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In Defense of the Roosevelt Court

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IN DEFENSE OF THE ROOSEVELT COURT

Wilson Ray Huhn*

These economic royalists complain that we seek to overthrow the institutions of America. What they really complain of is that we seek to take away their power. Our allegiance to American institutions requires the overthrow of this kind of power. In vain they seek to hide behind the flag and the Constitution. In their blindness they forget what the flag and the Constitution stand for. Now, as always, they stand for democracy, not tyranny; for freedom, not subjection; and against a dictatorship by mob rule and the overprivileged alike.

Franklin Delano Roosevelt, June 27, 1936

ABSTRACT

The overriding purpose of the New Deal was to create opportunities for the common person to acquire a stake in society. The Roosevelt appointees to the Supreme Court were unwilling to allow either entrenched wealth or arbitrary governmental action to interfere with that objective. They remade the Constitution, but in so doing they returned the Constitution to its original purpose – the protection of personal liberty. The Roosevelt Court laid the foundation for a jurisprudence of human rights upon which the Warren Court and subsequent Supreme Courts have continued to build.

Two justices presently serving on the Supreme Court – Justice Antonin Scalia and Justice Clarence Thomas – oppose many of the principles established by the Roosevelt Court, and they wish to turn back the clock to the interpretation of Constitution as it was prior to 1937. The purpose of this article is to describe and defend the human rights revolution of the Roosevelt Court.

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INTRODUCTION

The purpose of this article is to describe the principles of human rights that were established by the Roosevelt Court, and to defend those principles from attacks that have been leveled against them by two present members of the Supreme Court, Justice Antonin Scalia and Justice Clarence Thomas.

From 1937 to 1954 the balance of power on the United States Supreme Court was in the hands of justices who had been appointed by President Franklin Delano Roosevelt.¹ It is well-known, at least among lawyers and historians, that 1937 was the turning point in the Supreme Court’s interpretation of the Commerce Clause.² Less appreciated is the fact that the Roosevelt Court also initiated a revolution in the interpretation of the Bill of Rights and the 14th Amendment.³

Considering the Constitution as *law*, before 1937 there was little judicial protection for the constitutional rights that we now take for granted.⁴ The concept of a

¹ See generally WILLIAM DOMNARSKI, *THE GREAT JUSTICES: 1941-1954* (2006) (focusing on the period of time that Roosevelt appointees Hugo Black, Felix Frankfurter, William Douglas, and Robert Jackson served together on the Supreme Court); JEFFREY D. HOCKETT, *NEW DEAL JUSTICE: THE CONSTITUTIONAL JURISPRUDENCE OF HUGO L. BLACK, FELIX FRANKFURTER, AND ROBERT H. JACKSON* (1996) (contrasting the judicial reasoning of Black, Frankfurter, and Jackson). See also *infra* notes 30-43 and accompanying text.

² See generally EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* (1941) (describing the then-recent doctrinal shift towards upholding the constitutionality of commercial and social legislation); BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 235 (1993) (stating that in 1937 “there was a real conversion in a majority of the Supreme Court and its effects do justify the ‘constitutional revolution’ characterization.”); see also *infra* notes 242-60 and accompanying text.

³ See generally WILLIAM M. WIECEK, 12 OLIVER WENDALL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941-1953 (2006) (a comprehensive description of the justices and decisions of the Roosevelt Court); *id.* at 707 (“The Court between *West Coast Hotel* and *Brown v. Board of Education* seems condemned to obscurity, if not scorn, [but t]his undeserved low repute of the Court and its Justices devalues the real significance of their work.”); *id.* (“The most striking feature [of the Court’s jurisprudence during this era] is the dominance of civil liberties and civil rights issues in its work.”).

⁴ See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (observing that the framers considered the Constitution to be “the fundamental and paramount law of the nation.”); but see Mark Tushnet, *Weak-Form Judicial*

general constitutional right to privacy was little more than a theory that had been proposed by Justice Louis Brandeis.⁵ Religious *belief* was protected, but religiously motivated *conduct* was not.⁶ The requirement of the Separation of Church and State that is implicit in the Establishment Clause had been acknowledged by the Court but had never been applied to invalidate any law.⁷ Until 1930, protection for freedom of expression was but a vision expressed in the passionate dissents of Justice Brandeis and Justice Oliver Wendell Holmes, and although the Court had begun to protect freedom of speech and press after 1930, the Roosevelt Court made enormous progress on this front after 1937.⁸ Finally, before 1937 the Supreme Court was at best indifferent, if not hostile, to the plight of blacks and other minorities, largely neglecting to enforce the Equal Protection Clause of the 14th Amendment.⁹

The interpretation of the Constitution changed because Franklin Delano Roosevelt appointed a series of justices to the Supreme Court who were devoted to the principles that are *stated* in the Constitution and which *motivated* the framers, but which the Supreme Court had, until 1937, largely failed to *enforce*.

Review and Core Civil Liberties, 41 HARV. C.R.-C.L. L. REV. 1, 2 (2006) (in effect challenging the premise that the Constitution should be considered binding law in certain circumstances and proposing “a form of judicial review in which judges’ rulings on constitutional questions are expressly open to legislative revision in the short run.”); MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000) (describing three 19th Century American political movements, outside the judicial context, defending freedom of expression).

⁵ See *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J. dissenting) (“The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.”). See also Louis Brandeis and Samuel Warren, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890); Benjamin E. Bratman, *Brandeis’ and Warren’s “The Right to Privacy and the Birth of the Right to Privacy,”* 69 Tenn. L. Rev. 623, 624 (2002) (“In the more than 110 years since its publication, Brandeis and Warren's article has attained what some might call legendary status. It has been widely recognized by scholars and judges, past and present, as the seminal force in the development of a ‘right to privacy’ in American law.”). See *infra* notes 158-169 *infra* and accompanying text.

⁶ See *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (Waite, C.J.) (“Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”). See also *infra* notes 223-230 and accompanying text.

⁷ See *Reynolds*, 98 U.S. at 164 (Waite, C.J.). After quoting Jefferson for the proposition that the First Amendment builds “a wall of separation between church and state,” the Court stated, “Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured.”). However, the Court in *Reynolds* failed to find that the federal law forbidding polygamy in United States Territories violated the First Amendment. See *id.* at 166 (Waite, C.J.) (“In our opinion, the statute immediately under consideration is within the legislative power of Congress.”). See also *infra* notes 231-238 and accompanying text.

⁸ See *infra* notes 170-217 and accompanying text.

⁹ See *infra* notes 309-312 and accompanying text.

On January 6, 1941, Roosevelt delivered his State of the Union Address, “The Four Freedoms,” as he girded the country for worldwide war against Germany and Japan.¹⁰ Roosevelt outlined the threats that America faced from abroad, and the sacrifices that would be necessary to meet those threats, but he chose to emphasize, as the centerpiece of his address, *not* military preparedness, but rather *why* we must fight – what it is that makes our society worth fighting for. In his address he distinguished our society from the fascist governmental, economic, and social systems of Germany and Japan. He first described what ordinary people expect from their society:

The basic things expected by our people of their political and economic systems are simple. They are:
Equality of opportunity for youth and for others.
Jobs for those who can work.
Security for those who need it.
The ending of special privilege for the few.
The preservation of civil liberties for all.
The enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living.¹¹

Roosevelt then articulated what he considered to be the basic human rights – the Four Freedoms:

In the future days which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression – everywhere in the world. The second is freedom of every person to worship God in his own way - everywhere in the world. The third is freedom from want, which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants - everywhere in the world. The fourth is freedom from fear, which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor - anywhere in the world.¹²

Franklin Roosevelt fought passionately and tirelessly for the economic rights of workers,¹³ and he led us to victory in the war against totalitarian fascism,¹⁴ but it was

¹⁰ See President Franklin D. Roosevelt, Annual Message to Congress: The “Four Freedoms” Speech, Franklin D. Roosevelt Presidential Library and Museum (January 6, 1941), <http://www.fdrlibrary.marist.edu/4free.html>, last visited September 17, 2007; STAMFORD PARKER, THE WORDS THAT RESHAPED AMERICA: FDR 157-66 (2000) (excerpting from address); KENNETH S. DAVIS, FDR: THE WAR PRESIDENT 96-97 (2000) (summarizing address).

¹¹ PARKER, *supra* note 10, at 164-65.

¹² *Id.* at 165-66.

¹³ See *id.* at 104-105 (quoting Roosevelt’s speech to the Democratic Convention on June 27, 1936) (“The royalists of the economic order have conceded that political freedom was the business of the government,

Eleanor Roosevelt who most eloquently gave voice to the drive for human rights within this Nation and on the world stage. It was Eleanor who descended into the coal mines¹⁵ and who exposed the extreme poverty of the people of Appalachia¹⁶ – it was Eleanor who met with and supported civil rights leaders A. Philip Randolph, Walter White, and Mary McLeod Bethune¹⁷ – it was Eleanor who publicly resigned from the Daughters of the American Revolution when that organization refused to allow Marion Anderson to perform at Constitution Hall¹⁸ – it was Eleanor who opposed the internment of the

but they have maintained that economic slavery was nobody's business. They granted that the government could protect the citizen in his right to vote, but they denied that the government could do anything to protect the citizen in his right to work and his right to live. Today we stand committed to the proposition that freedom is no half-and-half affair. If the average citizen is guaranteed equal opportunity in the polling place, he must have equal opportunity in the market place. These economic royalists complain that we seek to overthrow the institutions of America. What they really complain of is that we seek to take away their power. Our allegiance to American institutions requires the overthrow of this kind of power. In vain they seek to hide behind the flag and the Constitution. In their blindness they forget what the flag and the Constitution stand for. Now, as always, they stand for democracy, not tyranny; for freedom, not subjection; and against a dictatorship by mob rule and the overprivileged alike." See also Cass R. Sunstein & Randy E. Barnett, *Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialog*, 53 DRAKE L. REV. 205 (2005) (debating the significance of Roosevelt's "Second Bill of Rights," contained in his State of the Union Address of January 11, 1944).

¹⁴ See generally DAVIS, *supra* note 10.

¹⁵ See CANDACE FLEMING, OUR ELEANOR: A SCRAPBOOK LOOK AT ELEANOR ROOSEVELT'S REMARKABLE LIFE 88 (2005) (showing Eleanor Roosevelt taking a 2 ½ mile trip underground into an Ohio mine).

¹⁶ See *id.* at 94 ("One day a journalist named Frank Kingdon entered a miner's shack and was astounded to find Eleanor Roosevelt sitting on a stained, bare mattress. She was holding a thin, naked baby on her lap while the mother stirred a pot of watery soup in the stove. 'The two women were discussing their household problems as though that Appalachian hut was no different from a Washington drawing room,' the journalist declared.").

¹⁷ See DORIS KEARNS GOODWIN, NO ORDINARY TIME: FRANKLIN AND ELEANOR ROOSEVELT: THE HOME FRONT IN WORLD WAR II 161-72 (describing Eleanor's address to the Convention of Sleeping Car Porters on September 16, 1940, at the invitation of A. Philip Randolph, and her subsequent efforts to achieve equal treatment for blacks in the New Deal programs and the armed services); *id.* at 447 (describing Eleanor's efforts to persuade the President to address racial tensions during the war); *id.* at 626 ("Eleanor Roosevelt's stand on civil rights, her insistence that America could not fight racism abroad while tolerating it at home, remains one of the affirming moments in the history of the home front during the war. Though she was naïve about many aspects of the racial problem, she was far ahead of the president and the times in her understanding that separate but equal facilities were not enough, that the fact of segregation itself impaired the lives of the Negro population."); FLEMING, *supra* note 15, at 100 (describing how Eleanor attempted to sit in the section reserved for blacks, next to Mary McLeod Bethune, at a meeting of the Southern Conference for Human Welfare in Birmingham, Alabama, in 1938); WILLIAM E. LEUCHTENBURG, FRANKLIN ROOSEVELT AND THE NEW DEAL 192 (1963) [hereinafter NEW DEAL] ("An ardent exponent of Negro rights, the First Lady kept Walter White of the N.A.A.C.P. posted on the President's views, and on occasion secured him an unusual one hour and twenty minutes' conference with Roosevelt."). In contrast, the administration of Franklin Roosevelt produced no significant civil rights legislation. See Peter Irons, *New Deal Symposium: Politics and Principle: An Assessment of the Roosevelt Record on Civil Rights and Liberties*, 59 WASH. L. REV. 693 (1984) (criticizing in general Roosevelt's performance on civil rights as President); *id.* at 722 ("The 'moral tone' set by Franklin D. Roosevelt in the crucial area of civil rights and liberties was, regrettably, one more of disdain than determination.").

¹⁸ See FLEMING, *supra* note 15, at 100-101 (displaying Eleanor's letter to the D.A.R., which says in part, "I am in complete disagreement with the attitude taken in refusing Constitution Hall to a great artist. You have set an example which seems to me unfortunate, and I feel obliged to send in to you my resignation. You had an opportunity to lead in an enlightened way and it seems to me that your organization has failed.").

Japanese-American citizens and resident aliens,¹⁹ who urged Franklin to send the Tuskegee Airmen into combat,²⁰ and who, throughout World War II, persistently maintained that victory abroad was not enough, and that our Nation would be truly victorious only if we achieved equality at home²¹ – and finally, it was Eleanor, as chair of the United Nations Human Rights Commission, who oversaw the drafting of the Universal Declaration of Human Rights.²²

It is unnecessary in this article to recount in detail Franklin Roosevelt’s bitter conflict with the Supreme Court:²³ the Court’s intransigence in the face of populist sentiment and progressive legislation during Roosevelt’s first term;²⁴ the presidential election of 1936, construed by many people as a referendum on the decisions of the Supreme Court;²⁵ Roosevelt’s court-packing plan;²⁶ and Roosevelt’s victory over the Court in early 1937, the “switch in time that saved nine.”²⁷ All of these events have been

¹⁹ FLEMING, *supra* note 15, at 116 (quoting Eleanor, who traveled to California after Pearl Harbor, stating “Let’s be honest. There is a chance now for great hysteria against minority groups – loyal Americans who have not suddenly ceased to be Americans.”); *id.* at 117 (stating that “Eleanor was enraged by her husband’s decision to displace Japanese Americans,” and quoting her as saying, “These people were not convicted of any crime.”).

²⁰ See FLEMING, *supra* note 15, at 123 (describing Eleanor’s visits to the Tuskegee airfield and her correspondence with the airmen, and describing her note to Secretary of War Henry Stimson as stating, “This seems to me a really crucial situation.”).

²¹ See, e.g., ELEANOR ROOSEVELT, COURAGE IN A DANGEROUS WORLD: THE POLITICAL WRITINGS OF ELEANOR ROOSEVELT 138-39 (Allida M. Black ed. 1999) (“If I were a Negro today, I think I would have moments of great bitterness.” (quoting *Freedom: Promise or Fact*, Negro Digest, October 1943)); *id.* at 139-40 “Many a boy, when asked, still says he does not know what he is fighting for. While he knows we have to beat Hitler and the Japs, he will be glad when it is done and he is back home again. That would be all right if winning the war would settle all the racial questions, but it is after the war when we live together that they will become really important. In addition, if every boy was sure that he would be going back home again, he could decide later for what objectives he had fought and work for them, but if he is to die, he must be sure that what he died for is worthwhile to his parents, his brothers, his sisters, his wife or his sweetheart.” (quoting *Abolish Jim Crow*, New Threshold, August 1943)).

²² See generally MARY ANN GLENDON, THE WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001); see also FLEMING, *supra* note 15, at 138; Mary Robinson, *Making Human Rights Matter: Eleanor Roosevelt’s Time Has Come*, 16 HARV. HUM. RTS. J. 1 (2003).

²³ See generally SCHWARTZ, *supra* note 2, at 231-38 (describing the Court’s decisions striking down New Deal legislation and Roosevelt’s response). See also *infra* notes 239-250 and accompanying text.

²⁴ See SCHWARTZ, *supra* note 2, at 231-33 (summarizing a series of Supreme Court decisions in 1935 and 1936 striking down important New Deal legislation); WILLIAM E. LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 26-51 (1995) [hereinafter SUPREME COURT REBORN] (describing the decision of the Supreme Court in the *Rail Pension* case and the reaction of Roosevelt and his advisors to the decision).

²⁵ See BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 53 (1991) (“If the American people were ever endorsing a break with their constitutional past, they were doing so in the 1930’s.”); William E. Leuchtenberg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 108 Yale L.J. 2077 (1999) (discussing Ackerman’s thesis).

²⁶ See NEW DEAL, *supra* note 17, at 231-38 (describing Roosevelt’s failed attempt to persuade Congress to allow him to add six additional members to the Supreme Court).

²⁷ See SUPREME COURT REBORN, *supra* note 24, at 177 (explaining how the defection of Justice Roberts defeated the court-packing plan); see NEWMAN, *supra* note 71, at 214 (attributing the “switch” quip to columnist Joseph Alsop).

adequately chronicled by other legal scholars.²⁸ What has not received sufficient emphasis, however, is the significance of what the Roosevelt Court accomplished after 1937 and how it laid the groundwork for the achievements of the Warren Court.²⁹ The purpose of this article is to describe the constitutional reforms of the Roosevelt Court in the field of human rights, and to rebut certain criticisms of the Roosevelt Court that have been leveled at it by Justice Antonin Scalia and Justice Clarence Thomas.

Part I of this article describes the justices whom Roosevelt appointed, and analyzes the jurisprudential approach of each of the leading justices. Part II reviews the fundamental changes that the Roosevelt Court made in the interpretation of the Constitution in seven areas of constitutional law. Part III identifies some attacks that Justice Scalia and Justice Thomas have made upon the constitutional principles that were established by the Roosevelt Court, and answers those attacks.

I. THE JUSTICES OF THE ROOSEVELT COURT

Between 1937 and 1943 President Franklin Delano Roosevelt appointed eight justices to the Supreme Court, filling seven different seats.³⁰ Two holdover justices served throughout Roosevelt's tenure: Justice Harlan Fiske Stone, who was generally sympathetic to the New Deal legislation,³¹ and Justice Owen Roberts, a moderate who converted to Roosevelt's understanding of the Constitution after the 1936 Presidential election.³² Roosevelt's first appointment – Hugo Black – ascended to the high court in August of 1937,³³ and he cemented the majority of the Court which would vote to uphold the constitutionality of Roosevelt's New Deal legislation.³⁴ Thereafter Roosevelt appointed Stanley Reed,³⁵ Felix Frankfurter,³⁶ William Douglas,³⁷ Frank Murphy,³⁸

²⁸ See generally, CORWIN, *supra* note 2 (supporting in general the “constitutional revolution, ltd.” of the New Deal era); SUPREME COURT REBORN, *supra* note 24 (same); SCHWARTZ, *supra* note 2, at 225-45 (1993) (describing same); BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 279-382 (Belknap Press 1998) (critiquing the New Deal transformation); Stephen R. Alton, *Loyal Lieutenant, Able Advocate: The Role of Robert H. Jackson in Franklin Roosevelt's Battle with the Supreme Court*, 5 WM & MARY BILL RTS. J. 527 (1997).

²⁹ See *supra* note 3.

³⁰ See HOCKETT, *supra* note 1, at 2-3 (listing the Roosevelt appointees).

³¹ See, e.g., *United States v. Butler*, 297 U.S. 1, 78-88 (1936) (Stone, J., dissenting) (dissenting from decision of Court declaring the federal Agricultural Adjustment Act to be unconstitutional); *Carter v. Carter Coal Co.*, 298 U.S. 238, 341 (1936) (Cardozo, J., dissenting) (dissenting from decision of Court declaring federal Bituminous Coal Act to be unconstitutional, and indicating that he was joined by Justice Stone).

³² See *infra* notes 248-252 and accompanying text (describing Court's decision in *Jones & Laughlin Steel v. N.L.R.B.*, 301 U.S. 1 (1937)).

³³ Sworn in August 19, 1937. Oyez: Hugo L. Black, U.S. Supreme Court Justice, http://www.oyez.org/justices/hugo_1_black/ (last visited September 17, 2007).

³⁴ See *infra* note 250 and accompanying text.

³⁵ Sworn in January 31, 1938. Oyez: Stanley Reed, U.S. Supreme Court Justice, http://www.oyez.org/justices/stanley_reed/ (last visited September 17, 2007).

³⁶ Sworn in January 30, 1939. Oyez: Felix Frankfurter, U.S. Supreme Court Justice, http://www.oyez.org/justices/felix_frankfurter/ (last visited September 17, 2007).

³⁷ Sworn in April 17, 1939. Oyez: William O. Douglas, U.S. Supreme Court Justice, http://www.oyez.org/justices/william_o_douglas/ (last visited September 17, 2007).

³⁸ Sworn in February 5, 1940. Oyez: Frank Murphy, U.S. Supreme Court Justice, http://www.oyez.org/justices/frank_murphy/ (last visited September 17, 2007).

James Byrnes,³⁹ Robert Jackson,⁴⁰ and Wiley Rutledge,⁴¹ who filled the vacancy that occurred when Justice Byrnes left office in 1942. Roosevelt also appointed Justice Stone to be Chief Justice in 1941.⁴² The Roosevelt appointees constituted a majority of the Court until the death of Justice Robert Jackson in the fall of 1954.⁴³ It is thus fair to say that the Roosevelt Court existed from late 1937 through late 1954,⁴⁴ and that the Roosevelt era encompassed decisions from *United States v. Carolene Products* (1938)⁴⁵ through *Brown v. Board of Education* (1954).⁴⁶ In this sense, *Brown* represents the overlap between the Roosevelt Court and the Warren Court.⁴⁷ *Brown* was the culmination of the Roosevelt Revolution, and the commencement of the Warren era.

There are several remarkable features about the justices whom Roosevelt appointed. All of the Roosevelt appointees had demonstrated their support for Roosevelt or for his policies.⁴⁸ Four of them (Frankfurter, Douglas, Brynes, and Jackson) were

³⁹ Sworn in July 8, 1941. Oyez: James F. Burns, U.S. Supreme Court Justice, http://www.oyez.org/justices/james_f_byrnes/ (last visited September 17, 2007).

⁴⁰ Sworn in July 11, 1941. Oyez: Robert H. Jackson, U.S. Supreme Court Justice, http://www.oyez.org/justices/robert_h_jackson/ (last visited September 17, 2007).

⁴¹ Sworn in February 15, 1943. Oyez: Wiley B. Rutledge, U.S. Supreme Court Justice, http://www.oyez.org/justices/wiley_b_rutledge/ (last visited September 17, 2007).

⁴² Sworn in as Chief Justice July 3, 1941. Oyez: Harlan Fiske Stone, U.S. Supreme Court Justice, http://www.oyez.org/justices/harlan_fiske_stone/ (last visited September 17, 2007).

⁴³ At the time of Robert Jackson's death on October 9, 1954, Hugo Black, William Douglas, Felix Frankfurter, and Stanley Reed still sat upon the Supreme Court. See Oyez: Robert H. Jackson, U.S. Supreme Court Justice, http://www.oyez.org/justices/robert_h_jackson/ (last visited September 17, 2007).

⁴⁴ See DOMNARSKI, *supra* note 1, at 1 (identifying the Roosevelt era as starting with the appointment of Justice Jackson in 1941 and ending with his death in 1954).

⁴⁵ 304 U.S. 144 (1938).

⁴⁶ 347 U.S. 343 (1954).

⁴⁷ Earl Warren was sworn in as Chief Justice on October 5, 1953. He presided over reargument in *Brown*, and authored the opinion for a unanimous court. Oyez: Earl Warren, U.S. Supreme Court Chief Justice, http://www.oyez.org/justices/earl_warren/ (last visited September 17, 2007).

⁴⁸ See NEWMAN, *supra* note 71, at 207 (“Roosevelt appreciated Black’s value to the party and to liberalism . . .”); *id.* at 211-19, (describing Hugo Black’s support for the President’s court-packing plan and his tireless work to secure the enactment of the Fair Labor Standards Act); Louis L. Jaffe, *Professors and Judges as Advisors to Government: Reflections on the Roosevelt-Frankfurter Relationship*, 83 *Harvard Law Review* 366 (1969) (describing the closeness of the relationship between Frankfurter and Roosevelt); MELVIN I. UROFSKY, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES* 44 (1991) (stating that Frankfurter “certainly enjoyed the friendship and attention of the President, who discovered in the Court battle that he could count on Frankfurter’s loyalty.”); JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* 100-101 (1995) (stating that William O. Douglas’ attacks on business “delighted” President Roosevelt, “who invited Douglas to join both his poker parties and his inner circle of economic advisors.”); HOCKETT, *supra* note 1, at 231-36 (describing Jackson’s service as Solicitor General and Attorney General under Roosevelt); *id.* at 236-37 (quoting Frankfurter advising Roosevelt to appoint Stone rather than Jackson as Chief Justice because “Bob is of your personal and political family, as it were, while Stone is a Republican [W]hen war does come, the country should feel you are a national, the Nation’s President, and not a partisan President.”); DAVID G. SAVAGE, *GUIDE TO THE U.S. SUPREME COURT* 996 (2004) (describing Brynes’ service as “speechwriter and political strategist” and his “loyal support” of Roosevelt, as well as the fact that after leaving the Court Byrnes “exercised great power in the administration”); *id.* at 997 (describing how Rutledge came to Roosevelt’s attention because of his strong support of Roosevelt’s court-packing plan); *id.* at 991 (describing Reed’s service as Solicitor General).

close and trusted advisors to the President.⁴⁹ In addition, most of the appointees had achieved prominence in public office outside the judiciary.⁵⁰ Two of the appointees served as State Governors (Murphy and Brynes);⁵¹ two as United States Senators (Black and Brynes);⁵² two as Attorney General (Murphy and Jackson);⁵³ two as Solicitor General (Reed and Jackson);⁵⁴ one as Secretary of State (Brynes);⁵⁵ one as Chair of the War Labor Policies Board (Frankfurter),⁵⁶ and one as Chair of the Securities and Exchange Commission (Douglas).⁵⁷ Only two of the Roosevelt appointees were not serving in elected or appointed political office when they were nominated for the Supreme Court: Felix Frankfurter⁵⁸ and Wiley Rutledge.⁵⁹ Rutledge was the only Roosevelt appointee who had significant prior judicial experience.⁶⁰

Another striking characteristic of the Roosevelt Court is that several of its members had known hardship or had risen from modest circumstances. William Douglas, Robert Jackson, Hugo Black and Wiley Rutledge were all born into working class families in poor, rural communities.⁶¹ Frankfurter immigrated to this country at the

⁴⁹ See *id.*

⁵⁰ See Mark Tushnet, *Constitutional Interpretation, Character and Experience*, 72 Boston U. L. Rev. 747, 757 (summarizing the political experience of the members of the United States Supreme Court at the time of *Brown*, stating that “[e]arly in his tenure, Frankfurter sat on a Court with members who had attained substantial experience on the national political scene before they were appointed to the Court.”).

⁵¹ See SAVAGE, *supra* note 48, at 996.

⁵² See *id.* at 990, 995.

⁵³ See *id.* at 994, 996.

⁵⁴ See *id.* at 991, 996.

⁵⁵ See *id.* at 995.

⁵⁶ See *id.* at 992.

⁵⁷ See *id.* at 993.

⁵⁸ At the time of his appointment, Frankfurter was a highly respected Harvard law professor. On the other hand, Frankfurter was no stranger to politics. During the early part of the century he had served in several positions in the federal government, including Chair of the War Labor Policies Board. See SAVAGE, *supra* note 48, at 992.

⁵⁹ Like Frankfurter, Rutledge came from academia. As Dean of Iowa Law School, Rutledge had spoken out in favor of Roosevelt’s court-packing plan. In 1939, Roosevelt appointed Rutledge to the D.C. Circuit Court of Appeals, and two years later Rutledge was elevated to the Supreme Court. See SAVAGE, *supra* note 48, at 998.

