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The Constitution in the Supreme Court: 1946-1953

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THE CONSTITUTION IN THE SUPREME COURT: 1946-1953

by

David P. Currie

Vinson, Burton, Minton, and Clark. Scarcely household names, President Truman's four appointees to the Supreme Court tended to join the more restrained of their senior colleagues to slow down the expansion of civil liberties after the departures of Roberts and Stone at the end of World War II and the premature deaths of Frank Murphy and Wiley Rutledge in 1949. 


2 See Frank, Fred Vinson and the Chief Justiceship, 21 U. Chi. L. Rev. 212, 246 (1954)
This period, however, witnessed great strides in the related field of civil rights. The Vinson Court stretched the concept of state discrimination to outlaw judicial enforcement of racial covenants, put the final nail in the coffin of the obnoxious white primary, and aggressively limited discrimination against aliens — while exhibiting an incongruous indifference toward disadvantageous treatment of women.

While federalism remained in its deep freeze, the Court struck a major blow for the separation of powers by invalidating the President's seizure of steel mills in *Youngstown Sheet & Tube Company v. Sawyer*.

Moreover, despite its general passivity in the face of the persecution of suspected communists, the Court drew a brave line in *Wieman v. Updegraff* to limit indirect interference with first amendment freedoms. Indeed, the Vinson period began with the incorporation of yet another of those freedoms into the due process clause of the fourteenth amendment; that is the starting point of our inquiry.

(describing Vinson as a "symbol of the judicial age which reversed the trend of the Hughes-Stone periods toward judicially enforced civil liberties").


See infra note 178 and accompanying text.

See infra notes 191-94 and accompanying text.

See infra notes 200-02 and accompanying text.


8 343 U.S. 579 (1952).

9 344 U.S. 183 (1952).

10 For table of Justices who served during the Vinson period, see page 251.
I. Religion

A. School Buses

"Congress shall make no law," reads the first amendment, "respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." By their own terms, these provisions limit only the federal government. While Hughes was Chief Justice, however, the Court had held that religious freedom was part of the "liberty" the fourteenth amendment protected against deprivation of without due process of law. In *Everson v. Board of Education*, the Court concluded that the due pro-

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11 U.S. Const. amend I.


The only interesting free-exercise case decided during the Vinson period was *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) (Reed, J.), holding over Justice Jackson's dissent that New York could not transfer authority over the Russian Orthodox Church in America to local dissidents to avoid communist influence after the Russian Revolution of 1917. For criticism, see P. Kurland, Religion and the Law 96 (1978) ("Especially difficult to comprehend is the compulsory withdrawal of state power in favor of 'ecclesiastical government' when the very issue in the case was which of two ecclesiastical governments was entitled to make the decision.").
cess clause made the establishment clause applicable to the states as well.\textsuperscript{14}

There were no dissents on this point, and there was no discussion. The difficulty was that the text did not lend itself to incorporation of the establishment clause. Unlike the provisions earlier held applicable to the states, the clause in question does not speak in terms of "freedom." It was not obvious that every establishment of religion would deprive anyone of "life, liberty, or property."\textsuperscript{15} Justice Black slid over the problem, as had Roberts in the case of free exercise, with an overbroad invocation of precedent: a free-exercise decision was said to have established that "the First Amendment" applied to the states.\textsuperscript{16} Earlier incorporation decisions, it is true, had taken comparable liberties with the language. Not once, for example, had the Justices explained the bearing of the limiting phrase "without due process of law" upon state deprivation of freedom of religion, expression, or assembly.

The measure under attack in \textit{Everson} provided government funds to transport pupils to public and parochial schools.\textsuperscript{17} The Court upheld it 5-4. Along the way, however, Justice Black gave the establishment clause a broad construction going far beyond the prohibition of a national church on the English model that the text suggested.

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. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions. . . . Neither a state nor the Federal Government can . . . participate in the affairs of any religious organizations or groups and \textit{vice-versa}. In the words of Jefferson, the clause . . . was intended to

\footnotesize{\textsuperscript{14} 330 U.S. 1 (1947).}
\footnotesize{\textsuperscript{15} See Corwin, \textit{The Supreme Court as National School Board}, 14 \textit{Law & Contemp. Probs.} 3, 19 (1949); M. Howe, \textit{The Garden and the Wilderness} 72-73, 138 (1965) (adding that the measure in \textit{Everson} might be argued to deprive taxpayers of property but doubting that the fourteenth amendment was meant to deprive states of their historic authority to support religion). \textit{But see} L. Levy, \textit{The Establishment Clause} 168 (1986) ("[F]reedom from an establishment . . . is an indispensible attribute of liberty.").}
\footnotesize{\textsuperscript{16} 330 U.S. at 8 (citing Murdock v. Pennsylvania, 319 U.S. 105 (1946)). \textit{Cf. Cantwell}, 310 U.S. at 303 (citing a speech case for the proposition that liberty in the fourteenth amendment "embraces the liberties guaranteed by the First Amendment.").}
\footnotesize{\textsuperscript{17} 330 U.S. at 3.}
erect 'a wall of separation between church and State.'

