infringed upon constitutional text: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."¹⁵³ Meanwhile, the second two paragraphs of the Footnote, as Justice Stone had explained to Chief Justice Hughes, aimed to "avoid the possibility of

147. 304 U.S. 1 (1938). The Court first heard the *Morgan* case in 1936, remanding for further development of the record. *Morgan v. United States (Morgan I)*, 298 U.S. 468 (1936).

148. *Morgan II*, 304 U.S. at 19–20; see also Ernst, *supra* note 141, at 71–74.

149. *Morgan II*, 304 U.S. at 15–16, 19–20.

150. *Id.* at 15.

151. *Id.*

152. See Linzer, *supra* note 15, at 283.

153. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

having . . . the presumption of constitutionality in the ordinary run of due process cases applied as a matter of course to . . . more exceptional cases” when there arose “possible restraints on liberty and political rights which do not fall within those specific prohibitions [of the constitutional text] and are forbidden only by the general words of the due process clause of the Fourteenth Amendment.”¹⁵⁴

Yet Justice Stone’s inclusion of the Hughesian first paragraph introduced a fundamental ambiguity into the Footnote’s reasoning: “[T]he ordinary run of due process cases”¹⁵⁵ marginalized by the body of the *Carolene Products* opinion included those cases that jurists had long seen as involving regulations that “appear[ed] on [their] face[s] to be within a specific prohibition of the Constitution, such as those of the first ten amendments”¹⁵⁶—namely, the Fifth’s protections of property.¹⁵⁷ Even the third paragraph undermined the clean break with the Court’s earlier economic jurisprudence that the body of *Carolene Products* seemed to announce.¹⁵⁸ The precedents on which Justice Stone relied for heightened review of regulation affecting politically vulnerable “discrete and insular minorities” were cases in which the Court had rejected a state’s economic “discrimination” against out-of-state businesses.¹⁵⁹ Criticism of this specific kind of “class” legislation could be nicely reconciled with the New Deal Court’s expansive reading of the Commerce Clause and its nationalizing ambitions. But such criticism also recalled the broader, anti-redistributionist interpretation of the Equal Protection Clause that had long undergirded the Court’s opposition to “class” legislation favoring the interests of wage laborers over those of property owners.¹⁶⁰ It was on this economically libertarian interpretation of equal protection that Justice Sutherland had initially wished to ground *Grosjean*, only acquiescing to the First Amendment approach to appease his more progressive colleagues.¹⁶¹

154. Hughes to Stone (Apr. 18, 1938), *supra* note 137, at 180.

155. *Id.*

156. 304 U.S. at 152 n.4.

157. Cf. Ackerman, *supra* note 137, at 743–44 (“In calling the Bill of Rights ‘specific,’ Justice Stone doubtless wished to emphasize that the Court had learned its lesson in 1937 and would not use the Constitution’s grand abstractions to revive the *laissez faire* capitalism of the *Lochner* era. Nonetheless, by framing its pledge of judicial restraint in this way, *Carolene* added a distortion of its own.”).

158. See 304 U.S. at 152 n.4.

159. See *id.* (citing *South Carolina v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819); and cases cited therein).

160. See William E. Forbath, *Politics, State-Building, and the Courts, 1870–1920*, in 2 *The Cambridge History of Law in America* 643, 645–46 (Michael Grossberg & Christopher Tomlins eds., 2008); Claudio J. Katz, *Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era*, 31 *Law & Hist. Rev.* 275, 275 (2013).

161. See *supra* notes 47–56 and accompanying text.

In 1937, the *Associated Press* minority's effort to transform *Grosjean* into an expansive, economically libertarian interpretation of the First Amendment had failed to carry the day. A year later, however, the shadow that Footnote Four cast over *Carolene Products*'s "presumption of constitutionality" raised new questions about the distinction between economic liberty and civil liberty and about which institutions—the political branches or the judiciary—would determine the boundaries of that distinction.

II. POPULARIZING THE ANTI-NEW DEAL FIRST AMENDMENT

When anti-New Dealers failed to secure an expansive, economically libertarian reading of the First Amendment in *Associated Press*, New Deal politics were in a state of transition. On the one hand, President Roosevelt had recently scored resounding presidential and congressional victories in the fall of 1936, thanks in part to his populist attacks on the ALL's patrician, constitutional formalism.¹⁶² On the other hand, the President's postelection announcements of an ambitious executive reorganization plan and an even more radical judicial reorganization plan sparked a new phase of legal and political resistance to the New Deal.¹⁶³ In the spring and summer of 1937, this growing discontent with President Roosevelt's efforts to strengthen administrative governance coincided with economic collapse at home and a surge in fascist aggression abroad.¹⁶⁴ Precisely at the moment President Roosevelt had chosen to cash in his electoral mandate, executive rule looked both more ineffective and more dangerous than ever before. The judiciary might once more have an important role to play in safeguarding democracy.

A. *The Jehovah's Witnesses and the American Bar Association*

It was within this legal and political context that the Jehovah's Witnesses confronted a particularly painful period in their own history, both domestically and internationally. Shortly after Hitler's rise to power, an administrative order made the Nazi salute compulsory during the singing of the National Anthem, and by 1934 the regime had established special tribunals to try violators.¹⁶⁵ German Witnesses systematically refused to salute, and whole families were imprisoned or sent to the

162. See Wolfskill, *supra* note 32, at 247; Goldstein, *supra* note 32, at 321–24.

163. See Barry D. Karl, *The Uneasy State* 139, 154–58 (1983); Polenberg, *supra* note 32, at 55–78.

164. See Joanna L. Grisinger, *The Unwieldy American State* 21–24 (2012); Karl, *supra* note 163, at 168; Ira Katznelson, *Fear Itself* 173–82 (2013).

165. Ian Kershaw, *The 'Hitler Myth': Image and Reality in the Third Reich* 60 (2d ed. 2001); Allert Tillman, *The Hitler Salute: On the Meaning of a Gesture* 61 (Jefferson Chase trans., 2009).

earliest concentration camps.¹⁶⁶ Things only got worse when Hitler re-instituted conscription in 1935. Most draft-eligible Witnesses refused to serve, in keeping with their commitment to fight only for Jehovah's kingdom.¹⁶⁷ German authorities summarily imprisoned all resisters and eventually shot most of them.¹⁶⁸

In the summer of 1935, Joseph Rutherford, the leader of the American Witnesses, called on his congregation to stand in solidarity with their German brethren.¹⁶⁹ Witnesses across the country responded to Rutherford's call, launching a campaign of massive resistance to compulsory flag-salute laws in the American public schools.¹⁷⁰ Between the summer of 1935 and June 1940, "the public school flag-salute ceremony became an issue in at least twenty states, leading to actual or imminent expulsions in sixteen."¹⁷¹ The Witnesses would not, however, be satisfied with mere martyrdom. Confrontation with religious and secular governments, from Catholic churches to school boards, was a core part of the sect's mission.¹⁷² Accordingly, the Witnesses wanted the expulsions of their children overturned and the compulsory-flag-salute laws invalidated.¹⁷³

Their leader, Rutherford, was himself a lawyer, fond of mixing biblical and constitutional argument. He viewed the flag-salute laws as a particularly acute example of the ungodly—and illegitimate—totalitarianism that had seized both sides of the Atlantic during the 1930s and considered Social Security numbers to be "the mark of the beast" foretold by the Book of Revelation.¹⁷⁴ A legal challenge to the flag-salute laws could serve as an exemplary attack on the demonic character of the entirety of the New Deal state. Working out of their Brooklyn headquarters, Rutherford and his general counsel, Olin Moyle, spearheaded the legal campaign to exempt Witness schoolchildren from saluting the American flag.¹⁷⁵

166. Peter Brock, *Conscientious Objectors in Nazi Germany*, in *Challenge to Mars: Essays on Pacifism from 1918 to 1945*, at 370, 370–71 (Peter Brock & Thomas P. Socknat eds., 1999) [hereinafter Brock, *Conscientious Objectors*].

167. Peter Brock, *Jehovah's Witnesses as Conscientious Objectors in Nazi Germany*, in *Against the Draft: Essays on Conscientious Objection from the Radical Reformation to the Second World War* 425, 426 (2006).

168. Brock, *Conscientious Objectors*, supra note 166, at 371–72.

169. Peters, supra note 33, at 24–25.

170. *Id.* at 26–28, 260. At the time, the American flag salute, like the "Heil Hitler," incorporated an outstretched right arm. See Richard A. Primus, *The American Language of Rights* 198–200 (Quentin Skinner et al. eds., 1999).

171. David R. Manwaring, *Render Unto Caesar: The Flag-Salute Controversy* 79 (1962).

172. See Peters, supra note 33, at 32–34.

173. See *infra* section II.B.

174. Gordon, supra note 33, at 21–29.

175. Manwaring, supra note 171, at 84; Peters, supra note 33, at 38.

Early on, this campaign met with defeat after defeat in the courts.¹⁷⁶ Between 1937 and 1939, the Supreme Court rejected four Witness appeals from adverse flag-salute decisions, dismissing three state court appeals for want of a substantial federal question¹⁷⁷ and affirming one federal court decision.¹⁷⁸ In finding no substantial federal question, the Court usually cited its 1934 decision in *Hamilton v. Regents*,¹⁷⁹ a unanimous decision holding that a state could require all public university students, even those religiously opposed to war, to take classes in military training without violating Fourteenth Amendment due process.¹⁸⁰ Although the Court would not apply the First Amendment's Free Exercise Clause to the states until May 1940,¹⁸¹ Justices Cardozo, Brandeis, and Stone filed a concurrence in *Hamilton* "assum[ing] for the present purposes" that it was so incorporated and that the First Amendment right was no bar to compulsory military training in the public university.¹⁸²

The Witnesses' first effort to challenge a flag-salute regulation in a federal district court—*Johnson v. Deerfield*¹⁸³—brought their plight to the attention of the ABA's Special Committee on the Bill of Rights.¹⁸⁴ Formed in September 1938, the ABA's Bill of Rights Committee was the brainchild of the well-connected Wall Street lawyer Grenville Clark.¹⁸⁵ Clark conceived of the Committee as a way of wresting civil liberties law from the control of the labor movement and the legal left—the ACLU and the National Lawyers Guild.¹⁸⁶ As he explained to fellow leaders of the corporate bar in a June 1938 call to arms, "conservative and middle elements" had "a tremendous stake in the maintenance of civil liberty"

176. Manwaring, *supra* note 171, at 56–80.

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

178. *Johnson v. Deerfield*, 306 U.S. 621, reh'g denied, 306 U.S. 650 (1939).

179. 293 U.S. 245 (1934).

180. *Id.* at 265.

181. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding "[t]he fundamental concept of liberty embodied in [the Fourteenth] Amendment" included the First Amendment's right to free exercise of religion).

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

183. 25 F. Supp. 918 (D. Mass. 1939).

184. See Letter from Zechariah Chafee to Grenville Clark (Jan. 17, 1939) [hereinafter Chafee to Clark (Jan. 17, 1939)] (on file with the *Columbia Law Review*), in Grenville Clark Papers, Rainer Library, Dartmouth Coll., series VIII, box 2 [hereinafter GCP].

185. See Dunne, *supra* note 32, at 105–06; ABA, The American Bar Association's Committee on the Bill of Rights, 1 Bill Rts. Rev. 1 (1940), in GCP, *supra* note 184, series VIII, box 11.

186. For early statements of his vision, see Letter from Grenville Clark to Arthur Garfield Hays 1–2 (Jan. 22, 1938) (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series VI, box 1 [hereinafter Clark to Hays (Jan. 22, 1938)]; Memorandum from Grenville Clark 2 (June 21, 1938) [hereinafter Clark, Memorandum (June 21, 1938)] (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series VI, box 1; see also Weinrib, *Civil Liberties*, *supra* note 29, at 412–29.

and “the maintenance of civil liberty [would], in the long run, mainly depend” upon them.¹⁸⁷

Clark’s discovery of the “tremendous stake” that he and his colleagues had in “the maintenance of civil liberty” was a quite recent development, dating to President Roosevelt’s 1937 effort to redesign the Supreme Court.¹⁸⁸ A moderate Republican, Clark had supported Roosevelt’s reelection bid in 1936 but became incensed months later when the victorious President announced his court-packing plan.¹⁸⁹ Over the next six months, Clark spearheaded elite legal resistance to the President’s vision, forming the National Committee for Independent Courts (NCIC) to coordinate anti-court-packing efforts.¹⁹⁰

Like so many of his colleagues, Clark interpreted President Roosevelt’s plan as a totalitarian assault on the rule of law.¹⁹¹ But Clark’s reaction was distinct in two respects. First, he insisted on the bipartisan nature of the anti-court-packing cause, going so far as to give NCIC fliers the subtitle: “A Committee of Citizens, All of Whom Favored the President’s Election in 1936, and All of Whom Are Opposed to the President’s Supreme Court Proposal.”¹⁹² Opposition to court packing did not mean opposition to President Roosevelt or the Democratic Party—it meant defense of a prepolitical legal order. Second, Clark would go further than perhaps any lawyer of his generation in synthesizing the defense of judicial review with the defense of civil rights and civil liberties. In the summer of 1937, as the court-packing bill went down to defeat, Clark’s advocacy transitioned almost seamlessly into a more general campaign for civil libertarian reform.¹⁹³

An early indication of Clark’s pivot to civil liberties came in an article he wrote for the May 1937 “Supreme Court” issue of the *Yale Review*.¹⁹⁴

187. Clark, Memorandum (June 21, 1938), *supra* note 186, at 2. Clark forwarded this planning memorandum to leading New York attorneys, including Henry Shattuck, Elihu Root, Jr., and C.C. Burlingham. See Memorandum Cover Sheet from Grenville Clark (June 27, 1938) (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series VI, box 1; see also Grenville Clark, Conservatism and Civil Liberty (June 11, 1938) [hereinafter Clark, Conservatism and Civil Liberty Speech] (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series XXI, box 5.

188. Dunne, *supra* note 32, at 97 (“Prior to his confrontation with the President, Clark had given little to the specific subject of Bill of Rights guarantees, aside from some collaboration with [President James] Conant of Harvard in opposing teachers’ oaths.”).

189. *Id.* at 78–80.

190. *Id.* at 80–81.

191. For the antitotalitarian climate that defined the court-packing debate, see Benjamin, L. Alpers, Dictators, Democracy, and American Public Culture 129–56 (2003); Victoria Nourse, In Reckless Hands 116–20 (2008).

192. Dunne, *supra* note 32, at 81.

193. *Id.* at 98 (“[T]actical defense of the Supreme Court led necessarily in Clark’s mind to a defense of the Constitution in general terms and constitutional guarantees in particular.”).

194. Grenville Clark, The Supreme Court Issue, 26 *Yale Rev.* 669 (1937) (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series XXI, box 1.

Clark's contribution took up the court-packing debate and sought to show that the Hughes Court, then being assailed as irredeemably backward, had actually been "reasonably flexible in construing the Constitution to enable both federal and state action to meet new needs . . ."¹⁹⁵ The ultimate target of the Court's detractors, Clark implied, was not the pace of policy but constitutionalism itself—and its vital adjunct, judicial review.¹⁹⁶ Salient to this argument was the Hughes Court's civil libertarian record. Noting liberal criticisms of the Court for "unduly magnif[y]ing the scope of the 'due process' clause so as unduly to restrict government regulation," Clark insisted on the "important fact" that not all due process cases were about economic regulation.¹⁹⁷ Due process jurisprudence also encompassed "the decisions involving civil liberties—the personal rights of the individual guaranteed by the First Amendment and other provisions of the Bill of Rights."¹⁹⁸ When it came to "free press," "free speech and the right of assembly," and "cases involving the right to a fair trial," the Hughes Court was a liberal court and "little reasonable criticism" could be leveled at it.¹⁹⁹ Surely, the Court's detractors did not wish to check this important work?

After reading the *Yale Review* piece, Clark's college classmate and old friend Felix Frankfurter, who had refused to condemn court packing, responded with a warning: "[Y]our view of the Supreme Court, as the great safe-guard of those democratic institutions that you and I so passionately care about, is much too romantic and too simplified."²⁰⁰ To Frankfurter's dismay, Clark would spend the next year publicly celebrating robust judicial review as the cornerstone of civil liberties and American democracy. His first major campaign stop, in January 1938, was a series of lectures at the New School for Social Research titled "The Bill of Rights."²⁰¹ These lectures laid out Clark's vision of the federal judiciary as privileged guardian of the Bill of Rights—both against the federal government and against the states.

Zechariah Chafee, Frankfurter's Harvard Law School colleague and the leading First Amendment theorist of the day, also thought that Clark's vision of judicial civil libertarianism was flawed, though for more technical reasons. As Chafee cautioned Clark, the first eight amendments

195. *Id.* at 669.

196. *Id.* at 670.

197. *Id.* at 681.

198. *Id.*

199. *Id.*

200. Letter from Felix Frankfurter to Grenville Clark (July 1, 1937) [hereinafter Frankfurter to Clark (July 1, 1937)] (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series VI, box 1. For Clark and Frankfurter's court-packing correspondence, see Dunne, *supra* note 32, at 84–88.

201. Grenville Clark, *The Constitution: The Bill of Rights, Six Lectures Delivered at the New School for Social Research (Jan.–Feb. 1938)* (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series XXI, box 5.

of the Constitution were far from fully incorporated in the Fourteenth Amendment, and the contemporary federal courts did not seem eager to become the police of state government.²⁰² While sounding a note of deference to Chafee's expertise, Clark demurred, writing that "virtually everything in the first eight amendments is protected against state infringement."²⁰³ While Chafee's understanding of the case law was more accurate than Clark's, he and Clark would soon be working together to make the latter's vision a reality.

It was also around this time that Clark began to assemble a small group of "pretty cautious and conservative" lawyers to promote the cause of civil liberties.²⁰⁴ To this end, two months after concluding his New School lectures, he gave a speech to ANPA.²⁰⁵ As discussed in Part I, ANPA and its general counsel Hanson were early innovators in using the language and law of civil liberties to critique federal and state regulation, even when such regulation primarily targeted economic activity.²⁰⁶ ANPA had cast considerable constitutional doubt on circulation taxes in the 1936 *Grosjean* case and in 1937, had worked with Davis to challenge the NLRB on First Amendment grounds.²⁰⁷ A year after the Court turned back this challenge in *Associated Press*, Clark gave ANPA the red meat it wanted, endorsing the free speech rights of employers as a shield against the New Deal's prolabor machinations.²⁰⁸

Clark's campaign for a moderate-to-conservative civil libertarian front against New Deal threats to the rule of law reached its climax in a June speech before the Nassau County Bar Association. Titled "Conservatism and Civil Liberty," the speech linked Clark's call for a neutral civil libertarianism that protected rich and poor, employee and employer alike, to the previous year's court-packing fight.²⁰⁹ The ABA had managed to defeat President Roosevelt's designs then, Clark explained, because of the "conviction, arrived at both by reason and instinct, that the proposal . . . was fundamentally a threat to our civil liberties."²¹⁰ He argued that the same "zeal and power that manifested

202. Letter from Grenville Clark to Zechariah Chafee (Jan. 25, 1938) (on file with the *Columbia Law Review*) in GCP, supra note 184, series VI, box 1; Letter from Zechariah Chafee to Grenville Clark (Jan. 29, 1938) (on file with the *Columbia Law Review*), in GCP, supra note 184, series VI, box 1.

203. Letter from Grenville Clark to Zechariah Chafee (Jan. 31, 1938) (on file with the *Columbia Law Review*), in GCP, supra note 184, series VI, box 1.

204. Clark to Hays (Jan. 22, 1938), supra note 186.

205. Grenville Clark, *The Relation of the Press to the Maintenance of Civil Liberty* (Apr. 27, 1938) [hereinafter *Clark, Relation of the Press*] (on file with the *Columbia Law Review*), in GCP, supra note 184, series XXI, box 5; see also Dunne, supra note 32, at 99.

206. See supra section I.A.

207. See supra section I.A.

208. Clark, *Relation of the Press Speech*, supra note 205.

209. Clark, *Conservatism and Civil Liberty*, supra note 187. For an analysis of the speech, see Weinrib, *Liberal Compromise*, supra note 32, at 412-15.