⁶⁰ See SUPREME COURT REBORN, *supra* note 24, at 211 (noting that, of the justices who were sitting on the Supreme Court when Roosevelt became President, only one – Justice Cardozo – had any prior judicial experience); *id.* at 212 (noting that Black had briefly served as a police court magistrate).

⁶¹ See HOCKETT, *supra* note 1, at 216-18 (describing Jackson’s upbringing near Jamestown, New York); *id.*, at 219 (Jackson did not attend college, and attended law school for only one year); *id.* at 237 (quoting Jackson as saying, “associate justice of the Supreme Court is a long ways from the farm in Spring Creek”); DOMNARSKI, *supra* note 1, at 130 (describing Douglas’ poverty as a child, and his struggle with infantile paralysis); WILLIAM D. PEDERSON & NORMAN W. PROVIZER, GREAT JUSTICES OF THE U.S. SUPREME COURT: RATINGS & CASE STUDIES 252 (1994) (referring to Black as “the eighth (and last) child of a small-town rural merchant” and of his “impoverished rural background”); HOCKETT, at 73-83 (describing Hugo Black’s devotion to yeoman farmers and workingmen of rural Alabama in his legal and political career); THE SUPREME COURT JUSTICES 411 (Clare Cushman, ed. 1995) (describing Wiley Rutledge’s childhood); WIECEK, *supra* note 3, at 72 (stating that Black was raised in “modest circumstances”); *but see* DOMNARSKI, *supra* note 1, at 100 (“Hugo Black was raised in relative prosperity made possible by his father’s success as a merchant, amid the county’s poverty.”); WIECEK, *supra* note 3, at 94 (stating that Douglas “fabricated legends about himself . . .”).

age of 12, and grew up in New York’s lower east side.⁶² Byrnes’ mother was a dressmaker in Charleston, South Carolina.⁶³ Wiley Rutledge lost his mother at age 9,⁶⁴ William Douglas lost his father at age 6,⁶⁵ and James Byrnes’ father died before he was born.⁶⁶

In summary, this was a court of *practical* men. They had either exercised political power themselves or they had advised those who did. They supported the New Deal and they were loyal to Franklin Roosevelt. Having experienced or witnessed hard times themselves, when they ascended to the Court they did not forget their roots nor did they abandon those who needed their protection. They were determined not only to *permit* the state and federal government to redress *economic* injustice,⁶⁷ but they were equally determined to *prevent* the state or federal government from imposing *racial, religious, or political* injustice.⁶⁸

Based upon the number, scope and influence of their judicial opinions in constitutional cases, the leading members of the Roosevelt Court were Hugo Black, Felix Frankfurter, William O. Douglas, and Robert Jackson.⁶⁹ What is remarkable is that each

⁶² See UROFSKY, *supra* note 48, at 1 (describing Frankfurter’s childhood); WIECEK, *supra* note 3, at 84 (stating that Frankfurter spoke no English upon his arrival in America).

⁶³ See DAVID G. SAVAGE, II GUIDE TO THE U.S. SUPREME COURT 996 (2004) (describing Rutledge’s childhood).

⁶⁴ See THE SUPREME COURT JUSTICES, *supra* note 61, at 411 (death of Rutledge’s mother).

⁶⁵ See DOMNARSKI, *supra* note 1, at 130 (death of Douglas’ father).

⁶⁶ See SAVAGE, *supra* note 63, at 996 (death of Brynes’ father); WIECEK, *supra* note 3, at 105 (stating that Brynes’ father died shortly *after* he was born, “leaving his family impoverished.”).

⁶⁷ See *infra* notes 139-162, 239-265 and accompanying text (describing Roosevelt Court’s interpretation of Substantive Due Process and Commerce Clause).

⁶⁸ See *infra* notes 170-296, 309-348 and accompanying text (describing Roosevelt Court’s interpretation of First Amendment, State Action Doctrine, and Equal Protection Clause).

⁶⁹ See HOCKETT, *supra* note 1, at 4 (identifying Black and Frankfurter as Roosevelt’s “best known justices,” and Douglas, Jackson, and Rutledge as “only slightly less celebrated.”). The other four Roosevelt appointees – Stanley Reed, Frank Murphy, James Byrnes, and Wiley Rutledge – authored relatively few opinions interpreting the Constitution and are seldom quoted. Their significance lies mainly in the votes that they cast in support of the opinions authored by other justices of the Roosevelt Court expanding both the power of Congress and the rights of individuals under the Constitution. One reason for the relative paucity of constitutional authority emanating from these justices is that three of them served on the Supreme Court for but a limited time. Justice Byrnes served only a little over a year on the Supreme Court, leaving no mark on the interpretation of the Constitution. For an overview of Byrnes’ political career, see *generally*, Peter M. Fishbein, Book Review, *All in One Lifetime, James F. Byrnes*, 72 Harv. L. Rev. 1193 (1953). Justice Rutledge was a member of the Court for six years until his death in 1949. His most significant constitutional opinion is *Prince v. Massachusetts*, 321 U.S. 158 (1944), which recognized the fundamental right of parents to raise their children (now considered to be one aspect of the right to privacy), but which ruled that the State’s interest in regulating child labor trumped this right. Justice Murphy served on the Supreme Court for only nine years. He also died in 1949, the year before the Court decided the graduate school desegregation cases of *Sweat and McLaurin*. He was passionately committed to civil rights. See WIECEK, *supra* note 3, at 99-100 (describing Murphy as “the most outspoken opponent of racism on the Court before the accession of Justice Thurgood Marshall.”); *id.* at 102 (stating that as Attorney General Murphy a Civil Rights Section within the Department of Justice). Murphy is perhaps best remembered for his dissenting opinion in *Korematsu*, where he stated: “This exclusion of ‘all persons of Japanese ancestry, both alien and non-alien,’ from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over ‘the very brink of

of these four justices employed a different approach to interpreting the Constitution. They embraced profoundly different principles to guide them in the interpretive task, and they disagreed repeatedly – sometimes bitterly – over the scope and application of those principles.⁷⁰ But what they had in common was a devotion to basic human rights,⁷¹ a devotion which they shared with both Franklin and Eleanor Roosevelt.⁷² As a result, they began in earnest the process of defining the nature and the scope of our rights under the Constitution, a process which has continued down to the present day.

Hugo Black was a textualist,⁷³ perhaps the greatest textualist ever to have graced the Court.⁷⁴ Black was also a careful constitutional historian,⁷⁵ but in case after case,

constitutional power’ and falls into the ugly abyss of racism.” *Korematsu v. United States*, 23 U.S. 214, 233 (1944) (Murphy, J., dissenting). Justice Reed, despite his 19-year tenure on the Supreme Court, created little constitutional precedent. Foremost among his decisions was *Smith v. Allwright*, 321 U.S. 649 (1944) (striking down the “white primary” rule). See *infra* notes 276-280 (discussing *Smith*).

⁷⁰ See, e.g., WALLACE MENDELSON, *JUSTICE BLACK AND FRANKFURTER: CONFLICT IN THE COURT* 118-131 (1966) (contrasting Justice Frankfurter’s judicial restraint with Justice Black’s judicial activism); HOCKETT, *supra* note 1 (describing the different jurisprudential approaches of Black, Frankfurter, and Jackson; *id.* at 5 (referring to the “jurisprudential dissonance of the New Deal Justices”)); DOMNARSKI, *supra* note 1 (contrasting the judicial philosophies of Black, Frankfurter, Jackson, and Douglas); JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA (NEED PINPOINT CITE)* (1989).

⁷¹ See, e.g., ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 210-211 (1994) (quoting Black, “It is my belief that the part of the Bill of Rights which protects free speech, free religion, and a free press constitutes the real bulwark of liberty and that a suppression of these rights would destroy our Nation as a Democracy.”); UROFSKY, *supra* note 48, at 127 (noting that Frankfurter had courageously demanded justice for Tom Mooney and Sacco and Vanzetti, but that given his philosophy of judicial restraint, “he could do little to fight the intolerance he saw and despised.”); DOMNARSKI, *supra* note 1, at 134 (“Douglas did not arrive at the Court as the great civil libertarian he became.”); *id.* at 162 (stating that Douglas “either led or followed the Court in the 1960s in its individual rights revolution”); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (Jackson, J.) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”).

⁷² See *infra* notes 10-22 and accompanying text (setting forth evidence of Franklin’s and Eleanor’s commitment to human rights).

⁷³ See HOCKETT, *supra* note 1, at 3 (stating that Justice Black “maintained that the only legitimate influences in constitutional adjudication are the document’s language and, where the language is not explicit, the history of the adoption of the provision in question.”). Justice Black’s textual approach, tempered by history, may be contrasted to the “new textualism” approach of Justice Antonin Scalia, who has resorted to dictionaries instead of legislative history in the interpretation of statutes. See William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671 (1999); Eskridge, *The New Textualism*, 37 U.C.L.A. L. REV. 621, 623 (1990) (describing Justice Scalia’s approach as “an uncompromising application of statutory plain meaning”); WILSON R. HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 13 (2002) (describing Justice Scalia’s interpretative approach to statutory interpretation).

⁷⁴ See HOCKETT, *supra* note 1, at 3 (stating that many legal scholars regard Justice Black as one of the “greatest” justices, and noting that others consider him to be “absurd” or “irresponsible.”).

⁷⁵ See *supra* note 72; *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting) (containing an exhaustive appendix of historical evidence regarding the intent of the framers of the Fourteenth Amendment); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57 (1993) (hereinafter *On Misreading John Bingham*) (supporting Justice

Black looked to the language of the Constitution for ultimate guidance to its meaning. For example, in the arena of the freedom of expression, where Justice Black is perhaps best known, he was a First Amendment absolutist.⁷⁶ Black consistently took the position that obscenity laws are unconstitutional, because the First Amendment says that “Congress shall make *no law* ... abridging the freedom of speech, or of the press.”⁷⁷ However, Black’s faithfulness to literal constitutional text cut both ways. In *Tinker v. Des Moines Independent School District*,⁷⁸ Justice Black contended that a high school student did not have a constitutional right to wear a black armband in protest of the Vietnam War, because, he said, “While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleased and when he pleases.”⁷⁹ Justice Black also misconstrued the plain language of the 9th amendment, which essentially provides that the people have constitutional rights that are not enumerated in the Bill of Rights.⁸⁰ In my opinion, Justice Black simply could not admit the possibility that in order to identify *all* of our fundamental rights, it is sometimes necessary to resort to non-textual methods of interpreting the Constitution.⁸¹

Before his appointment to the Supreme Court, Felix Frankfurter had courageously fought to obtain justice for the embattled labor leader Tom Mooney and the accused anarchists Sacco and Vanzetti,⁸² but his human rights record on the Court was ultimately unsatisfactory. Justice Frankfurter frequently found reason *not* to decide a case on the merits,⁸³ and even when he did consider the merits of a cause, his reliance upon “history”

Black’s reading of the historical evidence) ; NEWMAN, *supra* note 71, at 405 (stating that Black “had digested [the framers’] debates and could practically regurgitate them whole.”).

⁷⁶ See NEWMAN, *supra* note 71, at 513 (quoting Justice Black as stating that under the First Amendment “there should be no libel or defamation law in the United States under the United States Government, just absolutely none as far as I am concerned.”).

⁷⁷ U.S. CONST., amend. 1 (emphasis added).

⁷⁸ 393 U.S. 503 (1969) (upholding right of a public school student to wear a black armband in opposition to the Vietnam War).

⁷⁹ *Id.* at 517 (Black, J., dissenting); see also NEWMAN, *supra* note 71, at 592 (stating that Black’s fellow justices “were in various stages of shock as [Black] delivered his blistering dissent from the bench” in *Tinker*).

⁸⁰ See U.S. CONST. amend. 9 (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”)

⁸¹ See NEWMAN, *supra* note 71, at 593 (stating that Hugo Black’s textualism led him to view the First Amendment “as if it were a literal Gospel instead of a living charter for a society full of contradictions.... This fundamentalism cramped his approach toward individual rights.”).

⁸² See UROFSKY, *supra* note 48, at 11-12 (describing Frankfurter’s efforts on Mooney’s behalf as counsel to the Mediation Commission); *id.* at 22-25 (describing Frankfurter’s efforts on behalf of Sacco and Vanzetti).

⁸³ See PHILIP B. KURLAND, MR. JUSTICE FRANKFURTER AND THE CONSTITUTION 5-38 (1971) (describing Frankfurter’s philosophy of judicial restraint). Kurland describes the welter of objections that Frankfurter raised to the exercise of constitutional oversight in a number of cases, including *Ex Parte Peru*, 318 U.S. 578 (1943) (objecting to the use of an extraordinary writ to confer jurisdiction upon the Court); *Irwin v. Dowd*, 359 U.S. 394 (1959) (whether the decision below actually turned upon a question of federal law); *Burns v. Ohio*, 360 U.S. 252 (1959) (invoking the final judgment rule and stating “[i]t is the special obligation of this Court strictly to observe the limits of its jurisdiction.”); and *Poe v. Ullman*, 367 U.S. 497 (1961) (ripeness). See also *Terminiello v. Chicago*, 337 U.S. 1 (1949) (Frankfurter, J., dissenting)

made it unnecessary for him to evaluate the more difficult aspects of constitutional adjudication.⁸⁴ Justice Frankfurter recognized that difficult constitutional cases represent a clash of principles,⁸⁵ but he himself often shrank from the task of balancing one principle against another. Frankfurter sometimes cited federalism concerns⁸⁶ or the necessity to conserve judicial resources⁸⁷ as reasons for judicial restraint, but he also expressed the idea that judicial restraint is necessary because judicial intervention in political conflicts “may well impair the Court’s position as the ultimate organ of ‘the Supreme Law of the Land’”⁸⁸ Frankfurter considered judicial restraint to be not just fundamental, but rather “the most fundamental principle of constitutional adjudication.”⁸⁹ Philip Kurland has observed that some of Frankfurter’s justifications for judicial self-restraint “were dear to him but somewhat elusive for many others.”⁹⁰ A contemporary commentator, Edward Corwin, referring to Frankfurter’s opinion in *Gobitis* deferring to the decision of a local school board to suspend schoolchildren for refusing to salute the flag, said: “even more distasteful than the ruling itself is Justice Frankfurter’s smug assumption that the Court is the happy possessor of a patent formula which enables it in cases like this to dispense with exercising its own judgment.”⁹¹

William O. Douglas was the polar opposite of Frankfurter in his approach to deciding constitutional cases. Where Frankfurter was timid in his reading of the Constitution, Douglas was bold, both as to substance and as to style. With his decisions

(contending that the defendant had waived any constitutional error by failing to object to the jury instructions, stating that “[w]e have no authority to meddle with such a judgment unless some claim under the Constitution or the laws of the United States has been made before the State court whose judgment we are reviewing and unless the claim has been denied by that court.”).

⁸⁴ See, e.g., *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (contending that legislative malapportionment problems are nonjusticiable “political questions,” and that the decision of the majority to the contrary and finding the matter to be governed by Equal Protection principles “cast[s] aside . . . the . . . uniform course of our political history regarding the relationship between population and legislative representation”); *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362 (1940) (Frankfurter, J.) (“Deeply imbedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text.”); see also KURLAND, *supra* note 83, at 5, identifying “history and the obligation that constitutionalism imposes to adhere to the essential meaning put in the document by its framers” as the first of several considerations that drove Frankfurter’s philosophy of judicial restraint.

⁸⁵ See FELIX FRANKFURTER, *OF LAW AND MEN* 43 (1956) (“[T]here is hardly a question of real difficulty before the Court that does not entail more than one so-called principle.”).

⁸⁶ See, e.g., *Adamson v. California*, 332 U.S. 46, 64-65 (Frankfurter, J., concurring) (“Indeed, the suggestion that the Fourteenth Amendment incorporates the first eight Amendments as such is not unambiguously urged. Even the boldest innovator would shrink from suggesting to more than half the States that they may no longer initiate prosecutions without indictment by grand jury, or that thereafter all the States of the Union must furnish a jury of 12 for every case involving a claim above \$20.”).

⁸⁷ *Ex Parte Peru*, 318 U.S. at 602 (Frankfurter, J., dissenting) (“The tremendous and delicate problems which call for the judgment of the nation’s ultimate tribunal require the utmost conservation of time and energy even for the ablest judges.”).

⁸⁸ *Baker v. Carr*, 369 U.S. at 267 (Frankfurter, J., dissenting).

⁸⁹ *United States v. Lovett*, 328 U.S. 323 (1946) (“[T]he most fundamental principle of constitutional adjudication is not to face constitutional questions, if it is at all possible to avoid them.”); see also *infra* note 137 (describing James Bradley Thayer’s judicial philosophy and Frankfurter’s adherence to it).

⁹⁰ See KURLAND, *supra* note 83, at 8.

⁹¹ CORWIN, *supra* note 2, at 112.

in *Skinner v. Oklahoma*⁹² and *Griswold v. Connecticut*⁹³ Justice Douglas must be considered the seminal author of the constitutional “Right to Privacy.”⁹⁴ Although Justice Douglas had, like Justice Black, employed a literal interpretive approach to First Amendment problems,⁹⁵ in *Griswold* Justice Douglas parted ways with Justice Black and read the Bill of Rights broadly, finding that the “penumbra” emanating from the specific guarantees of the Bill of Rights implies a general “right to privacy.”⁹⁶ Nor did Justice Douglas confine himself to the issues under consideration in any particular case. In a difficult case involving the standing of the plaintiffs to bring challenges under the environmental protection laws, Douglas evocatively argued on behalf of vesting legal rights in rivers and trees.⁹⁷ In another troublesome case involving the First Amendment rights of an individual who had burned his draft card, Douglas preferred to consider whether or not it was constitutional to draft soldiers to fight in an undeclared war.⁹⁸ Despite the greatness of his vision and his contributions to the Right to Privacy, Justice Douglas’ lack of discipline diminishes the value of his jurisprudence. He was often inspiring, but because he demonstrated so little regard for existing legal doctrine and the customary norms of legal reasoning, he was frequently unable to erect a solid foundation for the future development of the law.⁹⁹

⁹² 316 U.S. 535 (1942) (striking down state law permitting sterilization of repeat felons).

⁹³ 381 U.S. 479 (1965) (striking down state law that prohibited the use of contraception).

⁹⁴ See SIMON, *supra* note 48, at 101 (observing that Douglas had recognized the right to procreate and the right to be let alone decades before the Court’s decision in *Roe v. Wade*).

⁹⁵ See, e.g., *Roth v. United States*, 354 U.S. 476, 511-12 (1957) (Douglas, J., dissenting) (Douglas, joined by Justice Black, would have declared an obscenity statute to be unconstitutional because “The standard of what offends ‘the common conscience of the community’ conflicts, in my judgment, with the command of the First Amendment that ‘Congress shall make no law ... abridging the freedom of speech, or of the press.’”); *id.* at 514 (“The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position. Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it.”)

⁹⁶ 381 U.S. at 484 (Douglas, J.) (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”); *id.* at 485 (Douglas, J.) (“[T]he right of privacy which presses for recognition here is a legitimate one.”); *id.* at 507-527 (Black, J., dissenting) (reiterating his position that the Fourteenth Amendment incorporates the provisions of the Bill of Rights and no other rights).

⁹⁷ See *Sierra Club v. Morton*, 405 U.S. 707, 743 (1972) (Douglas, J., dissenting). After observing that corporations may sue and be sued, Justice Douglas stated: “So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes - fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water - whether it be a fisherman, a canoeist, a zoologist, or a logger--must be able to speak for the values which the river represents and which are threatened with destruction.” *Id.* at 743 (Douglas, J., dissenting).

⁹⁸ *United States v. O’Brien*, 391 U.S. 367, 389 (1968) (Douglas, J., dissenting) (“The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war. That question has not been briefed nor was it presented in oral argument; but it is, I submit, a question upon which the litigants and the country are entitled to a ruling.”).

⁹⁹ See WIECEK, *supra* note 3, at 93 (stating that Douglas “left no coherent doctrinal legacy”); SIMON, *supra* note 48, at 101 (describing Douglas as “a loner” and stating that he was “capable of producing shafts of stark constitutional insight but more often satisfied with idiosyncratic positions calculated to appeal to

In my opinion, the most influential of all of the Roosevelt appointees is Robert H. Jackson. In the elegance of his prose, the only 20th Century judges who can be compared to Robert Jackson are Oliver Wendell Holmes and Louis Brandeis,¹⁰⁰ and the only judge who matches Jackson in the intricacy of his thought is Benjamin Nathan Cardozo.¹⁰¹ However, Holmes and Brandeis are famous mainly for their dissents,¹⁰² while Cardozo served only 6 years on the Supreme Court of the United States¹⁰³ and authored a bare handful of well-known opinions interpreting the Constitution.¹⁰⁴ In contrast, Robert Jackson was a member of the Court for 13 years, and Roosevelt appointees held sway for that entire period.¹⁰⁵ If Holmes, Brandeis, and Cardozo had come to the Court a generation later, they might have been the authors of the human rights revolution in the interpretation of the Constitution. But this great task fell instead to Robert Jackson, and he proved himself to be equal to it.

not a single colleague.”); *but see* DOMNARSKI, *supra* note 1, at 129 (stating that Douglas, unlike Black, Frankfurter, and Jackson, “did not, as they did, indulge the pettiness of personality” in his work on the Court); *id.* at 164 (stating that “Douglas’ values have been the values that have distinguished the court and the nation.”).

¹⁰⁰ *See* DOMNARSKI, *supra* note 1, at 4 (stating that Jackson was “after Holmes, perhaps the finest writer ever to sit on the Court.”); *id.* at 42 (“At its best, Jackson’s prose gives life to the language of the law and shows it not as a distinct branch of learning or science but as life in its essence. He achieved an immediacy with the language of his opinions that has not been equaled by anyone sitting on the Court.”).

¹⁰¹ *See* BENJAMIN NATHAN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) (setting forth a complex and elegant theory of judicial decisionmaking); Michael Bernick, *Benjamin Cardozo: A Judge Most Eminent*, in *THE SUPREME COURT AND ITS JUSTICES* 149-155 (Jesse H. Choper, ed. 2001) (summarizing Cardozo’s career and judicial philosophy); WIECEK, *supra* note 3, at 109 (stating “Jackson was, bar none, the finest literary craftsman to have served on the Court since Cardozo.”).

¹⁰² *See* *Lochner v. New York*, 195 U.S. 45, 65-74 (1905) (Holmes, J., dissenting) (opposing principle of economic substantive due process); *Abrams v. United States*, 250 U.S. 616, 624-631 (1919) (Holmes, J., dissenting) (supporting principle of freedom of expression); *Gitlow v. New York*, 268 U.S. 652, 672-673 (1925) (Holmes, J., dissenting) (same); *Whitney v. California*, 274 U.S. 357, 372-380 (1927) (Brandeis, J., concurring) (supporting principle of freedom of expression); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280-311 (1932) (Brandeis, J., dissenting) (opposing economic substantive due process); *id.* at 311 (“[A] single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); *Olmstead v. United States*, 277 U.S. 438, 471-485 (1928) (Brandeis, J. dissenting) (opposing wiretapping on 4th Amendment grounds); *id.* at 478 (referring to “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”).

¹⁰³ *See* The Oyez Project, Benjamin N. Cardozo, http://www.oyez.org/oyez/resource/legal_entity/75.

¹⁰⁴ *See, e.g.,* *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (Cardozo, J.) (using dormant commerce clause analysis to strike down state law setting minimum prices to be paid to out-of-state milk producers); *Palko v. Connecticut*, 302 U.S. 319 (Cardozo, J.) (setting forth theory of selective incorporation of provisions of Bill of Rights into Due Process Clause of 14th Amendment); *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495, 551-55 (1935) (Cardozo, J., concurring) (rejecting distinction between “direct” and “indirect” effects on interstate commerce, and arguing that the constitutionality of Congressional measures under the Commerce Clause depended upon the degree to which the activity being regulated has an effect on commerce); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (upholding Social Security tax); PEDERSON AND PROVIZER, *supra* note 61, at 165 (stating that Cardozo’s Supreme Court opinions are cited less frequently than those of the average justice, but that when his state court opinions are considered, he “rises to dominance” in numbers of citations; *id.* (stating that “considering that Cardozo was a junior justice and served only six years, and that he was one of the so-called liberal ‘pariah group’ of justices, his continued popularity ... is phenomenal.”).

¹⁰⁵ *See supra* notes 30-43 and accompanying text; DOMNARSKI, *supra* note 1, at 1 (noting that Black, Frankfurter, Douglas, and Jackson served together from 1941-1954).

Jackson had been a successful trial lawyer,¹⁰⁶ and his judicial opinions are phrased not as cold, technical dissections of the law, but rather as if they were closing arguments.¹⁰⁷ Above all, Jackson was *persuasive*. His forensic skill as well as his commitment to human rights earned Jackson the opportunity to serve as the United States' lead counsel at the Nuremburg trials in 1945 to 1946, where he performed brilliantly.¹⁰⁸

Jackson's trademark, and his chief contribution to our understanding of the Constitution, was that he would identify the *purpose* of a constitutional provision and then apply this insight to deciding the case before him. Jackson captured our constitutional ideals so accurately, and his phrasing is so eloquent, that his opinions are frequently quoted. A few familiar selections from Justice Jackson's opinions demonstrate the power of his reasoning:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.¹⁰⁹

¹⁰⁶ See HOCKETT, *supra* note 1, at 220-221 (describing how Jackson built “a very successful and diverse practice” as a “country lawyer.”).

¹⁰⁷ See, e.g., *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 537 (1949) (Jackson, J.). In the course of his opinion striking down a state law that interferes with interstate commerce Justice Jackson makes a number of wonderfully eloquent arguments based upon the purpose and intent of the Commerce Clause. Jackson commences his peroration by referring to “This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units,” *id.* at 537-538, and he closes it by stating: “[o]ur system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.” *Id.* at 539 (Jackson, J.).

¹⁰⁸ See Brady O. Bryson, *Remembering Robert H. Jackson at Nuremberg Decades Ago*, 68 Alb. L. Rev. 9, 10 (2004) (author, a member of Jackson's legal team, recalled that Jackson was “always organized, always busy, always working, always confident, always in charge and inspirational.”); Benjamin B. Ferencz, *Tribute to Nuremberg Prosecutor Jackson*, 16 Pace Int'l L. Rev. 365 (2004). The author states: [w]hat was done at the Nuremberg trials between 1945 and 1949 was not “victors' justice” but a determined effort, led by the United States, and inspired by Jackson's rhetoric and logic to create a world order governed by law rather than violence. His colleague and successor for twelve subsequent trials at Nuremberg, Telford Taylor, wrote, ‘Jackson worked and wrote with deep passion and spoke in winged words. There was no one else who could have done half as well as he.’ In addition to clarifying the scope of Crimes Against Humanity, Robert H. Jackson's greatest contribution at Nuremberg was outlawing the crime of aggression. In his final report to President Truman, Jackson expressed the belief of all those who shared in the work of the IMT that ‘at long last the law is now unequivocal in classifying armed aggression as an international crime instead of a national right.’” *Id.* at 369.

¹⁰⁹ *Barnette*, 319 U.S. at 642 (Jackson, J.).

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself.¹¹⁰

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.¹¹¹

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.¹¹²

One case – *Youngstown Sheet & Tube Co. v. Sawyer*¹¹³ – vividly demonstrates the differences between the competing juristic styles of Justice Black, Justice Frankfurter, and Justice Jackson. All three of those justices agreed as to the result in *Youngstown Sheet & Tube* – they all concluded that President Truman lacked the power, under the Constitution, to seize the Nation’s steel mills in order to prevent a work stoppage during the Korean War.¹¹⁴ However, they each reached this conclusion in characteristically different ways.