For this sweeping interpretation Black relied on the history of opposition to religious taxes in Virginia that lay behind Madison's drafting of the first amendment. Opposing a bill to impose taxes to support teachers of the Christian religion, Madison's famous Memorial and Remonstrance had condemned the state's exaction of even "three pence" for religious purposes. Jefferson's Virginia Bill for Religious Liberty, enacted in response to the Remonstrance, had declared it "sinful and tyrannical" to "compel a man to furnish contributions of money for the propagation of opinions which he disbelieves."

Justice Story had taken a narrower view of the Virginia Bill of Rights, opining in 1815 that an impartial subsidy of all religions would be permissible. Many influential critics took the same view of the federal provision. The Court's history, however, suggests a concern that went beyond the mere favoring of one sect over another. Against this background there may be significance in the Framers' decision to not ban merely an "establishment" but all laws "respecting" one, and to define the forbidden establishment as one not of "a religion" but of "religion" in general.

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18 Id. at 15-16 (emphasis in original).
19 Id. at 11-13 (quoting the Preamble of the Virginia Bill for Religious Liberty). See also id. at 33-41 (Rutledge, J., dissenting). Both the Remonstrance and the bill it protested are reprinted in full as appendices to Justice Rutledge's opinion; see id. at 63-74.
20 See, e.g., Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 49 (1815) (dictum); T. COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW 205 (1880) ("By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others."); R. CORD, SEPARATION OF CHURCH AND STATE 15 (1982); D. CURRIE, supra note 1, at 140; M. HOWE, supra note 15, at 10-16; Fahy, Religion, Education, and the Supreme Court, 14 LAW & CONTEMP. PROBS. 73 (1949); McConnell, Accommodation of Religion, 1985 SUP. CT. REV. 1, 20-22; Meiklejohn, Educational Cooperation between Church and State, 14 LAW & CONTEMP. PROBS. 61 (1949); Murray, Law or Prepossessions?, 14 LAW & CONTEMP. PROBS. 23 (1949).
21 See 330 U.S. at 31 (Rutledge, J., dissenting); L. LEVY, supra note 15, at 95; Pfeffer, Church and State: Something Less than Separation, 19 U. CHI. L. REV. 1, 14 (1951). But see Corwin, supra note 15, at 12 (explaining "respecting" as "a two-edged word, which bans any law disfavoring as well as any law favoring an establishment of religion") (emphasis in original).
22 The reported debates on the establishment clause are meager, but tend to suggest a narrower interpretation. James Madison explained to the House of Representatives that his proposed amendment ("no religion shall be established by law, nor shall the equal rights of conscience be infringed") meant "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience" and said it should quiet fears that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to
The dissenters thought it followed from the Court's reasoning that the busing provision was unconstitutional.\textsuperscript{23} Because the state's assistance could not be attributed only to secular instruction, Justice Black's criteria seemed to fit perfectly.\textsuperscript{24} In subsidizing bus rides to places where religious instruction was given, the state "aid[ed] . . . religion" by spending tax money "to support . . . religious activities."\textsuperscript{25} "[T]he most fitting precedent" for the majority opinion, Justice Jackson suggested, was "that of Julia who, according to Byron's reports, 'whispering I will ne'er consent,' — consented."\textsuperscript{26}

In the same sense, however, the state supports religion when it puts out a fire in a church or protects it against thieves.\textsuperscript{27} "[W]e must be careful," wrote Justice Black, "that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." The first 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."\textsuperscript{28}

This argument takes on added force when one considers the free exercise clause of the same amendment. To put out fires for everybody except churches would unconstitutionally discriminate against them.\textsuperscript{29}

which they would compel others to conform." I Annals of Cong. 757-58 (J. Gales ed. 1789). Professor Levy finds support for the Court's reading in the fact that by 1791 no state "maintained a single or preferential establishment of religion" and in the rejection of three narrow Senate versions of the establishment clause that would have barred Congress from "establishing articles of faith or a mode of worship." See L. LEVY, supra note 15, at xvi, 82-84. See also L. PFEFFER, CHURCH, STATE AND FREEDOM, ch. 5 (rev. ed. 1967); Kurland, The Origins of the Religion Clauses of the Constitution, 27 WM. & MARY L. REV. 839 (1986).

\textsuperscript{23} See 330 U.S. at 18-28 (Jackson, J., joined by Frankfurter, J., dissenting); 330 U.S. at 28-63 (Rutledge, J., joined by Frankfurter, Jackson, and Burton, JJ., dissenting).

\textsuperscript{24} See 330 U.S. at 29 n.3, 44-49 (Rutledge, J., dissenting).

\textsuperscript{25} Id. at 16 (Black, J.).

\textsuperscript{26} Id. at 19 (Jackson, J., dissenting).

\textsuperscript{27} Id. at 17 (Black, J.).

\textsuperscript{28} Id. at 16-18. See also M. HOWE, supra note 15, at 139 (arguing that the decision may have been influenced by "the Court's mounting concern for equality"); Katz, Freedom of Religion and State Neutrality, 20 U. CHI. L. REV. 426, 432 (1953).