210. Clark, *Conservatism and Civil Liberty Speech*, supra note 187.

itself in the crisis of a year ago . . . should be better organized for opposition to other attacks on civil liberty that are constantly occurring.”²¹¹ The success of this speech spurred the ABA into action. In August, the *Journal of the American Bar Association* reprinted the speech and the ABA’s House of Delegates approved the formation of a new Special Committee on the Bill of Rights, the committee that Clark had been envisioning, in one form or another, for the past, frantic year.²¹²

On the cusp of becoming chairman of the new venture, Clark wrote to Douglas Arant, cofounder of the previous year’s National Committee for Independent Courts and future member of the Bill of Rights Committee.²¹³ Clark mused about writing a short book on this “civil liberties business” and explained that the two interests that had occupied him and Arant for some time now—“independence of the courts” and “sound national finance”—were “aspects . . . of the broader subject.”²¹⁴ Like ANPA’s civil libertarian advocacy on behalf of an independent and financially powerful press, Clark and Arant’s vision of strong judicial enforcement of civil libertarian rights was inextricably bound up with a political economic outlook increasingly anxious about New Deal experiments.²¹⁵ While more moderate on this point than Hanson or Davis, Clark’s appeal to the relatively conservative American Bar to embrace civil liberties in order to safeguard its own social status was far from politically or economically neutral. Indeed, in an October 26 planning memorandum, Clark identified the “regulation of the radio and the screen” and the “procedure of administrative tribunals” as the top two emerging civil libertarian problems.²¹⁶ Noting the Bar’s increasing impatience with New Deal agency procedures, Clark wrote:

There is widespread and serious complaint that the practice of permitting a tribunal to make an investigation, file a complaint, prosecute the complaint, and also try it and pronounce judg-

211. *Id.*

212. Grenville Clark, *Conservatism and Civil Liberty*, 24 *A.B.A. J.* 640, 640 (1938); Letter from Arthur Vanderbilt, President, ABA, to Grenville Clark (July 6, 1938) (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series VI, box 2 (describing praise for the speech among the Nassau Bar and saying he hoped “to have something to say along the same line in my Annual Address”); see also Weinrib, *Liberal Compromise*, *supra* note 32, at 412–17.

213. Letter from Grenville Clark to Douglas Arant (July 15, 1938) [hereinafter Clark to Arant (July 15, 1938)] (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series XXI, box 5.

214. *Id.*

215. Clark’s 1938 civil libertarian campaign coincided with the trough of the 1937–1938 recession. See *supra* notes 163–164 and accompanying text (discussing the political economic context).

216. Memorandum from Grenville Clark to Committee Members as to Meeting in New York, November 17–18, 1938, at 8–9 (Oct. 26, 1938) (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series VIII, box 2.

ment on it, violates principles of justice and is contrary to the spirit if not the letter of the Bill of Rights.²¹⁷

Where Clark and the Bill of Rights Committee really differed from earlier civil libertarian challenges to New Deal administration was in terms of tactics. Just as Clark had insisted that the opponents of court packing present themselves as a group of disillusioned Roosevelt voters, he thought it wisest for the Bill of Rights Committee to emphasize the defense of underdogs. By building common ground with marginal litigants and left-wing civil libertarians, Clark hoped to articulate a set of general principles—a civil libertarian sensibility—that would, in the end, redound to the benefit of more powerful social actors threatened by administrative government. As he explained to Douglas Arant, the goal was to establish a “line of thought”: “one of firm resistance to authoritarian ideas . . . whether in suppressing assembly, or censoring the radio or unnecessarily regimenting the children or intimidating employers from speaking their minds or impairing the independence of the courts or in any other way tending towards the undue subordination of the individual to the State.”²¹⁸

The first opportunity to “educat[e] the opinion of the Bar and public” came in the fall of 1938 when the Committee filed an amicus brief in *Hague v. Committee for Industrial Organization*, opposing the efforts of a corrupt Jersey City mayor to shut down prolabor protests and leafleting.²¹⁹ The following January, as the *Hague* brief was making the rounds in elite legal circles,²²⁰ Harvard Law School Professor George K. Gardner was closely following the saga of three Jehovah’s Witness schoolchildren who had been expelled from a public school in western Massachusetts.²²¹ When the Supreme Court declined to consider these

217. *Id.* at 9. That same fall, Roscoe Pound of the ABA’s Special Committee on Administrative Law denounced such “administrative absolutism.” Report of the Special Committee on Administrative Law, 63 Ann. Rep. A.B.A., 1938, at 331, 343–68.

218. Letter from Grenville Clark to Douglas Arant 2 (Mar. 31, 1939) [hereinafter Clark to Arant (Mar. 31, 1939)] (on file with the *Columbia Law Review*), in GCP, supra note 184, series VIII, box 1.

219. Dunne, supra note 32, at 103–09.

220. The *Hague* brief elicited early praise from across the political spectrum, applauded by former Liberty Leaguer Davis as well as New Deal die-hards Justice Douglas and Justice Frankfurter. See Letter from John W. Davis to Grenville Clark (Jan. 1, 1939) (on file with the *Columbia Law Review*), in GCP, supra note 184, series VIII, box 2 (“It is well done and I am glad the Bar Assn. under your leadership has taken this stand.”); Letter from William O. Douglas, Chairman, SEC, to Grenville Clark (Jan. 5, 1939) (on file with the *Columbia Law Review*), in GCP, supra note 184, series VIII, box 2 (“[T]his contribution to civilized government is memorable.”); Letter from Felix Frankfurter to Grenville Clark (Dec. 31, 1938) [hereinafter Frankfurter to Clark (Dec. 31, 1938)] (on file with the *Columbia Law Review*), in GCP, supra note 184, series VIII, box 2 (“It’s a very good brief, intrinsically, and of course its symbolic significance makes it a document of first importance.”).

221. Letter from George K. Gardner to Zechariah Chafee (Jan. 12, 1939) (on file with the *Columbia Law Review*), in GCP, supra note 184, series VIII, box 3.

Witnesses' appeal in *Johnson v. Deerfield*, Gardner reached out to his colleague Chafee, whom Clark had since coaxed into joining the Bill of Rights Committee and who had coauthored the *Hague* amicus brief.²²²

The day after Chafee received Gardner's letter, he wrote Clark.²²³ Enclosing Gardner's letters summarizing the entrenched anti-Witness legal situation, Chafee concluded, "[I]t is clear that the Court will not act unless some new factor enters. I feel strongly we ought to be that new factor and hope that the rest of the Committee will agree."²²⁴ Unsettled by the formidable, countervailing case law, the Committee's members compromised, filing a jurisdictional brief supporting a rehearing on the cert petition but taking no position on the merits.²²⁵ Nonetheless, *Johnson* put the flag-salute issue on the Committee's radar and established a connection between the beleaguered Witness legal team and the new crown jewel of the public interest bar. This was just the sort of collaboration through which Clark hoped to establish a new "line of thought." As Clark explained to Gardner in April 1939, the "flag salute problem" should not be understood as a minor dispute between local officials and a handful of religious eccentrics: The case presented "deep questions [about] the conflict between liberty and authority."²²⁶

B. *Flag Salutes and Footnote Four*

During the summer and fall of 1939, Clark kept in touch with Gardner about developments in the Massachusetts flag-salute case. It was through this correspondence that Clark first learned of the Jehovah's Witnesses' new counsel, "a big breezy young man from Texas," the thirty-two-year-old Hayden Covington.²²⁷ Covington split time with Gardner during the later stages of the *Deerfield* oral arguments, and he would soon become involved in a parallel litigation in Minersville, Pennsylvania—the case of Walter, Lillian, and Billy Gobitas. In November 1939, the Third Circuit affirmed a district court order invalidating the Gobitas children's expulsion from the Minersville public schools, creating a circuit split on the flag-salute issue.²²⁸ The Bill of Rights Committee agreed to file an

222. *Id.*

223. Chafee to Clark (Jan. 17, 1939), *supra* note 184.

224. *Id.* at 2.

225. See Letter from Grenville Clark to Louis Lusky (Mar. 28, 1939) (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series VIII, box 4.

226. Letter from Grenville Clark to George K. Gardner (Apr. 19, 1939) (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series VIII, box 3.

227. Letter from George K. Gardner to Grenville Clark (Sept. 22, 1939) (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series VIII, box 3.

228. *Minersville Sch. Dist. v. Gobitis*, 108 F.2d 683 (3d Cir. 1939), *rev'd*, 310 U.S. 586, 586 (1940), overruled by *W. Va. Bd. of Educ. v. Barette*, 319 U.S. 624, 624 (1943).

amicus brief in *Minersville School District v. Gobitis*²²⁹ if the Supreme Court granted the school district's cert petition.²³⁰

While waiting on word from the High Court, Gardner met with Covington in New York. The young Texan had just replaced Olin Moyle as the Jehovah's Witnesses' general counsel, and Gardner reported that "it was just beginning to dawn on [Covington] that the issues in the Gobitis case were controlled by four earlier decisions of the United States Supreme Court. Mr. Covington has no legal assistance, and at the moment is a rather lonely, harassed and anxious young man."²³¹ Gardner offered to assist Covington directly, but Covington felt bound to respect the wishes of the Witness leader, Rutherford, who wanted to argue the case himself.²³² On March 6, 1940, two days after the Supreme Court agreed to hear *Gobitis*, Clark took matters into his own hands, organizing a luncheon with Covington, Gardner, and Louis Lusky, an associate at Clark's law firm.²³³ The purpose of the meeting was to coordinate legal strategy. Notably, Lusky had clerked for Justice Stone two years earlier and had helped him draft Footnote Four of *Carolene Products*.²³⁴

Two weeks later, Lusky and Clark sent a first draft of their amicus brief to Covington; a week after that, Chafee sent Clark edits.²³⁵ Chafee was particularly exercised by one point that he felt had "carrie[d] our argument in the *Hague case*":

At a time when governmental functions are expanding rapidly, it seems to me essential to impress officials with a concept rather novel to them, namely, that the government resembles a public utility and is under obligations to give reasonable service to all. The frequent claim that the government may impose any conditions it pleases on what it does for the public is too often echoed by courts.²³⁶

229. The court reporter misspelled the name "Gobitas." See Gordon, *supra* note 33, at 227 n.76.

230. Letter from Grenville Clark to George K. Gardner (Feb. 16, 1940) (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series VIII, box 3; Letter from Grenville Clark to George K. Gardner (Jan. 4, 1940) (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series VIII, box 3.

231. Letter from George K. Gardner to William Fennell (Feb. 29, 1940) (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series VIII, box 3.

232. *Id.*

233. See Letter from Grenville Clark to George Gardner (Mar. 6, 1940) (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series VIII, box 3.

234. See Linzer, *supra* note 15, at 281-85.

235. Letter from Grenville Clark to Hayden Covington (Mar. 21, 1940) (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series VIII, box 2; Letter from Zechariah Chafee to Grenville Clark (Mar. 28, 1940) [hereinafter Chafee to Clark (Mar. 28, 1938)] (on file with the *Columbia Law Review*), in GCP, *supra* note 184, series VIII, box 3.

236. Chafee to Clark (Mar. 28, 1938), *supra* note 235.

Although Chafee's reference to public utilities law recalled an old progressive preoccupation, he was right that his rhetorical reconfiguration of that jurisprudence was quite novel. Indeed, it posed a fundamental challenge to progressive and New Deal conceptions of the proper distribution of power among the branches of government. The very concept of "public utility" had emerged to describe the authority of the *political* branches to regulate ostensibly private service providers.²³⁷ In Chafee's analogy, however, the political branches became the service providers and the courts became the regulators. Conceiving of the government as a public utility sounded progressive, but it actually inverted the progressive preference for political as opposed to judicial control of the nation's political economy.

It was just this inversion of progressive legal theory that Justice Felix Frankfurter targeted in his 8-1 majority opinion in *Minersville School District v. Gobitis*, which rejected the arguments of the Witnesses and the ABA.²³⁸ In the June 1940 decision, Frankfurter explained that to second-guess the Minersville School District's flag-salute policy "would in effect make us the school board for the country."²³⁹ "That authority has not been given to this Court," Frankfurter cautioned, "nor should we assume it."²⁴⁰ While the ABA Committee's championship of civil liberties derived from a commitment to the "independence of the courts"²⁴¹ and the resuscitation of judicial review, Frankfurter insisted that "to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties."²⁴² In this regard, government was not a public utility, but a public: "To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."²⁴³

Many of Frankfurter's old civil libertarian comrades were shocked and disappointed by his apparent insensitivity to the Jehovah's Witnesses' plight—surely the "forum of public opinion" was cruelly stacked against a minuscule religious minority!²⁴⁴ Just as many historians and legal

237. See generally William Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, in *The Corporation and American Democracy* (Naomi Lamoreaux & William Novak eds., 2015).

238. 310 U.S. 586 (1940), overruled by *W. Va. Bd. of Educ. v. Barette*, 319 U.S. 624 (1943).

239. *Id.* at 598.

240. *Id.*

241. Clark to Arant (July 15, 1938), *supra* note 213.

242. *Gobitis*, 310 U.S. at 600.

243. *Id.* For Frankfurter's defense of the constitutional authority of the political branches, see generally Brad Snyder, *Frankfurter and Popular Constitutionalism*, 47 *U.C. Davis L. Rev.* 343 (2013).

244. See Peters, *supra* note 33, at 46–71 (discussing the *Gobitis* opinion); Melvin I. Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties* 52–58 (1991) (same).

scholars do today, contemporary critics of *Gobitis* attributed Frankfurter's betrayal to the deteriorating situation in Europe, hysteria about national security, and sympathy for his German Jewish brethren overcoming the Justice's civil libertarian instincts. Yet Frankfurter's correspondence with Clark in the three years between the court-packing crisis and *Gobitis* suggests that the Justice's opinion grew out of a political and legal struggle both longer running and closer to home.

As Frankfurter had written to Clark time and again, while he celebrated his friend's recent discovery of civil liberties, he did not think that civil liberties necessitated a commitment to robust judicial review.²⁴⁵ Bolstered by his experience in the WWI War Department, where he had successfully promoted an accommodating approach to conscientious objectors to the military draft, Frankfurter viewed reasonable administration and legislation as the best hope for both democracy and civil liberty.²⁴⁶ While Clark resisted court packing and assailed the threat that administrative tribunals posed to the Bill of Rights, Frankfurter defended the New Deal's redistribution of power from the judiciary to the administrative state. And he emphatically rejected the idea that a special carve out for judicial protection of civil liberties was compatible with this redistribution.

It was just such a carve out that Justice Harlan Fiske Stone proposed in his lone dissent, circulated only days before *Gobitis* was slated for publication. Frankfurter hurriedly wrote Stone a four-page memorandum, asking him to shelve the dissent and warning of its epochal implications.²⁴⁷ In doing so, Frankfurter invoked an earlier era of

245. See, e.g., Frankfurter to Clark (Dec. 31, 1938), supra note 220; Letter from Felix Frankfurter to Grenville Clark (Nov. 16, 1938) (on file with the *Columbia Law Review*), in GCP, supra note 184, series VIII, box 2; Frankfurter to Clark (July 1, 1937), supra note 200; see also Dunne, supra note 32, at 84–88 (discussing an exchange between Justice Frankfurter and Clark in which Justice Frankfurter explained the reasons for his silence regarding the court-packing plan).

246. See Kessler, *Administrative Origins*, supra note 29, at 1111–23. Taking a different tack, Professor Richard Danzig has offered a perceptive analysis of Justice Frankfurter's understanding of the relationship between reason, democracy, and pluralism as grounded in his own experience as a young Jew navigating the elite legal worlds of Harvard Law School and government service:

Felix Frankfurter interpreted his experience as demonstrating that prejudice fell away over the long term when minorities confronted it—that rational persuasion was a reliable vehicle for assimilation. In the flag salute cases, he seems to have unselfconsciously conceived the Jehovah's Witnesses and the world in which they functioned—persons and arenas he did not know—in the image of his own experience.

Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 *Stan. L. Rev.* 675, 705 (1984).

247. Letter from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Harlan Fiske Stone, Assoc. Justice, U.S. Supreme Court (May 27, 1940) [hereinafter Frankfurter to Stone (May 27, 1940)] (on file with the *Columbia Law Review*), in Harlan Fiske Stone Papers, Library of Cong., container 65 [hereinafter HFSP].

aggressive judicial protection of private economic power from public safety regulation:

Just as *Adkins v. Children's Hospital* had consequences not merely as to the minimum wage laws but in its radiations and in its psychological effects, so this case would have a tail of implications as to legislative power . . . were it to deny the very minimum exaction, however foolish as to the *Gobitis* children, of an expression of faith in the heritage and purposes of our country.²⁴⁸

Progressives had long seen the 1923 *Adkins* decision,²⁴⁹ which rejected the constitutionality of a minimum wage for women in the District of Columbia, as marking the Taft Court's rightward turn and as a brutal setback for social and economic experiment; Justice Frankfurter himself had argued and lost the case as a young law professor.²⁵⁰ Seventeen years later, in his letter to Justice Stone, Justice Frankfurter invoked the case as a warning about the damage that rights-obsessed judging could do to sound public policy. He also appealed to Justice Stone's own recent dissent from the Court's 1936 decision in *United States v. Butler*.²⁵¹ There, Justice Stone had criticized the majority for its cramped reading of the federal government's power to secure the "general welfare."²⁵² Praising Justice Stone's *Butler* dissent as "a lodestar for due regard between legislative and judicial powers," Justice Frankfurter emphasized that the main goal of his approach in *Gobitis* was to avoid a judicial overreaction to the undoubtedly "foolish" treatment of a religious minority, an overreaction that might upset the fragile balance between political and judicial power achieved during the past few years.²⁵³

At this point in his plea, Justice Frankfurter had to confront the difference between the rights at stake in a case like *Adkins* (economic) and those at stake in *Gobitis* (civil)—especially given Justice Stone's recent authorship of *Carolene Products*,²⁵⁴ a decision that seemed to emphasize just that difference. Yet according to Justice Frankfurter, neither the different substance of the rights at issue nor Footnote Four itself changed the basic philosophy to which both he and Stone had long adhered. The political branches remained the "primary resolvers" of "the clash of rights," even when that clash involved "ultimate civil liberties."²⁵⁵ "For resolving such clash we [as judges] have no calculus,"

248. *Id.* at 4.

249. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

250. *Id.* at 526.

251. 297 U.S. 1 (1936).

252. *Id.* at 86–88 (Stone, J., dissenting).

253. Frankfurter to Stone (May 27, 1940), *supra* note 247, at 4.

254. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

255. Frankfurter to Stone (May 27, 1940), *supra* note 247, at 1–2.

Justice Frankfurter wrote to Justice Stone.²⁵⁶ “But there is for me, and I know also for you, a great makeweight for dealing with this problem, namely, that we are not the primary resolvers of the clash. We are not exercising an independent judgment; we are sitting in judgment upon the judgment of the legislature.”²⁵⁷

How should judges judge the “primary resolvers” of the “clash of rights”? Here, Justice Frankfurter explained, he regarded “as basic” Footnote Four, “particularly the second paragraph of it,” which proposed heightened judicial scrutiny of legislation that itself interfered with the political process.²⁵⁸ Explicitly downplaying the first paragraph (about textually enumerated constitutional rights) and the third paragraph (about discrete and insular minorities), Justice Frankfurter sought to interpret the Footnote narrowly lest it lead down a slope that ended in *Adkins, Butler*, and the judicial restraint of public power in the name of private rights.²⁵⁹ Compulsory-flag-salute laws in no way impeded the Witnesses’ ability to participate in politics. What’s more, the sect’s refusal to salute the flag looked to Justice Frankfurter like a rejection of political participation, an exercise of exit rather than voice.

Although selective, Justice Frankfurter’s narrow reading of Footnote Four was not outlandish at the time. A month earlier, Justice Murphy’s 8-1 majority decision in *Thornhill v. Alabama*,²⁶⁰ the first Supreme Court opinion to cite Footnote Four, had emphasized the second paragraph’s political process logic. Striking down a law that prohibited labor picketing, Justice Murphy wrote: “Abridgment of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.”²⁶¹ When a regulation threatened “the effective exercise of rights so necessary to the maintenance of democratic institutions, . . . courts should ‘weigh the circumstances’ and ‘appraise the substantiality of the reasons advanced’ in support of the challenged regulations.”²⁶²

Justice Stone’s dissent in *Gobitis*, however, elevated Footnote Four above this proceduralist and functionalist terrain. It was only the second Supreme Court opinion to cite the Footnote and the first to refer to the

256. *Id.* at 2.