Justice Black approached the problem from a textual standpoint. The power of the President, he said, must be derived either from the language of a statute or from the language of the Constitution.¹¹⁵ The President had conceded that no statute conferred upon him the authority to seize control of the steel mills,¹¹⁶ and as a result, the power of the President to take control of the steel industry must be found in the Constitution or not

¹¹⁰ *Korematsu*, 323 U.S. at 245-246 (Jackson, J., dissenting).

¹¹¹ *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

¹¹² *H.P. Hood & Sons, Inc., v. Du Mond*, 336 U.S. 525, 539 (1949) (Jackson, J.).

¹¹³ 343 U.S. 579 (1952) (striking down President’s executive order seizing control of the steel industry during Korean War as violation of the Separation of Powers).

¹¹⁴ *See infra* notes 113-130 and accompanying text

¹¹⁵ *See id.* at 585 (Black, J.) (“The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”).

¹¹⁶ *See id.* (Black, J.) (“[W]e do not understand the Government to rely on statutory authorization for this seizure.”).

at all.¹¹⁷ President Truman argued that that this power could be derived from the provisions of the Constitution that vest the executive power in the President, that make the President the Commander-in-Chief of the Army and Navy, or that devolve upon the President the duty to faithfully execute the laws.¹¹⁸ However, after analyzing each of these constitutional provisions, Justice Black concluded that none of them could be interpreted to confer this power upon the President.¹¹⁹ Wielding yet another textual argument, Justice Black argued that the President’s adoption of the seizure policy was essentially a *legislative* act, not an *executive* act, and accordingly only the Congress, not the President, had the authority under the Constitution to adopt this policy.¹²⁰

Justice Frankfurter looked primarily to the history of this country for guidance in resolving this case. He stated:

Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.¹²¹

Frankfurter then reviewed how various Presidents had acted in previous times of crisis, and found no historical precedent that rose to the level of Truman’s actions.¹²²

Justice Jackson commenced his concurring opinion in *Youngstown* by rejecting the methods of analysis that his colleagues had utilized.¹²³ He found the text of the

¹¹⁷ *See id.* at 587 (Black, J.) (“It is clear that if the President had authority to issue the order he did, it must be found in some provisions of the Constitution.”).

¹¹⁸ *See id.* at 587 (Black, J.) (citing President’s reliance upon the relevant provisions from U.S. Const., art. II, sec. 1, sec. 2, and sec. 3).

¹¹⁹ *See id.* at 587-589 (Black, J.) (rejecting President’s assertion of authority to seize steel industry under various provisions of Article II).

¹²⁰ *See id.* at 588 (Black, J.) (“The Constitution did not subject this law-making power of Congress to presidential or military supervision or control.”).

¹²¹ *Id.* at 610-611 (Frankfurter, J., concurring).

¹²² *See id.* at 611-613 (Frankfurter, J., concurring) (stating that before World War II “the record is barren of instances comparable to the one before us,” and that the three instances of Presidential seizures during World War II “do not add up, either in number, scope, duration or contemporaneous legal justification, to the kind of executive construction of the Constitution” that would justify the seizure of the steel industry in the case under consideration.).

¹²³ *See id.* at 634 (Jackson, J., concurring) (“A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves.”).

Constitution too vague, the judicial precedents too narrow, the intent of the framers lost to history, and the various constitutional traditions too varied and too contradictory to be of any practical assistance in guiding the Court to a resolution of this case.¹²⁴ So Jackson turned to first principles, as he so often did. In this case Jackson identified the purposes of the doctrine of Separation of Powers¹²⁵ and he outlined a framework for resolving difficult disputes in this area of constitutional law.¹²⁶ At the heart of his opinion is the famous “tripartite approach” identifying three contexts in which the power of the President to act might arise – when Congress has given the President authority to act, when Congress has been silent, and when Congress has withheld from the President the power to perform the action in question.¹²⁷ Justice Jackson concludes that, in this case, the Congress had deliberately withheld from the President the power to seize property under the circumstances of the case,¹²⁸ and that accordingly the President’s power was at its “lowest ebb.”¹²⁹ In the course of his opinion rebuffing the President’s claim that seizure of the steel industry was a military necessity, Jackson reminds us that while the Constitution invests the President with the title of Commander-in-Chief of the army and navy, it does not make him the Commander-in-Chief of the entire country.¹³⁰ Jackson closes his opinion with an impassioned appeal to the principle of the Rule of Law,¹³¹ in

¹²⁴ *See id.* at 634-635 (Jackson, J., concurring). Justice Jackson stated that “[j]ust what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way. The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.” *Id.* (Jackson, J., concurring) (citation omitted).

¹²⁵ *See id.* at 635 (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”).

¹²⁶ *See id.* at 635-638 (Jackson, J., concurring) (setting forth what Justice Jackson describes as “a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers....”).

¹²⁷ *See id.* (Jackson, J., concurring) (describing three different situations where the President “acts pursuant to an express or implied authorization of Congress,” where the President “acts in absence of either a congressional grant or denial of authority,” and where the President “takes measures incompatible with the expressed or implied will of Congress”).

¹²⁸ *See id.* at 638-640 (Jackson, J., concurring) (“This leaves the current seizure to be justified only by the severe tests under the third grouping, where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject.”).

¹²⁹ *Id.* at 637 (Jackson, J., concurring) (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”).

¹³⁰ *See id.* at 643-644 (Jackson, J., concurring) (“the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute him also Commander-in-Chief of the country, its industries and its inhabitants.”).

¹³¹ *See id.* at 654-655 (Jackson, J., concurring) (“The essence of our free Government is ‘leave to live by no man’s leave, underneath the law’ – to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties

which he echoed what he had said in his opening statement at Nuremburg in calling for international law to hold national leaders accountable for waging aggressive war.¹³²

The judicial opinions of Frankfurter, Black, and Jackson betray a lack of collegiality among them that legal scholars and biographers have confirmed.¹³³ Perhaps one source of the friction among them was the fact that each of them had a fundamentally different approach to constitutional interpretation.¹³⁴ Black (the textualist), Frankfurter (the traditionalist) and Jackson (the realist) each considered a different source of constitutional law to be the authoritative method of interpreting the Constitution.¹³⁵ It is a shame that each did not have more appreciation for the intellectual and moral strength of the others. They were engaged in a common enterprise, and together or in tandem they made invaluable contributions to our society. The accomplishments of the Roosevelt Court are described in the following section.

II. THE DECISIONS OF THE ROOSEVELT COURT

affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.”)

¹³² See Justice Robert H. Jackson, Opening Statement Before the International Military Tribunal, November 21, 1945, *available at* <http://www.roberthjackson.org/Man/theman2-7-8-1/>. Jackson closed with these words: “[c]ivilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance. It does not expect that you can make war impossible. It does expect that your juridical action will put the forces of international law, its precepts, its prohibitions and, most of all, its sanctions, on the side of peace, so that men and women of good will, in all countries, may have “leave to live by no man’s leave, underneath the law.” *Id.*

¹³³ See, e.g., *Everson v. Board of Education*, 330 U.S. 1, 19 (1947) (Jackson, J., dissenting) (Jackson implicitly accuses the majority of hypocrisy for “advocating a complete and uncompromising separation of church and state” while permitting public funds to be used to pay for children to be bused to parochial schools, and stating: “The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron’s reports, ‘whispering ‘I will ne’er consent,’-consented.”); UROFSKY, *supra* note 48, at 50 (stating that “Frankfurter’s behavior . . . poisoned the well of collegiality.”); *id.* at 62 (accusing Frankfurter of being “duplicitous and conniving” and of “intellectual arrogance” and “nastiness.”); *id.* at 85 (describing how Justice Jackson, in a dissenting opinion, embarrassed Justice Black by quoting statements that Black had made as a Senator); *id.* at 86 (describing how Jackson issued an opinion which implicitly accused Justice Black of impropriety for failing to recuse himself in a case); *id.* at 87 (describing how Justice Black and Douglas refused to sign a letter from the Justices praising Justice Roberts at the time of his retirement, with the result that no letter was sent); SIMON, *supra* note 48, at 101 (stating that Frankfurter “loathed his [Douglas’] person every bit as much as his philosophy”); *id.* (stating that Brennan “voted with Douglas regularly but seethed privately over Douglas’s lack of consideration for his colleagues.”); DOMNARSKI, *supra* note 1, at 19 (referring to Jackson as a “tragic figure” who “struggled with the demons of his ambition, jealousy, and resentment.”); *id.* at 50 (referring to “Jackson’s hatred of Douglas and especially Black.”).

¹³⁴ See UROFSKY, *supra* note 48, at 50 (citing “philosophical factionalization of the Court” as one divisive factor).

¹³⁵ See generally HOCKETT, *supra* note 1 (contrasting the “antihierarchical” jurisprudence of Justice Black, the “passive” jurisprudence of Justice Frankfurter, and the “pragmatic” jurisprudence of Justice Jackson).

The Roosevelt Court made substantial contributions to the interpretation of the Constitution in at least seven different categories of constitutional law: Substantive Due Process, Freedom of Expression, Freedom of Religion, the Commerce Clause, State Action, Separation of Powers, and Equal Protection. The Court’s decisions during this era on each of these topics are discussed below.

A. *Substantive Due Process*

The doctrine of Substantive Due Process prevents the government from violating the fundamental rights of Americans.¹³⁶ The greatest achievement of the Roosevelt Court in the area of Substantive Due Process was a *jurisprudential* innovation; the Court adopted a stricter standard to evaluate the constitutionality of laws that infringe upon fundamental rights. Before 1937, the Due Process Clause tested the constitutionality of *all* laws by asking whether or not the laws were “reasonable.”¹³⁷ The Roosevelt Court decided that laws that burden constitutional rights must meet a higher standard – the “strict scrutiny test.”¹³⁸

The Roosevelt Court also made a radical change in the *nature* of the rights that are considered to be fundamental. Prior to 1937 the Supreme Court had considered one

¹³⁶ Substantive Due Process is an oxymoron of the law. The Due Process Clauses of the 5th and 14th Amendments literally establish *procedural*, not *substantive* rights. That is, under each provision the government may not deprive any person of life, liberty, or property without “due process of law,” thus implying that life, liberty or property may be taken away so long as proper procedures are observed. The doctrine of Substantive Due Process, in contrast, is the concept that certain rights are so basic, so fundamental, that the government may not interfere with them no matter how much “due process” is provided to the individual. This doctrine is the rough equivalent of the “human rights” acknowledged by the United Nations in the Universal Declaration of Human Rights or the “inalienable rights” referred to in the Declaration of Independence. How the doctrine of substantive “fundamental rights” found a home in the Due Process Clauses of the 5th and 14th Amendment is an accident of history, owing to the fact that shortly after the 14th Amendment was adopted, the Supreme Court eviscerated the Privileges and Immunities Clause of the 14th Amendment. See *Slaughterhouse Cases*, 83 U.S. 36 (1873) (severely constricting the scope of the Privileges and Immunities Clause of the 14th Amendment); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi-Kent L. Rev. 627 (1994) (criticizing the reasoning of the Supreme Court in *Slaughterhouse*); Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 Chi-Kent L. Rev. 1197 (1995) (criticizing Justice Frankfurter’s approach to the incorporation of fundamental rights into the Due Process Clause); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L. J. 57 (1993) (supporting the views of John Bingham, principal author of the 14th Amendment, that the Amendment would make the Bill of Rights effective against the States).

¹³⁷ See, e.g., *Lochner v. New York*, 198 U.S. 45, 56 (1905) (Peckham, J.) (“In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?”); see also MARK SILVERSTEIN, *CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING* 38 (1984) (citing James Bradley Thayer as the “foremost academic spokesman” for the proposition that courts should defer to all legislative judgments that are “not open to rational question.”); see UROFSKY, *supra* note 48, at 31 (quoting Frankfurter as stating that Thayer’s approach “is for me the Alpha and Omega of our job.”).

¹³⁸ See *infra* notes 155-161 and accompanying text.

particular constitutional right above all others to be worthy of protection – the right to property. Eighty years previously in the *Dred Scott*¹³⁹ case the Supreme Court had declared that the property interest of slaveholders in their slaves deserved constitutional protection.¹⁴⁰ After the civil war, the Supreme Court turned Adam Smith’s economic philosophy of *laissez faire* capitalism into constitutional doctrine, ruling that businesses are constitutionally entitled to freedom from governmental regulation,¹⁴¹ a doctrine which came to be known as “economic substantive due process.”¹⁴² In dozens of cases over a period of fifty years from 1887 to 1937, the Supreme Court wielded this doctrine of economic substantive due process to invalidate laws protecting workers.¹⁴³ During this period minimum wage and maximum hours laws, collective bargaining laws, and other laws protecting workers were declared unconstitutional on the ground that these laws deprived corporations of their right to “liberty of contract” that the Court considered to be guaranteed under the Due Process Clauses of the Fifth and Fourteenth Amendments.¹⁴⁴

Before 1937 the only other substantive due process right that the Court had acknowledged was the right of parents to direct the education of their children, in the cases of *Meyer v. Nebraska* (1923)¹⁴⁵ and *Pierce v. Society of Sisters* (1925).¹⁴⁶

¹³⁹ *Dred Scott v. Sanford*, 60 U.S. 393 (1857) (striking down the Missouri Compromise of 1820 on the ground that the law violated the rights of slaveholders).

¹⁴⁰ *See id.* at 451-452 (Taney, C.J.). Chief Justice Taney stated that “the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.” *Id.* at 451-452 (Taney, C.J.)

¹⁴¹ *See, e.g., Coppage v. Kansas*, 236 U.S. 1, 23 (1915) (striking down state law forbidding employers from firing employees for joining a union, and stating that “[a]ny act of the legislature that would undertake to impose on an employer the obligation of keeping in his service one whom, for any reason, he should not desire, would be a denial of his constitutional right to make and terminate contracts and to acquire and hold property.”).

¹⁴² *See* Martin A. Schwartz, 17 *TOURO L. REV.* 237 (2000). Professor Schwartz states that “[s]ubstantive due process has always been a very contentious doctrine in the history of constitutional law. The first case that dealt with substantive due process was the *Dred Scott* case, in which the Supreme Court said that slave owners had a substantive due process right to possess slaves. Then, after *Dred Scott*, the Supreme Court, during the discredited *Lochner* era, created economic substantive due process rights.” *Id.*

¹⁴³ *See, e.g., Lochner, supra* note 136; *Adair v. United States*, 208 U.S. 161 (1908) (striking down a federal law that prohibited employers from terminating employees if they joined a labor union, on the ground that the law violated the Due Process Clause of the 5th Amendment); *Coppage v. Kansas*, 263 U.S. 1 (1915) (striking down a similar State law under the Due Process Clause of the 14th Amendment); *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (striking down federal minimum wage law).

¹⁴⁴ *See id.*; *see also* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* 33 (1992) (stating that during the *Lochner* era the Supreme Court had elevated “freedom of contract to the level of a sacred constitutional principle . . .”).

¹⁴⁵ 262 U.S. 390 (1923) (striking down State law that prohibited the public schools from teaching children any foreign language before the 8th grade).

¹⁴⁶ 268 U.S. 510 (1925) (striking down State law that prohibited parents from sending children under the age of 16 to any private or parochial school).

However, in *Buck v. Bell* (1927)¹⁴⁷ the Supreme Court upheld a Virginia statute which provided for the sterilization of persons with mental disabilities, and it refused to protect the right of a woman not to be sterilized against her will pursuant to this law.¹⁴⁸ Furthermore, before the Roosevelt appointees ascended to the Supreme Court the Court had given short shrift to the rights that *are* specifically mentioned in the Bill of Rights and the Fourteenth Amendment. Freedom of Religion had been ignored,¹⁴⁹ Equal Protection had been trampled upon,¹⁵⁰ and the Court had only just begun to protect Freedom of Expression.¹⁵¹

All of this changed after 1937. First of all, even before any of the Roosevelt appointees took office, Chief Justice Charles Evans Hughes and Justice Roberts, the two moderates upon the Court, joined forces with the three liberal members and declared “liberty of contract” to be a dead letter.¹⁵² This may have been a reaction to President Roosevelt’s landslide victory in the 1936 Presidential election where the Supreme Court was an issue, or it may simply have been a principled result reached after long study and repeated consideration.¹⁵³ In any event, the Supreme Court later unanimously reaffirmed the principle that the Due Process Clause does *not* prohibit the government from regulating business.¹⁵⁴

However, in 1938 Justice Stone signaled that although “liberty of contract” had met its demise, the principle of “substantive due process” yet survived. In his famous footnote 4 in the *Carolene Products*¹⁵⁵ case, Justice Stone noted that although the business regulation that was at issue in the case would be upheld so long as there was a “rational basis” for the law,¹⁵⁶ there would be a “narrower scope for operation of the

¹⁴⁷ 274 U.S. 200 (1927) (upholding state sterilization statute).

¹⁴⁸ *See id.* at 208 (Holmes, J.) (upholding sterilization statute against Carrie Buck’s challenge to the law under the Due Process Clause and the Equal Protection Clause of the Constitution); *id.* at 207 (“Three generations of imbeciles are enough.”); *see also* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (1985) (describing how Carrie Buck was betrayed by her lawyer and railroaded into undergoing the sterilization procedure).

¹⁴⁹ *See infra* notes 223-225 and accompanying text.

¹⁵⁰ *See infra* notes 309-312 and accompanying text.

¹⁵¹ *See infra* notes 170-183 and accompanying text.

¹⁵² *See West Coast Hotel v. Parrish*, 300 U.S. 379, 391(1937) (Hughes, C.J.) (“In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract.”).

¹⁵³ A contemporary commentator expressed *both* views. *Compare* CORWIN, *supra* note 2, at 73 (stating “considerably more important, I surmise, in inducing the Justices – or certain of them – to restudy their position, than the Court proposal or the homily which was its prologue, was the outcome of the election of 1936, manifesting overwhelming popular approval of the New Deal”; and *id.* at 76 (“Justice Stone’s relentless insistence in argument, the Chief Justice’s political skill, and Justice Roberts’s eagerness for the light – these were the chief intracurial factors in bringing about the Court’s reversal of position on the New Deal.”).

¹⁵⁴ *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (Black, J.) (“The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases - that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely - has long since been discarded.”).

¹⁵⁵ *United States v. Carolene Products*, 304 U.S. 144 (1938) (upholding the Federal Filled Milk Act against a Due Process challenge).

¹⁵⁶ *See id.* at 152 (Stone, J.) (“[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced

presumption of constitutionality” and “a more searching judicial inquiry” when fundamental rights were at stake – such as the rights enumerated in the Bill of Rights, political rights, or the rights of minority groups.¹⁵⁷

Four years later, in *Skinner v. Oklahoma ex rel. Williamson*,¹⁵⁸ the Supreme Court fulfilled Justice Stone’s prediction and for the first time employed its newly-crafted theory that imposes a stricter standard of review upon laws that infringe constitutional rights. Writing for a unanimous court, Justice Douglas ruled that the right of procreation is a “fundamental” right,¹⁵⁹ and that laws that infringe upon fundamental rights are subject to “strict scrutiny.”¹⁶⁰ This decision created two lines of analysis in constitutional cases – strict scrutiny for laws affecting fundamental rights, and rational basis for laws which do not affect fundamental rights – an approach which has dominated the Court’s constitutional jurisprudence down to the present day.¹⁶¹

Skinner is also a principal decision of the Supreme Court protecting the “right to privacy” although the Roosevelt Court did not use that term. Procreation is not mentioned in the Bill of Rights, yet Justice Douglas reasoned that it is a fundamental right because of its profound importance to society and in the life of the individual. Justice Douglas stated:

unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”

¹⁵⁷ See *id.* fn. 4. The Court stated that “[t]here 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 under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” *Id.* (Stone, J.). See also WIECEK, *supra* note 3, at 116-142 (discussing the significance of footnote 4); see also CORWIN, *supra* note 2, at 111-112 (approving relatively recent rulings of the Supreme Court incorporating freedom of speech and press and the right to fair trial into the Due Process Clause.); *id.* at 115 (“[T]he Court has, in the very act of retiring from the field of economic policy, manifested an increased concern to protect against hasty and prejudiced legislation the citizen’s freedom to express his views . . .”).

¹⁵⁸ 316 U.S. 535 (1942) (striking down state law which allowed the sterilization of “habitual criminals.”).

¹⁵⁹ See *id.* at 541 (Douglas, J.) (“We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”).

¹⁶⁰ See *id.* (Douglas, J.) (“[S]trict scrutiny of the classification which a State makes in a sterilization law is essential.”).

¹⁶¹ See, e.g., *Ashcroft v. A.C.L.U.*, 542 U.S. 656, 665-666, 673 (2004) (using strict scrutiny analysis to uphold preliminary injunction against enforcement of the Child Online Protection Act). *But see* *Lawrence v. Texas*, 539 U.S. 538, 577 (2003) (striking down state law prohibiting sodomy on ground that law was not supported by a sufficient governmental interest); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 876 (1992) (O’Connor, J., Kennedy, J., and Souter, J., plurality opinion) (employing “undue burden” test to evaluate constitutionality of laws restricting abortion).

Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.¹⁶²

Skinner laid the analytical foundation for all of the cases subsequently recognizing unenumerated rights of personal privacy, including rights to contraception,¹⁶³ abortion,¹⁶⁴ marriage,¹⁶⁵ and homosexuality.¹⁶⁶ Forty-one years later Justice Anthony Kennedy, writing for a majority of the Court in *Lawrence v. Texas*,¹⁶⁷ explained the rationale for sheltering “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education”¹⁶⁸ behind the mantle of constitutional protection:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹⁶⁹

¹⁶² 316 U.S. at 541 (Douglas, J.); *see also* *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Douglas, J.) (explicitly recognizing the “right to privacy”). Justice Douglas stated that “[w]e deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.” *Id.* (Douglas, J.).

¹⁶³ *See id.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down law prohibiting distribution of contraceptives to unmarried persons).

¹⁶⁴ *Roe v. Wade*, 410 U.S. 113 (1973) (striking down state law prohibiting abortion except to save the life of the mother on ground that women have a fundamental right to terminate a pregnancy prior to fetal viability); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (reaffirming *Roe*).

¹⁶⁵ *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (Warren, C.J.) (striking down state law prohibiting interracial marriage, stating that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the ‘basic civil rights of man’” (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)); *Zablocki v. Redhail*, 434 U.S. 374, 383-384 (1978) (Marshall, J.). Justice Marshall stated that “[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals.” *Id.* (Marshall, J.).

¹⁶⁶ *Lawrence*, 539 U.S. 558 (2003) (striking down Texas law that made homosexual sodomy a crime).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 574 (Kennedy, J.).

¹⁶⁹ *Id.* (Kennedy, J.) (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851, 851 (1992) (O’Connor, Kennedy, and Souter, JJ.)).

Justice Kennedy’s description of the fundamental right of privacy echoes Justice Douglas’ opinion in *Skinner* from sixty-two years earlier.

B. *Freedom of Expression*

Prior to 1930, the Supreme Court offered no protection to freedom of speech beyond a prohibition on “prior restraints.”¹⁷⁰ In several cases during World War I the Court affirmed the convictions of antiwar protesters under the federal Espionage Act¹⁷¹ and over the next few years the Court affirmed the convictions of communists under state laws that prohibited “criminal syndicalism” or “criminal anarchy.”¹⁷² Furthermore, at the end of the nineteenth century the Court had ruled that American citizens do *not* have a constitutional right to speak or protest on public property.¹⁷³ In the 1920s Oliver Wendell Holmes and Louis Brandeis, who had both initially conformed to the Court’s constricted interpretation of the First Amendment,¹⁷⁴ issued a series of impassioned dissents defending freedom of speech,¹⁷⁵ but they were unsuccessful in persuading their fellow justices to accord a broader scope to freedom of expression.

Between 1930 and 1937 the Supreme Court began to protect freedom of expression in a number of contexts. In 1931, in *Stromberg v. California*,¹⁷⁶ the Court ruled that a statute that prohibited the display of a red flag as a symbol of opposition to organized government was fatally vague, because it failed to exempt from its operation the use of the flag to peacefully and lawfully bring about a change in government.¹⁷⁷ The Supreme Court also invalidated prior restraints upon the publication of newspapers. In 1931, in *Near v. Minnesota*,¹⁷⁸ the Court struck down a law which allowed the courts

¹⁷⁰ See *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.) (upholding contempt of court conviction of attorney who had criticized ruling of a court in several articles and a cartoon, stating that “subsequent punishment” of speech “may extend as well to the true as to the false.”).

¹⁷¹ See *Schenck v. United States*, 249 U.S. 47 (1919) (upholding conviction of defendants under the Espionage Act); *Frohwerk v. United States*, 249 U.S. 204 (1919) (same); *Debs v. United States*, 249 U.S. 211 (1919) (same); *Abrams v. United States*, 250 U.S. 616 (1919).

¹⁷² See *Gitlow v. New York*, 268 U.S. 652 (1925) (affirming defendants’ convictions for “criminal anarchy”); *Whitney v. California*, 274 U.S. 357 (1927) (affirming defendant’s conviction for “criminal syndicalism”).

¹⁷³ See *Davis v. Massachusetts*, 167 U.S. 43 (1897) (upholding the conviction of a person who had delivered a speech on Boston Common in violation of a city ordinance which made it a crime to deliver a speech on public property without a permit).

¹⁷⁴ Holmes and Brandeis joined the opinions of the Court upholding the Espionage Act convictions in *Schenck*, *Frohwerk*, and *Debs* (see cases cited note 169). Holmes also authored the opinion of the Court in *Patterson* (see cases cited *supra* note 168).

¹⁷⁵ See *Abrams*, 250 U.S. at 624 (Holmes, J., dissenting); *Gitlow*, 268 U.S. at 672 (Holmes, J., dissenting); *Whitney*, 274 U.S. at 372 (Brandeis, J., concurring).

¹⁷⁶ 283 U.S. 359 (1931) (reversing conviction of defendant charged with violating a state statute that prohibited displaying a red flag as an emblem of opposition to organized government).

¹⁷⁷ See *id.* at 369 (Hughes, C.J.) (“A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity [“for free political discussion”] is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.”).

¹⁷⁸ 283 U.S. 697 (1931) (striking down state law which authorized the issuance of an injunction against the publication of defamatory newspapers).

to close a defamatory newspaper,¹⁷⁹ and in 1936, in *Grosjean v. American Press Co.*,¹⁸⁰ it voided a tax that was imposed upon the gross receipts of newspapers.¹⁸¹ Finally, in early 1937, before any Roosevelt appointees ascended to the Court, in *De Jonge v. Oregon*,¹⁸² the Court declared that a person could not be convicted of a crime simply because he had addressed a meeting of the Communist Party.¹⁸³

The Roosevelt Court accelerated this trend towards protection of freedom of expression.¹⁸⁴ It first turned its attention to laws that prohibited people from handing out leaflets on the streets or sidewalks or from canvassing door-to-door in residential neighborhoods. Today, we refer to this type of law as a “content neutral” law, because such a law seeks to restrict or shut off a *method* of communication without regard to the ideas that are being expressed.¹⁸⁵ The first decision in this line of cases was in the 1938 case of *Lovell v. Griffin*¹⁸⁶ in which the Court struck down a city ordinance that required people to obtain the permission of the city manager before handing out leaflets or other literature.¹⁸⁷ *Lovell* was quickly followed by *Schneider v. State*,¹⁸⁸ which invalidated municipal ordinances that made it a crime to distribute handbills to pedestrians, passengers, or to place them on vehicles,¹⁸⁹ and *Martin v. Struthers*,¹⁹⁰ which struck down a municipal ordinance that prohibited people from going door-to-door distributing literature.¹⁹¹

The most significant “content neutral” decision of the Supreme Court during this era was the 1939 case *Hague v. C.I.O.*,¹⁹² which originated the “public forum doctrine.” The case arose because the public officials of Jersey City had driven labor organizers out of the city using a variety of tactics, which included prosecuting the organizers for

¹⁷⁹ See *id.* at 722-723 (Hughes, C.J.) (holding statute unconstitutional under the liberty of the press guaranteed by the 14th Amendment).