\textsuperscript{29} See 330 U.S. at 17-18 ("State power is no more to be used so as to handicap religions than it is to favor them."). See P. KURLAND, supra note 13, at 82; Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle, 81 HARV. L. REV. 513, 520-21 (1968).

The dissenters noted with some force that the measure in question actually provided transportation only for pupils in public and in Catholic schools, thus raising difficulties of favoritism for a particular
B. Released Time

The following year, in another opinion by Justice Black, the Court employed the tools fashioned in *Everson* to strike down a state measure that promoted religion alone in *Illinois ex rel. McCollum v. Board of Education*. The measure released public school pupils from secular studies to attend religious classes in public classrooms. "[N]ot only are the State's tax-supported public school buildings used for the dissemination of religious doctrines," wrote Justice Black, "[t]he State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State." Four years later, however, the Court upheld a released time program by a divided vote in *Zorach v. Clauson*. "We are a religious people," wrote Justice Douglas in accents that betrayed no hint of neutrality, "whose institutions presuppose a Supreme Being." The program in *Zorach* was permissible, he concluded, because religious instruction took place on private rather than public property. In contrast to *McCollum*, no tax money was used to promote religion.

But the use of public property was only one of the objections the Court had emphasized in *McCollum*, and arguably not the most important.

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30 330 U.S. at 20-21 (Jackson, J., dissenting); 330 U.S. at 61-62 (Rutledge, J., dissenting). Justice Black responded by arguing that this issue had not properly been raised. 330 U.S. at 4 n.2 ("[A]ppellant does not allege . . . that there were any children in the township who attended or would have attended, but for want of transportation, any but public and Catholic schools.").

31 Id. at 205-09.

32 Id. at 212. Frankfurter, joined by the other three Justices who had dissented in *Everson*, wrote a concurring opinion, 330 U.S. at 212-32, as did Justice Jackson, 330 U.S. at 232-38. While professing to accept the interpretation of the establishment clause announced in *Everson*, Justice Reed, as the sole dissenter, actually seemed to call it into question by noting the existence of congressional and military chaplains and Jefferson's approval of religious instruction at the University of Virginia, adding that "[t]he phrase 'an establishment of religion' may have been intended . . . to be aimed only at a state church." 330 U.S. at 238, 244 (Reed, J., dissenting).


34 Id. at 313.

35 Id. at 308-09, 315.

one. As Justice Jackson pointed out in dissent, in both Zorach and McCollum "schooling . . . serves as a temporary jail for a pupil who will not go to church." The distinction between Zorach and McCollum was "trivial."

Justices Black and Frankfurter, intellectual leaders of the active and passive wings of the Court, added emphatic dissents of their own. It is food for thought when the Court's three strongest members take issue with its conclusions.

II. Speech

A. Peace and Quiet

1. State Power

In Saia v. New York, in 1948, the Court struck down an ordinance requiring a permit for the use of loudspeakers that might inconvenience people in public places. In Kovacs v. Cooper, a year later, the Court upheld an ordinance forbidding loudspeakers on the streets even though it did not authorize the issuance of permits at all. providing for sending public teachers into parochial schools); Burton v. Wilmington Parking Auth., 365 U.S. 715, 720, 724 (1961) (suggesting analogous argument in holding state responsible for private decision to serve only white patrons in restaurant built with public funds and operated by an agency of the state on public property). This difficulty was reduced in Zorach by the fact that public property was not involved. See generally Marshall, "We Know It When We See It": The Supreme Court and Establishment, 59 S. CAL. L. REV. 495 (1986).

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57 343 U.S. at 324.

58 Id. at 325 (Jackson, J., dissenting). Douglas's response that there was "no evidence" to support the suggestion of coercion missed the point. Id. at 311. Coercion was inherent in the program. See Cushman, Public Support of Religious Education in American Constitutional Law, 45 ILL. L. REV. 333, 353 (1950) ("A state which says to a pupil, 'You must study religion or sit in study-hall,' is not taking a neutral attitude toward religion."). Moreover, as Justice Frankfurter noted in dissent, evidence of coercion had been excluded. Zorach, 343 U.S. at 321-22 (Frankfurter, J., dissenting). See P. Kurland, supra note 13, at 86 ("Most of what McCollum had done . . . was undone a few years later in Zorach . . . ").

59 343 U.S. at 315-20 (Black, J., dissenting); 343 U.S. at 320-23 (Frankfurter, J., dissenting).

40 A further important establishment issue was postponed when the Court, over three dissents, held that a taxpayer had no standing to challenge Bible reading in the public schools. "There is no allegation that this activity . . . adds any sum whatever to the cost of conducting the school." Doremus v. Board of Educ., 342 U.S. 429, 433 (1952) (Jackson, J.).