257. *Id.*

258. *Id.*

259. In doing so, Justice Frankfurter previewed the approach to Footnote Four that would be championed decades later, in the wake of the Warren Court’s jurisprudential innovations. See John Hart Ely, *Democracy and Distrust* 75–77 (1980); Gilman, *supra* note 15, at 214–25; Linzer, *supra* note 15, at 285–88.

260. 310 U.S. 88 (1940).

261. *Id.* at 95.

262. *Id.* at 96 (quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)). *Schneider v. State*, struck down a blanket prohibition on street and door-to-door distribution of literature making no reference to Footnote Four. 308 U.S. at 161.

third paragraph's discussion of "discrete and insular minorities."²⁶³ Yet even here, Justice Stone had to acknowledge that the third paragraph, as written, focused on prejudice only to the extent that it "tend[ed] to curtail the operation of those political processes ordinarily to be relied on to protect minorities."²⁶⁴ For the authority to "scrutinize legislation restricting the civil liberty of racial and religious minorities although no political process was affected,"²⁶⁵ Justice Stone cited not Footnote Four but a string of 1920s substantive due process decisions striking down prohibitions on foreign language instruction and private school attendance, decisions rooted in the economic liberty of educators and parents.²⁶⁶ Nonetheless, by juxtaposing Footnote Four with these cases from an earlier era of guardian review, Justice Stone did what Justice Frankfurter had begged him not to do: identify Footnote Four with a conflation of the judicial protection of civil liberties and the judicial protection of substantive due process.

Professor Richard Danzig has argued that Frankfurter "inflated" the stakes in *Gobitis*, needlessly insisting that a school board's ex post facto adoption of a compulsory-flag-salute regulation be given the same deference "as though the legislature of Pennsylvania had itself formally directed the flag-salute," almost as though the U.S. Congress itself had done so.²⁶⁷ Yet the ABA's strategy was itself inflationary, using a test case involving the Jehovah's Witnesses to roll back the "undue subordination of the individual to the State."²⁶⁸ As Justice Frankfurter knew from his correspondence with Clark during the late 1930s, the goal of the ABA and its allies was to use the language of civil liberties to resuscitate judicial review and restrict the political branches' newfound autonomy.²⁶⁹ And it was clear both to Justice Frankfurter and to the ABA that Justice Stone's *Gobitis* dissent advanced that goal. For instance, shortly after the decision, Louis Lusky, Stone's former law clerk and the coauthor of the ABA's amicus brief, wrote to his old boss: "It certainly took me down a peg to see with how much more insight and skill you were able to expound the same position [as developed in the amicus brief] after working only a few days at the most."²⁷⁰

263. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

264. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 606 (1940) (Stone, J., dissenting).

265. *Id.*

266. *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). See generally Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. Rev. 1489 (1998) (reviewing the jurisprudence of the Taft Court in the 1920s).

267. Danzig, *supra* note 246, at 682 (citing *Gobitis*, 310 U.S. at 597).

268. Clark to Arant (Mar. 31, 1939), *supra* note 218, at 2.

269. See *supra* note 200 and accompanying text (discussing Frankfurter's debate with Clark).

270. Mason, *supra* note 15, at 620.

The press also recognized the high-stakes nature of the Frankfurter–Stone debate, while almost unanimously adopting the ABA’s point of view in interpreting it. Although the *Washington Post* agreed with Justice Frankfurter that “the Bill of Rights did not license ‘any group to interfere with legitimate functions of the state under the guise of practicing their religion,’” at least 170 other newspapers celebrated Justice Stone’s lone dissent for resisting “hysteria” in the name of fundamental American values.²⁷¹ The *Christian Century* opined that “[c]ourts that will not protect even Jehovah’s Witnesses will not long protect anybody.”²⁷² And in an editorial titled simply *Frankfurter v. Stone*, the *New Republic* warned that the Supreme Court was “dangerously close” to “adopting Hitler’s philosophy in the effort to oppose Hitler’s legions.”²⁷³ This association of judicial deference with totalitarianism was the linchpin of Clark and the ABA’s new brand of civil libertarianism. They had won more than they had lost in *Gobitis*; their depiction of judges as the privileged guardians of a free society shone through the gloomy prewar atmosphere and dazzled the American public.

III. FIRST AMENDMENT LOCHNERISM IN THE 1940S

A. *The 1942 Peddling-Tax Cases*

The negative press that rained down on the Supreme Court in the wake of *Gobitis* was particularly hard to bear for the avowed civil libertarians whom President Roosevelt had recently appointed—Justices Black, Douglas, and Murphy. In the fall of 1940, when Justice Douglas told Justice Frankfurter that Justice Black was reconsidering his position in *Gobitis*, Frankfurter asked if Black had been reading the Constitution over the summer. Douglas responded, “No—he has been reading the papers.”²⁷⁴ It could not have helped that these papers were reporting not only legal and political criticisms of the decision but also a wave of violent attacks on Witnesses. In the summer of 1940, the Witnesses responded to the unfavorable result in *Gobitis*—and the seemingly apocalyptic war in Europe—with increasingly aggressive proselytizing. Local mobs, in turn, responded with vigilantism, and the American Legion declared the Witnesses a “subversive” sect, along with other allegedly pro-Nazi or pro-Soviet ethnic and political groups.²⁷⁵

Yet if some members of the *Gobitis* majority were shaken by the criticism of media elites and news reports of anti-Witness violence, they did not immediately search out an opportunity to side with the Witnesses. One mitigating factor may have been that in August 1940, a

271. Peters, *supra* note 33, at 67–68.

272. *The Court Abdicates*, *Christian Century*, July 3, 1940, at 845–46.

273. *Frankfurter v. Stone*, Editorial, *New Republic*, June 24, 1940, at 843.

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

275. Peters, *supra* note 33, at 72–99.

Jehovah's Witness gunned down a sheriff's deputy in North Windham, Maine.²⁷⁶ Newspapers interpreted the murder as evidence of the real dangers those "disloyal" to the flag posed to law-abiding Americans.²⁷⁷ Another reason was that the next two Witnesses cases that came before the Court presented particularly ornery litigants and unsympathetic facts.

In the early spring of 1941, Chief Justice Hughes, writing for a unanimous court, upheld the conviction of over sixty Jehovah's Witnesses who had held a raucous, traffic-stopping parade without securing a permit.²⁷⁸ No Justice who read the record in *Cox v. New Hampshire* was prepared to question the propriety of time, place, and manner restrictions on such disruptive public gatherings, even when securing a permit came with a price tag. The following March, in the wake of American entry into World War II, *Chaplinsky v. New Hampshire* presented what seemed to the Justices an even easier question involving a Witness's especially aggressive street preaching, culminating in his calling the town marshal "a damned Fascist" for trying to defuse the situation.²⁷⁹ In another unanimous opinion, the Court's arch civil libertarian, Justice Murphy, canonized the "fighting words" exception to free-speech protection, explicitly deferring to First Amendment theorist Chafee's approval of this carve out.²⁸⁰

Even as Murphy was drafting *Chaplinsky*, however, the Court heard oral arguments in *Jones v. City of Opelika* and two other consolidated cases, the first set of Witness peddling-tax challenges.²⁸¹ While *Cox* and *Chaplinsky* had involved activities that resembled traditional breaches of the peace—unpermitted parades and lewd or libelous speech—the Witnesses' refusal to pay taxes on their door-to-door distribution and sale of religious literature seemed to merit both more and less judicial regard. More regard for two reasons. First, the Witnesses characterized the distribution and sale of religious pamphlets as their faith's peculiar mode of *ministry*, itself an act of worship.²⁸² Second, they characterized the distribution and sale of literature as an exercise of press freedom, the most entrenched of First Amendment rights and the one championed by

276. *Id.* at 217.

277. *Id.* at 217–19.

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

279. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942).

280. *Id.* at 572 (citing Zechariah Chafee, *Free Speech in the United States* 149 (1941)).

281. *Opelika I*, 316 U.S. 584 (1942). For the timing, see Peters, *supra* note 33, at 230.

282. See Brief for Petitioner at 5, *Opelika I*, 316 U.S. 584 (No. 280), 1941 WL 52767. Although the Witnesses had also tried to defend Cox's parade and Chaplinsky's imprecations as religious exercise, their characterization of the sale and distribution of literature as ministerial was systematic and well attested. See Nathan T. Elliff, *Jehovah's Witnesses and the Selective Service Act*, 31 Va. L. Rev. 811, 813–18 (1945); Deputy Dir. Hershey, Vol. III, Op. 14, *Ministerial Status of Jehovah's Witnesses* (June 12, 1941) (on file with the *Columbia Law Review*), in National Archives, College Park, Md., container 7, RG 147.

the widest range of political constituencies—from communist radicals seeking access to the mails to the newspaper magnates who had funded the epochal victories in *Near* and *Grosjean*.

Two other features of the peddling-tax challenges, however, militated for prompt judicial dismissal. First, the laws at issue—taxes on the sale of goods and services—were general commercial regulations, in the heartland of the New Deal Court’s “presumption of constitutionality.” Second, two months before *Opelika I* was decided, a unanimous Court had drawn a line in the sand with respect to what would come to be called “commercial speech.” In *Valentine v. Chrestensen*,²⁸³ a case involving the New York City Sanitary Code’s prohibition on commercial advertising in public thoroughfares, Justice Roberts distinguished the string of decisions that, since 1938, had struck down prohibitions on leafleting as violations of free speech, free press, and in the case of Jehovah’s Witnesses, free exercise.²⁸⁴ In those cases, Justice Roberts explained, the Court had “unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion” and that, accordingly, state and municipalities could “not unduly burden or proscribe” leafleting.²⁸⁵ Yet, Justice Roberts went on, “[w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.”²⁸⁶ Going further, the unanimous *Valentine* opinion held that “[w]hether, and to what extent, one may promote or pursue a gainful occupation in the streets . . . are matters for legislative judgment.”²⁸⁷ Even though the respondent, F.J. Chrestensen, had combined in one handbill an advertisement for his submarine touring business and a protest against the city for its boat-docking regulations, the Second Circuit had erred in finding this mix of commercial and political speech sufficient to bring Chrestensen’s activity within the ambit of the First Amendment.²⁸⁸ If the Second Circuit’s ruling were to stand, “every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law’s command.”²⁸⁹

Although *Valentine* had not yet been decided when the Jehovah’s Witnesses’ general counsel Covington was briefing and arguing the peddling-tax cases, he knew he faced an uphill battle given the general commercial nature of the challenged regulations. Confronting the Court for only the second time since Pearl Harbor (the first had been in the

283. 316 U.S. 52 (1942).

284. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Schneider v. State*, 308 U.S. 147, 164 (1939); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

285. *Valentine*, 316 U.S. at 54.

286. *Id.*

287. *Id.*

288. *Id.* at 55.

289. *Id.*

unfavorable context of *Chaplinsky*), Covington framed the peddling-tax issue in world historical terms: “In today’s perilous hours men’s hearts are failing them for fear of what they see coming upon the human family. This great *fear* has driven rulers and judges of every land into desperation and perplexity, resulting in a breaking down of justice and morality.”²⁹⁰ To make the stakes as vivid as possible, Covington’s brief asked the Justices to imagine how the peddling taxes would function in a Nazi invasion:

Let us assume that the Nazis and Fascists were moving in secret to invade the Gulf shore of Alabama, and some good citizen learning this fact printed millions of pamphlets or leaflets for distribution throughout Alabama. In Opelika, under this ordinance, both he and every loyal citizen aiding him to distribute such printed matter could be convicted for their failure to pay the tax and secure a license.²⁹¹

This thought experiment might be read as suggesting that the Witnesses’ primary objection to the peddling taxes was process-based—that it blocked avenues of democratic deliberation and defense. Yet Covington’s brief took a more formalist and absolutist stance, one that echoed the ideology featured in newspaper criticisms of *Gobitis*. “The only factor which distinguishes this country as a republic with a democratic form of government . . . is that American heritage epitomized as the Bill of Rights,” Covington insisted.²⁹² “Once the freedom anchored and secured thereby is gone, the reason is lost for fighting Nazism and allied totalitarian tyranny.”²⁹³ According to this logic, if the Court upheld the license taxes, the difficulties they posed to the defense of Opelika from Nazi attack would be irrelevant, as there would be nothing worthy left to defend.

The first half of Covington’s brief focused on the Witnesses’ free exercise claim, arguing that literature distribution was, for the sect’s members, a ministerial activity and that the work of ministers of other religions was not so taxed.²⁹⁴ The second half developed a press-freedom claim largely reliant on *Grosjean*. Noting that “[t]his right and liberty [of freedom of the press] . . . embrace the right to distribute, to circulate printed informative matter, to disseminate ideas in recorded form,” Covington contended that, as in *Grosjean*, the taxes at issue in *Opelika* restricted circulation and threatened the viability of the Witnesses’ informative enterprise.²⁹⁵ Covington copied almost verbatim from Justice Sutherland’s unanimous *Grosjean* opinion in arguing that the peddling taxes impermissibly “encumber[ed] and smother[ed] distribution and

290. Brief for Petitioner, *supra* note 282, at 37.

291. *Id.* at 32.

292. *Id.* at 38–39.

293. *Id.* at 39.

294. *Id.* at 5–10.

295. *Id.* at 25–27.

circulation” of literature: “This is plain enough when we consider that if [the tax] were increased to a high degree, as it could be, it well might result in completely suppressing both distribution and even publishing to [the] point of destruction.”²⁹⁶ Finally, Covington concluded by recommending a passage from Sutherland’s *dissent* in *Associated Press*:

Do the people of this land—in the providence of God, favored as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship . . . ? [sic] If so, let them withstand all *beginnings* of encroachment.²⁹⁷

Notably, Covington emphasized those aspects of Justice Sutherland’s *Grosjean* and *Associated Press* opinions that suggested that even incidental burdens on First Amendment exercise, regardless of regulatory intent, were unconstitutional. The Witnesses did not claim that the peddling taxes were discriminatory in intent or prohibitive in application. The ACLU, by contrast, placed considerable emphasis on discrimination against the Witnesses in its peddling-tax amicus brief.²⁹⁸ Indeed, the organization characterized the “basic question” in *Opelika I* as “whether a municipality, *under the guise* of collecting license fees for carrying on of various occupations,” may impose such a fee on “any person who, even on a single occasion, offers for sale a pamphlet containing an expression of opinion.”²⁹⁹ The phrase “under the guise” echoed what was arguably the actual holding in *Grosjean*:

The tax here involved is not bad because it takes money from the . . . appellees It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device *in the guise* of a tax to limit the circulation of information³⁰⁰

Writing for Justices Roberts, Frankfurter, Byrnes, and Jackson (who had joined the Court in July 1941), Justice Reed found the question of discrimination to be critical. In rejecting the Witnesses’ challenge, Justice Reed insisted on a fundamental “distinction between nondiscriminatory regulation of operations which are incidental to the exercise of religion or the freedom of speech or the press and those which are imposed upon the religious rite itself or the unmixed dissemination of information.”³⁰¹ Given that the Witnesses had not even *alleged* discrimination, this

296. *Id.* at 32 (citation omitted); cf. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 245 (1936).

297. Brief for Petitioner, *supra* note 282, at 39 (internal quotation marks omitted) (quoting *Associated Press v. NLRB*, 301 U.S. 103, 141 (1937) (Sutherland, J., dissenting)).

298. Brief of American Civil Liberties Union as Amicus Curiae at 2–3, *Jones v. Opelika*, 316 U.S. 584 (1942) (No. 280), 1942 WL 53575.

299. *Id.* at 1 (emphasis added).

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

301. *Opelika I*, 316 U.S. 584, 596 (1942).

distinction, plus the commercial aspect of their peddling activity, resolved the free-speech and free-press issues outright. Citing the *Associated Press* majority opinion and the Court's decision two months earlier in *Valentine v. Chrestensen*, Justice Reed concluded:

It would hardly be contended that the publication of newspapers is not subject to the usual governmental fiscal exactions, or the obligations placed by statutes on other business. The Constitution draws no line between a payment from gross receipts or a net income tax and a suitably calculated occupational license. Commercial advertising cannot escape control by the simple expedient of printing matter of public interest on the same sheet or handbill.³⁰²

As for the free exercise issue, Justice Reed refused to distinguish between the Witnesses' sale of their religious tracts and a teacher or preacher's "need to receive support for themselves": "[W]hen, as in these cases, the practitioners of these noble callings choose to utilize the vending of their religious books and tracts as a source of funds, the financial aspects of their transactions need not be wholly disregarded."³⁰³ Exacting a "reasonable fee" from "religious or didactic group[s]" for their "money-making activities," Justice Reed continued, "does not require a finding that the licensed acts are *purely* commercial. It is enough that money is earned . . ."³⁰⁴

The shadow of *Valentine* loomed large over Justice Reed's reasoning, as did the more general principle of judicial deference to commercial regulation that New Dealers like Reed—President Roosevelt's former solicitor general—had spent many years championing. The Roosevelt appointees in the peddling-tax majority were not entirely unsympathetic to the burden that taxation might place on marginal expressive communities such as the Witnesses. But precisely because of their experience with progressive and New Deal state building, these Justices insisted the solution lay in political reform, not judge-driven constitutionalism. "It may well be," Justice Reed allowed, even hoped, "that the wisdom of American communities will persuade them to permit the poor and weak to draw support from the petty sales of religious books without contributing anything for the privilege of using the streets and conveniences of the municipality."³⁰⁵ But "[s]uch an exemption . . . would be a voluntary, not a constitutionally enforced, contribution."³⁰⁶

With respect not only to free exercise, but also to free speech and free press, then, the majority saw an inescapable nexus between the commercial aspect of the Witnesses' peddling and the state's "right to employ the sovereign power explicitly reserved . . . by the Tenth

302. *Id.* at 597 (citations omitted).

303. *Id.* at 596.

304. *Id.* (emphasis added).

305. *Id.* at 598.

306. *Id.*

Amendment to ensure orderly living without which constitutional guarantees of civil liberties would be a mockery.”³⁰⁷ Justice Reed’s invocation of the Tenth Amendment was a pointed reminder that there was more to the Bill of Rights than individual protections from state interference. He combined this bit of counterformalism with a call for New Deal deference to political reason in the realm of economy: “When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the state to charge reasonable fees for the privilege of canvassing.”³⁰⁸

Two years earlier, the *Washington Post* had lauded the *Gobitis* majority for preventing “any group [from] interfer[ing] with legitimate functions of the state under the guise of practicing their religion.”³⁰⁹ Yet the paper saw the *Opelika I* majority’s deference to state economic regulation in a very different light. That *Opelika I* explicitly raised the possibility of broad First Amendment limits on economic regulation—a long-cherished goal of the newspaper industry—helps to explain the *Post*’s change of heart. So does the increasingly hegemonic status of antitotalitarian ideology in wartime America.³¹⁰ To the extent that this ideology was previously associated with opposition to the Roosevelt Administration, it might have seemed ill fated in the wake of the President’s declarations of war against imperial Japan and Nazi Germany in December 1941, six months before *Opelika I* was decided. Yet the United States’s entry into World War II, and its ideologically awkward alliance with the Soviet Union, simply shifted the emphases of antitotalitarian critique. Pro-war public intellectuals such as Reinhold Niebuhr played an important role in associating the wartime oppression of dissenters—including the Witnesses—with the overly regimented societies that young Americans were now fighting to defeat.³¹¹ So did the U.S. Office of War Information, which described the conflict as one against a “system” in which “the individual is a slave,” “a cog in a military machine, a cipher in an economic despotism.”³¹² The *Washington Post* sounded similar notes when it warned that the *Opelika I* majority’s reasoning

seem[ed] to be an opening wedge . . . for the taxation of ecclesiastical and academic property, which . . . would . . . have the ultimate effect of bringing all education under the control of the state, and thus of placing in the hands of the state the

307. *Id.* at 593.

308. *Id.* at 597.

309. Religion and Taxation, *Wash. Post*, June 10, 1942, at 8.

310. See, e.g., Nelson, *supra* note 136, at 121–37; Primus, *supra* note 170, at 224–33.

311. See Peters, *supra* note 33, at 106–07 (describing Niebuhr and other religious leaders’ commendation of the ACLU’s pro-Witness legal agenda “to all liberty-loving Americans”).