¹⁸⁰ 297 U.S. 233 (1936) (striking down state statute imposing a tax on newspapers).

¹⁸¹ *Id.* at 251 (Sutherland, J.) (striking down tax on ground of liberty of the press guaranteed by the 14th Amendment).

¹⁸² 299 U.S. 353 (1937) (reversing defendant’s conviction for violation of state law prohibiting criminal syndicalism).

¹⁸³ *Id.* at 365 (Hughes, C.J.) (“[P]eaceable assembly for lawful discussion cannot be made a crime.”)

¹⁸⁴ See WIECEK, *supra* note 3, at 145-202 (describing freedom of speech decisions of the Roosevelt Court).

¹⁸⁵ See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 791-792 (2nd ed. 1988) (describing content based laws as those that are “aimed at the communicative impact of an act” and content neutral laws as those that are “aimed at the noncommunicative impact of an act.”).

¹⁸⁶ 303 U.S. 444 (1938) (striking down municipal ordinance requiring permit to distribute circulars or other literature).

¹⁸⁷ *Id.* at 452 (Hughes, J.) (finding ordinance to be “void on its face.”).

¹⁸⁸ 308 U.S. 147 (1939) (striking down municipal ordinances which prohibited the public distribution of handbills).

¹⁸⁹ *Id.* at 163, 165 (Roberts, J.) (declaring ordinances unconstitutional).

¹⁹⁰ 319 U.S. 141 (1943) (striking down municipal ordinance prohibiting persons from ringing a doorbell or knocking on doors of any residence in order to distribute literature).

¹⁹¹ *Id.* at 149 (Black, J.) (finding ordinance to be invalid).

¹⁹² 307 U.S. 496 (1939).

distributing literature in the public streets.¹⁹³ Speaking for the majority of the Court, Justice Roberts stated:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.¹⁹⁴

In 1942 in *Chaplinsky v. New Hampshire*¹⁹⁵ the Supreme Court turned its attention to content based laws. In *Chaplinsky* the Court considered the constitutionality of a New Hampshire law that prohibited directing any “offensive, derisive, or annoying word” to another person as applied to someone who had cursed at a public official while being arrested.¹⁹⁶ This case is significant because the Court outlined an analytical framework for assessing the constitutionality of content based laws, that is, laws that punish speakers for *what* was said.¹⁹⁷ The Court explained that certain categories of speech such as “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words” are entitled to little constitutional protection because they have little constitutional *value*.¹⁹⁸ Legal scholars continue to debate whether or not it was wise or appropriate for the Court to distinguish among subject categories of speech,¹⁹⁹ but this “categorical approach” has remained the dominant method used by the Court to evaluate the constitutionality of content-based laws,²⁰⁰ and using this approach the Court has

¹⁹³ See *id.* at 504-506 (Butler, J.) (describing implementation of public officials’ policy to keep labor organizers out of the city).

¹⁹⁴ *Id.* at 515 (Butler, J.).

¹⁹⁵ 315 U.S. 568 (1942) (upholding defendant’s conviction for violating state law that prohibited any person from uttering any “offensive, derisive, or annoying word” to another person in a public place, on the ground that what the defendant said constituted “fighting words,” which are unprotected by the First Amendment.).

¹⁹⁶ See *id.* at 570 (Murphy, J.) (stating that Chaplinsky admitted calling the City Marshall a “damned fascist” and a “damned racketeer”).

¹⁹⁷ See TRIBE, *supra* note 174 (describing difference between content based and content neutral laws).

¹⁹⁸ See *id.* at 572 (Murphy, J.). Justice Murphy stated that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Id.* (Murphy, J.).

¹⁹⁹ See, e.g., Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547, 547 (“Dividing the realm of speech into ‘high value,’ ‘low value,’ and ‘no value’ is quite problematic.”); Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 S.M.U.L. REV. 297, 348 (“[C]ategorizing speech on the basis of its supposed value is a dubious practice that seems to contradict basic First Amendment principles.”); R. Scott Shildes, *Suturing Discourses Within the First Amendment*, 34 HOUS. L. REV. 1531, 1532-1533 (1998) (proposing “a new dynamic that disposes of the less than useful categorical approach to free speech doctrine.”).

²⁰⁰ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (Scalia, J.) (“[A] limited categorical approach has remained an important part of our First Amendment jurisprudence.”).

afforded substantial protection to political, religious, scientific, literary and artistic expression.²⁰¹

In 1940, in the case of *Minersville School District v. Gobitis*,²⁰² in an opinion authored by Justice Frankfurter, the Supreme Court upheld the action of a public school that had expelled two children because they had refused to salute the American flag and to say the Pledge of Allegiance.²⁰³ Three years later, in *Barnette v. West Virginia Board of Education*²⁰⁴ in an opinion by Justice Jackson, the Roosevelt Court overruled *Gobitis* and held that two schoolchildren could not be punished for refusing to salute the flag and to say the Pledge.²⁰⁵ Two passages from the opinion of the Court in *Barnette* are especially significant. In the first passage, Justice Jackson explained the purpose of the Bill of Rights:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.²⁰⁶

In the second famous passage from this opinion, the Court expressed the essential underlying purpose of the First Amendment:

²⁰¹ See, e.g., *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (Blackmun, J.) (“[T]his Court has recognized that ‘the First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.’”) (citation omitted); *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 760 (1995) (Scalia, J.) (“[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.”); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, (2002) (Kennedy, J.) (describing the importance of works such as Shakespeare’s *Romeo and Juliet* and movies such as *Traffic* and *American Beauty*); see also Wilson Huhn, *Scienter, Causation, and Harm: The Right-Hand Side of the Constitutional Calculus*, 13 WM. & MARY BILL RTS. J. 125, 129 (2004) (“The value principle is the concept that speech that serves the search for political, religious, scientific, or artistic truth receives more protection under the First Amendment than speech that does not.”) [hereinafter *Scienter, Causation, and Harm*].

²⁰² 310 U.S. 586 (1940) (upholding the expulsion from public school of a 10-year-old and a 12-year-old for refusing to participate in the flag salute ceremony).

²⁰³ See *id.* at 600 (Frankfurter, J.) (upholding decision of public school expelling children for refusing to salute and pledge allegiance to the American flag).

²⁰⁴ 319 U.S. 624 (1943) (striking down school board regulation requiring all teachers and students to salute the American flag).

²⁰⁵ See *id.* at 642 (Jackson, J.). Justice Jackson stated that “[w]e think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control. The decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few per curiam decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is affirmed. *Id.* (Jackson, J.).

²⁰⁶ *Id.* at 638 (Jackson, J.).

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.²⁰⁷

The influence of the Supreme Court’s opinion in *Barnette* has been profound. The reasoning that the Court articulated establishes two fundamental doctrines in the law of freedom of expression: the rule against laws that compel speech²⁰⁸ and the rule against laws that are viewpoint-based.²⁰⁹ Furthermore, Justice Jackson’s vivid imagery has captured the imagination of subsequent generations of jurists. The Supreme Court has quoted one or both of the forgoing passages from Justice Jackson’s opinion in twenty-six different cases.²¹⁰

In 1949 in *Terminiello v. City of Chicago*²¹¹ the Supreme Court added an additional building block to its defense of freedom of expression: the “overbreadth doctrine.”²¹² Terminiello had been arrested for disorderly conduct when he refused to stop delivering an incendiary speech at a rally that had become a riot.²¹³ Certainly, Terminiello’s conduct at the rally appeared to create a “clear and present danger” of serious violence; his speech was therefore not protected under the First Amendment.²¹⁴ However, the Court ruled that it was not necessary to consider whether Terminiello was

²⁰⁷ *Id.* at 642 (Jackson, J.).

²⁰⁸ *See* *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 557 (2004) (Scalia, J.) (“We first invalidated an outright compulsion of speech in *West Virginia State Board of Education v. Barnette*.”).

²⁰⁹ *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) (Brennan, J.) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *id.* at 415 (Brennan, J.). Justice Brennan stated that “[i]n holding in *Barnette* that the Constitution did not leave this course open to the government, Justice Jackson described one of our society’s defining principles in words deserving of their frequent repetition: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Id.* (Brennan, J.) (quoting *Barnette*, 319 U.S. at 642).

²¹⁰ *See, e.g., id.*

²¹¹ 337 U.S. 1 (1949) (reversing defendant’s conviction for breach of the peace on the ground that the municipal ordinance forbidding was unconstitutional).

²¹² *See Note: The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 845 (1970) (“[T]he Court has been willing to review the breadth of statutory burdens on expressive activity even in the case of a person whose conduct could constitutionally be burdened.” (citing *Terminiello*, 337 U.S. 1 (1949), *Kunz v. New York*, 340 U.S. 290 (1951), and *Aptheker v. Secretary of State*, 378 U.S. 500 (1964)).

²¹³ *Terminiello*, 337 U.S. at 14-22 (Jackson, J., dissenting) (describing Terminiello’s speech and the violent situation in which it was delivered). “[T]he local court that tried Terminiello was not indulging in theory. It was dealing with a riot and with a speech that provoked a hostile mob and incited a friendly one, and threatened violence between the two.” *Id.* at 14 (Jackson, J., dissenting).

²¹⁴ *See id.* at 26 (Jackson, J., dissenting) (“In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate.”).

within his First Amendment rights in delivering the speech.²¹⁵ Instead, the Court ruled that Terminiello could not be convicted for breach of the peace because even though Terminiello's speech might be *unprotected* under the First Amendment, the municipal ordinance under which he was charged was unconstitutional because it had the potential of reaching *protected* speech.²¹⁶ In this case the Court in effect drew a distinction between First Amendment challenges that attack a law "on its face" and those challenges that attack a law "as applied" to the particular defendant. Terminiello mounted a successful *facial* attack upon the law restricting speech even though his speech was *not* protected under the First Amendment, and even though he might properly have been convicted under a more narrowly drawn ordinance. The First Amendment "overbreadth doctrine" was born.²¹⁷

After *Terminiello*, at the height of the "second red scare" instigated by Senator Joseph McCarthy in the early 1950s,²¹⁸ the Roosevelt Court retreated on First Amendment matters. The Court decisions upholding convictions in *Feiner v. New York*²¹⁹ and *Dennis v. United States*²²⁰ are inconsistent with the principle that persons may not be punished for expressing unpopular views.²²¹ But, as noted above, the Roosevelt Court had already opened the door to greater protection for freedom of speech and had introduced a number of principles that are central to modern First Amendment analysis, including the public forum doctrine, the weighing of expressive value versus expected harm, the rule against coerced speech, the rule against viewpoint-based laws, and the overbreadth doctrine. Building on the early legacy of the Roosevelt Court, the Supreme Court subsequently handed down decisions protecting speech which are more consistent with *Barnette* and *Terminiello* and which implicitly call *Feiner* and *Dennis* into question.²²²

²¹⁵ See *id.* at 3 (Douglas, J.) (referring to the question of whether the defendant's speech constituted "fighting words," and stating that "[w]e do not reach that question, for there is a preliminary question that is dispositive of the case.").

²¹⁶ See *id.* at 5 (Douglas, J.) ("The ordinance as construed by the trial court seriously invaded [the First Amendment]. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand.").

²¹⁷ See *supra* note 209.

²¹⁸ See generally, MARTIN H. REDISH, *THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA* (2005).

²¹⁹ 340 U.S. 315 (1951) (upholding defendant's conviction for disorderly conduct).

²²⁰ 341 U.S. 494 (1951) (upholding defendants' convictions for violation of Smith Act).

²²¹ See *Feiner*, 340 U.S. at 324-325 (Black, J., dissenting) (setting forth facts of case); *id.* at 321-322 (Black, J., dissenting) ("The record before us convinces me that petitioner, a young college student, has been sentenced to the penitentiary for the unpopular views he expressed on matters of public interest while lawfully making a street-corner speech in Syracuse, New York."). See also transcripts of the record in *Feiner*, available at First Amendment Online at <http://1stam.umn.edu/archive/primary/Feiner.pdf>; *Dennis*, 341 U.S. at 496 (Vinson, C.J.) (upholding provision of Smith Act which provided, "It shall be unlawful for any person . . . to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.").

²²² See, e.g., *Yates v. United States*, 356 U.S. 363 (1958) (holding that "mere doctrinal justification" of forcible overthrow is insufficient to justify conviction under the Smith Act); *Noto v. United States*, 367 U.S. 290 (1961) (requiring proof of "present advocacy" of violent acts to justify conviction under the

C. Freedom of Religion

The principal case decided by the Supreme Court on freedom of religion before 1937 was *Reynolds v. United States*,²²³ a polygamy case that had been decided in 1878. In that case the Court upheld a federal law against polygamy on the ground that the Constitution protects religious *beliefs* but not religiously motivated *conduct*.²²⁴

The opinion of the Court in *Reynolds* is inconsistent with the text of the First Amendment, which protects the “free exercise” of religion.²²⁵ This language plainly means that the Constitution does not simply protect what we *think*, but also what we *do* in the service of our religion. In 1940, in *Cantwell v. Connecticut*²²⁶ the Supreme Court gave effect to the plain language of the First Amendment, ruling that “the Amendment embraces two concepts, - freedom to believe and freedom to act.”²²⁷ The Court concluded that although the freedom to act is not absolute, that Jesse Cantwell did have the right to express his religious views on a public street without first obtaining a license,²²⁸ and that his conduct did not constitute a breach of the peace.²²⁹ The Court also ruled that the religion clauses of the First Amendment are applicable against the States.²³⁰

The most significant judicial decision on the Establishment Clause – a decision that Justice Scalia has referred to as “the fountainhead” of modern First Amendment analysis in this field²³¹ – was also issued by the Roosevelt Court. In 1947, in *Everson v.*

membership clause of the Smith Act); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam) (“[W]e are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments.”); *Texas v. Johnson*, 491 U.S. 397 (1989) (striking down state law prohibiting the desecration of the American flag); *id.* at 415 (Brennan, J.) (quoting *Barnette*, 319 U.S. at 642 (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”)).

²²³ 98 U.S. 145 (1878) (upholding federal law prohibiting polygamy).

²²⁴ *See id.* at 166 (Waite, C.J.) (“Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”).

²²⁵ *See* U.S. CONST. amend. 1, which provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”

²²⁶ 310 U.S. 296 (1940) (reversing defendants’ convictions for soliciting funds for a religious purpose without a license, and defendant Jesse Cantwell’s conviction for breach of the peace).

²²⁷ *Id.* at 303 (Roberts, J.).

²²⁸ *See id.* (Roberts, J.) (“We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment.”).

²²⁹ *See id.* at 310 (Roberts, J.) (“We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.”).

²³⁰ *See id.* at 303 (Roberts, J.) (“The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.”).

²³¹ *See* *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 890 n.2 (2005) (Scalia, J., dissenting) (referring to *Everson v. Board of Education*, 330 U.S. 1 (1947) as “the fountainhead of this jurisprudence . . .

Connecticut,²³² all nine justices of the Supreme Court agreed that the purpose of the Establishment Clause was to create “a wall of separation” between church and state.²³³ Although a divided Court voted to uphold public financing of bus transportation of children to parochial schools,²³⁴ the justices were unanimous in their opinion that the Constitution demands that the government remain “neutral” towards religion.²³⁵

The neutrality principle has remained the cornerstone of the principle of freedom of religion ever since, and the Court has invoked the concept in many of its decisions.²³⁶ But with the retirement of Justice Sandra Day O’Connor, who developed the principle that the government is prohibited from “endorsing” religion,²³⁷ it is unclear whether the

. . .” interpreting the Establishment Clause as prohibiting “governmental affirmation of society’s belief in God.”).

²³² 330 U.S. 1 (1947) (upholding state law authorizing local boards of education resolution to reimburse parents for the costs of sending their children to parochial schools).

²³³ See *id.* at 15-16 (Black, J.). Justice Black stated that “[t]he ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’” *Id.* (Black, J.). See also *id.* at 31-32 (Rutledge, J., dissenting) (stating that the purpose of the Establishment Clause was “to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.”); *id.* at 26 (Jackson, J., dissenting) (“There is no answer to the proposition more fully expounded by Mr. Justice Rutledge that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers’ expense.”).

²³⁴ See *id.* at 17 (Black, J.) (upholding law permitting school districts to reimburse parents for costs of transporting children to private schools, including religious schools).

²³⁵ See *id.* at 18 (Black, J.) (“That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.”); *id.* at 23-24 (Jackson, J.) (describing the public schools as having been “organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion.”); *id.* at 59 (Rutledge, J., dissenting) (“[I]t is only by observing the prohibition rigidly that the state can maintain its neutrality and avoid partisanship in the dissensions inevitable when sect opposes sect over demands for public moneys to further religious education, teaching or training in any form or degree, directly or indirectly.”).

²³⁶ See, e.g., *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (Clark, J.). Justice Clark stated that “[t]he wholesome ‘neutrality’ of which this Court’s cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies.” *Id.* (Clark, J.). See also *McCreary County*, 545 U.S. at 860 (Souter, J.) (“The touchstone for our analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’” (internal citations omitted)).

²³⁷ See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring) (proposing the “no endorsement” test). Justice O’Connor stated that “[t]he purpose prong of the *Lemon* test asks whether

Court will retain the neutrality principle. The modern criticism of the neutrality principle is reviewed in Part III below.²³⁸

D. Commerce Clause

The interpretation of the Commerce Clause is a “human rights” issue for one simple reason. Many of the most significant federal civil rights laws have been enacted pursuant to Congress’ power to regulate commerce.²³⁹ If the Supreme Court had continued to adhere to the narrow, pre-1937 reading of Congress’ power under the Commerce Clause, it would have made it difficult or impossible for Congress to have adopted this legislation.²⁴⁰

Even considered solely from an economic perspective, there is no doubt that President Roosevelt considered the interpretation of the Commerce Clause to be central to the struggle for human rights, for Roosevelt believed it was the obligation of the government to protect the average person from economic exploitation.²⁴¹

During President Roosevelt’s first term, 1932-1936, the Supreme Court aggressively struck down vital New Deal legislation protecting workers and regulating industry on the ground that Congress lacked authority under the Commerce Clause to regulate “local” means of production such as factories, mines, and farms.²⁴² The rulings of the Supreme Court became an issue in the 1936 Presidential election, primarily because Alf Landon and his supporters predicted (quite accurately, as it turned out) that Roosevelt would change the direction of the Court if he were given the opportunity to appoint justices during a second term.²⁴³

government’s actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.” *Id.* (O’Connor, J., concurring).

²³⁸ See notes 394-409 and accompanying text *infra*.

²³⁹ See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (Title II of Civil Rights Act of 1964 enacted pursuant to Commerce Clause).

²⁴⁰ See, e.g., *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (Congress had authority under Commerce Clause, but not under § 5 of the 14th Amendment, to adopt Age Discrimination in Employment Act); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001) (Congress had authority under Commerce Clause, but not under § 5 of the 14th Amendment, to adopt Title I of the Americans with Disabilities Act); see also *United States v. Morrison*, 529 U.S. 598, 619-627 (2000) (Rehnquist, C.J.) (ruling that Congress lacked authority under either Commerce Clause or § 5 of the 14th Amendment to enact the federal Violence Against Women Act)

²⁴¹ See *supra* notes 10-13 and accompanying text.

²⁴² See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating the National Industrial Recovery Act partly on the ground that the enactment of the law was beyond Congress’ power under the Commerce Clause). See also WILLIAM E. LEUCHTENBERG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940 145 (1963) (quoting a newspaper headline stating “America Stunned: Roosevelt’s Tow Years’ Work Killed in Twenty Minutes,” and stating that Roosevelt was “dumbfounded” by the Court’s decision in *Schechter* and that in speaking to reporters Roosevelt compared the *Schechter* decision to *Dred Scott*).

²⁴³ See UROFSKY, *supra* note 48, at 40 (quoting Roosevelt as stating in June of 1936 “that he believed the Constitution had not been meant to a dead hand ‘blocking humanity’s progress’ but rather ‘a living force for the expression of the national will with respect to national needs.’”); ACKERMAN, *supra* note 25, at 313

Landon actually *understated* Roosevelt’s determination to change the make-up of the Court. On February 5, 1937, one month into his second term, Roosevelt unveiled his “court-packing plan.”²⁴⁴ Roosevelt proposed to appoint one new justice for every justice over the age of 70 who did not retire, which would have given him six additional appointments, more than enough to secure a majority that would uphold his New Deal legislation.²⁴⁵

Congress and the public rejected Roosevelt’s plan,²⁴⁶ but he ultimately achieved a constitutional victory anyway before he had appointed a single justice.²⁴⁷ In April of 1937 the Supreme Court decided *Jones & Laughlin Steel Corp. v. N.L.R.B.*,²⁴⁸ in which the Court ruled that Congress *did* have authority to adopt a law requiring employers to recognize unions and to bargain collectively.²⁴⁹ The following month Justice Van Devanter announced his retirement from the bench, thus ensuring that the Supreme Court would no longer stand in the way of Roosevelt’s policies.²⁵⁰

In its ruling in *Jones & Laughlin Steel*, however, the Supreme Court emphasized the enormous size of the company’s operations and the interstate character of its transactions. After a lengthy description of the company’s many plants and holdings, the Court adopted this finding:

(“Landon and his partisans emphasized the danger of court-packing in their last-ditch efforts to mobilize the American people.”); *id.* (quoting columnist H.L. Mencken, an opponent of Roosevelt, who on August 17, 1936 wrote, “During his second term, if he has one, [Roosevelt] will have the choosing of at least three judges, and perhaps of all nine Thus his reelection will set off the most violent attack upon the Constitution ever made”)

²⁴⁴ See LEUCHTENBURG, *NEW DEAL*, at 232 (describing court-packing plan); LEUCHTENBURG, *SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 169 (Oxford U. Press 1995) (same); see also STAMFORD PARKER, *THE WORDS THAT RESHAPED AMERICA: F.D.R.* 114-115, *Fireside Chat* of March 9, 1937 (in which Roosevelt explained the purpose of his proposal to add justices to the Supreme Court, stating that “[d]uring the past half century the balance of power between the three great branches of the federal government has been tipped out of balance by the courts in direct contradiction of the high purposes of the framers of the Constitution. It is my purpose to restore that balance.”).

²⁴⁵ See LEUCHTENBURG, *NEW DEAL*, *supra* note 17, at 232-233; LEUCHTENBURG, *SUPREME COURT REBORN*, *supra* note 242, at 169.

²⁴⁶ LEUCHTENBURG, *NEW DEAL*, *supra* note 17, at 233-237 (describing reaction to the Roosevelt’s court-packing plan).

²⁴⁷ See UROFSKY, *supra* note 48, at 43 (“Roosevelt . . . lost the battle but won the war.”); LEUCHTENBURG, *NEW DEAL*, *supra* note 17, at 237 (quoting Senator Byrnes, a supporter of the court-packing plan, as saying, “Why run for a train after you’ve caught it?”).

²⁴⁸ 301 U.S. 1 (1937) (upholding the National Labor Relations Act against a constitutional challenge).

²⁴⁹ See *id.* at 43 (Hughes, C.J.) (“[W]e have no doubt that Congress had constitutional authority to safeguard the right of respondent’s employees to self-organization and freedom in the choice of representatives for collective bargaining.”).

²⁵⁰ See LEUCHTENBURG, *NEW DEAL*, *supra* note 17, at 237; LEUCHTENBURG, *SUPREME COURT REBORN*, *supra* note 243, at 211 (quoting Charlotte Williams, a biographer of Black, stating that Black’s appointment “made it plain beyond all doubt that the Court was about to be reconstituted in the image of the New Deal.”). See also *id.* at 180 (speculating that Justice Van Devanter may have retired in May of 1937 in order to derail the court-packing plan, or possibly in response to “more favorable retirement legislation.”).

Summarizing these operations, the Labor Board concluded that the works in Pittsburgh and Aliquippa “might be likened to the heart of a self-contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the respondent; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent has elaborated.”

To carry on the activities of the entire steel industry, 33,000 men mine ore, 44,000 men mine coal, 4,000 men quarry limestone, 16,000 men manufacture coke, 343,000 men manufacture steel, and 83,000 men transport its product. Respondent has about 10,000 employees in its Aliquippa plant, which is located in a community of about 30,000 persons.²⁵¹

The Court ruled that Congress had the power to require Jones & Laughlin Steel to bargain collectively with its employees,²⁵² but the decision implicitly left open the question of whether federal law could constitutionally be made applicable to businesses that were not, in and of themselves, interstate in scope. The Roosevelt Court conclusively settled that question in *United States v. Darby*²⁵³ and *Wickard v. Filburn*.²⁵⁴

In *Darby* the Court upheld the constitutionality of the federal Fair Labor Standards Act, which set minimum wages and maximum hours for workers, as applied to a Georgia lumber mill.²⁵⁵ The Court stated that *intrastate* commercial activities of a business might be regulated if they “affect” interstate commerce,²⁵⁶ and held that the law could be applied to small businesses because “the total effect of the competition of many small producers may be great.”²⁵⁷ The Court reaffirmed this principle in *Wickard* in ruling that the federal Agricultural Adjustment Act, which limited the production of

²⁵¹ *Jones & Laughlin Steel*, 301 U.S. at 27 (Hughes, C.J.).

²⁵² *See id.* at 43 (Hughes, J.) (“[W]e have no doubt that Congress had constitutional authority to safeguard the right of respondent's employees to self-organization and freedom in the choice of representatives for collective bargaining.”).

²⁵³ 312 U.S. 100 (1941).

²⁵⁴ 317 U.S. 111 (1942).

²⁵⁵ *Darby*, 312 U.S. at 111 (Stone, J.).

²⁵⁶ 312 U.S. at 118 (Stone, J.) (“The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.”).

²⁵⁷ *Id.* at 123 (Stone, J.) (“Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great.”).

wheat, could be constitutionally applied to a small farm.²⁵⁸ Justice Jackson, writing for a unanimous Court, stated:

That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.²⁵⁹

These cases establish Congress' power to regulate virtually every aspect of the national economy, including small commercial enterprises.²⁶⁰ In later decades, when Congress enacted civil rights legislation such as the Public Accommodations Act,²⁶¹ the Age Discrimination in Employment Act,²⁶² the Family Medical Leave Act,²⁶³ and the Americans With Disabilities Act,²⁶⁴ the Supreme Court upheld these laws as valid exercises of Congress' power under the Commerce Clause.²⁶⁵

E. State Action

The State Action Doctrine is not simply a technicality. Instead it is a principle of civil rights that lies at the heart of Constitutional Law.²⁶⁶

The Constitution is a law that governs the *government*²⁶⁷ – it does not apply to

²⁵⁸ *Wickard*, 317 U.S. at 114 (Jackson, J.) (describing Filburn's operation as a "small farm").

²⁵⁹ *Id.* at 127-128 (Jackson, J.).

²⁶⁰ *See id.* at 125 (Jackson, J.) ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . .").

²⁶¹ 42 U.S.C. § 2000a *et. seq.*

²⁶² 29 U.S.C. § 621 *et. seq.*

²⁶³ 29 U.S.C. § 2611 *et. seq.*

²⁶⁴ 42 U.S.C. § 12101 *et. seq.*

²⁶⁵ *See* *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (Title II of Civil Rights Act of 1964 validly enacted pursuant to Commerce Clause); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001) (Americans with Disabilities Act enacted pursuant to Commerce Clause); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act enacted pursuant to Commerce Clause); *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (Family Medical Leave Act enacted pursuant to Commerce Clause).

²⁶⁶ *See generally* Wilson Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 Hofstra L. Rev. 1379 (2006) (characterizing the central purpose of the state action doctrine as the promotion of "democratic choice").