42 336 U.S. 77 (1949).
Both decisions were 5-4; only Chief Justice Vinson thought the cases distinguishable. Justices Black and Jackson, who were on opposite sides in each case, believed that the Court had it backwards: the ordinance the Court upheld limited speech more than the one the Court struck down, for the latter authorized the police to waive the restriction.\(^43\)

In so concluding, Black and Jackson took no account of the dangers of discriminatory application that had condemned the permit provision in *Saia*. As Justice Douglas wrote in that case, the ordinance provided "no standards" to guide the determination of whether to authorize a loudspeaker.\(^44\) "The right to be heard is placed in the uncontrolled discretion of the Chief of Police."\(^45\) Since the 1930s, the Court had consistently stood firm against such discretionary power to favor among potential speakers.\(^46\) The only surprising thing about *Saia* was that Frankfurter, Reed, Jackson, and Burton dissented.\(^47\)

The flat prohibition in *Kovacs*, while more restrictive, avoided this risk of arbitrary enforcement; the question was whether it was a reasonable regulation of the time, place, and manner of speaking. Under Hughes, the Court had held that the state could not ban all handbilling or picketing in the streets; under Stone, it had held door-to-door solicitation equally protected.\(^48\) Without citing these cases, Justice Black invoked their reasoning

\(^{43}\) *Id.* at 98 (Jackson, J., concurring); 336 U.S. at 101 (Black, J., dissenting).

\(^{44}\) *Saia*, 334 U.S. at 560.

\(^{45}\) *Id.* at 560-61.


\(^{47}\) Ignoring the precedents respecting administrative discretion, the dissenters essentially argued that the city need not allow noise in the parks — a separate issue that the majority did not have to reach. See 334 U.S. at 562-66 (Frankfurter, J., joined by Reed and Jackson, JJ., dissenting); 334 U.S. at 566-72 (Jackson, J., dissenting).

\(^{48}\) Martin v. Struthers, 319 U.S. 141 (1943); Thornhill v. Alabama, 310 U.S. 88 (1940); Schneider v. State, 308 U.S. 149 (1939). See generally Hughes II, *supra* note 1, at 821-22, 827-28 (discussing Schneider, where the Court struck down ordinances prohibiting the distribution of handbills on public streets and Thornhill, which struck down an overbroad ban on picketing); Stone II, *supra* note 1, at 51-52 (discussing Martin, striking down ordinances prohibiting the distribution of handbills by going door-to-door).
in his *Kovacs* dissent: sound trucks were the poor man’s press, and barring them stacked the deck in favor of those with more money. As in the solicitation case, Jackson and Frankfurter balanced the opposing interests in favor of privacy. Three Justices, in an opinion by Reed, read the ordinance to forbid only “loud and raucous” noises and voted to uphold it.

As Justice Reed noted, sound trucks are more intrusive than handbills, which the passerby need not read; “[t]he unwilling listener . . . is practically helpless to escape. . . .” They are likewise more intrusive than the solicitor, who the Court had said could be kept away by no-trespassing signs. Justice Black conceded that the state could limit the volume, hours, and location of amplifiers, and Justice Reed agreed that a total ban would “probably” be unconstitutional. They thus seemed to differ only as to the meaning of the statute and of the judgment below. Both seemed to strike an appropriate balance between the competing interests, and together they spoke for a clear majority of the Court.

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50 See 336 U.S. at 89-97 (Frankfurter, J., concurring); 336 U.S. at 97-98 (Jackson, J., concurring); cf. Martin v. Struthers, 319 U.S. 141, 152-57 (1943) (Frankfurter, J., dissenting); 319 U.S. at 166-82 (Jackson, J., dissenting).

51 336 U.S. at 82-89 (opinion of Reed, J., joined by Vinson, C.J., and Burton, J.). Justice Black took Reed to task for interpreting the ordinance more narrowly than it had apparently been understood by the state court and for finding the defendant guilty of an offense with which he had never been charged. The complaint was simply that he had operated a sound truck on the street. 336 U.S. at 98-100 (Black, J., joined by Douglas and Rutledge, J.J., dissenting).

52 336 U.S. at 86-87. See Stone, Fora Americana: Speech in Public Places, 1974 Sup. Ct. Rev. 233, 269 (adding that the unwilling listener in the loudspeaker case “is in his home, his ‘castle,’ where his right to be let alone is at its peak”).


54 336 U.S. at 104 (Black, J., dissenting).

55 Id. at 81-82.

56 See Frank, *The United States Supreme Court: 1948-49*, 17 U. Chi. L. Rev. 1, 29 (1949) [hereinafter Frank, 1948-49] (“It is hard to find in the Constitution a requirement that anyone . . . can be compelled to hear a message which he does not choose to hear.”).

57 Justice Frankfurter’s concurrence in *Kovacs* was largely devoted to an attack on Reed’s invocation of the “preferred position” terminology that had characterized recent speech and religion decisions. 336 U.S. at 89-97. See 336 U.S. at 88 & n.14 (discussing preferred-position and citing, e.g., Murdock v. Pennsylvania, 319 U.S. 105 (1943)). See generally Stone II, *supra* note 1, at 48-52 (discussing earlier preferred-position opinions).