312. Alpers, *supra* note 191, at 194.

most potent of all instruments of regimentation and indoctrination.³¹³

Time magazine likewise called *Opelika I* an “ominous decision,” while the *Yale Law Journal* lamented that “with the exception of the West Coast Japanese Americans, the Witnesses are already the most persecuted minority in America.”³¹⁴

The press also praised the dissents of Chief Justice Stone and Justice Murphy—both of which Justices Black and Douglas joined—as antidotes to the totalitarian implications of the majority opinion.³¹⁵ Each dissent rejected the majority’s emphasis on the nondiscriminatory nature of the challenged taxes. Neutrality, Stone announced, meant nothing when “preferred” First Amendment freedoms were concerned:

The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a *preferred position*. Their commands . . . extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it.³¹⁶

According to the dissenters, the Witnesses did not have to show that the challenged regulations were discriminatory in intent or that they imposed prohibitive burdens on the expression of ideas or religious beliefs. Rather, it was up to the respondents to “show that the instant activities of Jehovah’s Witnesses create special problems causing a drain on the municipal coffers, or that these taxes are commensurate with any expenses entailed by the presence of the Witnesses.”³¹⁷ Only a narrowly tailored regulatory tax could pass constitutional muster. “In the absence of such a showing,” the dissenters argued, “no tax whatever can be levied on petitioners’ activities in distributing their literature or disseminating their ideas.”³¹⁸

In addition to the two dissents, Justices Black, Douglas, and Murphy appended what the *Post* called an “extraordinary memorandum”—an expression of “singular humility and intellectual honesty”—repudiating their earlier support for *Gobitis*.³¹⁹ Describing the majority opinion in *Opelika I* as “a logical extension of the principles upon which [*Gobitis*] rested,” the three converts announced that “this is an appropriate

313. Religion and Taxation, supra note 309.

314. Peters, supra note 33, at 232–33.

315. *Id.* at 232; see also William O. Douglas Papers, Library of Cong., Washington, D.C., container 65 [hereinafter WODP] (on file with the *Columbia Law Review*) (collecting clippings).

316. *Opelika I*, 316 U.S. 584, 608 (1942) (Stone, J., dissenting) (emphasis added).

317. *Id.* at 620 (Murphy, J., dissenting).

318. *Id.*

319. Religion and Taxation, supra note 309.

occasion to state that we now believe that it also was wrongly decided.”³²⁰ Mirroring Covington’s call for democracy to submit to the dictates of liberty, they concluded that “our democratic form of government, functioning under the historic Bill of Rights, has a high responsibility to accommodate itself to the religious views of minorities, however unpopular and unorthodox those views may be.”³²¹ To do otherwise would place “the right freely to exercise religion” in a “subordinate”—rather than a “preferred”—position to democratic decisionmaking.³²²

This repudiation of *Gobitis* by Justices Black, Douglas, and Murphy in the first set of peddling-tax cases likely doomed the constitutionality of compulsory-flag-salute laws. This was because one member of the 1942 peddling-tax majority, Justice Jackson, had already made clear his disagreement with *Gobitis*. As discussed below, while Justice Jackson believed that the Witnesses’ peddling-tax arguments represented a signal threat to the New Deal order, he viewed the flag-salute controversy as entirely distinguishable. In 1941, shortly before Jackson joined the Supreme Court, he had publicly singled out *Gobitis* as departing from the Court’s limited but important role in “stamping out attempts by local authorities to suppress the free dissemination of ideas, upon which the system of responsible democratic government rests.”³²³ Indeed, Justice Jackson had become convinced during his tenure as Attorney General that *Gobitis* was a boon to local malcontents and a threat to the nascent war effort.³²⁴ His authorship of *West Virginia Board of Education v. Barnette*,³²⁵ which finally reversed *Gobitis* in June 1943,³²⁶ surprised almost no one.

Accordingly, the close First Amendment question in the early 1940s was not whether school children could be compelled to salute the American flag. Rather, the close and critical question was whether private economic actors engaged in expressive conduct should be exempted from nondiscriminatory health, safety, and commercial regulations on civil libertarian grounds. Justices Frankfurter and Jackson, the opposing authors of *Gobitis* and *Barnette*, were in total agreement that the answer to this second question had to be “no.”³²⁷ The D.C. Circuit Judge Wiley Rutledge, however, saw things differently. In February 1943, when Rutledge took the seat of Justice Byrnes, who stepped down to join the American war effort, the Court flipped. On May 3, 1943, Justice Rutledge and the four former peddling-tax dissenters vacated *Jones v. City of Opelika*

320. *Opelika I*, 316 U.S. at 623–24 (Black, Douglas & Murphy, JJ., dissenting).

321. *Id.* at 624.

322. *Id.*

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

324. See Robert L. Tsai, *Reconsidering Gobitis: An Exercise in Presidential Leadership*, 86 Wash. U. L. Rev. 363, 397–99 (2008).

325. 319 U.S. 624 (1943).

326. *Id.* at 642.

327. See *infra* section III.B.

less than a year after it had been decided, striking down a host of other peddling taxes in the process.³²⁸ The *New Republic* described these 1943 peddling-tax decisions as an “outright about-face . . . one of the most notable acts in the entire span of the 154 years of Supreme Court history.”³²⁹

B. *The 1943 Peddling-Tax Cases*

On August 31, 1942, Covington moved for rehearing in *Jones v. City of Opelika*, describing the decision as “the most serious denial of liberty within history of the nation” and warning that “[I]liberty is destroyed by people who do not know they are destroying it.”³³⁰ Covington’s core argument tracked a line of thought that anti–New Deal lawyers had spent more than a decade developing: “Taxed speech is not free speech. It is silence for persons unable to pay the tax. Nor is taxed distribution of literature a free press Nor is taxed dissemination of Bible literature freedom of worship.”³³¹ Notably, the only Supreme Court authorities that Covington could cite for these propositions were Justice Sutherland’s majority opinion in *Grosjean v. American Press Co.* and his dissent in *Associated Press v. NLRB*.³³² Just as notably, this entire passage was lifted without attribution from then-Judge Rutledge’s D.C. Circuit dissent in *Busey v. District of Columbia*, an April 1942 decision upholding a similar tax levied by the District of Columbia.³³³ Justice Murphy had cited then-Judge Rutledge’s circuit opinion in his own dissent in *Opelika I*, and now Judge Rutledge’s language was before the Court, months before his appointment as a Justice.

Just as the ABA had sought to give the Witnesses a boost after their initial flag-salute failures back in 1939, the ANPA filed an amicus brief in support of rehearing the peddling-tax cases. ANPA’s general counsel, Hanson, had argued *Grosjean* and submitted an amicus brief in *Associated Press*, a brief on which Justice Sutherland had drawn heavily in dissent. Now, Hanson’s task was to convince a Supreme Court dominated by New Dealers to resuscitate the civil libertarian vision championed by the stalwart anti–New Dealer Sutherland but rejected by Justice Roberts’s majority opinion in *Associated Press*. Indeed, ANPA’s general counsel drew a direct connection between the “subtle encroachments on the freedom

328. See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Opelika II*, 319 U.S. 103 (1943) (mem.) (per curiam).

329. Dilliard, *About-Face*, supra note 18, at 693–94. Dilliard was a frequent correspondent of Clark’s and wrote a profile of him for the *American Scholar* shortly before his death. See Irving Dilliard, Grenville Clark, Public Citizen, *Am. Scholar* (on file with the *Columbia Law Review*), in GCP, supra note 184, series I, box 1.

330. Petitioner’s Motion for Rehearing at 3, *Opelika II*, 319 U.S. 103 (1943) (Nos. 280, 314, 966).

331. *Id.* at 18.

332. *Id.* at 18, 26, 36.

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

of the press to which the [peddling-tax] majority opinion . . . lends support” and some “misconceptions attributable to a dictum of this Court in *Associated Press*.”³³⁴ The “dictum” to which Hanson referred was Justice Robert’s statement that:

The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others, he must pay equitable and nondiscriminatory taxes on his business.³³⁵

Hanson allowed that “newspapers are not immune from the ordinary forms of taxation.”³³⁶ Nonetheless, he insisted that *Grosjean*, which *Associated Press* had in no way overruled, *did* render newspapers immune from any tax or regulation that had a “prohibitory or censorial quality” or “operate[d] as a condition precedent to the publication or circulation of newspapers.”³³⁷ This included any regulation that lowered advertising revenue because, as *Grosjean* had recognized, “every newspaper depends upon advertising revenue” and “[d]ecreased revenue . . . seriously impairs the operation of the press.”³³⁸ Most importantly, contrary to the *Opelika I* majority’s emphasis on the nondiscriminatory nature of the peddling taxes, Hanson insisted that “[t]he rationale of the *Grosjean* case was not rested upon the fact that a selected group of newspapers was singled out for attack.”³³⁹ Rather, “[t]he *Grosjean* case condemn[ed] every form of restraint upon the circulation of newspapers,” however neutral or generally applicable.³⁴⁰

Hanson reminded the Court that Justice Sutherland had nine votes for the proposition that since the taxes challenged in *Grosjean* “curtail[ed] the amount of revenue realized from advertising,” they operated as a restraint on press freedom.³⁴¹ “This is plain enough,” Justice Sutherland had reasoned, “when we consider that, if it were increased to a high degree, as it could be if valid, [the tax] well might result in destroying both advertising and circulation.”³⁴² This aspect of Justice Sutherland’s *Grosjean* opinion was no less “dictum” than the narrowing construction that Justice Roberts had placed upon the *Grosjean* opinion in *Associated Press*. But in the end, a new “liberal” majority would find the reasoning of the anti-New Dealer Sutherland

334. Brief of American Newspaper Publishers Ass’n as Amicus Curiae at 8, *Opelika II*, 319 U.S. 103 (1943) (Docket Nos. 280, 314, 966), 1942 WL 54231.

335. *Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937).

336. Brief of the American Newspaper Publishers Ass’n, *supra* note 334, at 9.

337. *Id.*

338. *Id.* at 10.

339. *Id.*

340. *Id.*

341. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936).

342. *Id.* at 245.

more congenial than that of the New Deal's judicial savior, Justice Roberts.

In addition to the petition for rehearing in *Opelika I*, the Witnesses also filed a new set of cert petitions seeking review of adverse peddling-tax decisions in Pennsylvania and a failed challenge to a prohibition on door-to-door solicitation in Ohio. Crucially, oral argument in all these cases was delayed until March 10 and 11, 1943, one month after Wiley Rutledge joined the Court. Justice Rutledge had already made his views clear while on the D.C. Circuit, and at the initial conference vote, he was happy to fall in with the dissenters from *Opelika I*. Reminding his colleagues that the peddling taxes were "a generalized imposition not [directed] against anybody," Justice Frankfurter lamented that "Jefferson and Madison would have been 'shocked' to discover what the Court was doing in the name of freedom of religion."³⁴³ The new majority was unmoved, and Chief Justice Stone assigned the task of making sense of the Court's rapid reversal to Justice Douglas, who overruled *Opelika I* in the course of his opinion in *Murdock v. Pennsylvania*.³⁴⁴ Chief Justice Stone himself wrote the Court's opinion in *Douglas v. City of Jeannette*, which affirmed a circuit court's dismissal of another of the Witnesses' Pennsylvania challenges for jurisdictional reasons.³⁴⁵

Meanwhile, the dissenters huddled. On April 9, Justice Frankfurter wrote to Justices Roberts, Reed, and Jackson emphasizing the long-term implications of the peddling-tax cases and encouraging as many dissents as possible: "[T]hese cases are probably but the curtain raisers of future problems of such range and importance that the usual objections to multiplicity of opinions are outweighed by the advantages of shedding as much light as we are capable of for the wisest unfolding of the subject in the future."³⁴⁶ That same month, Justice Jackson's law clerk, John Costelloe, also emphasized the potential impact of the majority's expansive interpretation of the First Amendment and its relationship to the Court's earlier substantive due process jurisprudence:

[T]he difference between the activities here revealed and the usual sort of religious activity should be pointed out This Court is forever adding new stories to the temples of the law, and the temples have a way of collapsing in toto when one story

343. Fine, *supra* note 274, at 379 (quoting Justice Murphy's conference notes).

344. *Murdock v. Pennsylvania*, 319 U.S. 105, 117 (1943); cf. *Opelika II*, 319 U.S. 103, 104 (1943) (referring to *Murdock* for the majority opinion).

345. *Douglas v. City of Jeannette*, 319 U.S. 157, 165–66 (1943).

346. Memorandum from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Stanley Reed, Assoc. Justice, U.S. Supreme Court, Owen Roberts, Assoc. Justice, U.S. Supreme Court & Robert Jackson, Assoc. Justice, U.S. Supreme Court (Apr. 9, 1943) (on file with the *Columbia Law Review*), in Robert Jackson Papers, Library of Cong., Washington, D.C., container 127 [hereinafter RJP].

too many is added to them. Thus, the liberty of contract stuff got built up too far, and it is now completely collapsed.³⁴⁷

Costelloe worried that the majority's emerging approach to the First Amendment represented a return to an earlier era of formalism, blind to the social and economic impact of aggressive rights protection. "[Y]ou can do a real service," Costelloe told Justice Jackson, "by pointing out that . . . the Court should not decide cases by some abstract concept of 'religious liberty,' to the exclusion of consideration of the facts."³⁴⁸ And the facts were that "[t]hese peddling ordinances" were protective in nature, aimed at "crews of magazine salesmen who swoop into a small town and . . . then depart, leaving a trail of angry, frightened, seduced, or assaulted people."³⁴⁹ A Catholic, Costelloe also cautioned Justice Jackson that the majority's abstract and absolutist civil libertarianism would inevitably require further, more expansive accommodations—or anger those who did not receive them:

Something that may have been overlooked by the writers of the pro-Jehovah's Witness opinions is the situation with reference to Catholic parochial schools The Catholic doesn't believe in sending his children to secular schools, so he wants to establish his own. Many times this is not feasible because starting your own school doesn't give you an exemption from maintaining the public schools So far the Catholics have had to work and pay for their crochets or go without them. I suppose, though, that it is more vital to the maintenance of the Church that her members be exempt from supporting schools they will put no stock in than for the Witnesses to be exempt from sales taxes.³⁵⁰

Costelloe assured Justice Jackson that "[o]f course I maintain no sentiment for exempting Catholics."³⁵¹ "But," Costelloe predicted, "there will be a whole lot of people who will, and will be pretty noisy about the matter."³⁵² Costelloe's discussion of the relationship between accom-

347. Memorandum #2 from John F. Costelloe, Clerk to Assoc. Justice Jackson 2 (Apr. 1943) (on file with the *Columbia Law Review*), in RJP, *supra* note 346, container 127.

348. *Id.* at 3.

349. *Id.*

350. Memorandum #1 from John F. Costelloe, Clerk to Assoc. Justice Jackson 1-2 (Apr. 1943) (on file with the *Columbia Law Review*), in RJP, *supra* note 346, container 127.

351. *Id.* at 2.

352. *Id.* In his *Barnette* dissent later that spring, Justice Frankfurter would make Costelloe's point about the slippery slope of accommodation, using the same parochial school example:

All citizens are taxed for the support of public schools, although this Court has denied the right of a state to compel all children to go to such schools and has recognized the right of parents to send children to privately maintained schools. Parents who are dissatisfied with the public schools thus carry a double educational burden. Children who go to public school enjoy in many states derivative advantages such as free textbooks, free lunch, and free transportation in going to and from school. What of the claims for equality of treatment of

modating Witnesses and Catholics was not simply an example. The communities in which the Witnesses operated tended to be majority Catholic, and Witnesses were themselves famously antipapist in their theology.³⁵³ Striking down the peddling taxes would thus deprive majority Catholic communities—whose own religious practices were arguably burdened by general fiscal policy—from using fiscal policy to regulate the Witnesses' activities.

Joining in Justices Reed's and Frankfurter's dissents from Justice Douglas's majority opinion holding the peddling taxes unconstitutional,³⁵⁴ Justice Jackson added a concurrence in *Douglas v. City of Jeannette*,³⁵⁵ which all Justices agreed should be affirmed for lack of jurisdiction.³⁵⁶ He did so because that case included the most detailed record. This record allowed Justice Jackson to develop the empirical and doctrinal points Costelloe had raised. Empirically, Justice Jackson documented Jeannette's majority Catholic population³⁵⁷ and the aggressively anti-Catholic nature of the tracts the Witnesses had peddled there.³⁵⁸ Doctrinally, he pointed out that the question of First Amendment enforcement in the peddling-tax cases was unavoidably a distributional question, the granting of expansive rights to some necessarily eroding the rights of others.

These Witnesses, in common with all others, have extensive rights to proselyte and propagandize. These of course include the right to oppose and criticize the Roman Catholic Church or any other denomination The real question is where their rights end and the rights of others begin. The real task of determining the extent of their rights on balance with the rights of others is not met by pronouncement of general propositions with which there is no disagreement A common-sense test as to whether the Court has struck a proper balance of these rights is to ask what the effect would be if the right given to these Witnesses should be exercised by all sects and denominations Can we give to one sect a privilege that we could not give to all, merely in the hope that most of them will not resort to it? Religious freedom in the long run does not come from this kind of license to each sect to fix its own limits, but comes of hard-headed fixing of those limits by neutral authority with an eye to the widest freedom to proselyte

those parents who, because of religious scruples, cannot send their children to public schools?

W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 660 (1943) (Frankfurter, J., dissenting).

353. See Fine, *supra* note 274, at 372–73; Peters, *supra* note 33, at 34.

354. *Opelika II*, 319 U.S. 103, 117 (1943).

355. 319 U.S. 157 (1943).

356. *Id.* at 166; see also *id.* at 182 (Jackson, J., concurring).

357. *Id.* at 167 (majority opinion).

358. *Id.* at 167–73.

compatible with the freedom of those subject to proselyting pressures.³⁵⁹

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

This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added. So it was with liberty of contract, which was discredited by being overdone. The Court is adding a new privilege to override the rights of others to what has before been regarded as religious liberty.³⁶⁰

Just over a month after publishing this concurrence, Justice Jackson invoked its distributional theory of First Amendment enforcement in his majority opinion in the second flag-salute case, *West Virginia Board of Education v. Barnette*.³⁶¹ There, "[b]efore turning to the *Gobitis* case," Justice Jackson wrote that it was "desirable to notice certain characteristics by which this controversy is distinguished."³⁶² These "certain characteristics" were that "[t]he freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual."³⁶³ Echoing his insistence in *Douglas* that "[t]he real question is where [the Witnesses'] rights end and the rights of others begin," Justice Jackson explained that it was those "conflicts" in which individual rights collided that "most frequently require intervention of the State to determine where the rights of one end and those of another begin."³⁶⁴ But the flag-salute challenge was not that kind of case:

[T]he refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.³⁶⁵

According to Jackson's logic, not all "intervention[s] of the State" in the First Amendment context raised equal suspicion. The absence of such intervention would, in fact, be worrisome in any context in which an individual's exercise of First Amendment rights impinged upon the

359. *Id.* at 178–80.

360. *Id.* at 179, 181–82.

361. 319 U.S. 624 (1943).

362. *Id.* at 630.

363. *Id.*

364. *Id.*

365. *Id.* at 630–31.

rights of another.³⁶⁶ Unsurprisingly, Justices Black, Douglas, and Murphy all issued concurrences in *Barnette*, pushing back against Justice Jackson's treatment of the flag-salute controversy as a relatively special case in which state coercion was obviously inappropriate. For Justices Black and Douglas, only those state interventions that were "either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which . . . merely regulate[d] time, place or manner of religious activity" merited the restraint of free exercise.³⁶⁷ For Justice Murphy, only "essential operations of government [required] for the preservation of an orderly society," such as the "compulsion to give evidence in court," could validly limit the "right of freedom of thought and of religion."³⁶⁸

Earlier that spring, however, even some in the new peddling-tax majority were apparently worried about the implications their decisions could have for the relationship between public regulation and private conscience. Days before Justice Douglas handed down the *Murdock* decision, he reportedly told Justice Roberts that he was "very much troubled about these Jehovah's Witnesses."³⁶⁹ According to a memorandum in Justice Frankfurter's papers, Douglas confided in Roberts that:

I am afraid that our decisions in these cases may lead [the Witnesses] to believe that they can violate any law simply because their religious convictions sanction such violation. And I wish we would say somewhere, somehow that people cannot break laws simply because their consciences tell them to do so.³⁷⁰

Despite his earlier strong language on the D.C. Circuit, even Justice Rutledge was unclear about the majority's reasoning and anxious about its extent. On March 27, he wrote to Justice Douglas with two possible theories motivating First Amendment critique of the license taxes:

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

366. Cf. John Dewey, *The Public and Its Problems* 15–16 (1927) (defining a "public"—the proper object of state administration—as "all those who are affected by the indirect consequences of transactions to such an extent that it is deemed necessary to have those consequences systematically cared for"). For an alternative interpretation of what made *Barnette* special for Jackson, see Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia Board of Education v. Barnette*, in *Constitutional Law Stories* 433 (Michael C. Dorf ed., 2004).