²⁶⁷ *See* *Marbury v. Madison*, 5 U.S. 137, 176 (1803) (Marshall, C.J.). Chief Justice Marshall stated that "the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments." *Id.* (Marshall, C.J.). *See also* Alexander Hamilton or James Madison, *The Federalist Papers*: No. 51, *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, available at <http://www.yale.edu/lawweb/avalon/federal/fed51.htm>. Hamilton or

private parties.²⁶⁸ This conclusion is apparent from the text of the Constitution. The First Amendment commences with the words “*Congress shall make no law . . .*”²⁶⁹ and the Fourteenth Amendment provides “*No state shall . . .*”²⁷⁰ The Constitution prohibits both the federal and the State governments from violating our fundamental rights, but the actions of individuals and private corporations are not governed by the Constitution.²⁷¹ This rule of constitutional law is called the “state action doctrine.”

The Supreme Court first articulated the state action doctrine in 1875²⁷² and formally adopted it in 1883.²⁷³ Before 1937 the state action doctrine was applied in a number of cases to strike down federal laws protecting blacks. The Court ruled, over and over, in cases where blacks had been lynched, murdered, beaten, prevented from voting and otherwise discriminated against, that Congress lacks the authority under Constitution to punish this conduct because Section 5 of the 14th Amendment confers power upon the Congress only to “enforce the provisions of this Article,”²⁷⁴ meaning that Congress only has the power to enforce the provisions of the 14th Amendment against “state action,” not against private action.²⁷⁵

Madison wrote: “But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.” *Id.*

²⁶⁸ See *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (Bradley, J.) (describing Section 1 of the 14th Amendment, and stating that “[i]t is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (Vinson, C.J.) (“Since the decision of this Court in the *Civil Rights Cases*, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.”). Cf. *Civil Rights Cases*, 109 U.S. at 20 (Bradley, J.) (noting that the 13th Amendment is “direct and primary” in its character, in that it abolishes slavery, and authorizes Congress to adopt legislation to abolish all of the “badges and incidents of slavery in the United States” whether the result of state action or private action.).

²⁶⁹ U.S. CONST., amend I (emphasis added).

²⁷⁰ U.S. CONST., amend XIV, sec. 1 (emphasis added).

²⁷¹ See *supra* note 265.

²⁷² See *United States v. Cruikshank*, 92 U.S. 542, 554 (1875) (Waite, C.J.) (“The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another.”); *Civil Rights Cases*, *supra* note 265; *United States v. Harris*, 106 U.S. 629, 638 (1883) (Woods, J.). Justice Woods stated that the 14th Amendment “[i]s a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the state, not a guaranty against the commission of individual offenses; and the power of congress, whether express or implied, to legislate for the enforcement of such a guaranty, does not extend to the passage of laws for the suppression of ordinary crime within the states.” *Id.* (Woods, J.) (quoting *United States v. Cruikshank*, 25 Fed. Cas. 707, 1 Woods, 316 (Bradley, J.)).

²⁷³ See *Civil Rights Cases*, *supra* note 265.

²⁷⁴ U.S. CONST., amend. XIV, § 5.

²⁷⁵ See *Blyew v. United States*, 80 U.S. 581 (1871) (perpetrators of racial murders could not be tried in federal court pursuant to federal removal statute); *Cruikshank*, *supra* note 245 (perpetrators of the notorious Colfax Massacre could not be charged under federal law); *Harris*, *supra* note 245 (ruling that the members of a lynch mob could not be punished under federal law); *Civil Rights Cases*, *supra* note 241 (invalidating Civil Rights Act of 1875 on the ground that Congress lacked authority under 14th Amendment to prohibit private acts of discrimination).

What changed after 1937 was that the Supreme Court began to rule that private parties *are* subject to the dictates of the Constitution in certain situations. The Roosevelt Court found that there was “state action” even in cases where *private parties* had violated other people’s fundamental rights. The decision of the Supreme Court in *Smith v. Allwright*²⁷⁶ demonstrated in dramatic fashion the sea change that occurred in the Roosevelt Court’s understanding of the “state action” doctrine.

In *Smith*, decided in 1944, the Supreme Court determined that the policy of the Democratic Party of the State of Texas to prohibit blacks from becoming members of the party and from voting in primary elections constituted “state action,” and therefore was a violation of the Equal Protection Clause of the Fourteenth Amendment.²⁷⁷ In *Smith* the Court overruled *Grovey v. Townsend*,²⁷⁸ a 1936 case in which the Court had unanimously upheld the “white primary” rules of the Texas Democratic Party.²⁷⁹ In overruling *Grovey* the *Smith* Court stated, “when convinced of former error, this Court has never felt constrained to follow precedent.”²⁸⁰

Two years later in *Marsh v. Alabama*²⁸¹ the Roosevelt Court ruled that the actions of the Gulf Shipbuilding Company in preventing a Jehovah’s Witness from distributing literature in the company-owned town of Chickasaw, Alabama, violated the First Amendment.²⁸² Writing for the Court, Justice Black stated:

We do not agree that the corporation’s property interests settle the question. The State urges in effect that the corporation’s right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We can not accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of

²⁷⁶ 321 U.S. 649 (1944) (striking down the rule of the State Democratic Party excluding blacks from membership, and therefore excluding them from voting in primary elections).

²⁷⁷ *See id.* at 664-665 (Reed, J.) (“The privilege of membership in a party may be, as this Court said in *Grovey v. Townsend* no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state.”).

²⁷⁸ 295 U.S. 45 (1936) (upholding rule of State Democratic Party excluding blacks from membership).

²⁷⁹ *See id.* at 55 (Roberts, J.) (stating that “the privilege of membership in a party” is of “no concern” to the State).

²⁸⁰ *Smith*, 321 U.S. at 665 (Reed, J.).

²⁸¹ 326 U.S. 501 (1946) (finding the presence of “state action” and reversing defendant’s conviction for trespass on First Amendment grounds).

²⁸² *See id.* at 509 (Black, J.) (“In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State’s permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute. Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand.”).

those who use it. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.²⁸³

Like *Smith*, *Marsh* stands for the proposition that the action of a private organization may constitute “state action,” and therefore the action of the organization must therefore conform to the principles of fairness and tolerance that are set forth in the Constitution. The Court justified its ruling in *Marsh* by observing that it was necessary to prevent the Gulf Shipbuilding Company from censoring the information that is disseminated to its employees.²⁸⁴ The First Amendment rights of the residents of the company town outweighed the property rights of the employer.²⁸⁵

A third significant state action case decided by the Roosevelt Court is *Shelley v. Kraemer*,²⁸⁶ which was handed down in 1948. In that case a private homeowner brought a lawsuit against a neighbor in an effort to enforce a racial covenant, entered into by prior owners of the homes, that prohibited blacks from occupying homes in the neighborhood.²⁸⁷ The Supreme Court ruled that although the action of the homeowners entering into the restrictive covenant was *private action*,²⁸⁸ the judicial enforcement of the covenant constituted *state action*, and thus was prohibited by the Equal Protection Clause.²⁸⁹

These three cases were only the first of many, decided down to the present day, in which the Court has found “state action” in the conduct of private parties.²⁹⁰ The essential concept is that when the state has “significantly involved itself” with private

²⁸³ *Id.* at 506 (Black, J.).

²⁸⁴ *See id.* at 508-509 (Black, J.). Justice Black stated that “[m]any people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.” *Id.* (Black, J.).

²⁸⁵ *See id.* at 509 (Black, J.) (“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.”).

²⁸⁶ 334 U.S. 1 (1948) (reversing the decision of a state court enforcing a racially restrictive covenant).

²⁸⁷ *See id.* at 4-7 (Vinson, C.J.) (describing facts of cases before the Court).

²⁸⁸ *See id.* at 13 (Vinson, C.J.) (“[T]he restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.”).

²⁸⁹ *See id.* at 20 (Vinson, C.J.) (“We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.”).

²⁹⁰ *See, e.g.*, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (finding that the action of a privately-owned restaurant to discriminate on the basis of race constituted “state action” where the restaurant was located in and leased space from a publicly operated, publicly funded parking deck);

parties are sufficiently imbued with governmental power, their conduct will be considered to be “state action.”²⁹¹ There are at least five recognized categories of situations where the Court will find “state action.” *Smith* and *Marsh* represent cases where a private party is exercising a “public function.”²⁹² *Shelley* leads the “judicial enforcement” category.²⁹³ In recent decades the Court has recognized at least three other categories of private conduct that constitute “state action:” occasions when the government has “influenced, encouraged, or coerced” a private party into committing a violation of the Constitution;²⁹⁴ projects where the government and the private party are “joint participants”;²⁹⁵ and situations where the government is “pervasively entwined” with private parties in the governance of an organization.²⁹⁶

While the justices of the Supreme Court still disagree about the nature and extent of governmental involvement that must be present before the actions of a private party will be construed as “state action,” the legal foundation for finding “state action” in the acts of private parties was established by the Roosevelt Court in *Smith, Marsh* and *Shelley*.

F. Separation of Powers

In the 220 years that the Constitution has guided our society and determined our forms of government, the leading decision of the Supreme Court in the field of Separation of Powers is *Youngstown Sheet and Tube Co. v. Sawyer*,²⁹⁷ and it is a product of the Roosevelt Court. The Court’s opinion in *Youngstown* is a bulwark against dictatorship written by men who had grappled with its horrors. The *Youngstown* case stands for the proposition that even in wartime the President must obey and uphold the law.²⁹⁸

²⁹¹ See, e.g., *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967) (White, J.) (noting “the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations.”).

²⁹² See *supra* text accompanying note 280.

²⁹³ See *Shelley*, 334 U.S. at 20 (Vinson, C.J.) (finding “judicial enforcement” of restrictive covenants to be state action); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (finding attachment procedure to constitute state action).

²⁹⁴ See, e.g., *Reitman*, 387 U.S. at 381 (White, J.) (“The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.”).

²⁹⁵ See, e.g., *Burton*, 365 U.S. at 725 (Clark, J.) (“The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so ‘purely private’ as to fall without the scope of the Fourteenth Amendment.”).

²⁹⁶ See *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 291 (2001) (Souter, J.) (“We hold that the association’s regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association”).

²⁹⁷ 343 U.S. 579 (1952) (striking down Presidential order seizing steel industry to prevent work stoppage during Korean War).

²⁹⁸ See *supra* notes 113-132 and accompanying text.

The leading opinions in that case, which were authored by the Roosevelt appointees Hugo Black, Felix Frankfurter, and Robert Jackson, are described above.²⁹⁹ The legal principles that were articulated by those three justices in *Youngstown* have been applied by the Supreme Court whenever the President has overstepped his constitutional powers. In *United States v. Nixon*,³⁰⁰ the Court invoked the *Youngstown* decision in ordering President Richard Nixon to turn over evidence of his own wrongdoing to a grand jury.³⁰¹ In *Hamdi v. Rumsfeld*,³⁰² where the Court ruled that the President may not indefinitely detain suspected terrorists as part of the War on Terror,³⁰³ the Court cited *Youngstown* for the proposition that “a state of war is not a black check for the President.”³⁰⁴ The significance of *Youngstown* was reiterated in *Hamdan v. Rumsfeld*,³⁰⁵ decided in 2006, where the Supreme Court stated:

Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The Government does not argue otherwise.³⁰⁶

²⁹⁹ See *id.*

³⁰⁰ 418 U.S. 683 (1974) (ordering President to comply with subpoena requiring disclosure of confidential communications with advisors).

³⁰¹ See *id.* at 703 (Burger, C.J.) (“No holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential Presidential communications for use in a criminal prosecution, but other exercises of power by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution.” (citing *Powell v. McCormack*, 395 U.S. 486 (1969); *Youngstown*, 343 U.S. 579 (1952)); *id.* at 707 (Burger, C.J.). Justice Burger stated: “In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. ‘While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.’ To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of ‘a workable government’ and gravely impair the role of the courts under Art. III.” *Id.* (citations omitted).

³⁰² 542 U.S. 507 (2004) (ruling that President may not indefinitely detain “enemy combatants,” and that prisoners who are being held at Guantanamo Bay are entitled to a fair hearing to determine whether they are “enemy combatants.”)

³⁰³ *Id.* at 521 (O’Connor, J.) (“Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress’ grant of authority for the use of “necessary and appropriate force” to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles.”)

³⁰⁴ *Id.* at 536 (O’Connor, J.) (“We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” (citing *Youngstown*, 343 U.S. at 587)).

³⁰⁵ 126 S.Ct. 2749 (2006) (ruling that military commissions established by the President to try prisoners for various terrorism-related offenses failed to comply with requirements of the Uniform Code of Military Justice and the Geneva Conventions).

³⁰⁶ *Id.* at 2774 n.23 (Stevens, J.).

In the near future the Supreme Court may be called upon to determine whether or not President George W. Bush had the inherent authority under the Constitution to order the National Security Administration to eavesdrop on the international communications of American citizens without a warrant in direct violation of federal statutes,³⁰⁷ and, if he ordered the Central Intelligence Agency and Military Intelligence to torture suspected terrorists in direct violation of federal and international law, whether he had the inherent authority to do so.³⁰⁸ If these issues should come before the Supreme Court of the United States, the cases will be governed by the principles articulated in the *Youngstown* decision.

G. Equal Protection

Prior to 1937, the Equal Protection Clause in general “had fallen into disuse and contempt,”³⁰⁹ to the point that in 1927 the Court, in an opinion by Oliver Wendell Holmes, referred to a legal claim arising under Equal Protection as “the usual last resort of constitutional arguments.”³¹⁰ Furthermore, just as it had condoned and protected slavery before the Civil War,³¹¹ the Supreme Court condoned and protected racial segregation up until 1937.³¹² It was the Roosevelt Court that initiated the process of

³⁰⁷ See *ACLU v. NSA*, 438 F. Supp. 734 (2006) (ruling that President lacked authority under the Constitution to order the Agency’s warrantless eavesdropping program in violation of federal statutes).

³⁰⁸ See, e.g., *Padilla’s Papers Detail Charges of Mistreatment*, N.Y. Times A19, November 2, 2006, at A19 (Jose Padilla, an American citizen, asserts that for nearly four years, while he was held in the United States in military custody, military interrogators “threatened him with ‘imminent execution’ or with painful cuts; that he was forced to wear a hood and stand in ‘stress positions’ for long periods; that noxious fumes were sometimes introduced into his cell that he was forced to endure extreme heat and cold, bright lights or total darkness, denied opportunities to shower for weeks and deprived of sleep; and that he was not provided with a copy of the Koran.”); Bill Dedman, *Can the “20th Hijacker” Ever Stand Trial: Abusive Interrogation at Guantanamo May Prevent His Prosecution*, MSNBC, October 26, 2006, available online at <http://www.msnbc.msn.com/id/15361462/>. Dedman describes the treatment accorded a prisoner by military interrogators at Guantanamo Bay, “Mohammed al-Qahtani, detainee No. 063, was forced to wear a bra. He had a thong placed on his head. He was massaged by a female interrogator who straddled him like a lap dancer. He was told that his mother and sisters were whores. He was told that other detainees knew he was gay. He was forced to dance with a male interrogator. He was strip-searched in front of women. He was led on a leash and forced to perform dog tricks. He was doused with water. He was prevented from praying. He was forced to watch as an interrogator squatted over his Koran.”

³⁰⁹ DOMNARSKI, *supra* note 1, at 137.

³¹⁰ *Buck v. Bell*, 274 U.S. 200, 208 (1927) (Holmes, J.).

³¹¹ See, e.g., *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (striking down a Pennsylvania law that prohibited any person from forcibly removing persons from the State for the purpose of enslaving them); *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (declaring the Missouri Compromise unconstitutional, and ruling that Congress lacks the authority to prohibit slavery from the territories of the United States); *Abelman v. Booth*, 62 U.S. 506 (1858) (upholding the Fugitive Slave Act of 1850 “in all of its provisions”).

³¹² See, e.g., *Blyew v. United States*, 80 U.S. 581 (1871) (reversing the murder conviction of two whites who had killed members of a black family on the ground that removal of this case to federal court was improper because, the Court reasoned, the rights of the victim and the witness were not “affected” by the fact that blacks were not allowed to testify in State courts.); *United States v. Reese*, 92 U.S. 214 (1875) (striking down civil rights law protecting blacks right to vote); *United States v. Cruikshank*, 92 U.S. 542 (1875) (reversing the convictions of the perpetrators of the Colfax Massacre, on the ground that the indictment had simply stated that the victims were black, instead of stating that the murders were committed because the victims were black); *Civil Rights Cases*, 106 U.S. 3 (1883) (striking down the Civil Rights Act of 1875, a law prohibiting segregation in certain places of public accommodation); *Pace v.*

removing this moral cancer from our fundamental law, and it was Roosevelt appointees who provided the majority of the votes to overrule the pernicious doctrine of “separate but equal.”³¹³

After 1937, the Roosevelt Court made two momentous contributions to the interpretation of the Equal Protection Clause. First, in a concurring opinion Justice Robert Jackson articulated the core meaning of Equal Protection, a standard for measuring whether or not the government is observing the principle of equality under the law.³¹⁴ Second, the Court as a whole decided that racial classifications in the law must be strictly scrutinized.³¹⁵

*Railway Express Agency v. New York*³¹⁶ was a simple case, but in the course of his separate concurring opinion Justice Jackson expressed a fundamental truth about the Equal Protection Clause. The issue was the constitutionality of a New York City ordinance that outlawed the practice of putting motor vehicles on the streets for the sole purpose of displaying advertising.³¹⁷ The businesses that challenged the law claimed that the law violated the Equal Protection Clause because other businesses could advertise, for example, on their delivery trucks or on the sides of buses.³¹⁸ Not surprisingly, the Supreme Court upheld the law,³¹⁹ but Justice Jackson’s statement of the relevant standard has become a common understanding of the purpose of the Equal Protection Clause. First, Justice Jackson expressed the practical meaning of the Equal Protection Clause. He said:

I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed

Alabama, 106 U.S. 583 (1883) (upholding Alabama statute forbidding blacks and whites from marrying or from having sex with each other); *United States v. Harris*, 106 U.S. 629 (1883) (declaring a civil rights law, the Enforcement Act of 1871, to be unconstitutional, thus reversing the convictions of a lynch mob); *Plessy v. Ferguson*, 63 U.S. 537 (1896) (upholding Louisiana law requiring segregated passenger cars on trains); *Williams v. Mississippi*, 170 U.S. 213 (1898) (upholding Mississippi election laws designed to disenfranchise blacks); *Cumming v. Richmond Board of Education*, 175 U.S. 528 (1899) (refusing to intervene when the City of Richmond closed the high school for blacks but kept the school for whites open); *Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding racial segregation in the public schools).

³¹³ See *infra* notes 326-336 and accompanying text.

³¹⁴ See *infra* notes 316-325 and accompanying text.

³¹⁵ See *infra* notes 346-348 and accompanying text.

³¹⁶ 336 U.S. 106 (1949) (upholding municipal regulation prohibiting the operation of vehicles on the public streets for the sole purpose of advertising).

³¹⁷ See *id.* at 107 (Douglas, J.) (setting forth the ordinance in question).

³¹⁸ See *id.* at 109-110 (Douglas, J.) (discussing due process and equal protection claims).

³¹⁹ See *id.* at 111 (Douglas, J.) (affirming the decision of the lower courts upholding the ordinance).

generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.³²⁰

Justice Jackson then articulated what he considered to be the relevant constitutional standard. He concluded that the ordinance was constitutional

because there is a real difference between doing in self-interest and doing for hire, so that it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price.³²¹

The principle that Justice Jackson articulated in this otherwise unnoteworthy case holds the potential to remake American society. It is the idea that people may not be treated differently unless there are *real differences* between them and others. This interpretation of the Equal Protection Clause is of fundamental importance because it completes the task that the Framers failed to accomplish. The founders of our Nation declared that “all men are created equal”³²² but they neglected to enshrine the concept of “equality” in the original Constitution. The reason for this failure is easily understood. The Constitution was a bargain between the North and the South, and it included a “dirty compromise” that protected the institution of slavery.³²³ While the Preamble of the Constitution hypocritically states that it is intended to “secure the blessings of liberty to ourselves and our posterity,”³²⁴ there was not even a pretense in the original Constitution that it was intended to protect equality.³²⁵

It was the framers of the 14th Amendment who introduced the concept of equality into our fundamental law, and it was the justices of the Roosevelt Court who embarked upon the unfinished work of breathing life into that principle by attacking and dismantling the system of state-sponsored racial apartheid that so many generations of Americans had suffered under.³²⁶

³²⁰ *Id.* at 112-113 (Jackson, J., concurring).

³²¹ *Id.* at 116 (Jackson, J., concurring).

³²² DECLARATION OF INDEPENDENCE.

³²³ See Paul Finkelman, *Garrison's Constitution: The Covenant with Death and How It Was Made*, 32 National Archives Prologue Magazine No. 4, available at <http://www.archives.gov/publications/prologue/2000/winter/garrisons-constitution-2.html> (describing the “dirty compromise” between the northern and southern delegates to the Constitutional Convention which protected the slave trade).

³²⁴ U.S. CONST., pmbl.

³²⁵ See U.S. CONST., art. I, sec. 2, cl. 3 (three-fifths clause, counting slaves as 3/5 of a person for purposes of taxation and representation); art. I, sec. 9, cl. 1 (protecting slave trade for a period of 20 years); art. IV, sec. 2, cl. 3 (fugitive slave clause, requiring states to deliver up escaped slaves); art V (prohibiting any constitutional amendment abolishing the slave trade for 20 years).

³²⁶ See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1966) (describing racial discrimination and segregation in America from the Civil War to the 1960s).

In 1938, shortly after Roosevelt appointees commenced their work, the Court ruled in *Missouri ex rel. Gaines v. Canada*³²⁷ that the State of Missouri had violated its duty under the Equal Protection Clause to provide equal educational opportunities to its black citizens when it refused to enroll black students at the State's only public law school.³²⁸ The State of Missouri offered to pay the student's tuition at an out-of-state institution, but the Court ruled that this was not sufficient to satisfy the obligation of the State under the Equal Protection Clause.³²⁹ In 1950, the Supreme Court followed with *Sweatt v. Painter*³³⁰ where the Court found that black students were denied equal opportunity by the State of Texas when it created a small, unknown law school for blacks,³³¹ and *McLaurin v. Board of Regents*,³³² where the Court ruled that the State of Oklahoma had violated equal protection when it required a graduate student in education to attend class, study, and eat in segregation from his white classmates.³³³

Gaines, *Sweatt* and *McLaurin* paved the way for *Brown v. Board of Education*.³³⁴ These three pre-*Brown* cases established that equality is to be measured not simply on the basis of physical factors, but also on the basis of the message that the government is communicating when it establishes separate facilities for blacks. The Roosevelt Court had begun to analyze *why* the government was separating the races, and what inferences that a reasonable person would draw from the government's actions. In *Brown* the Supreme Court, speaking unanimously through Chief Justice Earl Warren, drew these

³²⁷ 305 U.S. 337 (1938) (ruling that the State of Missouri violated the equal protection clause when it refused admission of a black student to the state-supported law school)

³²⁸ *See id.* at 343 (Hughes, C.J.) (stating that the student "was refused admission upon the ground that it was 'contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri'.")

³²⁹ *See id.* at 349 (Hughes, C.J.) ("The basic consideration is not as to what sort of opportunities, other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color.")

³³⁰ 339 U.S. 629 (1950) (finding that the educational opportunities offered to white and black students at state-supported law schools were not substantially equal, and that the State was therefore in violation of the Equal Protection Clause).

³³¹ *See id.* at 633-634 (Vinson, C.J.). Chief Justice Vinson stated that "[i]n terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." *Id.* (Vinson, C.J.).

³³² 339 U.S. 637 (1950) (ruling that the black student was entitled to be treated the same as white students at the University of Oklahoma).

³³³ *See id.* at 640 (Vinson, C.J.) ("[H]e was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria."); *id.* at 641 (Vinson, C.J.) ("Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."); *id.* at 642 (Vinson, C.J.) ("[T]he conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws.")

³³⁴ 347 U.S. 483 (1954) (declaring state-sponsored racial segregation of the public schools to be unconstitutional).

conclusions regarding the message that is communicated by official acts of racial segregation:

In *Sweatt v. Painter*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.³³⁵

The true evil of segregation is that instills notions of racial superiority in whites³³⁶ and notions of inferiority in blacks. In *Brown v. Board of Education*, the Supreme Court of the United States, including five justices appointed by Franklin Roosevelt, unanimously ruled that the Equal Protection Clause prohibits the government from endorsing this message.

The greatest failure in the modern era in the field of Equal Protection was also, sadly, the work of the Roosevelt Court. After the attack on Pearl Harbor, the President and Congress authorized the military to impose a curfew on Japanese-Americans,³³⁷ and later a relocation order³³⁸ that sent tens of thousands of Japanese-American citizens and resident aliens to concentration camps.³³⁹ The Supreme Court upheld these orders in

³³⁵ 347 U.S. at 493-494 (Warren, C.J.).

³³⁶ See *Loving*, 388 U.S. at 11-12 (Warren, C.J.). Chief Justice Warren stated that "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.*

³³⁷ See *Hirabayashi v. United States*, 320 U.S. 81, 88 (1943) (Stone, J.) (citing military order of March 27, 1942, which provided that "all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1 shall be within their place of residence between the hours of 8:00 P.M. and 6:00 A.M., which period is hereinafter referred to as the hours of curfew.").

³³⁸ See *Korematsu*, 323 U.S. at 215 (Black, J.) (considering the constitutionality of Civilian Exclusion Order No. 34 "which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area [of the Western Command].").

³³⁹ See generally JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (Peter Irons ed., 1989); see also Brant Lee, *A Racial Trust: The Japanese YWCA and the Alien Land Law*, 7 Asian Pac. Am. L.J. 1, 13-24 (describing the anti-Japanese movement in California in the early 20th Century).

*Hirabayashi v. United States*³⁴⁰ and *Korematsu v. United States*.³⁴¹ Justice Murphy, dissenting in *Korematsu*, called the relocation order “racism,”³⁴² a judgment that all three branches of the federal government have now acknowledged.³⁴³ Fifty-one years later, in *Adarand Constructors v. Peña*,³⁴⁴ Justice Sandra Day O’Connor, speaking for the Court, characterized the Roosevelt Court’s decision in *Korematsu* as “inexplicabl[e]” and quoted Justice Murphy’s remark.³⁴⁵

The only good that emerged from *Korematsu* is that in that case the Supreme Court ruled that racial classifications are subject to strict scrutiny.³⁴⁶ The Supreme Court has applied this strict standard in many cases to strike down racially discriminatory laws, such as in *Loving v. Virginia* (1967),³⁴⁷ where the Supreme Court declared Virginia’s law prohibiting racial intermarriage to be unconstitutional.³⁴⁸ The Roosevelt Court established the *principle* of using strict scrutiny when racial classifications are embedded in the law, even if the Roosevelt Court itself failed to properly apply the principle in *Hirabayashi* and *Korematsu*.

³⁴⁰ 320 U.S. 81 (1943) (upholding federal law which made it a crime to fail to comply with military orders, as applied to an order imposing a curfew on persons of Japanese descent).

³⁴¹ 323 U.S. 214 (1944) (upholding federal law which made it a crime to fail to comply with military relocation orders, as applied to orders directed at citizens and aliens of Japanese descent).

³⁴² See *id.* at 233 (Murphy, J.) (“This exclusion of ‘all persons of Japanese ancestry, both alien and non-alien,’ from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over ‘the very brink of constitutional power’ and falls into the ugly abyss of racism.”).