While condemning such language as “deceptive” and “mechanical,” Frankfurter seemed to modify his earlier position considerably by conceding that “those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with
It was nonetheless portentous that the four Justices who had voted with Stone to protect door-to-door solicitation in *Martin v. Struthers* found themselves in dissent in seeking to protect sound trucks. Two years after *Kovacs*, in *Breard v. Alexandria*, *Martin* itself was held inapplicable to salesmen soliciting magazine subscriptions because “selling . . . brings into the transaction a commercial feature” absent in the earlier case. Justices Stone, Rutledge, and Murphy having died, the number of votes to strike down the prohibition on speech grounds was reduced to two, and the majority's opinion seemed to cast doubt on *Martin* itself. The pendulum seemed to have swung away from aggressive protection of expression.

2. State Duty

In *Kovacs* the Court held the state was permitted to protect the unwilling listener against loudspeakers. In *Public Utilities Commission v. Pollok*, two Justices argued it was required to do so. The Capital Transit Company, operating in the District of Columbia under a franchise granted by Congress, broadcast radio programs through loudspeakers inside its buses and streetcars. When some passengers protested, the Public Utilities Commission concluded that the broadcasts “tend[ed] to improve the conditions under which the public ride” and thus were “not inconsistent with public convenience, comfort and safety.” The Court of Appeals for the District of Columbia held that the complaining passengers had been deprived of their liberty without due process of law. A divided Supreme Court reversed.

a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.” *Kovacs*, 336 U.S. at 95-96. Compare West Virginia Bd. of Educ. v. *Barnette*, 319 U.S. 625, 646-71 (1943) (Frankfurter, J., dissenting); see also Stone II, supra note 1, at 53-55 (discussing *Barnette*).

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68 341 U.S. 622 (1951) (Reed, J).
69 Id. at 642-43.
70 See id. at 649-50 (Black and Douglas, JJ., dissenting). Chief Justice Vinson, joined by Justice Douglas, dissented on the ground that the ordinance unreasonably burdened interstate commerce. Id. at 645-49.
71 See id. at 644-45 (balancing the interests in favor of privacy without considering the alternative of posting signs); id. at 627 (noting that this alternative “was rejected early as less practical”).
73 Id. at 454.
Justice Douglas, in dissent, agreed with the lower court that due process had been denied. "Liberty" in the fifth amendment, he argued in a passage that foreshadowed important developments, included "privacy," because "the right to be let alone is indeed the beginning of all freedom."\textsuperscript{65} Transit riders were "a captive audience," because many had no alternative means of transportation.\textsuperscript{66} Thus the case "involves a form of coercion to make people listen," and "if liberty is to flourish, government should never be allowed to force people to listen to any radio program."\textsuperscript{67} For a Justice who had denounced substantive due process arguments only a few years earlier as "notions of public policy" that "should not be read into the Constitution,"\textsuperscript{68} this sounded remarkably like \textit{Lochner v. New York}.\textsuperscript{69} The majority disagreed on the blandest and narrowest of grounds: most riders enjoyed the broadcasts, and "the liberty of each individual in a public vehicle or public place is subject to reasonable limitations in relation to the rights of others."\textsuperscript{70}

Justice Black, who agreed with the Court that the broadcasting of music offended nothing in the Constitution, came up with a more novel objection to other transmissions. "Subjecting . . . passengers to the broadcasting of news, public speeches, views, or propaganda of any kind and by any means would violate the First Amendment."\textsuperscript{71} He did not say why, and the majority said only that the issue was not properly presented: "There is no substantial claim that the programs have been used for objectionable propaganda."\textsuperscript{72}

Compelling people to listen to propaganda conjures up visions of the

\textsuperscript{65} 343 U.S. at 467 (Douglas, J., dissenting).
\textsuperscript{66} Id. at 468.
\textsuperscript{67} Id. at 468-69 (Douglas, J., dissenting).
\textsuperscript{68} Olsen v. Nebraska, 313 U.S. 236, 247 (1941) (overruling Ribnik v. McBride, 277 U.S. 350 (1928), a case that struck down regulations on employment agencies). \textit{See generally Hughes I, supra} note 1, at 546.
\textsuperscript{69} 198 U.S. 45 (1905). \textit{See generally Fuller I, supra} note 1, at 378-82 (discussing \textit{Lochner}).
\textsuperscript{70} 343 U.S. at 465.
\textsuperscript{71} Id. at 466 (separate opinion of Black, J.).
\textsuperscript{72} Id. at 463. Since the programs evidently included news broadcasts and other "matters of civic interest," the Court's reasoning does not seem wholly responsive. Id. at 461. Justice Black dissented "to the extent, if any," that the Court allowed the broadcast of news or views in \textit{Pollak}. Id. at 466. No Justice argued that the broadcasts were so loud as to interfere with communication among the passengers.
police state of Orwell's 1984, but it is not obvious that it has anything to do with freedom of speech. The first amendment's focus is on the right to communicate; even the flag-salute case had relied on the right to determine what one would say. A general right not to be spoken to seems more remote from the purposes of free expression.