367. *Barnette*, 319 U.S. at 643–44 (Black & Douglas, JJ., concurring).

368. *Id.* at 645 (Murphy, J., concurring).

369. Memorandum of Felix Frankfurter, Assoc. Justice, U.S. Supreme Court 1 (Apr. 22, 1943) (on file with the *Columbia Law Review*), in *Frankfurter Papers*, Harvard Law Sch., reel 7.

370. *Id.*

(b) That “selling” the literature, while not necessary itself a religious practice, is so necessary for the exercise of the rituals and practices of the religion (because it furnishes the group with funds) that it is protected from taxation.³⁷¹

Justice Rutledge worried that “[t]he former theory is perhaps too narrow and may be vulnerable both to attack and to abuse.”³⁷² If salesmanship could be a sacrament, the scope of free exercise threatened to swallow the marketplace itself. “The latter,” Rutledge went on, “if it is the basis of the opinion, should be articulated more clearly—and, if so, in such a manner as not to protect from taxation large accumulations of property or funds by the more affluent religious bodies.”³⁷³ Here, Justice Rutledge mirrored Justice Jackson’s clerk’s concerns about the relationship between an expansive accommodation of the Witnesses and the government’s treatment of much larger religious communities, such as Catholics. Indeed, Justice Rutledge was “not sure the opinion as it stands will not be taken to imply that no house publishing religious literature, on however wide a scale, can be taxed in a non-discriminatory manner.”³⁷⁴ Accordingly, Rutledge recommended that “both theories, (a) and (b) . . . be used, but probably should be separately stated, and each then somewhat more specifically guarded against possible too extensive application.”³⁷⁵

In the end, Justice Douglas did try to set some limits on the majority’s decision, noting that “we do not intimate or suggest in respecting their sincerity that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment” and insisting that “[t]he cases present a single issue—the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities.”³⁷⁶ As for Justice Rutledge’s “a” and “b” theories, Justice Douglas at times emphasized “a,” holding that “spreading one’s religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types.”³⁷⁷

Yet elsewhere in the opinion, Justice Douglas was much more expansive. Because “[f]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own

371. Memorandum from Wiley Rutledge, Assoc. Justice, U.S. Supreme Court, to William Douglas, Assoc. Justice, U.S. Supreme Court 1 (Mar. 27, 1943) [hereinafter Rutledge to Douglas (Mar. 27, 1943)] (on file with the *Columbia Law Review*), in WODP, supra note 315, container 89.

372. *Id.*

373. *Id.*

374. *Id.* at 1–2.

375. *Id.* at 2.

376. *Murdock v. Pennsylvania*, 319 U.S. 105, 109–10 (1943).

377. *Id.* at 110.

way,” Justice Douglas reasoned, financial burdens on their exercise had to be understood as “restrain[ing] in advance those constitutional liberties . . . and inevitably tend[ing] to suppress their exercise.”³⁷⁸ Most striking of all, Justice Douglas repeated nearly verbatim the argument floated by Justice Sutherland in *Grosjean* and trumpeted time and again by Hanson, Davis, and other anti–New Deal civil libertarians: that the mere potential for a tax to become prohibitive constituted an impermissible restraint on press and religious freedom. “The power to tax the exercise of a privilege is the power to control or suppress its enjoyment,” Justice Douglas wrote.³⁷⁹ “Those who can tax the exercise of [the Witnesses’] religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance.”³⁸⁰

These poignantly Lochnerian sentences adopted wholesale the argument put forward by Hanson in ANPA’s amicus brief, namely that *Grosjean* was not a case about discriminatory taxation but rather about the thin line between economic regulation and the suppression of First Amendment activity.³⁸¹ The single innovation of the “liberal” majority in this respect was to marry ANPA’s view of the issue to an even more rigorous constitutional formalism:

The fact that the ordinance is “nondiscriminatory” is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.³⁸²

This “preferred position” doctrine not only cast suspicion on any general economic regulation that could be said to incidentally burden the exercise of First Amendment rights, but also put immediate pressure on the Court’s recent exclusion of commercial speech from First Amendment protection in *Valentine v. Chrestensen*.³⁸³ In his 1942 peddling-tax opinion, Justice Reed had read *Valentine* as bolstering the Court’s rejection of the Witnesses’ claim.³⁸⁴ The Witnesses were engaged in the mass sale of religious pamphlets, and while the publication and distribution of religious literature was undoubtedly a First Amendment activity, the peddling taxes primarily affected the commercial aspect of

378. *Id.* at 111, 114.

379. *Id.* at 112.

380. *Id.*; cf. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244–45 (1936).

381. See *supra* notes 331–337 and accompanying text.

382. *Murdock*, 319 U.S. at 115.

383. 316 U.S. 52 (1942).

384. See *supra* notes 300–303 and accompanying text.

this activity.³⁸⁵ They recouped a portion of peddlers' profits for the purpose of municipal maintenance.³⁸⁶ The facts of *Valentine*—in which the owner of a submarine museum was prohibited from distributing a pamphlet soliciting ticket purchases on one side and protesting a wharf regulation on the other—certainly permitted this reading.³⁸⁷

But Justice Douglas sharply distinguished the cases and in doing so, inserted an economic logic into those rights that now occupied a "preferred position."³⁸⁸ "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way," Justice Douglas reasoned.³⁸⁹ "It is plain that a religious organization needs funds to remain a going concern."³⁹⁰ To hold that "the mere fact that the religious literature is 'sold' . . . transform[s] evangelism into a commercial enterprise" would be to subject "itinerant preachers" to the same "standards governing retailers or wholesalers of books," Justice Douglas argued.³⁹¹ But this argument simply begged the question—what distinguished moneymaking evangelism from book retailing? Justice Douglas did not face this question squarely. Instead, he pursued two somewhat contradictory lines of argument.

First, he reasoned that when a "religious venture" included the solicitation of funds necessary for that venture "to remain a going concern," the taxation of such funds deprived the religion's adherents of their free exercise rights.³⁹² Second, he insisted that the "selling activities" of the Witnesses were "merely incidental and collateral to their main object which was to preach and publicize the doctrines of their order."³⁹³ Without reconciling these two positions—one of which emphasized the inextricable relationship between the Witnesses' commercial and religious activities, the other of which dismissed the commercial aspect as insignificant—Justice Douglas concluded that "it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture."³⁹⁴ The possibility that a venture could be both commercial and religious was best avoided, as the venture prohibited in *Valentine* had been both commercial and political in nature.

In a dissent joined by Justices Roberts, Frankfurter, and Jackson, Justice Reed—the author of the now-overturned 1942 peddling-tax

385. *Opelika I*, 316 U.S. 584, 597–98 (1942).

386. *Id.* at 607 (Stone, C.J., dissenting).

387. *Valentine v. Chrestensen*, 316 U.S. 52, 53 (1942).

388. *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943).

389. *Id.* at 111.

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.* at 112 (internal quotation marks omitted) (quoting *State v. Mead*, 300 N.W. 523, 524 (Iowa 1941)).

394. *Id.* at 111.

decisions—described the enormous legal and political economic implications of the new majority’s approach to First Amendment enforcement. “The Court now holds that the First Amendment wholly exempts the church and press from a privilege tax, presumably by the national as well as the state government.”³⁹⁵ Echoing Justice Rutledge’s own worries about the majority decision’s “too extensive application,”³⁹⁶ the dissenters warned that the “withdrawal of the power of taxation over the distribution activities of those covered by the First Amendment” was “capable of indefinite extension” to other modes of regulation and other less sympathetic regulated parties.³⁹⁷

What line between economic and civil liberty could now be drawn? As Justice Reed noted, the Witnesses had alleged neither that the peddling taxes were “so excessive in amount as to be prohibitory” nor that “discrimination is practiced in the[ir] application.”³⁹⁸ “Is subjection to nondiscriminatory, nonexcessive taxation in the distribution of religious literature, a prohibition of the exercise of religion or an abridgment of the freedom of the press?” Justice Reed asked.³⁹⁹ The dissenters’ answer was a resounding “no.” Indeed, Justice Reed suggested that the autonomy of economic regulation depended on finding that, as a matter of law, the “freedom” implicated in the First Amendment was unaffected by economic burdens. The “free” in free press and free exercise, he reasoned, “cannot be held to [mean] without cost but rather its meaning must accord with the freedom guaranteed. ‘Free’ means a privilege to print or pray without permission and without accounting to authority for one’s actions.”⁴⁰⁰ This analysis of “freedom” was strikingly antirealist in character, but it was an antirealism made necessary by the equally antirealist elevation of textually enumerated constitutional rights to a “preferred position,” superseding other individual and collective rights.

As for *Grosjean*, Justice Reed dismissed as dicta Justice Sutherland’s argument that a regulation limiting newspaper revenue was, in effect, a prior restraint because it tended to limit newspaper circulation. This was the argument that Justice Douglas’s peddling-tax opinion so clearly echoed. Yet, as Justice Reed insisted, the actual holding in *Grosjean* seemed to lie elsewhere—in the determination that the challenged circulation tax was “a *deliberate and calculated device in the guise of a tax to limit the circulation.*”⁴⁰¹ This interpretation of *Grosjean* as a case about intentional efforts to suppress political dissent reflected how the ACLU

395. *Id.* at 133 (Reed, J., dissenting).

396. *Rutledge to Douglas* (Mar. 27, 1943), *supra* note 371, at 2.

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

398. *Id.* at 118 (majority opinion).

399. *Id.* at 121.

400. *Id.* at 122.

401. *Id.* at 128 (emphasis added) (internal quotation marks omitted) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)).

and the Hughes Court's progressives—Justices Brandeis, Cardozo, and perhaps Stone—understood the decision back in 1936. The 1943 peddling-tax majority, however, had unwittingly recovered *Grosjean's* roots in conservative concerns about the dangers that government regulation posed to economic freedom.⁴⁰²

IV. A LONG HISTORY OF FIRST AMENDMENT LOCHNERISM?

By recovering the early years of First Amendment Lochnerism, this Article does not seek to tell a simple history of continuity. Civil libertarian jurisprudence in the 1930s and 1940s did not constrain economic regulation to the degree that it does today. We are witnessing both political and doctrinal innovations in the use of civil libertarian argument. These innovations may well build on the legacy of the peddling-tax cases, but that argument will have to be explored more fully in a future article. This Part seeks only to establish that the peddling-tax cases' entanglement of judicial civil libertarianism and judicial review of economic regulation proved remarkably difficult to unknot. In doing so, it also demonstrates how implausible it is to attribute this entanglement to the conservative politics of Roosevelt appointees or their successors, or to any consistent judicial belief in the "naturalness"⁴⁰³ or "neutrality"⁴⁰⁴ of a common law regulatory "baseline."⁴⁰⁵ Rather, as the 1943 peddling-tax dissenters had warned and as the anti-New Deal civil libertarians of the 1930s had hoped, midcentury jurists confronted a basic, structural antagonism between judicial civil libertarianism and judicial deference to political regulation of the economy.

Section IV.A describes how the Supreme Court confronted this antagonism in the immediate wake of the peddling-tax cases. Some "liberal" Justices were ready to embrace the antagonism fully, sacrificing the autonomy of economic regulation on the altar of the First Amendment; others struggled to rein in the economically libertarian tendencies of the peddling-tax cases, their "preferred position" doctrine, and the *Carolene Products* framework of bifurcated review that undergirded that doctrine. Section IV.B places these judicial struggles in the context of contemporaneous scholarly warnings about the economically libertarian tendencies of putatively "bifurcated" review. Section IV.C demonstrates the failure of these judicial and scholarly attempts to shut the "Pandora's Box" of bifurcated review, sketching the

402. See *supra* section I.A. See generally Olken, *supra* note 45.

403. Shanor, *supra* note 6, at 136; see also Sepper, *supra* note 6, at 1460; Tebbe, *supra* note 6, at 41, 58.

404. Sunstein, *Lochner's Legacy*, *supra* note 4, at 874; see also Sepper, *supra* note 6, at 1464; Tebbe, *supra* note 6, at 58.

405. Gedicks & Van Tassell, *Burdens and Baselines*, *supra* note 6, at 13; Sepper, *supra* note 6, at 1457; Sunstein, *Lochner's Legacy*, *supra* note 4, at 874–75; Tebbe, *supra* note 6, at 52–58.

persistence of the peddling-tax cases and their conflation of civil and economic libertarianism during the 1950s, 1960s, 1970s, and early 1980s, particularly in the doctrinal contexts of free exercise and commercial speech. As the evidence demonstrates, it is difficult to attribute this persistence to judicial conservatism or to judicial beliefs about the superiority of common law property and contract rights. Rather, as in the 1940s, politically liberal concerns for socially and economically disadvantaged litigants led Justices to use the First Amendment to attack economic regulation and protect the economic autonomy of private actors.

A. *Regretting the Peddling-Tax Cases*

The 1943 peddling-tax majority did not have to wait long to confront the Lochnerian Pandora's Box it had opened. Less than a year after Justice Rutledge provided the crucial fifth vote in the peddling-tax decisions, he was forced to place the first limiting condition on the expansive First Amendment doctrine they had announced. In *Prince v. Massachusetts*, the Jehovah's Witnesses sought to extend their recent victories, challenging a state's child-labor law that prevented a Witness child from participating with her mother in the sale and distribution of religious literature.⁴⁰⁶ Writing for a badly divided Court, Justice Rutledge upheld the safety regulation on the narrow ground of the state's general responsibility to protect children. "Concededly a statute or ordinance identical in terms with [the instant one] except that it is applicable to adults or all persons generally, would be invalid," Justice Rutledge explained, nodding to the peddling-tax decisions of the previous year.⁴⁰⁷ But, he went on, "[t]he state's authority over children's activities is broader than over like actions of adults."⁴⁰⁸

Justice Murphy dissented, arguing that "vague references to the reasonableness underlying child labor legislation in general" were not sufficient to justify a regulation impinging on "the human freedoms enumerated in the First Amendment."⁴⁰⁹ Citing Footnote Four, Justice Murphy insisted that such a regulation was not aided by "any strong presumption of . . . constitutionality" and was, indeed, "prima facie invalid."⁴¹⁰ Justice Rutledge himself later told Thomas Reed Powell that he almost had "to write [*Prince*] the other way": The Court was "dodging . . . between points pretty closely packed [I]t was one of those situations where almost a toss of the coin could have turned the trick for me."⁴¹¹

406. 321 U.S. 158, 161–62 (1944).

407. *Id.* at 167.

408. *Id.* at 168.

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

410. *Id.*

411. Fine, *supra* note 274, at 384.

Agreeing with the result as a matter of policy, Justice Jackson, joined by Justices Roberts and Frankfurter, nonetheless characterized his separate opinion as a dissent. If the *Murdock* majority had been right in equating the Witnesses' sale and distribution of literature with "worship in the churches," then the *Prince* majority laid the foundation "for any state intervention in the indoctrination and participation of children in religion, provided it is done in the name of their health or welfare."⁴¹² This *reductio ad absurdum*, Justice Jackson reasoned, revealed "the real basis of disagreement among members of this Court in previous Jehovah's Witness cases."⁴¹³ Making clear that *Barnette* had not signaled a departure from his more general approach to the relationship between public regulation and civil liberty, Jackson reiterated the analysis of the First Amendment he had first outlined in his *Douglas v. City of Jeanette* concurrence: "I think the limits [on religious freedom] begin to operate whenever activities begin to affect or collide with liberties of others or of the public."⁴¹⁴

Just as *Barnette* did not indicate Justice Jackson's retreat from balancing First Amendment claims with third-party rights, *Prince* did not indicate the "liberal" majority's retreat from striking down economic regulations on First Amendment grounds. Later that spring, Justice Douglas issued an opinion invalidating another town's door-to-door peddling tax. Unlike in *Murdock*, in which there was a mixed record with respect to the question whether itinerant Witnesses wholly supported themselves through the sale of literature, in *Follett v. Town of McCormick*, the Witness petitioner was a resident of the town and admitted that book selling was his sole occupation.⁴¹⁵ The majority argued that these facts made no difference—so long as book selling was an exercise of the petitioner's religion, the First Amendment's "preferred position" trumped the commercial regulation.⁴¹⁶ Citing now to *Grosjean* and *Murdock* in tandem, Justice Douglas wrote that "[t]he exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendments is as obnoxious as the imposition of censorship or a previous restraint."⁴¹⁷

Justices Jackson, Roberts, and Frankfurter dissented in unison, assailing *Follett* as a further expansion of the power of private economic actors and judges to interfere with political economic decisionmaking in the name of the First Amendment.

The present decision extends and reaches beyond what was decided in *Murdock v. Pennsylvania* There the community

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

413. *Id.*

414. *Id.*

415. *Follett v. Town of McCormick*, 321 U.S. 573, 574 (1944).

416. *Id.* at 575.

417. *Id.* at 577 (citations omitted).

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

If the First Amendment grants immunity from taxation to the exercise of religion, it must equally grant a similar exemption to those who speak and to the press. . . . If exactions on the business or occupation of selling cannot be enforced against Jehovah’s Witnesses they can no more be enforced against publishers or vendors of books, whether dealing with religion or other matters of information. The decision now rendered must mean that the guarantee of freedom of the press creates an immunity equal to that here upheld as to teaching or preaching religious doctrine. Thus the decision precludes nonoppressive, nondiscriminatory licensing or occupation taxes on publishers, and on news vendors as well, since, without the latter, the dissemination of views would be impossible.⁴¹⁸

Predicting the kinds of cases that today fill the state and federal courts in the form of Religious Freedom Restoration Act litigation, the dissenters concluded by insisting that, “in the field of religion alone, the implications of the present decision are startling”:

Multiple activities by which citizens earn their bread may, with equal propriety, be denominated an exercise of religion as may preaching or selling religious tracts. Certainly this court cannot say that one activity is the exercise of religion and the other is not. . . . It would be difficult to deny the claims of those who devote their lives to the healing of the sick, to the nursing of the disabled, to the betterment of social and economic conditions, and to a myriad other worthy objects, that their respective callings, albeit they earn their living by pursuing them, are, for them, the exercise of religion.⁴¹⁹

Back in November 1943, Donald Richberg, the architect of the New Deal’s National Industrial Recovery Act, had praised Justice Jackson’s *Douglas v. City of Jeanette* opinion as a perfect expression of their shared New Deal “faith”—“that liberty is only preserved by restraints on liberty, and that therefore the imposition of restraints is an essential part of preserving freedom.”⁴²⁰ Four months later, Justice Jackson and the other *Follett* dissenters argued that the new “liberal” majority’s “preferred

418. Id. at 581–82 (Roberts, Frankfurter & Jackson, JJ., dissenting).

419. Id. at 582–83.

420. Letter from Donald R. Richberg to Robert H. Jackson, Assoc. Justice, U.S. Supreme Court (Nov. 24, 1943) (on file with the *Columbia Law Review*), in RJP, supra note 346, container 127.

position” doctrine had severed this link between liberty and the restraint of liberty. The First Amendment now “entitle[d] believers to be free of contribution to the cost of government, which itself guarantees them the privilege of pursuing their callings without governmental prohibition or interference.”⁴²¹ Looking back at the Jehovah’s Witness cases in 1951, the education law expert Ralph Dornfeld Owen would more explicitly, if ironically, identify the Supreme Court’s “preferred position” civil libertarianism as a definitive break with President Roosevelt’s New Deal regime.⁴²² Whereas President Roosevelt had famously declared “Four Freedoms” to be equally fundamental—freedom of speech, freedom of worship, freedom from want, and freedom from fear—the “preferred position” doctrine enshrined an alternative set of “four freedoms”: “freedom of the press, freedom of speech, freedom of religion, all of them guaranteed by the Constitution, and freedom to invade the rights of others, guaranteed . . . by the majority of the members of the Supreme Court.”⁴²³ These “four freedoms” clearly disregarded freedoms from want and fear, which depended on affirmative government action to protect society as a whole. In their place stood “the freedom of the press”—always a sore spot for President Roosevelt given his political battles with the newspaper industry—and the anarchic “freedom to invade the rights of others.”