³⁴³ See *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (reversing *Korematsu*’s conviction); Lorraine K. Bannai, *Taking the Stand: The Stories of Three Men Who Took the Japanese-American Internment to Court*, 4 Seattle J. Soc. Jus. 1, 34 (stating that “On August 10, 1988, President Reagan declared the internment a “grave injustice” and signed into law the Civil Liberties Act of 1988, which provided a formal apology and redress of \$20,000 to each surviving internee.”); *id.* (describing how, upon presenting the Presidential Medal of Freedom to Fred Korematsu in 1998, President Clinton stated, ““In the long history of our country’s constant search for justice, some names of ordinary citizens stand for millions of souls – Plessy, Brown, Parks. To that distinguished list today we add the name of Fred Korematsu.”); Karl Manheim and Allan Ides, *The Unitary Executive*, 29-Sep. L.A. Lawyer 24 (2006) (“[T]he decision in *Korematsu* upholding the challenged internment orders was eventually repudiated by all three branches of the U.S. government.”).

³⁴⁴ 515 U.S. 200 (1995) (ruling that strict scrutiny applied to a federal public contracting minority set-aside program).

³⁴⁵ See *id.* at 215 n.* (O’Connor, J.). Justice O’Connor stated that “Justices Roberts, Murphy, and Jackson filed vigorous dissents; Justice Murphy argued that the challenged order ‘falls into the ugly abyss of racism.’ Congress has recently agreed with the dissenters’ position, and has attempted to make amends. See Pub.L. 100-383, § 2(a), 102 Stat. 903 (“The Congress recognizes that . . . a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II”).” *Id.* (O’Connor, J.).

³⁴⁶ See 323 U.S. at 216 (Black, J.). Justice Black stated, “[i]t should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.” *Id.*

³⁴⁷ 388 U.S. 1 (1967) (Warren, C.J.) (“At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the ‘most rigid scrutiny’” (quoting *Korematsu*, 323 U.S. at 216 (Black, J.)).

³⁴⁸ *Id.* at 12 (Warren, C.J.) (“There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”).

III. PRESENT-DAY JUDICIAL OPPOSITION TO THE REFORMS OF THE ROOSEVELT COURT

The human rights advances that were achieved by the Roosevelt Court have not been universally applauded. Two justices who are currently members of the Supreme Court of the United States – Justice Antonin Scalia and Justice Clarence Thomas – have frequently expressed disagreement with the principles that the Roosevelt Court established in each of the seven areas described above, and in many cases these two justices would, if they could, turn back the clock to a pre-1937 interpretation of the Constitution. Their opposing views are set forth below, along with a defense of the positions that were taken by the Roosevelt Court.

Substantive Due Process

The Roosevelt Court transformed the doctrine of Substantive Due Process into a bulwark of protection for individual rights.³⁴⁹ Justice Scalia would jettison the entire concept of substantive due process, and short of achieving that, he would limit its protection solely to activities that have *always* received constitutional protection.

Justice Scalia contends that the Due Process Clauses of the 5th and 14th Amendments guarantee *procedural* rights only, and not substantive rights. He has stated: “The text of the Due Process Clause does not protect individuals against deprivations of liberty simpliciter. It protects them against deprivations of liberty ‘without due process of law.’”³⁵⁰ He also maintains that if the Due Process Clause is considered to protect substantive rights, that these rights should be strictly limited to those freedoms which have been traditionally respected by the majority of the people: “[i]t is my position that the term ‘fundamental rights’ should be limited to ‘interest[s] traditionally protected by our society. . . .’”³⁵¹ As understood by Justice Scalia, our constitutional right to liberty is not only circumscribed by tradition, but it is *defined* by tradition.³⁵²

³⁴⁹ See *supra* notes 136-169 and accompanying text.

³⁵⁰ *Cruzan v. Mo. Dept. of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

³⁵¹ *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

³⁵² See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J., plurality opinion) (setting forth theory that “fundamental rights” are defined by “specific,” “particular” traditions). Justice Scalia stated that “[w]e do not understand why, having rejected our focus upon the societal tradition regarding the natural father’s rights vis-à-vis a child whose mother is married to another man, Justice Brennan would choose to focus instead upon “parenthood.” Why should the relevant category not be even more general—perhaps “family relationships”; or “personal relationships”; or even “emotional attachments in general”? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent [A] rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.” *Id.* (Scalia, J.).

In contrast to Justice Scalia’s position, the Supreme Court not only still recognizes the principle of Substantive Due Process as outlined and projected by the Roosevelt Court,³⁵³ but it has also sought to give meaning to the word “liberty,” a word that appears not only appears in the Due Process Clauses of the Bill of Rights and the Fourteenth Amendment, but which also figures prominently in the Preamble of the Constitution,³⁵⁴ the second sentence of the Declaration of Independence,³⁵⁵ the writings of the founders,³⁵⁶ and the speeches of Abraham Lincoln.³⁵⁷ In *Skinner v. Oklahoma*,³⁵⁸

³⁵³ See, e.g., *Casey*, 505 U.S. 833, 849 (1992) (O’Connor, J., Kennedy, J., and Souter, J.) (citing *Skinner* and other cases, and stating that “[i]t is settled now, as it was when the Court heard arguments in *Roe v. Wade* that the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood.”).

³⁵⁴ See U.S. CONST. pmb. (“We, the people of the United States, in order to . . . secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.”).

³⁵⁵ DECLARATION OF INDEPENDENCE (stating that all people are “endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness . . .”).

³⁵⁶ See, e.g., Patrick Henry, Give Me Liberty or Give Me Death, March 23, 1775, available at <http://www.yale.edu/lawweb/avalon/patrick.htm>; THOMAS PAINE, COMMON SENSE, THE RIGHTS OF MAN, AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE 39 (1969) (“The new world hath been the asylum for the persecuted lovers of civil and religious liberty from every part of Europe.”); The Sons of Liberty, <http://www.ushistory.org/declaration/related/sons.htm> (describing the “Sons of Liberty”, a revolutionary organization founded in 1765); Benjamin Franklin, *Rules by Which a Great Empire May Be Reduced to a Small One*, September 11, 1773, in FOUNDING AMERICA, DOCUMENTS FROM THE REVOLUTION TO THE BILL OF RIGHTS (Jack N. Rakove, ed., 2006) [hereinafter FOUNDING AMERICA] (“We have *something* left that is valuable; we have constitutional *liberty* both of person and of conscience.”); Thomas Jefferson, *A Summary View of the Rights of British America*, July, 1774, in FOUNDING AMERICA 35 (“The god who gave us life, gave us liberty at the same time: the hand of force may destroy, but cannot disjoin them.”); Samuel Adams, *On American Independence*, August 1, 1776, available at <http://www.bartleby.com/268/8/18.html> (“If ye love wealth better than liberty, the tranquility of servitude than the animating contest for freedom – go from us in peace.”); Alexander Hamilton, *The Farmer Refuted*, February 23, 1775, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch3s5.html> (referring to “the natural rights of mankind” as including “the inviolable right to personal liberty. . .”).

³⁵⁷ See, e.g., ABRAHAM LINCOLN, *Address Delivered at the Dedication of the Cemetery at Gettysburg* (November 19, 1863), in 7 COLLECTED WORKS OF ABRAHAM LINCOLN 23 (Roy P. Basler, ed., 1953), available at <http://quod.lib.umich.edu/cgi/t/text/text-idx?c=lincoln;idno=lincoln7> (follow “Address Delivered at the Dedication of the Cemetery at Gettysburg” hyperlink) (“Four score and seven years ago, our fathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal.”). Lincoln also explained the centrality of the principle of “liberty” in the following written fragment, possibly in response to a letter from Alexander Stephens, Vice-President of the Confederacy, shortly before the commencement of the Civil War. Speaking of the apparent success of the American experiment, Lincoln wrote: “All this is not the result of accident. It has a philosophical cause. Without the *Constitution* and the *Union*, we could not have attained the result; but even these, are not the primary cause of our great prosperity. There is something back of these, entwining itself more closely about the human heart. That something, is the principle of ‘Liberty to all’ – the principle that clears the *path* for all – gives *hope* to all --- and, by consequence, *enterprise*, and *industry* to all. The *expression* of that principle, in our Declaration of Independence, was most happy, and fortunate. Without this, as well as *with* it, we could have declared our independence of Great Britain; but *without* it, we could not, I think, have secured our free government, and consequent prosperity. No oppressed, people will *fight*, and *endure*, as our fathers did, without the promise of something better, than a mere change of masters. The assertion of that *principle*, at *that time*, was *the word*, ‘*fitly spoken*’ which has proved an ‘apple of gold’ to us. The *Union*, and the *Constitution*, are the *picture* of *silver*, subsequently framed around it. The picture was made, not to *conceal*, or *destroy* the apple; but to *adorn*, and *preserve* it. The *picture* was made *for* the apple – *not* the apple for the picture. So let us act, that neither *picture*, or *apple*, shall ever be

Justice Douglas considered the right of procreation to be a fundamental right of “liberty” because of its supreme importance in the life of the individual.³⁵⁹ In *Lawrence v. Texas* Justice Kennedy defined the word “liberty” broadly in describing the concept of the Right to Privacy:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.³⁶⁰

Justice Scalia has characterized Justice Kennedy’s description of this core principle of freedom as “the sweet-mystery-of-life” passage.³⁶¹ In dismissing this portion of the Court’s ruling from *Lawrence*, Justice Scalia not only mocks the writing style of a colleague, but he also belittles the concerns and passions that lie at the heart of people’s lives – whom they love, whom they live with, whom they marry, how they raise their children, and how they choose to die.

By using “tradition” to determine what rights are fundamental, Justice Scalia has an easy time disposing of Substantive Due Process claims. Under Justice Scalia’s approach, by definition all *emerging* claims for justice or tolerance or fairness have no merit.³⁶² But despite the opposition mounted by Justice Scalia and Justice Thomas,³⁶³ the right to privacy is now firmly established in American constitutional law. The Constitution protects people’s rights to marry,³⁶⁴ to live with extended family,³⁶⁵ to

blurred, or bruised or broken [emphases original].” Abraham Lincoln, *Title of Speech Needed* (Date of Speech Needed), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 168-69 (Roy P. Basler, ed., 1953), available at <http://quod.lib.umich.edu/cgi/t/text/text-idx?c=lincoln;cc=lincoln;view=toc;idno=lincoln4> (follow “*Title of Link*” hyperlink).

³⁵⁸ 316 U.S. 535, 537 (1942) (striking down Oklahoma law providing for the sterilization of “habitual criminals”).

³⁵⁹ *See id.* at 541 (Douglas, J.) (“There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.”); *supra* note 162 and accompanying text.

³⁶⁰ *Lawrence*, 539 U.S. at 574 (2003) (Kennedy, J.).

³⁶¹ *See id.* at 588 (Scalia, J., dissenting).

³⁶² *See id.* at 598 (Scalia, J., dissenting) (asserting that a state law criminalizing sodomy is constitutional, and stating, “. . . an ‘emerging awareness’ is by definition not ‘deeply rooted in this Nation’s history and tradition[s],’ as we have said ‘fundamental right’ status requires.”).

³⁶³ *See id.* at 605-06 (Thomas, J., dissenting). Justice Thomas joined Justice Scalia’s dissenting opinion in *Lawrence*, and quoted Justice Potter Stewart’s dissenting opinion in *Griswold*, stating that the state law forbidding the use of contraceptives was “uncommonly silly” but that the Constitution does not encompass a “general right to privacy.” *Id.* (Thomas, J., dissenting) (quoting *Griswold*, 381 U.S. at 527, 530 (Stewart, J., dissenting)). *But see Roe*, 410 U.S. 113, 167-71 (1973) (Stewart, J., concurring) (accepting *Griswold*’s recognition of the right to privacy as embodied in the word “liberty” of the 14th Amendment). Justice Stewart changed his mind about the “right to privacy,” and in *Roe* he stated that “[t]he Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights.” *Id.* at 168 (Stewart, J., concurring).

³⁶⁴ *See, e.g., Loving*, 388 U.S. 1 (1967) (Warren, C.J.) (“Marriage is one of the ‘basic civil rights of man. . . .’” (quoting *Skinner*, 316 U.S. at 541 (Douglas, J.)).

procreate,³⁶⁶ to use contraception,³⁶⁷ to terminate a pregnancy prior to viability,³⁶⁸ to raise children,³⁶⁹ to enter homosexual relationships,³⁷⁰ and to refuse lifesaving medical treatment.³⁷¹ None of these rights is absolute – each of them is subject to qualification³⁷² – but following the principles established by the Roosevelt Court, the Supreme Court has ruled that the government carries the burden of proving that any restrictions of these rights is justified.³⁷³ The reason that the Supreme Court has recognized these rights is not primarily because all of these rights have some grounding in “tradition,”³⁷⁴ but rather

³⁶⁵ See *Moore v. City of E. Cleveland, Ohio* 431 U.S. 494 (1977) (striking down municipal “single-family” residential zoning ordinance insofar as it narrowly defined a “single family” to exclude members of an extended family).

³⁶⁶ See *Skinner*, 316 U.S. 535 (1942) (striking down state law providing for the sterilization of “habitual criminals.”).

³⁶⁷ See *Griswold*, 381 U.S. 479 (1965) (striking down state law forbidding use of contraceptives, as applied to married couples); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down state law prohibiting the distribution of contraceptive devices to single persons).

³⁶⁸ See *Roe*, 410 U.S. 113 (1973) (striking down state law prohibiting abortion except to save the life of the mother, and recognizing woman’s constitutional right to terminate a pregnancy up to the point of fetal viability); *Casey*, 505 U.S. 833 (1992) (reaffirming *Roe*).

³⁶⁹ See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down state law prohibiting the teaching of foreign languages in the public schools before the 8th grade); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (striking down state law prohibiting children from attending private or parochial schools between the ages of 8 and 16); *Troxel v. Granville*, 530 U.S. 57 (2000) (striking down state court visitation order granting paternal grandparents extensive visitation rights over objection of mother, in the absence of a showing that mother was unfit).

³⁷⁰ See *Lawrence*, 539 U.S. 538 (2003) (striking down state law prohibiting persons from engaging in sodomy).

³⁷¹ See *Cruzan*, 497 U.S. 261, 278 (1990) (Rehnquist, C.J.) (“The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.”).

³⁷² See, e.g., *Griswold*, 381 U.S. at 497-98 (1965) (Goldberg, J., concurring) (“Although the Connecticut birth-control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any ‘subordinating (state) interest which is compelling’ or that it is ‘necessary . . . to the accomplishment of a permissible state policy.’”); *Casey*, 505 U.S. at 874 (1992) (O’Connor, J., Kennedy, J., and Souter, J.) (“Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”); *Cruzan*, 497 U.S. at 279 (1990) (Rehnquist, C.J.) (upholding Missouri law requiring proof of clear and convincing evidence of patient’s desire to reject lifesaving nutrition and hydration, and stating that “determining that a person has a ‘liberty interest’ under the Due Process Clause does not end the inquiry; ‘whether respondent’s constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.’” (citing *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) and *Mills v. Rogers*, 457 U.S. 291, 299 (1982)).

³⁷³ See, e.g., *Griswold*, 381 U.S. at 497-98 (Goldberg, J., concurring) (applying strict scrutiny test because state law infringed a fundamental right); *Carolene Products*, 304 U.S. at 153 n.4 (dictum) (Stone, J.) (opining that laws which infringe upon constitutional freedoms should be subjected to “more searching judicial inquiry.”).

³⁷⁴ See *Lawrence*, 539 U.S. at 577-78 (Kennedy, J.) (“Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (Stevens, J., dissenting)).

because all of these rights represent “intimate and personal choices” that must be left to the individual.³⁷⁵

If Justice Scalia had invoked the true American tradition of “liberty;” if he had acknowledged that in this frontier Nation the government did not traditionally intrude on people’s private lives; if he were faithful to the beliefs of the framers who were “Sons of Liberty” and who, above all, were *not* beholden to tradition, then I could not object to his use of “tradition” as the principal means of interpreting the Constitution. However, in my opinion, Justice Scalia has confused the American tradition of liberty with specific *religious* traditions, such as religious injunctions against abortion and homosexuality. Justice Scalia has taken an oath to preserve, protect and defend the Constitution of the United States. There is room in this sacred oath for only one “higher law.”

Freedom of Speech

In the arena of freedom of expression, Justice Scalia has courageously voted to protect the right of dissenters to express views that society disapproves of. With Justice Thomas, however, it is a different story.

In the last two decades, the two most important cases decided by the Court on freedom of expression have been *Texas v. Johnson*³⁷⁶ (the flag-burning case) and *Virginia v. Black*³⁷⁷ (the cross-burning case). In these cases the Court ruled that statutes prohibiting flag burning and cross burning were unconstitutional,³⁷⁸ but for different reasons.

In *Texas v. Johnson*, a majority of the Supreme Court, including Justice Scalia, struck down a state statute that prohibited desecration of the American flag because the law constituted a viewpoint based restriction on people’s right to freedom of expression³⁷⁹ in violation of the principle established in *West Virginia State Board of Education v. Barnette*.³⁸⁰

³⁷⁵ See *id.* at 574 (Kennedy, J.) (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” (quoting *Casey*, 505 U.S. at 521 (O’Connor, Kennedy, & Souter, JJ.)).

³⁷⁶ 491 U.S. 397 (1989) (striking down Texas law which prohibited desecration of the American flag).

³⁷⁷ 538 U.S. 343 (2003) (upholding Virginia law which prohibited burning a cross with the intent to intimidate someone, but striking down provision of law that made the act of cross-burning “prima facie evidence” of intent to intimidate).

³⁷⁸ See *Johnson*, 491 U.S. at 399 and *Black*, 538 U.S. at 347-48.

³⁷⁹ See 491 U.S. at 414 (Brennan, J.) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

³⁸⁰ See *id.* at 415 (Brennan, J.) (“In holding in *Barnette* that the Constitution did not leave this course open to the government, Justice Jackson described one of our society’s defining principles in words deserving of their frequent repetition: ‘If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.’” (quoting *Barnette*, 319 U.S. at 642 (Jackson, J.)).

In *Virginia v. Black*³⁸¹ the Court found that a state law prohibiting cross-burning was unconstitutionally overbroad because it prohibited burning crosses as a political statement even in circumstances where there was no intent to threaten others.³⁸² The Court's decision in *Black* is consistent with the Roosevelt Court's decision in *Terminiello*. *Terminiello* stands for the proposition that statutes which are overbroad on their face, in that they unduly infringe upon First Amendment rights, are void and may not be used to prosecute anyone, even people whose actions are not protected by the Constitution.³⁸³

In summary, in *Johnson* the Supreme Court held that people have the right to burn the American flag so long as they are not trying to provoke violence, and in *Black* the Court ruled that people have the right to burn a cross so long as they are not trying to intimidate anyone.³⁸⁴ Justice Thomas was not on the Court when *Texas v. Johnson* was decided, but he dissented in *Black*,³⁸⁵ and his opinion displays a profound disagreement with the First Amendment principles established by the Roosevelt Court. In *Black*, Justice Thomas articulated a view interpreting the meaning of the First Amendment that is diametrically opposed to the principle that Justice Jackson had expressed in *Barnette*.³⁸⁶ Justice Thomas commenced his *Black* dissent with this observation:

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, see *Texas v. Johnson* . . . (Rehnquist, C.J., dissenting) (describing the unique position of the American flag in our Nation's 200 years of history), and the profane. I believe that cross burning is the paradigmatic example of the latter.³⁸⁷

In my opinion, Justice Thomas' use of a religious metaphor in his dissenting opinion in *Black* is not a coincidence. Like Justice Scalia's approach to resolving Substantive Due Process questions, Justice Thomas' approach to First Amendment problems is essentially religious in nature. For Justice Thomas, the leading principle that seems to guide his decision in a "symbolic speech" case is whether the symbol that is being used is "sacred" or "profane." He appears to believe that the government may not only punish people for desecrating sacred objects and displaying profane objects, but that the government also has the power to define what is "sacred" and what is "profane."

³⁸¹ 538 U.S. at 347-48 (2003) (upholding statute prohibiting burning a cross for the purpose of intimidation, but striking down a provision making the burning of a cross *prima facie* evidence of intent to intimidate).

³⁸² *Id.* at 365 (O'Connor, J.) ("The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The *prima facie* evidence provision in this statute blurs the line between these two meanings of a burning cross.").

³⁸³ *See supra* notes 212-217 and accompanying text.

³⁸⁴ *See supra* notes 376-382 and accompanying text.

³⁸⁵ 538 U.S. at 388-400 (Thomas, J., dissenting).

³⁸⁶ *See id.*

³⁸⁷ *Id.* at 388 (Thomas, J., dissenting).

In vivid contrast to Justice Thomas’ position is Justice Jackson’s interpretation of the Constitution set forth in the “flag salute” case, *West Virginia Board of Education v. Barnette*:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.³⁸⁸

Justice Thomas’ position on freedom of expression is also inconsistent with the views of Justices Oliver Wendell Holmes and Louis Brandeis. Justice Holmes believed that America is a marketplace of ideas,³⁸⁹ while Justice Brandeis reminded us that “[t]hose who won our independence by revolution were not cowards,”³⁹⁰ and that they were not afraid to allow the expression of dissenting views.³⁹¹

Justice Thomas considers the American flag to be a “sacred” object and the burning cross to be a “profane” one,³⁹² and from these assumptions he concludes that government may employ the criminal law to protect the one and to ban the other.³⁹³ In light of Justice Thomas’ premises and conclusions, it would seem that the Constitution would also allow the government to prosecute people who express ideas that our society deems to be “profane” and that it could also prosecute people for refusing to echo beliefs that our society deems to be “sacred.” Justice Thomas’ narrow interpretation of our First Amendment right to freedom of expression is contrary to the Holmes-Brandeis paradigm

³⁸⁸ 319 U.S. at 642 (Jackson, J.).

³⁸⁹ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

³⁹⁰ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J.) (“Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, selfreliant [sic] men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.”).

³⁹¹ See *id.*

³⁹² See *Black*, 538 U.S. at 388.

³⁹³ See *id.*

of freedom of speech that has held sway since the time of the Roosevelt Court.³⁹⁴ Justice Thomas’ understanding of the First Amendment deserves to remain a minority view.

Freedom of Religion

The views of Justice Scalia and Justice Thomas on freedom of religion are fundamentally at odds with the principles that were established by the Roosevelt Court in three respects. Justice Scalia and Justice Thomas reject the neutrality principle;³⁹⁵ they deny that the Establishment Clause is effective against the States;³⁹⁶ and they offer little protection to the Free Exercise of Religion.³⁹⁷

The neutrality principle is the idea that government may neither help nor may it hinder religion; instead it must act in a neutral fashion towards religion.³⁹⁸ The Supreme Court adopted the neutrality principle as a postulate of American constitutional law in 1947 in *Everson v. Board of Education*,³⁹⁹ and for sixty years this principle has been the starting point for analysis under both the Establishment Clause and the Free Exercise Clause.

Justice Antonin Scalia has belittled and mocked both this precedent and the justices who issued it. In his dissenting opinion in *McCreary County v. ACLU*, he characterized the neutrality principle that was articulated in *Everson* as being based upon the “unsubstantiated say-so” and “thoroughly discredited say-so” of the Roosevelt Court,⁴⁰⁰ and he concludes, “how can the Court possibly assert that “the First Amendment

³⁹⁴ Justice Thomas’ opinion in *Black* radically departs from accepted First Amendment doctrine in two other fundamental respects as well. He contends that the burning of a cross is not “expression” but rather is “conduct.” This contradicts the line of precedent establishing the principle that symbolic speech is constitutionally protected. *See Johnson*, 491 U.S. at 404-406 (reviewing case law on expressive conduct and finding that burning the American flag qualifies as expression which is subject to First Amendment protection.). Justice Thomas’ dissenting opinion also suggests that because knowledge of the victim’s age is not an element of a statutory rape case, that a person’s intent should not be relevant in First Amendment case. This ignores the fundamental principle making the speaker’s intent a central element of a First Amendment claim. *See Scierter, Causation, and Harm, supra* note 201, at 183-85 (critiquing this aspect of Justice Thomas’ dissenting opinion in *Black*).

³⁹⁵ *See supra* notes 394-396 and *infra* 398-409 and accompanying text.

³⁹⁶ *See infra* notes 410-426 and accompanying text.

³⁹⁷ *See infra* notes 427-434 and accompanying text.

³⁹⁸ *See Lemon*, 403 U.S. at 612 (Burger, C.J.) (stating that under the First Amendment the “principal or primary effect [of a law] must be one that neither advances nor inhibits religion. . . .”); *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring) (stating that the Establishment Clause prohibits “government endorsement or disapproval of religion.”); *McCreary County v. ACLU*, 545 U.S. at 881-82 (O’Connor, J., concurring). (“The First Amendment expresses our Nation’s fundamental commitment to religious liberty by means of two provisions—one protecting the free exercise of religion, the other barring establishment of religion. They were written by the descendants of people who had come to this land precisely so that they could practice their religion freely. Together with the other First Amendment guarantees – of free speech, a free press, and the rights to assemble and petition – the Religion Clauses were designed to safeguard the freedom of conscience and belief that those immigrants had sought. They embody an idea that was once considered radical: Free people are entitled to free and diverse thoughts, which government ought neither to constrain nor to direct.”).

³⁹⁹ *See* notes 231-236 *supra* and accompanying text.

⁴⁰⁰ 545 U.S. at 889-90 (Scalia, J., dissenting).

mandates governmental neutrality between ... religion and nonreligion.”⁴⁰¹ He also quoted one commentator for the proposition that the Roosevelt Court had been “sold ... a bill of goods.”⁴⁰² Justice Scalia suggests that so long as the government endorses *all* religions, and not a particular religion, that this does not violate the Establishment Clause, because endorsing religion in general is not the same as establishing one particular religion as an official church.⁴⁰³

The neutrality principle is squarely grounded in the text of the Constitution and it is deeply rooted in the clear and repeatedly expressed intent of the founders of this Nation. The Preamble to the Constitution does not invoke God or God’s blessing.⁴⁰⁴ Instead, the sovereign of this Nation is identified to be “We, the people of the United States.”⁴⁰⁵ Our Nation was not ordained by God nor does our government arise from religious obligation. Instead our government was erected upon the precept that “governments are instituted among men, deriving their just powers from the consent of the governed.”⁴⁰⁶ The only reference to religion that is contained in the original Constitution is the requirement that “no religious test shall ever be required as a qualification to any office or public trust under the United States.”⁴⁰⁷

In America, the idea that the *people* are sovereign may be traced back to the earliest colonial period. Roger Williams, who was the founder of the colony of Rhode Island, battled the theocracy that ran the Massachusetts Bay Colony.⁴⁰⁸ One of his principal arguments against the religious leaders of the Massachusetts colony was that their authority to govern the colony did *not* stem from God, but from the people themselves.⁴⁰⁹ In 1644, Williams wrote:

[T]he sovereign, original, and foundation of civil power lies in the *people*.
... This is clear not only in reason but in the experience of all

⁴⁰¹ *Id.* at 889 (Scalia, J., dissenting).

⁴⁰² *Id.* at 890 n.2 (Scalia, J., dissenting) (“The fountainhead of this jurisprudence, *Everson v. Board of Ed. of Ewing*, based its dictum that ‘[n]either a state nor the Federal Government . . . can pass laws which . . . aid all religions,’ on a review of historical evidence that focused on the debate leading up to the passage of the Virginia Bill for Religious Liberty. A prominent commentator of the time remarked (after a thorough review of the evidence himself) that it appeared the Court had been “sold . . . a bill of goods.” (citing Edward S. Corwin, *The Supreme Court as National School Board*, 14 *Law & Contemp. Prob.* 3, 16 (1949)).

⁴⁰³ *See id.* at 893 (Scalia, J., dissenting) (referring to the “demonstrably false principle that the government cannot favor religion over irreligion. . .”).

⁴⁰⁴ U.S. CONST. pmbl.

⁴⁰⁵ *Id.*

⁴⁰⁶ DECLARATION OF INDEPENDENCE.