The most striking aspect of the Pollak decision, however, was the willingness of the entire Court to address the first and fifth amendment questions at all, since the decision to play music in the buses and streetcars had been made by a private corporation. Although the fifth amendment speaks in the passive voice without identifying the actors it means to limit, history and precedent made clear that, like the rest of the Bill of Rights, it was designed to apply only to the federal government. The parties conceded that neither amendment restricted private actions.

Writing for the Court, Justice Burton nevertheless found "a sufficiently close relation between the Federal Government and the radio service to make it necessary for us to consider those Amendments." This was not because the company held a franchise granted by Congress, and not because Congress had given it "a substantial monopoly." It was because the company operated "under the regulatory supervision" of a governmental commission, and particularly because that agency, "after formal public hearings, ordered its investigation dismissed on the ground that the public

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74 West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); see generally Stone II, supra note 1, at 52-55 (discussing Barnette).
75 There have been suggestions that compulsory attendance at school prayers, quite apart from establishment problems, would infringe the free exercise of religion. This conclusion would not compel agreement with Justice Black's parallel argument respecting free speech, for the two provisions need not in all respects be congruent. Forced exposure to alien doctrine may easily offend religious tenets without interfering with freedom of expression. See, e.g., Engel v. Vitale, 370 U.S. 421, 423-24 n.2 (1962). (quoting the trial court opinion).
76 See 343 U.S. at 454 ("The Capital Transit Company . . . is a privately-owned public utility corporation. . . .").
77 U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . .").
78 343 U.S. at 461-62 (citing, inter alia, Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833)). See also D. CURRIE, supra note 1, at 189-93 (discussing Barron, which held that the takings provision of the fifth amendment was inapplicable to the states).
79 343 U.S. at 462.
80 Id.
safety, comfort and convenience were not impaired.  

The monopoly argument that Burton disdained seems in fact the strongest argument for holding the government responsible. If the distinction between public and private action means anything at all, it cannot be that a mere refusal to prevent private action — and that is all the dismissal of the investigation had been — activates constitutional limitations applicable only to government. If the government denies to the citizen all other practicable means of transportation, however, it may have to share responsibility for additional limits that the monopolist places upon his freedom. The government may not have a general duty to feed the people; but if it locks a man up without feeding him, it deprives him of life.  

Burton’s treatment of the issue was as sketchy as that provided here — perhaps because he did not necessarily mean to resolve it. In the next breath he proceeded to consider the substantive issues, “assuming that the action of Capital Transit . . . together with the action of the Commission . . . amounts to sufficient Federal Government action to make the First and Fifth Amendments applicable.” With this apparent disclaimer in mind, a second glance at the Court’s earlier conclusion reveals a conspicuous flabbiness. Burton wrote that the government’s connection to the broadcasting was sufficiently close “to make it necessary for us to consider” the amendments, not to make them applicable. That may have been only to say that the relationship was close enough that the argument of state involvement could not be rejected out of hand; rather than resolve the question, it was preferable to dismiss the less troublesome substantive arguments on the assumption that the government was responsible.  

Thus Pollak was tantalizingly inconclusive on its novel theories of both free speech and government responsibility. The Court’s unwillingness to take a firm stand may have reflected only a traditional reluctance to decide more than was necessary, but the seriousness with which it took such arguments suggested we had not heard the last of them.

81 Id.
82 See Black, supra note 73, at 963-64; Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864, 874 (1986).
83 343 U.S. at 462-63 (emphasis added).
84 Id. at 462.
85 The other Justices were silent on the issue. Justices Black and Douglas, who argued against constitutionality, were implicitly willing to find the government responsible.
B. The Heckler’s Veto

_Terminiello v. Chicago_ involved the disorderly conduct conviction of a public speaker who had engendered such strong feelings in his speech as to precipitate a riot.\(^8\) His anti-Communist and anti-Semitic diatribe appealed to some of his listeners’ prejudices, and a hostile crowd outside the building threw bricks through the windows. Although present in force, the police were unable to control the situation. The state appellate courts sustained conviction of the speaker on the ground that he had employed “fighting words” calculated to provoke reasonable listeners to violence,\(^8\) which the whole Court had held punishable in _Chaplinsky v. New Hampshire_.\(^8\)

Justice Jackson, who argued for affirmance of the conviction in his dissent, contended more broadly that Terminiello had “provoked a hostile mob and incited a friendly one.”\(^9\) Fresh from his extrajudicial labors in prosecuting Nazi war criminals at Nuremberg, Jackson compared what had happened in _Terminiello_ to the street battles between Fascists and Communists that had preceded Adolf Hitler’s rise to power and argued that Terminiello’s speech had created a clear and present danger of rioting that the state had a right to prevent.\(^9\)

To the dismay of Jackson and his fellow dissenters, Justice Douglas’s majority opinion avoided these troublesome questions as well as the original issue of fighting words by concluding that the statute as construed below was too broad. The state could not punish people for every speech that “stirs the public to anger, invites dispute, [or] brings about a condition of unrest.”\(^9\)\(^9\) It is “a function of free speech under our system to invite dispute.”\(^9\)\(^9\) In fact, speech “may . . . best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with condi-