The final 1940s case involving Witness peddling, *Marsh v. Alabama*,⁴²⁴ provided a peculiar coda to the New Deal politics that had simmered in the background of the Court’s foundational First Amendment jurisprudence. In *Marsh*, a Witness challenged his conviction for trespassing on a company town’s property. Justice Black, who had made a name for himself in part by investigating corporate lobbyists, happily applied the Court’s newly expansive First Amendment doctrine to the public enforcement of the company town’s prohibition on solicitation.⁴²⁵ Justice Frankfurter himself concurred in the opinion, writing that:

[s]o long as the views which prevailed in *Jones v. Opelika* . . . [and] *Murdock v. Pennsylvania* . . . express the law of the Constitution, I am unable to find legal significance in the fact that a town in which the Constitutional freedoms of religion and speech are invoked happens to be company-owned.⁴²⁶

This time it was Chief Justice Stone—the author of Footnote Four and the originator of the “preferred position” doctrine—who joined

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

422. See Ralph Dornfeld Owen, *Jehovah’s Witnesses and Their Four Freedoms*, 14 U. Det. L.J. 111, 133 (1951).

423. *Id.* at 134.

424. 326 U.S. 501 (1946).

425. *Id.* at 509 (“When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.”).

426. *Id.* at 510 (Frankfurter, J., concurring).

Justices Reed and Burton in repudiating the majority's "novel Constitutional doctrine."⁴²⁷ Justice Jackson took no part in the decision, being in Nuremberg at the time, but the dissenters offered a version of his own political economic analysis of rights. In this case, though, the analysis was invoked primarily to defend private property rather than public authority from civil libertarian attack.

Our Constitution guarantees to every man the right to express his views in an orderly fashion. An essential element of "orderly" is that the man shall also have a right to use the place he chooses for his exposition. The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech.⁴²⁸

Of course, Justice Jackson's point in *Douglas, Barnette*, and *Follett* had been that almost every rights holder will trespass to some extent on the rights of others. What was needed was "hard-headed fixing of . . . limits by neutral authority," by which Jackson meant, at least in the first instance, legislators and administrators, not judges.⁴²⁹ Chief Justice Stone had disagreed with Justice Jackson when it came to the rights of ordinary townspeople to public order and fiscal solvency; the rights of large-scale private-property owners, it turned out, were a different matter. Yet Stone's worst fears would not be realized—in the ensuing decades, civil liberties did not vitiate the rights of private property. Indeed, the Supreme Court gradually marginalized the *Marsh* doctrine.⁴³⁰ As Justices Jackson, Frankfurter, and Roberts had intuited in *Follett*, the more baffling problem was and would remain those cases in which the rights of the property holder *coincided with*, rather than cut against, the rights of the civil libertarian trespasser. This was the situation the peddling-tax cases had presented and the paradigm of First Amendment Lochnerism.

Chief Justice Stone died a few months after his dissent in *Marsh*. Three years later, in *Kovacs v. Cooper*,⁴³¹ Justice Frankfurter attempted to bury what he saw as the pernicious legacy of Stone's civil liberties jurisprudence, from Footnote Four through the discourse of "preferred position" that it had spawned. In *Kovacs*, the Court upheld an ordinance prohibiting the use of sound amplification equipment in the streets.⁴³² Justice Frankfurter agreed with the result but was disturbed by the majority opinion's invocation of the phrase "preferred position" and its citation to Footnote Four of *Caroline Products*. Accordingly, he filed a

427. *Id.* at 512 (Reed, J., dissenting).

428. *Id.* at 516.

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

430. See *Hudgens v. NLRB*, 424 U.S. 507, 516–21 (1976); Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 *Wm. & Mary Bill Rts. J.* 767, 794–95 (2009).

431. 336 U.S. 77 (1949).

432. *Id.* at 77.

concurrence reconstructing the doctrinal history of both.⁴³³ First, Frankfurter argued that Footnote Four itself “did not have the concurrence of a majority of the Court,” as Justice Black did not concur in Part III of the opinion, which included the famous Footnote.⁴³⁴ Frankfurter then reviewed all those cases either citing the Footnote or invoking the First Amendment’s “preferred position.”⁴³⁵ The conclusion of this review was that “the claim that any legislation is presumptively unconstitutional which touches the field of the First Amendment and the Fourteenth Amendment . . . has never commended itself to a majority of this Court.”⁴³⁶

But Justice Frankfurter was simply wrong. In *Murdock*, Justice Douglas had a majority for the proposition that: “A license tax certainly does not *acquire constitutional validity* because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers, and treats them all alike.”⁴³⁷ Implicit in this proposition was precisely the presumption that Justice Frankfurter considered anathema: a presumption of *unconstitutionality* when general social and economic regulation “touche[d] the field of the First Amendment.”⁴³⁸ As the peddling-tax majority had insisted, “equality in treatment does not save” such regulation because “[f]reedom of press, freedom of speech, freedom of religion are in a preferred position.”⁴³⁹

After the death of Chief Justice Stone, the “liberal” block that had made these words law no longer had the five votes necessary to sustain their full force. Nonetheless, the *Kovacs* dissenters—Justices Black, Douglas, Murphy, and Rutledge—were correct to note that Justice Frankfurter’s review of the case law “demonstrates the conclusion opposite to that which he draws, namely, that the First Amendment guaranties of the freedoms of speech, press, assembly and religion occupy preferred position not only in the Bill of Rights, but also in the

433. *Id.* at 89 (Frankfurter, J., concurring).

434. *Id.* at 91; cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 155 (1938). This argument was recently reiterated by Justice Scalia. See *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights*, 134 S. Ct. 1623, 1644 (2014) (Scalia, J., concurring in the judgment) (“[W]e should not design our jurisprudence to conform to dictum in a footnote in a four-Justice opinion.”); see also David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. Ill. L. Rev. 1251, 1252 n.2 (“Justices Cardozo and Reed did not participate in the case. Justice Black concurred in the majority opinion except for the part that included the footnote. Justice McReynolds dissented. Justice Butler concurred only in the result.” (citations omitted)). The argument for Footnote Four’s minority status is debatable. Even without Justice Black, there were four votes for the Footnote and only seven Justices voting in the case. Footnote Four was thus endorsed by a majority of voting members of the Court.

435. *Kovacs*, 336 U.S. at 91–94 (Frankfurter, J., concurring).

436. *Id.* at 94–95.

437. *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (emphasis added).

438. *Kovacs*, 336 U.S. at 94 (Frankfurter, J., concurring).

439. *Murdock*, 319 U.S. at 115.

repeated decisions of this Court.”⁴⁴⁰ However accurate, this testament to the post–New Deal judiciary’s first era of aggressive civil libertarianism would read more like a eulogy a few months later, when both Justices Rutledge and Murphy followed Chief Justice Stone to the grave.

President Truman replaced these “liberal” hard-liners with jurists who were more comfortable with balancing individual free expression and free exercise against broadly shared public interests.⁴⁴¹ In the context of early Cold War hysteria, the consequent retreat from aggressive First Amendment enforcement was hard to view as anything but reactionary.⁴⁴² Yet while Justices Tom Clark and Sherman Minton were generally regarded as more “conservative”⁴⁴³ than their predecessors, they were actually more sympathetic than Justices Rutledge and Murphy to the New Deal’s fundamental commitment to judicial deference in matters of political economy.

The votes of Justices Clark and Minton tipped the balance in *Breard v. City of Alexandria*,⁴⁴⁴ a 1951 case that gave Justice Reed the opportunity to mitigate the economically libertarian implications of the old “liberal” majority’s First Amendment jurisprudence, a jurisprudence that had overturned Reed’s original 1942 disposition of the Witnesses’ challenge. That opinion had upheld the peddling taxes on the ground that incidental economic burdens on the exercise of First Amendment rights—especially when that exercise had a commercial aspect—did not violate the Constitution.⁴⁴⁵ Now, nearly a decade later, Justice Reed sought to return the Court to this pre-“liberal” First Amendment jurisprudence, one that was more compatible with the New Deal’s rejection of judicial regulation of the economy.

Jack Breard, a door-to-door seller of magazine subscriptions, was convicted of violating a municipal ordinance prohibiting “the practice of going in and upon private residences . . . by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do.”⁴⁴⁶ This blanket prohibition looked more restrictive than the taxes levied on peddling in the 1943 Witness

440. *Kovacs*, 336 U.S. at 106 (Rutledge, J., dissenting).

441. See generally George D. Braden, Mr. Justice Minton and the Truman Bloc, 26 *Ind. L.J.* 153 (1951).

442. See Robert M. Lichtman, *The Supreme Court and McCarthy-Era Repression* 24–36 (2015); Ellen Schrecker, *Many Are the Crimes: McCarthyism in America 190–200* (1998). But cf. Linda C. Gugin & James E. St. Clair, *Sherman Minton: New Deal Senator, Cold War Justice* 257 (1997) (noting that Minton told former President Truman that Republican obsession with domestic communism was a “diversionary tactic so that people would not notice the problems in the economy”).

443. David N. Atkinson, *From New Deal Liberal to Supreme Court Conservative: The Metamorphosis of Justice Sherman Minton*, 1975 *Wash. U. L.Q.* 361, 361.

444. 341 U.S. 622 (1951).

445. *Opelika I*, 316 U.S. 584 (1942).

446. *Breard*, 341 U.S. at 624.

cases, and Breard argued, on this basis, that “the distribution of periodicals through door-to-door canvassing [was] entitled to First Amendment protection”: “[T]he mere fact that money [was] made out of the distribution [did] not bar the publications from First Amendment protection.”⁴⁴⁷

Echoing Justice Jackson’s peddling-tax dissent eight years earlier, Justice Reed drew attention to the distributional character of rights claims: “All declare for liberty and proceed to disagree among themselves as to its true meaning. . . . Everyone cannot have his own way and each must yield something to the reasonable satisfaction of the needs of all.”⁴⁴⁸ Particularly when the exercise of First Amendment rights involved commercial activity, the expressive nature of that activity did not necessarily tip the scales in its favor:

[O]pportunists, for private gain, cannot be permitted to arm themselves with an acceptable principle, such as that of a right to work, a privilege to engage in interstate commerce, or a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose.⁴⁴⁹

Reed allowed that “the fact that periodicals are sold does not put them beyond the protection of the First Amendment;” nonetheless, “[t]he selling” aspect of an expressive activity “brings into the transaction a commercial feature.”⁴⁵⁰ It was on the basis of this “commercial feature” of the expressive activity that Reed distinguished Breard’s case from *Martin v. Struthers*, a case decided the same day as the 1943 peddling-tax cases, in which the Court had struck down an ordinance prohibiting even *noncommercial* door-to-door leafleting.⁴⁵¹

Notably, Justice Reed ignored those cases that were most on point: the 1943 peddling tax cases themselves, which had shielded the door-to-door *sale* of magazines not only from an outright ban but also from incidental financial burdens, despite the “commercial feature” of the activity. He simply concluded that “[i]t would be . . . misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents.”⁴⁵²

The remaining two members of the old “liberal” majority vigorously dissented. Joined by Justice Douglas, Justice Black decried Reed’s absolute silence with respect to the peddling-tax cases and condemned

447. *Id.* at 641–42.

448. *Id.* at 625–26.

449. *Id.*

450. *Id.* at 642.

451. *Id.* at 642–43 (discussing *Martin v. Struthers*, 319 U.S. 141 (1943)).

452. *Id.* at 645.

his covert repudiation of the “preferred position” doctrine on which they rested:

Today a new majority adopts the position of the former dissenters [including Reed himself] and sustains a city ordinance forbidding door-to-door solicitation of subscriptions Since this decision cannot be reconciled with the [peddling-tax cases] . . . , it seems to me that good judicial practice calls for their forthright overruling. . . . Today’s decision marks a revitalization of the judicial views which prevailed before this Court embraced the philosophy that the First Amendment gives a preferred status to the liberties it protects. I adhere to that preferred position philosophy.⁴⁵³

Justice Black’s precedential argument was a powerful one, and it is unclear why Justice Reed and the new majority did not overrule the 1943 peddling-tax cases. Alternatively, Reed might have distinguished those cases on the ground that the *degree* of commerciality differed, as the Witnesses were a poor religious organization trying to make ends meet, while *Breard* represented a corporation with “an annual business of \$5,000,000.”⁴⁵⁴ Yet such a distinction would have involved the Court in precisely the sort of political economic decisionmaking that, for New Deal stalwarts like Reed, was beyond the Court’s authority. In any event, the *Breard* Court took neither course, simply passing over the peddling-tax cases in silence. Accordingly, those cases remained in all their ambiguity on the books, leaving unresolved the proper relationship between judicial civil libertarianism and judicial deference to political regulation of the economy.

B. *Regretting Footnote Four*

The effort by Justices Frankfurter and Reed in the late 1940s and early 1950s to marginalize the peddling-tax cases, the “preferred position” doctrine, and the *Carolene Products* framework that undergirded both is puzzling in light of the widely held view that Footnote Four of *Carolene Products* was little noticed until the 1960s or 1970s.⁴⁵⁵ Only then, it is contended, did lawyers and judges embrace the Footnote—particularly its second two paragraphs, concerning obstructions to the

453. *Id.* at 649–50 (Black, J., dissenting).

454. *Id.* at 644 (majority opinion).

455. See Evan Gerstmann, *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection* 35–36 (1999); Lucas A. Powe, Jr., *The Warren Court and American Politics* 487–89 (2000); Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Restrain Courts?*, 72 *U. Colo. L. Rev.* 923, 926–27 (2001); Edward J. Erler, *Equal Protection and Personal Rights: The Regime of the “Discrete and Insular Minority,”* 16 *Ga. L. Rev.* 407, 409, 419 (1982); Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 *Calif. L. Rev.* 685, 691–94 (1991); L.A. Powe, Jr., *Does Footnote Four Describe?*, 11 *Const. Comment.* 197, 197 (1994) [hereinafter Powe, Footnote Four].

political process and “discrete and insular minorities”—in order to justify (or explain) the Warren Court’s jurisprudential innovations.⁴⁵⁶

From one perspective, this argument about the belated invention of Footnote Four’s significance is insupportable. By 1948, legal scholars could speak matter of factly about *Carolene Products*’s “now famous footnote”⁴⁵⁷ and cite it as the origin of the Supreme Court’s “reject[ion], even revers[al], [of] the normal presumption of constitutionality” in cases involving civil liberties.⁴⁵⁸ That same year, the Supreme Court cited the Footnote for the sweeping proposition that:

[Legislative] judgment does not bear the same weight and is not entitled to the same presumption of validity, when the legislation on its face or in specific application restricts the rights of conscience, expression and assembly protected by the Amendment, as are given to other regulations having no such tendency. The presumption rather is against the legislative intrusion into these domains.⁴⁵⁹

Yet, from another point of view, the thesis of Footnote Four’s belated invention—or at least its reinvention—has merit. As the previous quotes suggest, judges and scholars in the first decade of the Footnote’s existence associated it not with the principal legacy of the Warren Court—equal citizenship—but with the First Amendment; with the notion that some rights occupied a “preferred position” in the constitutional order (principally those rights protected by the First Amendment); and with the related notion that judges should treat certain kinds of governmental action as presumptively invalid because certain kinds of rights were presumptively inviolable. In the 1940s, Footnote Four was not neglected but it also did not represent a set of tools for building a more egalitarian democracy. Rather, it represented a set of libertarian checks on majoritarian decisionmaking.

In the 1940s, Footnote Four of *Carolene Products*, “when it was cited, stood for ‘preferred position.’”⁴⁶⁰ Furthermore, while those Justices who most fiercely endorsed the “preferred position” doctrine—Black, Douglas, Murphy, and Rutledge—“associated *Carolene Products* with democracy,” they did not associate it with “the modern procedural notion of democratic representation-reinforcement” but rather “the idea that democracy involves certain substantive values and substantive freedoms.”⁴⁶¹ As Felix Gilman has argued, “because [Footnote Four] was generally associated with preferred position[,] [i]t was not seen as an argument for the compatibility of judicial review with the democratic

456. See Erler, *supra* note 455, at 409; Powe, Footnote Four, *supra* note 455, at 204.

457. Braden, Search, *supra* note 36, at 579; see also Wechsler, *supra* note 15, at 769 n.28 (citing “the famous *Carolene Products* footnote”).

458. Emerson & Helfeld, *supra* note 143, at 84.

459. *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 140 & n.18 (1948).

460. Gilman, *supra* note 15, at 188.

461. *Id.* at 189.

process, but as an argument for the necessity of judicial review from fundamental values.”⁴⁶²

It was for this reason that Justices Reed and Frankfurter sought to marginalize Footnote Four, the closely associated “preferred position” doctrine, and the peddling-tax cases that had formulated that doctrine. Scholars have generally attributed Frankfurter’s interventions in particular to an almost mechanical dedication to judicial deference—to the formalized conception of institutional roles soon to be developed by the “legal process” school, whose members admired Frankfurter deeply.⁴⁶³ Yet this was not the critique of the “preferred position” doctrine that Frankfurter, Reed, and the other dissenting Justices had offered in the 1943 peddling-tax cases. Rather, they attacked the “liberal” majority’s endorsement of “preferred position” from the perspective of legal realism. Since economic regulation invariably imposed burdens on regulated parties’ exercise of expressive rights, the dissenters reasoned, to say that these rights were presumptively inviolable was to say that economic regulation was presumptively invalid: subject to searching judicial review whenever challenged on First Amendment grounds or, potentially, on any of the myriad other grounds contemplated by Footnote Four.⁴⁶⁴ The “preferred position” gloss of Footnote Four threatened to negate the “presumption of constitutionality” that the body of *Carolene Products* had announced, not simply because the gloss encouraged judicial review but because it ignored the political economic character of all rights claims. Put more simply, the 1943 peddling-tax dissenters saw little difference between the libertarianism of the “preferred position” doctrine and the economic libertarianism that the New Deal Court had so recently repudiated.

Throughout the 1940s, prominent legal scholars echoed this skepticism, wondering at the strange predicament that a putatively “left wing”⁴⁶⁵ majority of Roosevelt appointees was creating for itself. As early

462. *Id.* at 202.

463. For the argument that judicial deference was the hard core of Frankfurter’s jurisprudence, see Urofsky, *supra* note 244; Joseph P. Lash, *A Brahmin of the Law*, in *From the Diaries of Felix Frankfurter* 3 (Joseph P. Lash ed., 1974); Michael E. Parrish, *Felix Frankfurter, the Progressive Tradition, and the Warren Court*, in *The Warren Court in Historical and Political Perspective* 51 (Mark Tushnet ed., 1993); G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 *N.Y.U. L. Rev.* 576 (1995). For a contrasting interpretation, see Snyder, *supra* note 243, at 350–51 (redescribing Frankfurter’s commitment to judicial deference as a method of judge-driven popular constitutionalism). For Frankfurter and the rise of the legal process school, see Neil Duxbury, *Patterns of American Jurisprudence* 220–84 (1995); Laura Kalman, *Legal Realism at Yale 1927–1960*, at 145–228 (1986); William N. Eskridge Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 *Harv. L. Rev.* 2031, 2032–34 (1993).

464. For realism’s analysis of the legally constructed nature of the economy, see generally Barbara Fried, *The Progressive Assault on Laissez Faire* (1998); Morton Horwitz, *The Transformation of American Law 1870–1960*, at 193–246 (1992).

465. Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 *Stan. L. Rev.* 140, 140 (1949).

as 1941, Yale Law School Professor Walton Hamilton—one of the founders of legal realism—unhappily predicted the emergence of a preferred-position-like doctrine from the Hughes Court’s First Amendment jurisprudence:

A few years ago a bench headed by the present Chief Justice read “liberty of contract” out of the due process clause and promptly read freedom of speech into its place. The current bench, accentuating a trend which for a decade has been in the making, has in effect set up a presumption of unconstitutionality against all legislation which on its face strikes at freedom of speech, press, assembly, or religion.⁴⁶⁶

Hamilton and his student coauthor George Braden⁴⁶⁷ argued that there was a worrisome tension between this civil libertarian trend and a parallel “revolution”—the Supreme Court’s ostensible abandonment of its role as arbiter of the fairness of the nation’s political economy.⁴⁶⁸ On the one hand, President Roosevelt’s recent appointees, Justices Black, Reed, Douglas, Frankfurter, and Murphy, could each “through concrete experience . . . testify to the mischief which had been done by an attempt of the [old] Court to impose its rigid dogma upon the seething activities of society.”⁴⁶⁹ They all surely recognized that “if, in nation and state, the economy is to be kept flexible enough to preserve personal opportunity, the dominant reliance must be upon the legislature.”⁴⁷⁰ Yet in practice, the new Court had proven “unwilling to make definitive its presumption that a statute is constitutional.”⁴⁷¹ Indeed, by creating a “presumption of unconstitutionality” in matters of “civil rights” as opposed to “the liberties of property,” the new Court was embracing “th[e] very process” that had characterized the old Court’s approach to property rights: “[T]he action of the state must be measured against the invasion of private right, and the issue becomes a matter of more or less.”⁴⁷²

466. Hamilton & Braden, *supra* note 36, at 1349; see also *id.* at 1352 & n.145. For Hamilton’s intellectual and institutional significance, see Kalman, *supra* note 463, *passim*. The year before Hamilton and Braden wrote their article, an anonymous note in the *Columbia Law Review* had reached a similar conclusion. Note, Recent Cases, Constitutional Law—Presumption of Constitutionality Not Applicable to Statutes Dealing with Civil Liberties, 40 *Colum. L. Rev.* 531, 532–33 (1940) (“[*Schneider*] lends authoritative substance to the theory that there may be no room for the presumption of constitutionality, usually accorded state or municipal legislation, where [it] interferes with a civil liberty This notion—rooted in conjecture, then accorded footnote recognition . . . has now culminated in definitive assertion” (footnote omitted)).

467. Graduating from law school in 1941, Braden would go on to clerk for Justice Minton before joining the Yale Law faculty in 1947 as a late defender of legal realism. Kalman, *supra* note 463, at 149.

468. Hamilton & Braden, *supra* note 36, at 1319.

469. *Id.* at 1322.

470. *Id.* at 1349.

471. *Id.*

472. *Id.* at 1350–51.

The problem, Hamilton and Braden argued, was not simply that the Court was applying a *procedure* once used to protect economic liberty in order to protect civil liberty. The deeper problem was the *substantive* ambiguity between the two kinds of liberty:

A couple of generations ago, in an America which was on the make, personal freedom was esteemed as opportunity in a land of promise. To the mind of Mr. Justice Field, liberty-and-property was a single word and he did not hesitate to read the right to get ahead into the Fourteenth Amendment. But the idiom of ultimates changes and common-sense goes along. A peaceful picketing, for which fifty years ago the law would have been hard put to find a place, is today an attribute of freedom of speech Today there are persons, whom the members of the Court would not consider unreasonable men, who regard the matter [of labor picketing] as an aspect of a clash between economic groups which the state should regulate. And men not devoid of reason argue that when the National Labor Relations Board forbids an employer to send anti-union pamphlets to his own employees, there is no denial of the traditional freedom of the individual.⁴⁷³

The blurred nature of the line between economic and civil liberty created a kind of “Step Zero” question,⁴⁷⁴ the answer to which would embroil the Court in the same sort of economic reasoning that it had purportedly abandoned in the late 1930s. In any given case, “[t]he Court must . . . exercise independent judgment in deciding whether an issue is one of civil rights” or one of economic liberty and therefore whether to apply the “presumption of unconstitutionality” or the “presumption of constitutionality.”⁴⁷⁵ But “[t]o accept the thesis that such questions fall within the discretion of the Court, is to accord deference to an ultimate.”⁴⁷⁶ “[D]iscretion as to what presumptions will be indulged” meant that the “door” of judicial scrutiny was “capable of being flung wide open.”⁴⁷⁷

Hamilton and Braden interpreted Footnote Four of *Carolene Products* as an indication that “[m]embers of the Court have been bothered by their own dichotomy” between economic and civil liberty.⁴⁷⁸ And they found some merit in the distinction suggested by the Footnote’s second paragraph—namely that some “rights . . . have unique importance because their denial tends to restrict ‘those political processes which can ordinarily be expected to bring about repeal of undesirable legis-

473. *Id.* at 1352.

474. Cf. Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 191 (2006) (describing “the initial inquiry into whether the *Chevron* framework applies at all”).

475. Hamilton & Braden, *supra* note 36, at 1352.

476. *Id.*

477. *Id.* at 1350.

478. *Id.* at 1352 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

lation.”⁴⁷⁹ Echoing the interpretation of Footnote Four that Justice Frankfurter had offered to Justice Stone during their *Gobitis* debate, Hamilton and Braden argued that the Footnote’s second paragraph, on its own, might effectively synthesize judicial deference to political decisionmaking with heightened scrutiny in cases where there was evidence that the normal pathways of political debate and decision had been obstructed. The second paragraph “would keep open the right of intellectual search and maintain a free forum for the interchange of ideas and the resulting action. That done, it is not of judicial concern that mistakes are made, provided the rules of the game are followed.”⁴⁸⁰

While Hamilton and Braden may have been short-sighted in thinking that “[s]uch a rationale has relatively easy going so long as it is limited to the democratic process,”⁴⁸¹ they were certainly correct that Footnote Four “encounters obstacles as soon as it leaves its procedural orbit.”⁴⁸² Unlike the Footnote’s second paragraph, its first and third paragraphs posited substantive categories—textually enumerated rights, “discrete and insular minorities”—that merited special judicial guardianship. Neither category suggested an obvious means of distinguishing economic from noneconomic matters or of shielding the former from heightened judicial scrutiny. As Hamilton and Braden emphasized, reasonable persons could and did differ as to the question whether a labor picket was a First Amendment activity to be zealously protected by the judiciary or one maneuver in a larger economic conflict to be reasonably regulated by legislators and administrators.

The troublingly “economic” character of many “civil liberties” claims was a frequent theme in the contemporaneous writings of the historian and public intellectual Henry Steele Commager. A few months before Hamilton and Braden’s article, Commager asked the readers of the *New York Times*, “What is a law dealing with ‘economic problems,’ and who is to decide whether a particular act falls into this or into some other category? . . . [F]ew laws fall into neat or clear categories A law providing heavy taxes on newspaper advertising is an ‘economic’ law.”⁴⁸³ Commager expanded on the point in his book *Majority Rule and Minority Rights*, published months after the 1943 peddling-tax decisions.⁴⁸⁴ “The dust of confusion hangs heavily over the discussions of [Roosevelt’s court-

479. *Id.* at 1353 (quoting *Carolene Prods.*, 304 U.S. at 152 n.4).

480. *Id.* This “political process” argument for heightened judicial scrutiny of the regulation of (publicly valuable) speech would be famously elaborated by Alexander Meiklejohn later in the decade. See Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 26–27 (1948).

481. Hamilton & Braden, *supra* note 36, at 1353. See generally Robert C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (2014) (discussing the dilemmas of judicial review of the democratic process).

482. Hamilton & Braden, *supra* note 36, at 1353.

483. Henry Steele Commager, *The Constitution*, *N.Y. Times*, Mar. 30, 1941, at 16.

484. Commager, *Majority Rule and Minority Rights*, *supra* note 36.

packing plan] and of the numerous Jehovah's Witnesses cases," Commager lamented.⁴⁸⁵ "Misunderstanding," he went on, "is no monopoly of conservatives who celebrate judicial review as a bulwark of republicanism; it distinguishes equally liberals who for the most part deprecate judicial intervention in the economic realm but rejoice exceedingly at judicial intervention on behalf of civil liberties."⁴⁸⁶ The problem for liberals, Commager explained, was that "the distinction between so-called civil-liberties laws and other laws is by no means clear-cut, that it may even be artificial and misleading":

Was the Louisiana law imposing a heavy tax upon newspapers with large circulations an exercise of the taxing powers, or was it a badly concealed attempt to penalize opposition papers and thus an interference with freedom of the press? . . . Is the law forbidding doctors to give out contraceptive information a proper exercise of the police power—or an illegal interference with the rights of the medical profession?⁴⁸⁷

Ambiguity between the economic and the noneconomic was also rife when it came to the protection of "discrete and insular minorities." Commager reminded his readers that it was "conservatives, fearful especially for the sanctity of property," who first championed "the protection of minority rights," "formulated a philosophy of the 'tyranny of the majority[,]'" and took refuge in the denial of the majority will" through the "institution of judicial review."⁴⁸⁸ Hamilton and Braden had similarly noted that a discrete and insular minority "may refuse, or be unable, to entertain commerce in 'reason' with the mass of persons whose will guides the state."⁴⁸⁹ Was such a minority entitled to special judicial protection? Expanding on this point a few years later, Braden asked, "What are 'discrete and insular minorities'? Racial and religious groups, yes. Public utilities? Had Chief Justice Stone sat on the Court in the days of Granger legislation against the railroads, would he have held the railroads to be such a minority?"⁴⁹⁰

The peddling-tax cases exemplified this slippery boundary between "economic" and "noneconomic" minorities. The Jehovah's Witnesses were both a religious minority and an economic minority, a socially disfavored religious sect that engaged in an economically disfavored mode of commerce: mass door-to-door sale and distribution of aggressively sectarian literature. Furthermore, the Witnesses' legal victory

485. *Id.* at 39.

486. *Id.*

487. *Id.* at 68–69.

488. *Id.* at 79.

489. Hamilton & Braden, *supra* note 36, at 1353.

490. Braden, Search, *supra* note 36, at 581.

arose through a distinct process of interest group convergence,⁴⁹¹ in which the asserted rights of a disfavored religious and economic minority achieved judicial recognition when they aligned with the asserted rights of elite economic and expressive minorities—specifically, the newspaper industry and the corporate bar.⁴⁹² Contrary to majoritarian accounts of minority-rights enforcement,⁴⁹³ the crucial dialectic at work in the peddling-tax cases was not majority–minority, but disfavored–minority–elite–minority. As scholars noted during the 1940s, this dialectic was immanent within the logic of Footnote Four itself: The third paragraph underdetermined the social and economic character of the minorities in need of judicial protection; and the first paragraph was entirely neutral with regard to the social and economic power of the claimant of any particular textually enumerated constitutional right.

These early, skeptical interpretations of “bifurcated” review were not simply the product of backward-looking jurists’ misplaced anxieties. The inextricably economic nature of civil liberties claims continued to plague the Supreme Court in the wake of its encounter with the Jehovah’s Witnesses’ peculiar hybrid of expressive and commercial activity.

C. *The Persistence of the Peddling-Tax Cases*

In hindsight, the 1951 decision by Justice Reed and the *Breard* Court to pass over the peddling-tax cases in silence—suggesting that their reasoning was inapt but declining to overrule them directly—looks fateful. Although Justice Black, in dissent, criticized what he saw as a cowardly, covert overruling of the peddling-tax cases and the abandonment of the “preferred position philosophy,”⁴⁹⁴ the peddling-tax cases and their “preferred position” approach to First Amendment enforcement were not dead. As Michigan Law Professor Paul G. Kauper summarized in his 1960 overview of “constitutional trends”:

Although it appeared with the death of Justices Rutledge and Murphy, who, along with Justices Black and Douglas, had

491. Cf. Derrick A. Bell, Jr., *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 528 (1980) (arguing that “the interests of the races converged to make the *Brown* decision inevitable”).

492. To an extent, then, the history of the peddling-tax cases supports Professor Bruce Ackerman’s pluralist critique of Footnote Four—but only to the extent that one acknowledges both the power differential between interest groups and the formalism that obscures this power differential. See Ackerman, *supra* note 137, at 718–31; see also Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 Cornell L. Rev. (forthcoming 2016) (discussing the failure of pluralist theory to take disparities in economic power into account). It is not that all discrete and insular minorities have outsized influence on the political process but rather that powerful minorities that do have outsized influence can further secure their interests in the courts by piggybacking on the claims of disfavored minorities.

493. See, e.g., Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 7 (1996).

494. *Breard v. Alexandria*, 341 U.S. 622, 649–50 (1951) (Black, J., dissenting).

formed a solid bloc on the Court during the 1940–1950 decade to elevate [First Amendment] freedoms to the highest level under the Constitution, that the emphasis thereafter would be somewhat abated[. . .] . . . it is now apparent that with the appointment to the bench of Chief Justice Warren and Justice Brennan, men whose views coincide largely with those of Murphy and Rutledge, we again have a very solid bloc on the Court committed to the preferred freedoms theory in the interpretation of the First Amendment.⁴⁹⁵

Over the course of the 1950s, the peddling-tax cases themselves reappeared at the Court, usually invoked by narrow liberal majorities for the proposition that incidental economic burdens on expressive activity might violate a litigant’s First Amendment rights, or that the commercial nature of expressive activity did not deprive that activity of First Amendment protection.⁴⁹⁶ By 1962, the political scientist Robert McCloskey could remark that bifurcated review—in its “preferred position” interpretation—was alive and well and causing as much trouble as ever.⁴⁹⁷

The “modern Court,” Professor McCloskey explained, “has fairly consistently held to the ‘dual standard’ enunciated by [Justice] Stone in the *Carolene Products* case.”⁴⁹⁸ But “[f]rom the first the modern Court has been troubled by a recurring problem: how does the dichotomy stand up when economic matters and personal rights are involved in a single governmental action?”⁴⁹⁹ “Examples abound,” McCloskey continued: “statutes that strike at picketing, which may be both free speech and . . . economic activity; State-supported professional dues-paying requirements[;] . . . labor regulations that impinge on freedom of religion; license requirements, and other restrictions with a secular purpose, that nevertheless impose burdens on religious practice, to name only a few.”⁵⁰⁰ This laundry list presaged a host of legal controversies that today

495. Paul G. Kauper, *Supreme Court: Trends in Constitutional Interpretation*, 24 F.R.D. 155, 176–77 (1960).

496. See, e.g., *Bates v. City of Little Rock*, 361 U.S. 516, 522–25 (1960); *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring); *Speiser v. Randall*, 357 U.S. 513, 535–36 (1958); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 461–62 (1958); *United States v. Rumely*, 345 U.S. 41, 56–57 (1953) (Douglas, J., concurring). For an alternative perspective on the imbrication of civil and economic liberties in this period, see generally Karen M. Tani, *Flemming v. Nestor: Anticommunism, the Welfare State, and the Making of “New Property”*, 26 *Law & Hist. Rev.* 379 (2008).

497. Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 *Sup. Ct. Rev.* 34, 54.

498. *Id.* at 45.

499. *Id.* at 55.

500. *Id.* For examples of the case law that motivated Professor McCloskey’s argument, see *Lathrop v. Donohue*, 367 U.S. 820, 845–48 (1961) (avoiding the First Amendment question by determining that the record did not support the lawyer’s contention that his state bar association dues were being used to advocate for political positions with which he disagreed); *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 768–69 (1961) (avoiding the

are mistakenly seen as distinctive artifacts of the Roberts Court's civil libertarian adventurism.

Professor McCloskey reasoned that the most obvious solution to the problem of distinguishing between civil and economic libertarianism would be "to hold that . . . the law or an application of it will fall only if it was aimed at or discriminates against personal rights [e.g., civil liberties] as such."⁵⁰¹ Midcentury liberals, however, were unwilling to limit judicial civil libertarianism to the policing of facial restrictions on textually enumerated constitutional rights. "[T]he trouble with this formula," McCloskey explained, "is that it *does* permit the state to impose *de facto* burdens on the exercise of personal rights, and this has disturbed some of the Justices."⁵⁰² "A Court that has resolved to protect personal rights because of their indispensability to democracy," he reasonably concluded, "is not likely to be content with a doctrine that allows them to be frittered away, even though an otherwise legitimate . . . purpose can be described."⁵⁰³

An alternative approach that the Court had tried was "to filter out the personal-rights elements in the law and insist on their protection; the economic-rights residue being left, as usual, to the chance of legislative judgment."⁵⁰⁴ But as Professor McCloskey noted, "this can involve very nettling problems" of distinguishing between the "personal-rights elements" and the "economic-rights residue" lurking within a given First Amendment claim.⁵⁰⁵

First Amendment question by interpreting the Railway Labor Act's authorization of union shops to prohibit a union from spending dues from an employee on a political cause to which the employee objects); *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139-40, 143-44 (1961) (avoiding the First Amendment question by interpreting the Sherman Act not to outlaw lobbying for legislation that would have negative effects on business competitors); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (holding a state could not deprive an individual of a tax benefit simply because he refused to swear that he had not engaged in criminal forms of speech); *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232, 243-47 (1957) (avoiding the First Amendment question by holding that petitioner's decades-old membership in the Communist Party was not reasonable evidence of bad "moral character" on which to base denial of his application to practice law); *Peters v. Hobby*, 349 U.S. 331, 345 (1955) (avoiding the First Amendment question by holding that the executive order creating loyalty review boards did not allow "political appointees who . . . might be more vulnerable to the pressures of heated public opinion" to reverse an agency's retention of an employee whose political associations allegedly constituted a security risk); *Dickinson v. United States*, 346 U.S. 389, 395-96 (1953) (avoiding the First Amendment question by holding that Congress could not have intended the definition of "minister" to preclude those who earned income from secular work); *Wieman v. Updegraff*, 344 U.S. 183, 190-92 (1952) (avoiding the First Amendment question by holding that the state lacked sufficient evidence to deprive an individual of employment because of her allegedly disloyal political affiliations).

501. McCloskey, *supra* note 497, at 55.

502. *Id.* (emphasis added).

503. *Id.*

504. *Id.*

505. *Id.*

A year after McCloskey's article, the Supreme Court once again ignored these "netting problems" and explicitly invoked the 1943 peddling-tax cases to invalidate the denial of unemployment benefits to an individual whose religious refusal to work on Saturdays left her without private-sector employment.⁵⁰⁶ That decision, *Sherbert v. Verner*, cannot be described as vindicating common law property or contract rights—it mandated more government interference in the market, not less. Accordingly, contemporary critics often distinguish *Sherbert* from today's First Amendment Lochnerism, relying on Professor Cass Sunstein's narrow definition of "Lochnerism" as preservation of a common law regulatory "baseline."⁵⁰⁷ But the *Sherbert* Court did use the First Amendment to protect a litigant's economic interests—specifically, her interest in the "new property"⁵⁰⁸ of statutorily created unemployment insurance. In doing so, the decision built not only on the peddling-tax cases but also on a series of 1950s cases in which the Court had secured litigants' access to publicly provided economic benefits on civil libertarian grounds.⁵⁰⁹ In any event, the *Sherbert* Court's application of strict

506. *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963).

507. Sunstein, *Lochner's Legacy*, supra note 4, at 874; cf. Gedicks & Van Tassell, *Burdens and Baselines*, supra note 6, at 326; Sepper, supra note 6, at 1486 & n.169; Tebbe, supra note 6, at 54. These articles also argue that contemporary instances of free exercise "Lochnerism" tend to shift burdens from exempted persons to third parties, especially from employers to employees, in violation of the Establishment Clause. The *Sherbert* Court, it is contended, was punctilious about avoiding such a violation, emphasizing that granting unemployment insurance to the petitioner on First Amendment grounds did not burden third parties. See, e.g., Gedicks & Van Tassell, *Burdens and Baselines*, supra note 6, at 326 (arguing that in *Sherbert*, the Court "observed that the exemption would not burden others"); Tebbe, supra note 6, at 54 (arguing that "the free exercise exemption that the Court granted in *Sherbert v. Verner* did not burden any identifiable person or group"). But this means of distinguishing *Sherbert* from contemporary free exercise "Lochnerism" may overread the case. The *Sherbert* Court did not rule out the possibility that the free exercise right to unemployment insurance placed third parties in an inferior economic position; it simply noted that such a right did not "abridge any other person's religious liberties." *Sherbert*, 374 U.S. at 409; cf. *id.* at 422 (Harlan, J., dissenting) ("The meaning of today's holding . . . is that the State . . . must single out for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior . . . is not religiously motivated.").

508. Professor Charles Reich would coin the term one year after *Sherbert* was decided. See Charles A. Reich, *The New Property*, 73 *Yale L.J.* 733, 733 (1964).

509. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 528–29 (1958) (holding that a tax benefit premised on petitioner's speech could not be withheld "until the State comes forward with sufficient proof to justify [the] inhibition" of that speech); *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 246–47 (1957) (holding that the petitioner's "past membership in the Communist Party [did] not justify an inference that he presently has had moral character" and thus did not support "denying him the opportunity to qualify for the practice of law"); *Dickinson v. United States*, 346 U.S. 389, 395–97 (1953) (holding that evidence of petitioner's part-time secular employment did not support the inference that he was not entitled to a regulatory exemption as a "minister"); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952) ("We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the

scrutiny to a facially neutral economic regulation for its incidental burdens on free exercise—a model of review first deployed in the peddling-tax cases—would later receive statutory codification in the Religious Freedom Restoration Act, a major source of contemporary debates about First Amendment Lochnerism.⁵¹⁰

Twelve years after *Sherbert*, the 1943 peddling-tax cases were once again trotted out, this time to justify the extension of First Amendment protection to “commercial speech.”⁵¹¹ Much like the “liberal” peddling-tax majority and the *Sherbert* Court, the Burger Court majorities that first conferred civil libertarian dignity on commercial speech were motivated by politically liberal goals—women’s access to abortion and poor and elderly Americans’ access to cheap medicines.⁵¹² These majorities did not understand themselves to be vindicating any common law regulatory baseline but rather the rights of consumers to gain information that was essential to their welfare and to the exercise of independent constitutional rights, such as *Roe*’s limited right to abortion.⁵¹³ Yet the early “commercial speech” decisions, like the 1943 peddling-tax decisions on which they relied, refused to justify themselves on these relatively narrow, pragmatic grounds. Rather, Justice Blackmun’s majority opinions in *Bigelow* and *Virginia State Board of Pharmacy* touted the expansive reach and constitutionally exalted character of the First Amendment.

In the process, Justice Blackmun cabined both *Valentine*, the Supreme Court’s initial effort to distinguish commercial from constitutionally protected speech, and *Breard*, Justice Reed’s effort to re-

public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.”).

510. See Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb(b)(1) (2012) (describing the statute’s purpose as, inter alia, “to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened”). For further discussion of RFRA and “Lochnerism,” see generally Sepper, *supra* note 6.

511. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (“Speech . . . is protected even though it is carried in a form that is ‘sold’ for profit . . .” (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943))); *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (“The State [is] not free of constitutional restraint merely because the advertisement involve[s] sales or ‘solicitations’ . . .” (quoting *Murdock*, 319 U.S. at 110–11)); see also *id.* (“The existence of ‘commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.” (quoting *Ginzburg v. United States*, 383 U.S. 463, 474 (1966))). The *Ginzburg* majority had itself noted that in *Murdock* “speech having the characteristics of advertising was held to be an integral part of religious discussions and hence protected” under the First Amendment. *Ginzburg*, 383 U.S. at 474 n.17.

512. For an excellent discussion of the liberal politics of “commercial speech” in the Burger Court, see Graetz & Greenhouse, *supra* note 38, at 245–55.

513. See *Va. State Bd. of Pharmacy*, 425 U.S. at 763–66; *Bigelow*, 421 U.S. at 822; Graetz & Greenhouse, *supra* note 38, at 246, 248.

instate that distinction in the wake of the 1943 peddling-tax cases.⁵¹⁴ Once again, efforts by pro–New Deal Justices to limit the First Amendment in the interests of preserving judicial deference to democratic regulation of the economy had failed. Whatever its initial political motives, the Burger Court majority’s early commercial speech cases opened the floodgates for the expansive commercial speech doctrine that today is seen as a second major source of First Amendment Lochnerism.⁵¹⁵

In a telling historical continuity, it was Justice Jackson’s former law clerk, Justice William Rehnquist, who most vociferously dissented from the Burger Court’s early commercial speech decisions. Back in 1943, Jackson had decried the “liberal” peddling-tax majority’s First Amendment “transcendentalism” and warned that it repeated the mistakes of the *Lochner* era’s “liberty of contract” jurisprudence, disregarding the superior ability of the political branches to balance the competing rights and interests of different groups of citizens.⁵¹⁶ In remarkably similar terms, Justice Rehnquist’s dissent in *Virginia State Board of Pharmacy* warned that:

The logical consequences of the Court’s decision in this case, a decision which elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas, are far reaching indeed. Under the Court’s opinion the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage. Now, however, such promotion is protected by the First Amendment so long as it is not misleading or does not promote an illegal product or enterprise This effort to reach a result which the Court obviously considers desirable . . . extends the protection of [the First] Amendment to purely commercial endeavors which its most vigorous champions on this Court had thought to be beyond its pale.⁵¹⁷

Justice Rehnquist went on to describe how the majority’s constitutional elevation of commercial speech was at odds with the Court’s previous validation of not only advertising regulation but also a host of

514. See *Va. State Bd. of Pharmacy*, 425 U.S. at 759 (deriding *Breard*’s “simplistic approach” and noting that by the early 1970s it “was regarded as of doubtful validity”); *id.* at 760 (implying that the Court’s present holding destroyed the last “fragment of hope for the continuing validity” of *Valentine*).

515. See generally Kendrick, *supra* note 6, at 1202–06 (discussing the expansion of the commercial speech doctrine); Shanor, *supra* note 6, at 142 (“[The Court] overruled *Christensen*, thereby creating the modern commercial speech doctrine.”).

516. *Douglas v. City of Jeannette*, 319 U.S. 157, 179–82 (1943) (Jackson, J., concurring).

517. *Va. State Bd. of Pharmacy*, 425 U.S. at 781 (Rehnquist, J., dissenting).

other forms of government regulation essential to the welfare state, most notably the regulation of employer speech in labor disputes.⁵¹⁸ Rehnquist also noted that even “so dedicated a champion of the First Amendment as Mr. Justice Black,” who dissented from Justice Reed’s effort to roll back the peddling-tax cases in *Breard*, had acknowledged as self-evident that “the protections of that Amendment do not apply to a ‘merchant who goes from door to door selling pots.’”⁵¹⁹ Finally, echoing Justice Jackson’s comparison of the 1943 peddling-tax decisions to *Lochner*-era “liberty of contract” jurisprudence, Justice Rehnquist offered his own allusion to *Lochner* itself. In that case, Justice Holmes had famously dissented from the Court’s invalidation of a maximum-hours law as violating the Fourteenth Amendment, writing that “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics,” a popular text advocating laissez faire economics.⁵²⁰ Justice Rehnquist similarly dismissed the majority’s argument that Virginia’s ban on the advertisement of drug prices violated consumers’ First Amendment interest in “intelligent and well-informed decisions as to allocation of resources”: “[T]here is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.”⁵²¹

Four years later, Justice Rehnquist made the comparison to *Lochner* explicit. In the interim, the Burger Court had continued to extend the commercial speech doctrine, redescribing a range of moneymaking activities as exercises of First Amendment rights and continuing to rely on the peddling-tax cases to do so.⁵²² Then, in *Central Hudson Gas and Electric Corp.*, Justice Powell signaled an end to the piecemeal approach, announcing the now-famous four-part test that places a heavy burden on the government to justify its regulation of any commercial speech that “concern[s] lawful activity” and is not “misleading.”⁵²³ In a lone, grave dissent, Justice Rehnquist warned his colleagues that by “fail[ing] to give

518. See *id.* at 786.

519. *Id.* at 788 (quoting *Breard v. City of Alexandria*, 341 U.S. 622, 650 (1951) (Black, J., dissenting)).

520. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

521. *Va. State Bd. of Pharmacy*, 425 U.S. at 784 (Rehnquist, J., dissenting).

522. See, e.g., *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 630 (1980) (invalidating an ordinance barring door-to-door solicitation of funds by charities that used less than seventy-five percent of their receipts for “charitable purposes” and citing *Murdock* for the proposition that “the distribution of handbills [is] not transformed into an unprotected commercial activity by the solicitation of funds”); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977) (invalidating a state bar association’s suspension of two lawyers for soliciting business through newspaper advertisements and asserting that “[o]ur cases long have protected speech even though it is . . . in a form that is sold for profit” (citing *Smith v. California*, 31 U.S. 147 (1959); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943))).

523. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

due deference to th[e] subordinate position of commercial speech,” they had “return[ed] to the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court’s own notions of the most appropriate means for the State to implement its considered policies.”⁵²⁴ This sharp critique was directed at, among others, the Court’s most liberal Justices: Justice Marshall, who joined the majority opinion, and Justices Blackmun, Brennan, and Stevens, who concurred in the judgment on the ground that the majority opinion risked being underprotective.⁵²⁵ Each of these Justices, according to Rehnquist, had helped “to resurrect the discredited doctrine of cases such as *Lochner*.”⁵²⁶ Each of these Justices had, four years earlier, “unlocked a Pandora’s Box” when they joined Justice Blackmun’s opinion in *Virginia State Board of Pharmacy*, “elevat[ing]’ commercial speech to the level of traditional political speech by according it First Amendment protection.”⁵²⁷

As this Article has shown, however, *Virginia State Board of Pharmacy* was not the first time that a group of liberal Justices unlocked the “Pandora’s Box” of commercially motivated, expressive activity. In extending First Amendment protection to the advertisement of cheap medicines (ostensibly for the benefit of the poor and elderly), the *Virginia State* majority invoked the authority of the first generation of post–New Deal liberals.⁵²⁸ Back in 1943, five “liberal” Justices had elevated the commercial activities of the relatively poor, socially marginal Witnesses to a “preferred position” in the constitutional order. In doing so, they put the first crack in the edifice of the commercial–noncommercial speech distinction—established only a year earlier in *Valentine v. Chrestensen*—and revealed the instability of bifurcated review as spelled out in *Carolene Products*. Once the Court held that a generally applicable, nonprohibitive tax on the door-to-door sale of goods and services could violate the First Amendment when levied on those who believed it was their religious duty to sell apocalyptic pamphlets, the framework of bifurcated review began to break down. It certainly did not collapse all at once and, to this day, the “presumption of constitutionality” that the body of *Carolene Products* affords to “regulatory legislation affecting ordinary commercial transactions” remains good law.⁵²⁹ But the presumptions of unconstitutionality mooted in Footnote Four of *Carolene Products* have gradually eaten away at the body of the

524. *Id.* at 589 (Rehnquist, J., dissenting) (citation omitted).

525. See *id.* at 572–73 (Brennan, J., concurring); *id.* at 573–79 (Blackmun, J., concurring); *id.* at 579–81 (Stevens, J., concurring).

526. *Id.* at 591 (Rehnquist, J., dissenting).

527. *Id.* at 598.

528. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

529. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 149–52 (1938).

opinion, often at the behest of liberal majorities seeking to protect the economically disadvantaged.

Perhaps most disturbingly for contemporary liberals, this process of erosion from within—from within the *Carolene Products* framework and from within the liberal legal community—was predicted from the beginning. As discussed above, both the peddling-tax dissenters and a number of pro-New Deal legal scholars raised red flags about the economically libertarian tendencies of judicial civil libertarianism throughout the 1940s. Why then has contemporary First Amendment Lochnerism caught so many by surprise? One answer is the popularity of an unduly narrow definition of “Lochnerism,” one that reduces the phenomenon to judicial suspicion of governmental interference with common law contract and property rights. This definition of Lochnerism, advanced by Professor Sunstein and adopted by many contemporary critics of First Amendment Lochnerism,⁵³⁰ has worked to obscure the long-term, economically libertarian tendencies of aggressive judicial enforcement of the First Amendment. By identifying Lochnerism with a politically conservative judiciary that seeks to preserve a common law regulatory “baseline,”⁵³¹ legal scholars are prone to overlook those areas of First Amendment doctrine in which politically liberal judges have defended the economic autonomy of religious and political actors: either by relieving those actors of regulatory burdens, as in the peddling-tax cases and the Burger Court’s early commercial speech cases,⁵³² or by compelling the government to provide economic benefits to religious and political actors, as in the case of the unemployment insurance at issue in *Sherbert v. Verner* or the other forms of “new property” protected on civil libertarian grounds during the 1950s and 1960s.⁵³³

In the peddling-tax and commercial speech cases, the judicial invalidation of regulatory burdens did in fact free religious and political actors to exercise their common law property and contract rights without governmental interference. The motivation of the Justices involved, however, was certainly not reducible to an atavistic defense of common law rights or a rabid commitment to the free market. These Justices rather saw a free market in particular goods and services (the sale of religious magazines, the advertisement of abortion services) as inextricable from the free market in self-expression and self-determination that they sought to vindicate. Then again, the immediate political motivation of the Justices hardly mattered; given the constitutional determination that First Amendment interests should override governmental interests in health, safety, and fiscal integrity, an economically libertarian outcome was all but assured.

530. See *supra* notes 25–26 and accompanying text.

531. Sunstein, *Lochner’s Legacy*, *supra* note 4, at 874.

532. See *supra* section III.B; *supra* notes 495–510 and accompanying text.

533. See *supra* notes 510–515 and accompanying text.

Meanwhile, the narrow, Sunsteinian definition entirely misses the significance of another strand of First Amendment doctrine: those cases involving the civil libertarian protection of “new property,” such as *Sherbert v. Verner*. By compelling the government to provide religious and political actors with economic benefits, such as unemployment insurance or public employment, the Supreme Court did not vindicate common law contract and property rights in these cases. To the contrary, the Court *extended* the reach of statutory schemes that displaced common law “baselines,” ensuring religious and political actors’ access to goods and services unavailable on the private market. For this reason, such First Amendment “new property” cases escape the charge of Lochnerism, narrowly defined.

Yet these cases stand for the same proposition that animates the peddling-tax cases, the commercial speech cases, and the cases that so trouble liberal legal scholars today. This proposition is that civil libertarian interests—even when inextricable from private economic interests—should override governmental interests in health, safety, and fiscal integrity. The Supreme Court has happily cited First Amendment decisions that protect common law economic rights in support of First Amendment decisions that protect statutorily created economic rights, and vice versa. Only a theoretical or ideological sleight of hand can distinguish the civil libertarian defense of economic autonomy when it is motivated by political liberalism or vindicates “new property” rights from the civil libertarian defense of economic autonomy when it is motivated by political conservatism or vindicates traditional property rights. Once this fiction is dispensed with, a longer history of First Amendment Lochnerism comes into view.

In light of this longer history, critics of contemporary First Amendment Lochnerism might be wise to abandon their defense of an illusory tradition of economically neutral First Amendment enforcement. Instead, they could take up the banner of radical reform and seek to break with a legal tradition that has long been insensitive to the tension between judicial civil libertarianism and judicial deference to economic regulation. Not only would the reformist position more accurately reflect the economically libertarian character of a significant subset of First Amendment jurisprudence, it might also prove more effective in alerting judges, political officials, social-movement activists, and other legal scholars to the ambitious, reconstructive work that needs to be done. Providing potential allies with such notice is especially important given the relatively *unconscious* role that political liberals have played for over seventy years in advancing economically libertarian applications of the First Amendment.

As this Article has shown, the doctrinal blurring of civil and economic libertarianism that drives First Amendment Lochnerism has been, more often than not, the work of politically liberal judges and activists. Accordingly, one of the easiest and most useful tactics that

judges and legal scholars who oppose First Amendment Lochnerism might adopt is simply a *refusal* to endorse civil libertarian doctrines that risk further erosion of the autonomy and legitimacy of political regulation of the economy.⁵³⁴ Thereafter, to the extent that critics of First Amendment Lochnerism seek to vindicate such political control, their focus may eventually have to shift from reforming the courts to building more respected and more powerful political institutions. The peddling-tax dissenters and the legal-realist scholars who first warned of the Lochnerian tendencies of judicial civil libertarianism got at least this much right: One task for which judicial review, no matter how “liberal,” is especially ill-suited is enhancing political control of the economy.

CONCLUSION

First Amendment Lochnerism has been with us since the dawn of aggressive judicial enforcement of the First Amendment in the late 1930s. The conflation of judicial civil libertarianism and economic libertarianism was the brainchild of corporate lawyers critical of judicial deference to the New Deal state. They diagnosed the government’s increasingly unfettered regulation of economy and society as a totalitarian threat to the civil liberties of all Americans and proposed a remedy with bipartisan appeal: aggressive judicial enforcement of an

534. Ironically enough, this refusal would represent a partial recovery of the “old police power doctrine” of the actual *Lochner* era, a doctrine according to which “no one had an absolute right if its exercise interfered with the rights of others or with public rights,” a doctrine that “required a balance between the needs of individuals and the needs of the common welfare.” Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 *Calif. L. Rev.* 751, 798 (2009). For a recent example of what such a refusal might look like, see *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring in the judgment) (“Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity.”). On the other hand, for a recent example of a politically liberal Justice endorsing a civil libertarian doctrine that risks undermining political regulation of the economy, see Justice Kagan’s concurrence, with Justice Alito, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 711 (2012) (Alito, J., concurring, joined by Kagan, J.). This concurrence called for an extension of the “ministerial” exemption from employment and labor law to “any ‘employee’ who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith” and argued that “[i]f a religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group’s right to remove the employee from his or her position.” *Id.* at 712. Similarly, Justice Sotomayor joined the majority opinion in *Sorrell v. IMS Health Inc.*, invalidating a Vermont statute on First Amendment grounds because it “disfavor[ed] marketing, that is, speech with a particular content” and “disfavor[ed] specific speakers, namely pharmaceutical manufacturers,” while potentially providing “academic organizations with prescriber-identifying information to use in countering the messages of brand-name pharmaceutical manufacturers and in promoting the prescription of generic drugs.” 131 S. Ct. 2653, 2663 (2011).

expansive First Amendment. These corporate civil libertarians found a sympathetic partner in the Jehovah's Witnesses. A small but transatlantic religious sect that had suffered terribly under Nazi totalitarianism, the Witnesses also viewed the New Deal as totalitarian and considered a commercial activity—the door-to-door sale of religious literature—to be an integral part of their faith.

The partnership between the corporate bar and the entrepreneurial Witnesses intersected with the early reception and interpretation of Footnote Four of *Carolene Products*. The work of the two Supreme Court Justices with closest ties to Wall Street, Footnote Four reflected both corporate anxieties about the New Deal and liberal anxieties about totalitarianism. Early critics of the Footnote warned that this combination blurred rather than clarified the boundary between judicial civil libertarianism and judicial oversight of the economy. These warnings were confirmed in 1943, when the Witnesses—supported by the anti-New Deal American Newspaper Publishers Association—persuaded the Supreme Court's five most "liberal" Justices that municipal peddling taxes placed an impermissible burden on the sect's door-to-door magazine sales. The challenged taxes were nondiscriminatory in form and nonprohibitive in application, and the Witnesses' peddling was a commercial activity as well as a religious and expressive vocation. But the Witnesses successfully argued that the taxes exemplified the way in which seemingly innocuous economic regulation could gradually suppress a pluralistic civil society.

The "peddling-tax model" of judicial review—scrutiny of economic regulation for its incidental burdens on the exercise of First Amendment rights, even when that exercise takes the form of commercial activity—did not come to dominate midcentury First Amendment jurisprudence. But it did enjoy a significant doctrinal afterlife. Future Supreme Court majorities, generally motivated by concern for socially and economically disadvantaged groups, relied on the peddling-tax precedents to overturn regulatory schemes that denied economic benefits to religious believers and political dissenters, and to extend First Amendment protection to commercial speech. These latter-day uses of the peddling-tax cases, in turn, laid the doctrinal basis for today's First Amendment Lochnerism.

This history suggests that contemporary critics of First Amendment Lochnerism have underestimated the doctrinal resources available to supporters of an economically libertarian First Amendment. It is the habit and skill of lawyers to present their prescriptions as following seamlessly from precedent, or as requiring only minor adjustments to existing doctrine. But First Amendment Lochnerism has a surprisingly long and distinguished pedigree. Successful attempts to shore up the logic of bifurcated review—to formulate a workable distinction between judicial defense of civil liberty and judicial supervision of the economy—

have been few and far between in the courts and in the academy.⁵³⁵ It is true that, until recently, the fuzziness of bifurcated review has more often than not benefited marginal dissenters rather than mainstream corporations.⁵³⁶ But as scholars have periodically warned since the 1940s,⁵³⁷ neither Footnote Four nor the First Amendment itself has ever offered a dependable doctrinal check on the judicial protection of private economic power in the name of civil liberty.

535. See Suzanna Sherry, *Property Is the New Privacy: The Coming Constitutional Revolution*, 128 *Harv. L. Rev.* 1452, 1468–73 (2015) (reviewing Richard Epstein, *The Classical Liberal Constitution* (2014)).

536. See, e.g., NeJaime & Siegel, *supra* note 23, at 2520 (“In the free exercise cases that RFRA invokes, claims were advanced by religious minorities who sought exemptions based on unconventional beliefs . . .”); Sepper, *supra* note 6, at 1510 (“For-profit corporations are not the insular or religious minority individuals of past accommodations.”).

537. Compare Braden, *Search*, *supra* note 36, at 581–82, with Ackerman, *supra* note 137, at 718–31.