⁴⁰⁷ U.S. CONST. art. VI, cl. 3.

⁴⁰⁸ *See* JAMES ERNST, ROGER WILLIAMS, NEW ENGLAND FIREBRAND 61-137 (1932) (describing Williams’ conflict with the leaders of the Massachusetts Bay Colony up to the time of his trial and banishment).

⁴⁰⁹ *See* PERRY MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO AMERICAN TRADITION 49 (1953) (quoting a contemporary criticizing Williams on the ground that his proposals “would subject king and parliaments ‘to the free will of the promiscuous multitude.’”); *see generally* ERNST, *supra* note 413, at 199 (describing Williams’ Initial Deed granting his associates “liberty and equality in land and government.”); *id.* at 264 (describing the Rhode Island colony as “the first democratic commonwealth in modern times.”).

commonwealths where the people are not deprived of their natural freedom by the power of tyrants.⁴¹⁰

The axiom that the powers of the government are derived, not from God, but from the consent of the people, is a fundamental precept of democracy, and it is the basis for the principle of the Separation of Church and State.⁴¹¹ It is, therefore, no coincidence that Williams is the author of the metaphor of “the wall of separation” between church and state.⁴¹² In the same year that he declared “the people” to be sovereign, Williams wrote: [w]hen they [the Church] have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, . . . and made His Garden a wilderness as it is this day.⁴¹³

Thomas Jefferson and James Madison both considered the principle of Separation of Church and State to be of fundamental importance. In 1785, two years before the Constitution was written, Madison fought the established church in Virginia over public funding for religious education,⁴¹⁴ and in 1786 he succeeded in persuading the Virginia Legislature to adopt Jefferson’s Act Establishing Religious Freedom.⁴¹⁵ Both Madison and Jefferson expressed commitment to the principle of Separation of Church and State, and they each considered this principle to have been enshrined in the Constitution by the First Amendment.⁴¹⁶

⁴¹⁰ MILLER, *supra* note 414, at 147 (quoting Roger Williams, *The Bloudy Tenent, of Persecution, for cause of Conscience, discussed, in A Conference betweene Truth and Peace* (1644)).

⁴¹¹ See Iranian Government Constitution, English Text, <http://www.iranonline.com/iran/iran-info/Government/constitution-1.html> (setting forth the General Principles of the Iranian Constitution, Article 2 of which states that “The Islamic Republic is a system based on belief in (1) the One God (as stated in the phrase ‘There is no god except Allah’), His exclusive sovereignty and the right to legislate, and the necessity of submission to His commands . . .”).

⁴¹² See Steven G. Gey, *Vestiges of the Establishment Clause*, 5 First Amend. L. Rev. 1, 14, 52 (2006) (noting that Roger Williams coined the phrase “wall of separation” between church and state).

⁴¹³ *Id.* at 52 n.173 (citing Roger Williams, *Mr. Cottons Letter Lately Printed, Examined and Answered* (1644), reprinted in 1 *The Complete Writings of Roger Williams* 313, 392 (Russel & Russel, Inc. 1963)).

⁴¹⁴ See James Madison, *A Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, in FOUNDING AMERICA, *supra* note 356, at 294-301 (“[W]e hold it for a fundamental and undeniable truth, ‘that religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.’ The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”).

⁴¹⁵ See Thomas Jefferson, *Virginia Statute for Religious Freedom*, January 16, 1786, in FOUNDING AMERICA, *supra* note 356, at 301-303 (“Almighty God hath created the mind free. All attempts to influence it by temporal punishments or burdens are a departure from the plan of the Holy Author of our religion. No man shall be compelled to frequent or support any religious worship or ministry or shall otherwise suffer on account of his religious opinions or belief, but all men shall be free to profess and by argument to maintain, their opinions in matters of religion.”)

⁴¹⁶ See James Madison, *Letter to Robert Walsh*, March 2, 1819, in 8 THE WRITINGS OF JAMES MADISON 1808-1819, 432 (Gaillard Hunt, ed. 1908), (advocating “the total separation of the church from the state.”); Arlen Specter, *Defending the Wall: Maintaining Church/State Separation in America*, 18 Harv. J.L. & Pub. Pol’y 575, 580 (1995) (quoting an undated essay by James Madison as stating, “strongly guarded . . . [is the] separation of religion and government in the Constitution of the United States.”); James Madison, *Letter to Edward Livingston*, July 10, 1822, in 9 THE WRITINGS OF JAMES MADISON 1819-1836, 98, 102 (Gaillard Hunt, ed., 1910) (disapproving of Congress’ appointment of chaplains, and stating, “a perfect separation between the ecclesiastical and civil matters is of importance.”); James Madison, *Letter to Rev.*

Furthermore, the plain language of the Establishment Clause is inconsistent with the position taken by Justice Scalia that the Constitution permits the government to endorse religion. The First Amendment does not prohibit “the establishment of a religion.”⁴¹⁷ Rather, it prohibits the “establishment of *religion*.”⁴¹⁸ In a very careful and thorough review of the history of the drafting of the First Amendment, Justice Souter has demonstrated that this language was deliberately chosen, and that the framers rejected proposed versions of the Establishment Clause that would have merely prohibited the government from preferring one religion over another.⁴¹⁹

Justice Thomas not only agrees with Justice Scalia that the neutrality principle should be overruled, but he also takes the position, contrary to the decisions of the Roosevelt Court in *Cantwell* and *Everson*, that the Establishment Clause is not applicable to the States.⁴²⁰ His primary argument is that the framers of the Bill of Rights did not view the Establishment Clause as protecting the right of the individual to freedom of religion, but rather that they adopted the Establishment Clause to protect the established churches of the States from federal interference.⁴²¹

Justice Thomas’ contention that the aspect of freedom of religion that is protected by the Establishment Clause does not constitute a “fundamental right” is rebutted by the

Jasper Adams, 1832, in 9 THE WRITINGS OF JAMES MADISON 1819-1836, 487 (Gaillard Hunt, ed., 1910) (“I must admit moreover that it may not be easy, in every possible case, to trace the line of separation between the rights of religion and the civil authority with such distinctness as to avoid collisions and doubts on unessential points. The tendency to a usurpation on one side or the other or to a corrupting coalition or alliance between them will be best guarded against by entire abstinence of the government from interference in any way whatever, beyond the necessity of preserving public order and protecting each sect against trespasses on its legal rights by others.”); Thomas Jefferson, *Letter to Danbury Baptist Association*, January 1, 1802, at Library of Congress, The Thomas Jefferson Papers, http://memory.loc.gov/cgi-bin/query/P?mtj:2:/temp/~ammem_uvf8::. Jefferson explained: “[b]elieving with you that religion is a matter which lies solely between man & his god, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between church and state. . . . Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.”

⁴¹⁷ U.S. CONST. amend. I [emphasis added].

⁴¹⁸ *Id.* [emphasis added].

⁴¹⁹ See *Lee v. Weisman*, 505 U.S. 577, 612-16 (1992) (Souter, J., concurring) (describing in detail the drafting history of the Establishment Clause); *id.* at 616 (Souter, J., concurring) (concluding that “history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some.”).

⁴²⁰ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment) (“I accept that the Free Exercise Clause, which clearly protects an individual right, applies against the States through the Fourteenth Amendment. But the Establishment Clause is another matter. The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause.”).

⁴²¹ See *id.* at 49-51 (analyzing the text of the Establishment Clause and citing the existence of established churches in some states at the time the Establishment Clause was adopted).

obvious structure of the Constitution and the overwhelming historical evidence regarding the intent of the framers. The Establishment Clause is not contained in Article I, Section 9 of the Constitution,⁴²² which details a number of limitations on the powers of the federal government, but rather it is the first of our liberties that is enumerated in the Bill of Rights.⁴²³ The Supreme Court has without exception construed the Establishment Clause as one of the fundamental rights of American citizens.⁴²⁴ Furthermore, it is abundantly clear that Roger Williams, James Madison, and Thomas Jefferson considered the principles of the Establishment Clause to be a fundamental human right.⁴²⁵ The framers of the Constitution regarded the official establishment of religion as a great social wrong, and they prohibited the federal government from engaging in the practice because it amounts to an infringement upon freedom of religion.⁴²⁶

⁴²² U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

⁴²³ U.S. CONST. amend. I.

⁴²⁴ See *Schempp*, 374 U.S. at 310 (Stewart, J., dissenting) (“I accept . . . the proposition that the Fourteenth Amendment has somehow absorbed the Establishment Clause, although it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy.”); *id.* at 254-58 (Brennan, J., concurring) (rebutting contention that the Establishment Clause was not incorporated into the 14th Amendment).

⁴²⁵ See *supra* notes 403-407 and accompanying text; *Schempp*, 374 U.S. at 256 (Brennan, J., concurring) (“It has also been suggested that the ‘liberty’ guaranteed by the Fourteenth Amendment logically cannot absorb the Establishment Clause because that clause is not one of the provisions of the Bill of Rights which in terms protects a ‘freedom’ of the individual.’ See EDWARD S. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE (1951), 113-16 (“The fallacy in this contention, I think, is that it underestimates the role of the Establishment Clause as a coguarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone. The Free Exercise Clause ‘was not to be the full extent of the Amendment’s guarantee of freedom from governmental intrusion in matters of faith.’” (quoting *McGowan v. Maryland*, 366 U.S. 420, 464 (1961) (Frankfurter, J.)); see also *McGowan*, 366 U.S. at 464-65 (Frankfurter, J., concurring) (“In assuring the free exercise of religion, the Framers of the First Amendment were sensitive to the then recent history of those persecutions and impositions of civil disability with which sectarian majorities in virtually all of the Colonies had visited deviation in the matter of conscience. This protection of unpopular creeds, however, was not to be the full extent of the Amendment’s guarantee of freedom from governmental intrusion in matters of faith. The battle in Virginia, hardly for years won, where James Madison had led the forces of disestablishment in successful opposition to Patrick Henry’s proposed Assessment Bill levying a general tax for the support of Christian teachers, was a vital and compelling memory in 1789. The lesson of that battle, in the words of Jefferson’s Act for Establishing Religious Freedom, whose passage was its verbal embodiment, was ‘that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporal rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind.’ What Virginia had long practiced, and what Madison, Jefferson and others fought to end, was the extension of civil government’s support to religion in a manner which made the two in some degree interdependent, and thus threatened the freedom of each. The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation.”).

⁴²⁶ See U.S. CONST. pmb.; *McCreary County*, 545 U.S. at 889-90, 890 n.2, 893; *McGowan*, 366 U.S. at 464-65; *Schempp*, 374 U.S. at 256; CORWIN, *supra* note 431.

Another fundamental error that Justice Thomas makes in this regard is that, in interpreting the 14th Amendment, the relevant timeframe is not 1787-1791, but rather 1866-1868.⁴²⁷ The Congress drafted and adopted the 14th Amendment in 1866, and the people ratified it in 1868, amending the original Constitution.⁴²⁸

The available evidence from that period sheds little light upon the intent of framers of the Fourteenth Amendment specifically regarding the Establishment Clause, for the simple reason that our society was, at that time, grappling with a different set of problems. The States which had lately been in rebellion were violating the fundamental rights of black citizens in a number of respects, and the separation of church and state was not an immediate concern.⁴²⁹ Senator Jacob Howard, introducing the Fourteenth Amendment to the floor of Congress, specifically stated that the Amendment would protect:

the personal rights guarantied and secured by the first eight amendments to the Constitution, such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the government for a redress of grievances, a right pertaining to each and all the people; the right to keep and bear arms; the right to be exempt from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.⁴³⁰

Senator Howard does not mention the Establishment Clause in the foregoing passage, but this does not seem to be a deliberate omission. Neither does he mention the right to the free exercise of religion,⁴³¹ the right to remain silent,⁴³² the right to an attorney,⁴³³ the

⁴²⁷ See Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 Akron L. Rev. 589, 591 (2003) (characterizing the life and words of Congressman John Bingham as relevant to the “original intent, meaning, or understanding of the Fourteenth Amendment.”).

⁴²⁸ See *id.* at 589 (noting that the Fourteenth Amendment was “first proposed in 1866 and declared ratified in 1868.”).

⁴²⁹ See *Schempp*, 374 U.S. at 255 (Brennan, J., concurring) (“[T]he last of the formal state establishments was dissolved more than three decades before the Fourteenth Amendment was ratified, and thus the problem of protecting official state churches from federal encroachments could hardly have been any concern of those who framed the post-Civil War Amendments.”).

⁴³⁰ Cong. Globe, 39th Cong., 1st Sess., 2765 (May 23, 1866).

⁴³¹ See U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”).

⁴³² See U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

⁴³³ See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”)

right to compel the production of evidence,⁴³⁴ the right to confront adverse witnesses,⁴³⁵ and the right to a speedy and public trial,⁴³⁶ all of which are now considered fundamental.⁴³⁷

Like Senator Howard, Representative John Bingham, the principal author of the 14th Amendment,⁴³⁸ specifically stated that the Amendment incorporates the first eight amendments of the Constitution, and to make his point crystal clear he read the provisions of the first eight amendments, including the Establishment Clause, into the legislative record.⁴³⁹ Justice Thomas has failed to cite any evidence from the history of the adoption of the 14th Amendment in support of the proposition that the framers did *not* intend to incorporate the Establishment Clause.

Justice Scalia and Justice Thomas have mounted yet another attack upon freedom of religion, and in this third respect they have been successful. In *Employment Division, Department of Human Resources of Oregon v. Smith*, Justice Scalia, with the supporting votes of Justice Thomas and three other justices, dramatically narrowed the scope of the Free Exercise Clause.⁴⁴⁰ In an opinion authored by Justice Scalia, the Supreme Court held in *Smith* that “laws of general application” do not violate the Free Exercise Clause of the First Amendment, even though they prohibit behavior that is ordained by a particular religion.⁴⁴¹ The Court applied this principle in the *Smith* case to rule that the State of

⁴³⁴ See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .”).

⁴³⁵ See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

⁴³⁶ See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

⁴³⁷ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating 6th Amendment right to counsel into the Due Process Clause of 14th Amendment); *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating 5th Amendment right to be free of compelled self-incrimination into the Due Process Clause of the 14th Amendment); *Pointer v. Texas*, 380 U.S. 400 (1965) (incorporating the 6th Amendment right to confrontation of opposing witnesses into the Due Process Clause of the 14th Amendment); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (incorporating 6th Amendment right to a speedy and public trial into the Due Process Clause of the 14th Amendment); *Washington v. Texas*, 388 U.S. 14 (1967) (incorporating 6th Amendment right to compulsory process for obtaining witnesses into the Due Process Clause of the 14th Amendment); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating 1st Amendment right to free exercise of religion into the Due Process Clause of the 14th Amendment).

⁴³⁸ See *On Misreading John Bingham, supra* note 75, at 58 (referring to Bingham as “the principal author of Section One of the Fourteenth Amendment”).

⁴³⁹ See Cong. Globe, 42nd Cong., 1st Sess, Appendix 84 (March 31, 1871). (“Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.”).

⁴⁴⁰ 494 U.S. 872 (1990) (upholding administrative determination that drug counselors who ingested peyote as a sacrament of the Native American Church had been terminated for “misconduct,” thus disqualifying them for unemployment compensation).

⁴⁴¹ See *id.* at 886 (Scalia, J.) (“The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.’” (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988)).

Oregon could constitutionally apply a law prohibiting the possession or use of peyote to a person who ingested peyote as part of a ritual of the Native American Church.⁴⁴² Presumably, the *Smith* case means that it is equally constitutional for the government to adopt and enforce laws of general application that force people to engage in other behavior that is contrary to their religious principles, such as engaging in military combat.⁴⁴³

At first glance, it might seem ironical that justices who utilize a “religious” approach to interpreting the Constitution⁴⁴⁴ would give short shrift to freedom of religion. However, the narrow interpretation of the Establishment Clause and the Free Exercise Clause that Justice Scalia and Justice Thomas have adopted is perfectly consistent with the fact that their interpretations of other provisions of the Constitution coincide with longstanding religious traditions. The positions that they have taken in their interpretation of the Establishment Clause and the Free Exercise Clause allow the government to discriminate against *minority* religions.⁴⁴⁵ In the view of these Justices, the government is free to endorse religion, and the government is free to adopt laws of general application that interfere with the exercise of specific religions, because religious groups are free to participate in the political process and to seek to achieve legal acceptance of their religious views.⁴⁴⁶ Of course, it would be theoretically possible for the legislature to adopt a law that endorses a *minority* religion, or that persecutes a religious sect that the *majority* of the people belong to. However, as a practical matter

⁴⁴² See *id.* at 890 (Scalia, J.) (“Because respondents’ ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug.”).

⁴⁴³ See Brian A. Freeman, *Expiating the Sins of Yoder and Smith: Toward a Unified Theory of First Amendment Exceptions from Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 35 (2001) (“The Supreme Court has never held that the Constitution requires an exemption from compulsory military service to those who are opposed to participation in war. Yet every conscription statute ever enacted by Congress has contained some type of exemption.”). See also Paul M. Landskroener, *Not the Smallest Grain of Incense: Free Exercise and Conscientious Objection to Draft Registration*, 25 VAL. U.L. REV. 455, 475-81 (1991) (contending that the Free Exercise Clause protects conscientious objectors).

⁴⁴⁴ See *supra* text following note 375; notes 385-390 and accompanying text.

⁴⁴⁵ See Nadine Strossen, *Religion and Politics: A Reply to Justice Scalia*, 24 FORDHAM URB. L.J. 427, 433 (1997) (responding to Justice Scalia, and stating that persons who adhere to a narrow interpretation of the Establishment Clause possess “insufficient consciousness of the adverse impact that such narrow views have on Jews and other religious minorities.”); David Goldberger, *Capitol Square Review and Advisory Board v. Pinnette: Beware of Justice Scalia’s Per Se Rule*, 6 GEO. MASON L. REV. 1, 22 (1997) (criticizing Justice Scalia’s opinion in *Smith*, stating that “[a]lthough the political majority could be expected to ignore the interests and needs of religious minorities, Scalia was unmoved.”); Renee Skinner, *Note: The Church of Lukui Babalu Aye, Inc., v. City of Hialeah: Still Sacrificing Free Exercise*, 46 BAYLOR L. REV. 259, 276 (1994) (“[T]he democratic process leaves religious minorities woefully unprotected despite Scalia’s assertions to the contrary.”).

⁴⁴⁶ See *Smith*, 494 U.S. at 890 (Scalia, J.) (“[L]eaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”); Kathleen M. Sullivan, *Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 449, 466 (2000) (“Justice Scalia’s approach to the Religion Clauses – favoring weak enforcement of free exercise exemptions and establishment prohibitions alike – would treat religion as a garden-variety interest group, participating in the political process just like any other lobby.”).

this will never occur; it is highly unlikely that a county government would exercise its authority to install Hindu statuary around a courthouse, or that a state legislature would prohibit Christian churches from serving wine at communion. Constitutional protection for freedom of religion, as a practical matter, protects religious minorities, and when this protection vanishes, it is the religious minorities who are affected. The Roosevelt Court was aware of this danger and was determined to protect against it; Justice Scalia and Justice Thomas are content to consign religious minorities to the majoritarian political process.⁴⁴⁷

Commerce Clause

Justice Clarence Thomas believes that the Supreme Court took a “wrong turn” in 1937 when it developed the Affection Doctrine, thus expanding Congress’ power under the Commerce Clause to regulate the nation’s economy.⁴⁴⁸ He also believes that Court ought to cut back the scope of Congress’ power to enact legislation affecting commerce.⁴⁴⁹ If the Court were to reverse direction and repeal the Affection Doctrine,

⁴⁴⁷ See Philip Spare, *Comment: Free Exercise of Religion: A New Translation*, 96 DICK. L. REV. 705, 722-23 (1992) (comparing the views of Justice Robert Jackson and Justice Antonin Scalia on the duty to protect religious minorities from the political process). Mr. Spare first quoted the words of Justice Jackson: “The very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of the majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.” *Id.* (quoting *Barnette*, 319 U.S. at 638). Spare concluded, “Justice Jackson’s words stand in sharp contrast to Justice Scalia’s assertion that placing religious minorities at ‘a relative disadvantage . . . [is an] unavoidable consequence of democratic government.’” *Id.* at 723 (quoting *Smith*, 494 U.S. at 890 (Scalia, J.)).

⁴⁴⁸ See *United States v. Lopez*, 514 U.S. 549, 599 (1995) (Thomas, J., concurring). (“As recently as 1936, the Court continued to insist that the Commerce Clause did not reach the wholly internal business of the States. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 308 (1936) (Congress may not regulate mine labor because “[t]he relation of employer and employee is a local relation”); see also *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 543-50 (1935) (holding that Congress may not regulate intrastate sales of sick chickens or the labor of employees involved in intrastate poultry sales). The Federal Government simply could not reach such subjects regardless of their effects on interstate commerce. These cases all establish a simple point: From the time of the ratification of the Constitution to the mid-1930’s, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the Commerce Clause. Moreover, there was no question that activities wholly separated from business, such as gun possession, were beyond the reach of the commerce power. If anything, the ‘wrong turn’ was the Court’s dramatic departure in the 1930’s from a century and a half of precedent.”).

⁴⁴⁹ See *id.* at 585 (1995) (Thomas, J., concurring) (“In an appropriate case, I believe that we must further reconsider our “substantial effects” test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.”). Justice Thomas and Justice Scalia would also overturn the “dormant commerce clause” doctrine and return to a pre-1937 understanding of the power of the States to regulate interstate commerce. See *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S.Ct. 1786, 1799 (2007) (Thomas, J., concurring in the judgment) (“The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice Because this Court has no policy role in regulating interstate commerce, I would discard the Court’s negative Commerce Clause jurisprudence.”); *id.* at 1798 (Scalia, J., concurring in part) (“[T]he so-called ‘negative’ Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain The historical record provides no grounds for reading the

it would revoke Congress' power to deal with fundamental economic issues such as collective bargaining or environmental protection.⁴⁵⁰ Even federal laws prohibiting child labor would be unconstitutional if the Court were to return to its pre-1937 understanding of the Commerce Clause.⁴⁵¹

Justice Thomas' position on the Commerce Clause is set forth most fully in his concurring opinion in *United States v. Lopez*,⁴⁵² where he argues that the Framers understood "commerce" to be distinct from manufacturing or farming,⁴⁵³ and cites the Court's 1895 decision in *United States v. E.C. Knight Co.*,⁴⁵⁴ which drew the same distinction in the course of striking down a federal antitrust law.⁴⁵⁵ However, Justice Thomas overlooks the fact that the Framers did not foresee the emergence of a highly integrated national economy. The Supreme Court changed course in 1937 because it realized that as commerce among the states expands, Congress' power to regulate "commerce among the several states" also expands.⁴⁵⁶ When labor conditions, environmental conditions, or the safety of products that are produced in one part of our Nation affect people and businesses throughout our Nation, then the regulation of economic matters becomes a matter of national concern.⁴⁵⁷ Justice Thomas in effect

Commerce Clause to be other than what it says – an authorization for Congress to regulate commerce.”) (citations omitted).

⁴⁵⁰ See, e.g., *Jones & Laughlin Steel Corp. v. N.L.R.B.*, 301 U.S. 1 (1937) (adopting the Affectation Doctrine to uphold the National Labor Relations Act against a challenge under the Commerce Clause); *Hodel v. Va. Surface Mining & Reclam. Ass'n, Inc.*, 452 U.S. 264 (1981) (invoking Affectation Doctrine to uphold the federal Surface Mining Control and Reclamation Act against a challenge under the Commerce Clause).

⁴⁵¹ See *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down federal law prohibiting child labor).

⁴⁵² 514 U.S. at 584-602 (1995) (Thomas, J., concurring) (suggesting that the interpretation of the Commerce Clause should be "tempered" in light of the invalidation of a federal law prohibiting the possession of firearms within 1000 feet of schools).

⁴⁵³ See *id.* at 586 (Thomas, J., concurring) ("[T]he term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture.”).

⁴⁵⁴ 156 U.S. 1 (1895) (ruling that Congress lacked authority under the Commerce Clause to enact antitrust law applicable to the manufacture of sugar).

⁴⁵⁵ See *id.* at 14 (drawing distinction between commerce on the one hand and "manufactures . . . , agriculture, horticulture, stock-raising, domestic fisheries, [and] mining" on the other) (citation omitted).

⁴⁵⁶ See *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 152 (1943) (Frankfurter, J.) ("From generation to generation fresh vindication is given to the prophetic wisdom of the framers of the Constitution in casting it in terms so broad that it has adaptable vitality for the drastic changes in our society which they knew to be inevitable, even though they could not foresee them. Thus it has come to be that the transforming consequences resulting from the pervasive industrialization of life find the Commerce Clause appropriate, for instance, for national regulation of an aircraft flight wholly within a single state. Such exertion of power by the national government over what might seem a purely local transaction would, as a matter of abstract law, have been as unimaginable to Marshall as to Jefferson precisely because neither could have foreseen the present conquest of the air by man. But law, whether derived from acts of Congress or the Constitution, is not an abstraction. The Constitution cannot be applied in disregard of the external circumstances in which [sic] men live and move and have their being.”).

⁴⁵⁷ See *id.*; See also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 251 (1964) (Clark, J.) ("[T]he fact that certain kinds of businesses may not in 1875 have been sufficiently involved in interstate commerce to warrant bringing them within the ambit of the commerce power is not necessarily dispositive of the same question today. Our populace had not reached its present mobility, nor were facilities, goods and services circulating as readily in interstate commerce as they are today. Although the principles which we apply today are those first formulated by Chief Justice Marshall in *Gibbons v. Ogden*, the conditions of

advocates a return to what Franklin Roosevelt characterized as “the horse and buggy definition of interstate commerce.”⁴⁵⁸ Justice Thomas would overturn the informed decisions of the Justices of the Roosevelt Court, who had first-hand experience with the social problems of a nationwide economic depression, and who established an unbroken line of precedent upholding the Affection Doctrine stretching back over 70 years.

State Action

In 2001 in *Brentwood Academy v. Tennessee Secondary School Athletic Association*,⁴⁵⁹ the Supreme Court ruled that the action of the Tennessee Secondary School Athletic Association constituted “state action.”⁴⁶⁰ Schools that belonged to the Association were permitted to compete only against other member schools.⁴⁶¹ Virtually all of the public schools in the State belonged to the Association,⁴⁶² and public schools accounted for 84 % of the membership of the Association.⁴⁶³ The Association’s governing boards were comprised of principals, assistant principals, and superintendents from member schools, and these boards met during school hours.⁴⁶⁴ The staff members of the organization were permitted to enroll in the state public employees’ pension program.⁴⁶⁵ Between 1972 and 1996, the State Board of Education, invoking its statutory authority, designated the TSSAA as the organization to regulate interscholastic athletics in the public schools.⁴⁶⁶ In light of these and other facts, the Supreme Court ruled that the decision of the TSSAA prohibiting member schools from exercising “undue influence” in recruiting athletes⁴⁶⁷ was “state action” because the organization was “pervasively entwined” with the state government.⁴⁶⁸

transportation and commerce have changed dramatically, and we must apply those principles to the present state of commerce. The sheer increase in volume of interstate traffic alone would give discriminatory practices which inhibit travel a far larger impact upon the Nation's commerce than such practices had on the economy of another day.”)

⁴⁵⁸ NEW DEAL, *supra* note 17, at 145 (quoting Roosevelt). See HOCKETT, *supra* note 1, at 233 (quoting Justice Jackson as stating that, prior to 1937, the members of the Supreme Court “were not open to conviction that conditions had changed. They were striking down a good deal of legislation on the basis of what conditions were when they were brought up on the frontier.”).

⁴⁵⁹ 531 U.S. 288 (2001) (finding the action of a private nonprofit athletic association to be “state action”).