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\(^8\) 337 U.S. 1 (1949).
\(^7\) 337 U.S. at 2-3 (1949); id. at 6-8 (Vinson, C.J., dissenting); id. at 14-23 (Jackson, J., dissenting). See generally Stone II, supra note 1, at 47-48 (discussing _Chaplinsky_).
\(^8\) 315 U.S. 568 (1942).
\(^9\) 337 U.S. at 13 (Jackson, J., dissenting).
\(^9\) Id. at 23-26 (“It was a local manifestation of a worldwide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which their kind has devastated Europe.”). Id. at 23.
\(^9\) Id. at 4.
\(^9\) Id.
tions as they are, or even stirs people to anger."93 It was irrelevant that Terminiello's speech might have been punished under a different law. Like the red-flag statute struck down in Stromberg v. California,94 the statute under which he had been convicted was invalid because it outlawed speech that created no clear and present danger of substantive harm.95

The issues Jackson raised in Terminiello arose once again in Feiner v. New York,96 after Minton and Clark had replaced Murphy and Rutledge. This time Jackson's views prevailed. Feiner's street-corner speech, the trial judge found, "gave the impression that he was endeavoring to arouse the Negro people against the whites," and "at least one [onlooker] threatened violence if the police did not act."97 Ultimately, "[b]ecause of the feeling that existed in the crowd both for and against the speaker," the police "'stepped in to prevent it from resulting in a fight.'"98 Feiner was convicted of disorderly conduct, and the Supreme Court affirmed.99

Quoting Cantwell v. Connecticut,100 Vinson emphasized that the state could punish "'incitement to riot,'" noting that "'[w]hen clear and present danger of riot, disorder . . . or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.'"101 What had been missing in Cantwell was present in Feiner:

It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persu-
sion and undertakes incitement to riot, they are powerless to prevent a breach of the peace. . . . The findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers [orders to stop speaking] convince us that we should not reverse this conviction in the name of free speech.102

Justice Black, dissenting, said there was no clear and present danger of breach of the peace (as there had been in Terminiello). It was "far-fetched to suggest" that there was "any imminent threat of riot or uncontrollable disorder."103 Black made a more fundamental point as well: even if the situation was critical, the police should have kept the peace by controlling the crowd, not by silencing the speaker.104 Douglas and Minton echoed this argument in a separate dissent. If "the police throw their weight on the side of those who would break up the meetings, the police become the new censors of speech."105

Like Roberts in Cantwell and Jackson in Terminiello, the majority in Feiner seemed to lump together two types of speakers who arguably presented quite different constitutional problems: one who urges his audience to commit crimes and one whose audience wishes to silence him. That the danger of disturbance may be equally clear and present in the two cases merely exposes one of the defects of Holmes's mellifluous phrase as a universal test of the limits of expression.106 Incitement to crime is not only dangerous but of little social value; the heckler's veto may deprive us of arguments that lie at the heart of first amendment protection.107 The inciter calls sanctions upon himself by blameworthy conduct; the heckler's veto rewards the enemies of freedom for their misbehavior. Black and Douglas were right: if the crowd refuses to let the speaker speak, it is the crowd that should be punished.

102 340 U.S. at 321.
103 Id. at 325 (Black, J., dissenting). Black insisted, as precedent suggested, that the Court had a duty to reassess the facts for itself to determine whether federal rights had been denied. Id. at 322 & n.4 (citing Norris v. Alabama, 294 U.S. 587, 589-90 (1935)). See also Hughes II, supra note 1, at 805 n.32 (discussing Norris).
104 340 U.S. at 326-27 (Black, J., dissenting).
105 Id. at 331 (Douglas, J., joined by Minton, J., dissenting).
107 This also distinguishes fighting words, which tend to provoke even reasonable people to violence and which can be avoided without suppressing whatever message the speaker wishes to convey.
A later Court would recognize this in holding that widespread public opposition did not justify abandoning the constitutional ban on racial exclusion from public schools.\(^{108}\) Although *Feiner* seems to look in the opposite direction, a studied ambiguity surrounds both Vinson’s opinion and the passage from *Cantwell* on which he relied. In each case the talk of clear and present danger was coupled with the term “incitement to riot” in such a way as to leave it unclear whether the former was intended as an alternative ground for upholding conviction\(^{109}\) or as an additional requirement even in cases of incitement — as the Court would later hold in one of its briefest and greatest opinions.\(^{110}\) In any event, because the Court concluded that Feiner had incited his hearers to riot, anything the opinion implied as to the hecklers’ power was unnecessary to the decision.\(^{111}\)

C. *Group Libel*

A leaflet distributed in Chicago called upon the City “to halt the further encroachment, harassment and invasion of white people, their prop-

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\(^{109}\) In a concurring opinion also applying to *Feiner*, Justice Frankfurter appeared to take this position: “It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd, whatever its size and temper, and not against the speaker.” Niemotko v. Maryland, 340 U.S. 268, 289 (1951) (Frankfurter, J., concurring).