⁴⁶⁰ See *id.* at 298 (Souter, J.) (“[T]he ‘necessarily fact-bound inquiry’ leads to the conclusion of state action here.” (citation omitted)); *id.* at 302 (Souter, J.) (“The entwinement down from the State Board is therefore unmistakable, just as the entwinement up from the member public schools is overwhelming. Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it.”).

⁴⁶¹ *Id.* at 291.

⁴⁶² *Id.*

⁴⁶³ *Id.*

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at 292.

⁴⁶⁷ See *id.* (Souter, J.) (“The Association's board of control found that Brentwood violated a rule prohibiting ‘undue influence’ in recruiting athletes, when it wrote to incoming students and their parents about spring football practice.”).

⁴⁶⁸ See *id.* at 298 (Souter, J.) (“The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there

Justice Thomas, joined by Justice Scalia, dissented in *Brentwood Academy* and contended that the action of the TSSAA did not constitute state action.⁴⁶⁹ His fundamental error is his contention that by narrowly construing what constitutes “state action” and finding that the conduct of the TSSAA constitutes “private action,” he is thereby protecting “individual freedom.”⁴⁷⁰ To state this argument is to refute it. One might just as well argue that if the Roosevelt Court in *Smith v. Allwright*⁴⁷¹ had found the action of the Democratic Party in refusing to admit blacks was “private action” not subject to constitutional restriction that this would have expanded the scope of “individual freedom” in America, or that if in *Marsh v. Alabama*⁴⁷² the Gulf Shipbuilding Company had been permitted to exclude Jehovah’s Witnesses from the company town of Chickasaw, that this would have expanded the “individual freedom” of Americans. It is undeniable that in the context of those cases the Democratic Party had no constitutional right to discriminate on the basis of race and that the Gulf Shipbuilding Company had no constitutional right to prevent the residents of its town from hearing religious dissenters.⁴⁷³ There may be good reasons not to subject the Democratic Party or the Gulf Shipbuilding Company or the Tennessee Secondary School Athletic Association to the requirements of the Constitution, but the protection of “individual freedom” is not one of them.⁴⁷⁴

The crabbed interpretation of the State Action Doctrine favored by Justice Thomas and Justice Scalia would insulate powerful private interests that are exercising a measure of governmental power from the demands of the Constitution. The underlying constitutional policy being promoted by Justice Thomas and Justice Scalia in this context favors the strong against the weak. In my opinion, this is precisely contrary to the conception of government held by Franklin Delano Roosevelt and the justices whom he appointed.⁴⁷⁵

Separation of Powers

is no substantial reason to claim unfairness in applying constitutional standards to it.”); *See supra* note 444 (Is this *supra* citation still correct?).

⁴⁶⁹ *See id.* at 305-315 (Thomas, J., dissenting).

⁴⁷⁰ *See id.* at 305 (Thomas, J., dissenting) (“The majority’s holding – that the Tennessee Secondary School Athletic Association’s (TSSAA) enforcement of its recruiting rule is state action – not only extends state-action doctrine beyond its permissible limits but also encroaches upon the realm of individual freedom that the doctrine was meant to protect.”).

⁴⁷¹ 321 U.S. 649 (1944) (striking down the rule of the State Democratic Party excluding blacks from membership, and therefore excluding them from voting in primary elections).

⁴⁷² 326 U.S. 501 (1946) (finding the conduct of a company-owned town in arresting a Jehovah’s Witness for trespassing on a sidewalk to be “state action”).

⁴⁷³ *See Roberts v. Jaycees*, 468 U.S. 609, 628 (1984) (“[A]cts of invidious discrimination . . . are entitled to no constitutional protection.”).

⁴⁷⁴ *See Wilson R. Huhn, The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379 (2006) (proposing that the purpose of the state action doctrine is not to protect individual freedom but rather to leave the regulation of purely private parties up to the democratic process).

⁴⁷⁵ *See supra* note 10-13, 241-242; 248-249 and accompanying text

One of the greatest achievements of the Roosevelt Court was its decision in *Youngstown Sheet & Tube Co. v. Sawyer*,⁴⁷⁶ where the Court ruled that even in wartime, the President must obey the law.⁴⁷⁷ As noted above, Justice Robert Jackson – who had served as Chief Prosecutor at Nuremberg – rejected a definitional approach to separation of powers, and instead developed a subtle yet powerful test for measuring the extent of Presidential power along a spectrum dependent upon the extent to which the actions of the President have been authorized by Congress or the Constitution.⁴⁷⁸

The unilateral actions of President George W. Bush in his conduct of the War on Terror have given rise to myriad constitutional questions. Does the President have the power to detain suspected terrorists in military prisons at Guantanamo Bay without trial?⁴⁷⁹ Does the President have the power to order the trial and punishment of suspected terrorists before military commissions of his own design?⁴⁸⁰ Does the President have the authority to order the C.I.A. to operate secret prisons holding thousands of prisoners for interrogation, and to order that these prisoners be tortured?⁴⁸¹ Does the President have the authority to order the N.S.A. to eavesdrop on the international telephone calls and e-mails of American citizens without a warrant?⁴⁸²

The Attorney General for the current administration has expressly claimed that the President has the unilateral authority to conduct warrantless surveillance of American citizens in direct disobedience to federal law because the Constitution vests in the President the duty to protect this country and its citizens.⁴⁸³ Furthermore, in dozens of

⁴⁷⁶ 343 U.S. 579 (1952) (striking down Executive Order taking control of the steel industry to prevent a work stoppage).

⁴⁷⁷ *Id.* at 655 (Jackson, J., concurring) (“With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.”)

⁴⁷⁸ See *supra* notes 113-132, 297-306 and accompanying text.

⁴⁷⁹ See *Hamdi*, 542 U.S. 507 (2005) (ruling that the President lacks the authority to indefinitely detain United States citizens in military prisons at Guantanamo Bay as “enemy combatants,” and ruling that determinations of enemy combatant status must be in accordance with the constitutional guarantee of procedural due process).

⁴⁸⁰ See, e.g., Richard J. Wilson, *Military Commissions in Guantanamo Bay: Giving “Full and Fair Trial” a Bad Name*, 10 GONZ. J. INT’L L. 63 (2006-2007) (“Military commissions are this administration’s version of TEGWAR [The Exciting Game Without Any Rules].”).

⁴⁸¹ Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L.J. 1255, 1294 (2006) (“[I]t may be time to rethink the longstanding historical prejudice against judicial engagement in matters of national security.”); Elizabeth Sepper, *The Ties That Bind: How the Constitution Limits the CIA’s Actions in the War on Terror*, 81 N.Y.U. L. REV. 1805, 1843 (2006) (“Ultimately, the Constitution simply does not permit our government to engage in indefinite detention or torture, no matter the end.”).

⁴⁸² Katherine Wong, *The NSA Terrorist Surveillance Program*, 43 HARV. J. ON LEGIS. 517 (2006) (discussing legality and constitutionality of government program of warrantless eavesdropping on the international emails and telephone calls of Americans); John Cary Sims, *What the NSA Is Doing . . . And Why It’s Illegal*, 33 HASTINGS L.Q. 105 (2006) (same).

⁴⁸³ See generally U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, 3, available at <http://www.usdoj.gov/opa/whitepaper/onnsalegalauthorities.pdf>, (stating that if FISA were interpreted as prohibiting the President’s Terrorist Surveillance Program, “FISA would be unconstitutional as applied to this narrow context.”). *Id.* at 35

“signing statements,” the current President has claimed that he has the authority to disobey hundreds of laws that he has signed.⁴⁸⁴ For example, both when he signed a law requiring him to make reports sharing foreign intelligence with Congress and when he signed a law prohibiting the torture of detainees, the President stated that he would construe those laws “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch.”⁴⁸⁵

From his opinions in *Hamdi* and *Hamdan*, it appears that Justice Thomas wholeheartedly and without reservation agrees with the President on this point.⁴⁸⁶ This is contrary to what Justice Black saw in the text of the Constitution,⁴⁸⁷ it is contrary to what Justice Frankfurter remembered from our nation’s traditions,⁴⁸⁸ and it is contrary to what Justice Jackson revealed as the purpose of the doctrine of Separation of Powers.⁴⁸⁹ As

(“FISA would be unconstitutional as applied to the current conflict if the canon of constitutional avoidance could not be used to head off a collision between the Branches.”).

⁴⁸⁴ See Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Power of His Office*, Boston Globe A1, April 30, 2006 (“President Bush has quietly claimed the authority disobey more than 750 laws enacted since he took office, asserting that he has the power to set aside any statute passed by Congress when it conflicts with his interpretation of the Constitution.”); *Note: Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597, 601 (2006) (proposing that signing statements should be considered by courts when interpreting statutes, but disapproving of statements that are used for the “more controversial purpose” of claiming that the statute being signed is unconstitutional and will not be enforced).

⁴⁸⁵ See T. J. Halstead, *Presidential Signing Statements: Constitutional and Institutional Implications* 12, Congressional Research Service, September 17, 2007, (“Contributing to the controversy has been the high profile of several of the provisions that have been objected to by President Bush. For instance, in the signing statement accompanying the USA Patriot Improvement and Reauthorization Act of 2005, President Bush declared that provisions requiring the Executive Branch to submit reports and audits to Congress would be construed ‘in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties.’ Likewise, in the signing statement accompanying the law that contained the McCain Amendment (as part of the Detainee Treatment Act) prohibiting the use of torture, or cruel, inhuman, or degrading treatment of prisoners, the President declared that the Executive Branch would construe that provision “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief . . . [in order to protect] the American people from further terrorist attacks.”), available at <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>.

⁴⁸⁶ See *Hamdi*, 542 U.S. at 579 (2004) (Thomas, J., dissenting) (“The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that decision.”); *Hamdan*, 126 S.Ct. 2749, 2823 (2006) (Thomas, J., dissenting) (dissenting from the decision of the Court overturning the military commissions established by the President to try detainees for war crimes, and stating that the opinion of the majority “openly flouts our well-established duty to respect the Executive’s judgment in matters of military operations and foreign affairs.”). Justice Scalia joined Justice Thomas’ opinion in *Hamdan*.

⁴⁸⁷ See *supra* notes 115-120 and accompanying text.

⁴⁸⁸ See *supra* notes 121-122 and accompanying text.

⁴⁸⁹ See *supra* notes 123-132 and accompanying text.

John Marshall said in *Marbury v. Madison*,⁴⁹⁰ ours “is a government of laws, and not of men.”⁴⁹¹ Justice Thomas would place the President above the law.

Equal Protection

As previously noted, in the *Railway Express Agency* case, Justice Robert Jackson expressed the core principle of the Equal Protection Clause as prohibiting the government from treating groups of people differently unless there are “real differences” between them.⁴⁹²

Justice Scalia does not agree with this basic, fundamental principle. Instead, just as he interprets the Due Process Clause to mean that our fundamental rights are limited to “traditional” rights, Justice Scalia concludes that under the Equal Protection Clause the government is permitted to treat people differently so long as, traditionally, they *have* been treated differently. In *United States v. Virginia*⁴⁹³ Justice Scalia stated:

[I]t is my view that, whatever abstract tests we may choose to devise [under the Equal Protection Clause], they cannot supersede – and indeed ought to be crafted *so as to reflect* – those constant and unbroken national traditions that embody the people’s understanding of ambiguous constitutional texts. More specifically, it is my view that “when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.”⁴⁹⁴

For Justice Scalia, “tradition” is the starting point and the ending point, the alpha and the omega, of constitutional analysis. Tradition is the *only* interpretive principle that he brings to bear upon the question of the meaning of Equal Protection, and he deems it to be sufficient.

In 1896, in *Plessy v. Ferguson*,⁴⁹⁵ the Supreme Court upheld a law requiring blacks and whites to ride in separate railroad cars on trains on the ground that the State “is at liberty to act with reference to the established usages, customs, and traditions of the people”⁴⁹⁶ This is the very same interpretive principle that is embraced by Justice

⁴⁹⁰ 5 U.S. 137 (1803).

⁴⁹¹ *Id.* at 163 (Marshall, C.J.) (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”).

⁴⁹² 336 U.S. 106, 116 (Jackson, J.) (upholding municipal ordinance prohibiting the operation of motor vehicles purely for the purpose of advertising on the ground that “there is a real difference between doing in self-interest and doing for hire”); *See supra* notes ___ - ___ and accompanying text.

⁴⁹³ 518 U.S. 515 (1996) (striking down state policy excluding women from admission to state-supported military academy).

⁴⁹⁴ *Id.* at 568 (Scalia, J., dissenting).

⁴⁹⁵ 163 U.S. 537 (1896) (upholding Louisiana law requiring separate railroad cars for blacks and whites).

⁴⁹⁶ *Id.* at 550 (Brown, J.).

Scalia and Justice Thomas. In light of the “tradition” and widespread practice of racial segregation in America in 1954, would Justice Scalia and Justice Thomas have voted with the majority in *Brown v. Board of Education* to overturn *Plessy v. Ferguson*?

In 1883 in *Pace v. State*⁴⁹⁷ the United States Supreme Court upheld an Alabama law that made it a felony for blacks and whites to marry or to have sex.⁴⁹⁸ In 1955, the Virginia Supreme Court upheld a similar law on the ground that “[i]t is the considered opinion of the people of more than half the States of the Union that the prohibition against miscegenetic marriages is a proper governmental objective”⁴⁹⁹ Few social traditions in America were stronger than the prohibition against interracial marriages.⁵⁰⁰ If Justice Scalia and Justice Thomas had been on the Court in 1967, would they have voted with the Court in *Loving v. Virginia*⁵⁰¹ to strike down this law?

In his dissenting opinions in *Romer v. Evans*⁵⁰² and *Lawrence v. Texas*,⁵⁰³ Justice Scalia uses harsh language to express outrage that the majority would find that gay and lesbians have the constitutional right to seek protection from discrimination on the same basis as other groups,⁵⁰⁴ or that they have the right not to be imprisoned for engaging in sexual activity.⁵⁰⁵ For Justice Scalia, it is sufficient that society “morally disapproves” of

⁴⁹⁷ 106 U.S. 583 (1883) (upholding state statute making it a felony for a black person and a white person to intermarry or to have sex with each other).

⁴⁹⁸ See *id.* at 583 (Field, J.) (setting forth provisions of state statute).

⁴⁹⁹ *Naim v. Naim*, 197 Va. 80, 88 (1955), *vacated*, *Naim v. Naim*, 350 U.S. 891 (1955).

⁵⁰⁰ See Tiffani Lennon, *Stepping Out of the Competing Constitutional Rights Conundrum: A Comparative Harm Analysis*, 82 DENV. U. L. REV. 359, 394 (“[N]inety-two percent of western whites surveyed in a 1958 Gallup poll opposed interracial marriage, sending a clear message that the public did not support the legalization of marriage between blacks and whites.”). Attitudes towards interracial marriage are slowly changing. The Pew Research Center, *A Future Full of Promise: Optimism Reigns, Technology Plays Key Role*, <http://people-press.org/reports/display.php3?PageID=257> (last visited October 15, 2007) (“Younger Americans are also more positive about interracial marriages. Nearly eight-in-ten young adults (78%) think they are good. This compares to only 38% of those over age 65.”).

⁵⁰¹ 388 U.S. 1 (1967) (striking down state law prohibiting interracial marriage).

⁵⁰² *Romer v. Evans*, 517 U.S. 620 (1996) (striking down state constitutional amendment that prohibited the state legislature and any state agencies or political subdivisions from adopting laws or policies prohibiting discrimination on the basis of sexual orientation).

⁵⁰³ 539 U.S. 558 (2003) (striking down state law making it a crime to engage in sexual conduct with someone of the same gender).

⁵⁰⁴ *Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (referring to what was at stake as a “Kulturkampf” (culture war)); *id.* (characterizing the members of the Supreme Court as having been selected from an “elite class”); *id.* at 638 (referring to antidiscrimination laws as “special treatment” and “preferential treatment”); *id.* (referring to the “hand wringing” of the majority in their concern for gays and lesbians); *id.* at 639 (referring to antidiscrimination laws as “obtain[ing] advantage”); *id.* at 640-41, 647 (referring to antidiscrimination laws as “special protection” for gays and lesbians); *id.* at 642-43 (repeatedly referring to “homosexual ‘orientation’” in quotes); *id.* at 644 (referring to antidiscrimination laws as “favored status”); *id.* at 652 (referring to the dispute as a “culture war”); *id.* at 652-53 (characterizing those who favor equal treatment for gays and lesbians as “Templars,” the “lawyer class” with a “law-school view,” in contrast to the “plebeian” views of those who oppose equal rights); *id.* at 653 (referring again to antidiscrimination laws as “preferential treatment”).

⁵⁰⁵ See *Lawrence*, 539 U.S. at 587 (Scalia, J., dissenting) (referring to the majority’s use of the doctrine of *stare decisis* as “manipulative”); *id.* at 592 (referring to the decision of the Court in *Casey* to reaffirm *Roe* as “a result-oriented expedient”); *id.* at 597 (observing, in support of his argument that America has a tradition of criminalizing sexual conduct between persons of the same gender, that “[t]here are also records

homosexuality.⁵⁰⁶ The existence of that tradition of “moral disapproval,” for Justice Scalia, precludes any constitutional claim on behalf of homosexuals under Due Process or Equal Protection.⁵⁰⁷

Justice Scalia’s devotion to tradition rather than to equality is also evident in his opinion in *United States v. Virginia*,⁵⁰⁸ where he would have upheld another discriminatory official policy of the State of Virginia – the prohibition against women attending the prestigious state-supported military college, the Virginia Military Institute.⁵⁰⁹ Justice Scalia based his dissent primarily upon the *tradition* of male-only military education. The first sentence of his opinion states: “Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half.”⁵¹⁰ He complains that the majority of the Court “counts for nothing the long tradition, enduring down to the present, of men’s military colleges supported by both States and the Federal Government”⁵¹¹

At the close of his dissent in *United States v. Virginia*, Justice Scalia waxes nostalgic over “The Code of the Gentleman,” a hodge-podge of rules of social etiquette from the gilded age based upon an outmoded understanding of strict gender roles, which was contained in a booklet that VMI freshmen were required to have in their possession at all times.⁵¹² This “Code of the Gentleman” recalls Justice Brennan’s admonition that

of . . . 4 executions [for sodomy] during the colonial period,” without condemning the imposition of the death penalty for homosexual conduct,); *id.* at 602 (“Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda”); *id.* (“the Court has taken sides in the culture war”); *id.* at 604-05 (“the Court coos (casting aside all pretense of neutrality), ‘[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring’”).

⁵⁰⁶ See *Romer*, 517 U.S. at 644 (Scalia, J., dissenting) (“Surely that is the only sort of ‘animus’ at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*. . . . Coloradans are, as I say, *entitled* to be hostile toward homosexual conduct”); *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (contending that “the belief of its citizens that certain forms of sexual behavior are ‘immoral and unacceptable. . . .’ [wa]s a legitimate governmental interest.”).

⁵⁰⁷ See note 493 *supra*.

⁵⁰⁸ 518 U.S. 515 (1996) (invalidating on Equal Protection grounds Virginia policy of excluding women from state-supported military college).

⁵⁰⁹ See *id.* at 566-603 (Scalia, J., dissenting).

⁵¹⁰ *Id.* at 566 (Scalia, J., dissenting). It should be noted that the Supreme Court did not “shut down” VMI, but rather ordered it to admit women on an equal basis, and that VMI is operating as a coeducational institution.

⁵¹¹ *Id.* (Scalia, J., dissenting). It should be noted that the Nation’s service academies are coeducational. See *id.* at 544-45 (Ginsburg, J.) (“Women’s successful entry into the federal military academies, and their participation in the Nation’s military forces, indicate that Virginia’s fears for the future of VMI may not be solidly grounded.”) (citations omitted).

⁵¹² See *id.* at 602-03 (Scalia, J.). Justice Scalia quoted “The Code of the Gentleman: Without a strict observance of the fundamental Code of Honor, no man, no matter how ‘polished,’ can be considered a gentleman. The honor of a gentleman demands the inviolability of his word, and the incorruptibility of his principles. He is the descendant of the knight, the crusader; he is the defender of the defenseless and the champion of justice . . . or he is not a Gentleman. A Gentleman . . . Does not discuss his family affairs in public or with acquaintances. Does not speak more than casually about his girl friend. Does not go to a lady’s house if he is affected by alcohol. He is temperate in the use of alcohol. Does not lose his temper; nor exhibit anger, fear, hate, embarrassment, ardor or hilarity in public. Does not hail a lady from a club

the traditional attitude of “‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”⁵¹³

The great jurisprudential battle which underlies all of Equal Protection analysis, but which is particularly acute in emerging areas such as gender equality and gay rights, is, “how are we to measure equality under the Constitution?” Lincoln understood that the concept of equality is an evolving one – that in fact, the principle of equality imposes a moral *obligation* upon us to question received opinions about people and to remain open to the possibility that our assumptions about human potential are wrong. He taught us that the idea that “all men are created equal” is an ideal that must be “constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.”⁵¹⁴

To go back to the “tradition” test that was used in *Plessy*, to find that “moral disapproval” of a group is sufficient to justify official discrimination,⁵¹⁵ to say that no law, no matter how arbitrary, how unjust, how rooted in superstition or irrational fear, is constitutional so long as it reflects “traditional” attitudes, would be to betray the solemn duty of the Supreme Court to fulfill the principle of the Declaration of Independence that “all men are created equal.” Justice Robert Jackson’s great insight into the meaning of the Equal Protection Clause is that the Supreme Court has the obligation under the Constitution to determine whether or not there are “real differences” “fairly related to the object of the regulation” between groups that are being treated differently.⁵¹⁶ Justice Scalia and Justice Thomas would abrogate this fundamental, constitutional principle of equality.

CONCLUSION

window. A gentleman never discusses the merits or demerits of a lady. Does not mention names exactly as he avoids the mention of what things cost. Does not borrow money from a friend, except in dire need. Money borrowed is a debt of honor, and must be repaid as promptly as possible. Debts incurred by a deceased parent, brother, sister or grown child are assumed by honorable men as a debt of honor. Does not display his wealth, money or possessions. Does not put his manners on and off, whether in the club or in a ballroom. He treats people with courtesy, no matter what their social position may be. Does not slap strangers on the back nor so much as lay a finger on a lady. Does not ‘lick the boots of those above’ nor ‘kick the face of those below him on the social ladder.’ Does not take advantage of another’s helplessness or ignorance and assumes that no gentleman will take advantage of him. A Gentleman respects the reserves of others, but demands that others respect those which are his. A Gentleman can become what he wills to be. . . .”

⁵¹³ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (Brennan, J.)

⁵¹⁴ Abraham Lincoln, *Speech at Springfield, Illinois*, (June 16, 1857), in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 405-06 (Roy P. Basler, ed., 1953), available at <http://quod.lib.umich.edu/cgi/t/text/text-idx?c=lincoln;cc=lincoln;view=toc;idno=lincoln2> (follow fourth hyperlink entitled “Speech at Springfield, Illinois”).

⁵¹⁵ Compare *supra* note 513 and accompanying text (citing Justice Scalia’s position that “moral disapproval” is a sufficient justification to support criminal laws against homosexuality) with *Lawrence*, 539 U.S. at 582 (2003) (O’Connor, J., concurring in the judgment) (stating: “Moral disapproval of this group, like a bare desire to harm a group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”).

⁵¹⁶ See *supra* notes ___-___ and accompanying text.

The Roosevelt Court made the following contributions to our fundamental law.

The Due Process Clause of the Constitution protects against governmental invasion of our personal, fundamental rights.⁵¹⁷

The Due Process Clause protects certain inalienable rights such as the right to procreation, even though these rights may not be enumerated in the Constitution.⁵¹⁸

Any law that infringes upon a fundamental constitutional right must be strictly scrutinized for its constitutionality.⁵¹⁹

The government may not coerce people – not even children – into expressing a particular point of view.⁵²⁰

Even when a person engages in speech that is *not* protected by the First Amendment, the government may not prosecute the person under a law which is overbroad in the sense that it would criminalize speech which *is* protected by the First Amendment, because this would discourage *other* people from exercising their First Amendment rights.⁵²¹

People not only have an absolute right to hold whatever religious *beliefs* that they choose, they also have a constitutional right to engage in religiously motivated *conduct*, although the right to engage in religiously motivated conduct is not absolute.⁵²²

The government must be neutral with respect to religion.⁵²³

The federal government has the authority to regulate all commercial activity in the Nation which, in the aggregate, has a substantial effect on interstate commerce.⁵²⁴

Some private actors are so imbued or have so imbued themselves with governmental authority that their behavior constitutes “state action” which is subject to the dictates of the Constitution.⁵²⁵

All of the powers of the President stem either from the Constitution or from statutes, and the President’s power is at its lowest ebb when the Congress has, by law, prohibited the President from acting.⁵²⁶

⁵¹⁷ See *supra* notes 162-169 and accompanying text.

⁵¹⁸ See *id.*

⁵¹⁹ See *supra* notes 155-161 and accompanying text.

⁵²⁰ See *supra* notes 204-210 and accompanying text.

⁵²¹ See *supra* notes 211-217 and accompanying text.

⁵²² See *supra* notes 226-229 and accompanying text.

⁵²³ See *supra* notes 231-237 and accompanying text.

⁵²⁴ See *supra* notes 255-265 and accompanying text.

⁵²⁵ See *supra* notes 276-293 and accompanying text.

⁵²⁶ See *supra* notes 115-120, 127-129 and accompanying text.

The President is the Commander-in-Chief of the army and navy, but he is *not* the Commander-in-Chief of the entire country; even during wartime, the President is under the rule of law.⁵²⁷

The government may not treat some groups of people differently from other groups unless there are “real differences” between them.⁵²⁸

Official acts of racial discrimination must be strictly scrutinized.⁵²⁹

State-sponsored racial segregation of the public schools is unconstitutional.⁵³⁰

The foregoing achievements in the interpretation of the Constitution are impressive, but the march of human rights that the Roosevelt Court commenced was not steady and regular. Instead the Court took halting steps towards freedom. A slip back in *Gobitis* was transformed into a rush forward in *Barnette*; the shameful retreat of the Court in *Korematsu* was redeemed at least somewhat by the pride we all feel for the advance in human rights that it achieved in *Brown*. But the path of the law, though not always straight, is apparent in the light of history. The fundamental principles that the Roosevelt Court recognized – the fundamental principles that Franklin and Eleanor Roosevelt stood for – have been become part of the fabric of our fundamental law, as the framers intended.

The overriding purpose of the New Deal was to create opportunities for the common person to acquire a stake in society. The Roosevelt appointees to the Supreme Court were unwilling to allow either entrenched wealth or arbitrary governmental action to interfere with that objective. They remade the Constitution, but in so doing they returned the Constitution to its original purpose – the protection of personal liberty. The Roosevelt Court laid the foundation for a jurisprudence of human rights upon which the Warren Court and subsequent Supreme Courts have continued to build.

Certainly the justices of the Roosevelt Court made some mistakes in their interpretation of the Constitution. But they did *not* equate the principles of “liberty” and “equality” with “moral traditions.” They did *not* take the position that the government has the power to define what is “sacred” and what is “profane” for every individual. They did *not* permit the government to endorse or promote religion. They would *not* have allowed majority religions to define what the minority may do or not do in the exercise of their religion. They did *not* ignore the reality of our economic development in interpreting the power of the federal government to regulate the national economy. They did *not* pretend that by precluding application of Constitutional norms to powerful private interests that they would be promoting “individual freedom.” And they did *not* rank the discretion of the President above the Rule of Law. Either Justice Scalia or Justice

⁵²⁷ See *supra* notes 130-131 and accompanying text.

⁵²⁸ See *supra* notes 316-321 and accompanying text.

⁵²⁹ See *supra* notes 346-348 and accompanying text.

⁵³⁰ See *supra* notes 327-336 and accompanying text.

Thomas or both of them have committed all of these errors in the interpretation of the Constitution.