\(^{111}\) Traditional incitement principles also go far to justify several decisions of the Vinson period upholding the prohibition of picketing whose object was to bring about actions in violation of the law. See Local Union No. 10, United Ass’n of Journeymen Plumbers v. Graham, 345 U.S. 192 (1953) (Burton, J.) (violation of Right-To-Work law); International Bhd. of Elec. Workers v. NLRB, 341 U.S. 694, 705 (1951) (Burton, J.) (secondary boycott); Building Serv. Employees v. Gazzam, 339 U.S. 532 (1950) (Minton, J.) (employer interference with choice of bargaining representative); International Bhd. of Teamsters v. Hanke, 339 U.S. 470 (1950) (no majority opinion) (involuntary union shop); Hughes v. Superior Court, 339 U.S. 460 (1950) (Frankfurter, J.) (racial quota in hiring); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (Black, J.) (refusal to deal with non-union ice peddlers). See also Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 595 (1951) (“Signal picketing” is entitled to no greater constitutional protection than the combination it sets in motion.”); Cox, *Some Aspects of the Labor Management Relations Act*, 1947, 61 HARV. L. REV. 1, 26-27 (1947) (“Banning the use of secondary strikes and boycotts as weapons of organization is primarily a prohibition against economic pressures; the interference with freedom of persuasion is relatively slight since all avenues of communication except the picket line are left open.”); *Stone II*, *supra* note 1, at 46 n.2 (discussing *Giboney* as well as earlier picketing cases). For a more critical assessment, see Fraenkel, *Peaceful Picketing — Constitutionally Protected?,* 99 U. PA. L. REV. 1 (1950).
erty, neighborhoods and persons, by the Negro.'”112 The leaflet added that “‘[i]f persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will.’”113 The distributor of this leaflet was prosecuted under an Illinois statute forbidding certain publications or exhibitions “‘which . . . portray[] depravity, criminality, unchastity, or lack of virtue in a class of citizens, of any race, color, creed or religion . . . [and] expose[] the citizens of any race, color, creed or religion to contempt, derision or obloquy.’”114 President Truman’s four appointees joined Justice Frankfurter’s 1952 opinion in Beauharnais v. Illinois to uphold the conviction.115 The other four Roosevelt appointees — Black, Douglas, Reed, and Jackson — dissented.116

Frankfurter resolved the case by an exercise in taxonomy. Libel of an individual had always been a crime, which Justice Murphy’s dictum in Chaplinsky had ranked with fighting words as a “class[] of speech, the prevention and punishment of which ha[s] never been thought to raise any Constitutional problem.”117 It would surely be libelous to brand an individual “a rapist, robber, carrier of knives and guns, and user of marijuana.”118 Furthermore, the state might “warrantably believe that a man’s job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits.”119 Extending the traditional libel law to statements disparaging an entire racial or religious group was thus not “a wilful and purposeless restriction unrelated to the peace and well-being of the State,” and no clear and present danger of injury was required since “[l]ibelous utterances” were not “within the area of constitutionally protected speech.”120

113 Id. at 252.
114 Id. at 251 (quoting ILL. REV. STAT. ch. 38, para. 471 (1949)).
115 Id. at 250, 251-67 (1952).
116 Id. at 267-305.
117 Id. at 256 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).
118 Id. at 257-58.
119 Id. at 258-66. On the other hand, when New York attempted to protect religious groups from “contempt, mockery, scorn and ridicule” by requiring a license to exhibit motion pictures, the
History indeed furnished powerful evidence that punishment of garden-variety defamation had been thought consistent with freedom of expression. As Frankfurter acknowledged, however, the historical record was not so clear as to statements that disparaged entire classes of the population. Moreover, as Justice Black observed in dissent, the differences between individual and group libels were relevant to the reasons why it was appropriate that ordinary libel be denied protection.

At first glance one might think it obvious that defaming an entire race was worse than defaming an individual. Group libel, however, may actually do less harm to the individual. To call blacks a race of "gun-toting rapists" says little about the habits of any particular black. Although it would be hard to deny the destructive power of group defamation, reduced harm to the individual arguably makes less pressing "the social interest in order and morality" on which Murphy relied in Chaplinsky.

More important are the differences between individual and group libel with respect to the other side of Murphy's calculus, the "social value" of the proscribed communication. Traditional libel law, said Black, "confined state punishment of speech and expression to the narrowest of areas involving nothing more than purely private feuds. Every expansion of the law of criminal libel so as to punish discussions of matters of public concern means a corresponding invasion of the area dedicated to free expression by the First Amendment." The leaflet in question presented "arguments on questions of wide public interest and importance;" to petition for and publicly discuss proposed legislation" could not constitu-

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121 343 U.S. at 258.
122 Id. at 272-75 (Black, J., joined by Douglas, J., dissenting).
123 See Arkes, Civility and the Restriction of Speech: Rediscovering the Defamation of Groups, 1974 SUP. CT. REV. 281, 291-92; Riesman, Democracy and Defamation: Control of Group Libel, 42 COLUM. L. REV. 727, 728 (1942) ("In the rise of the Nazis to power in Germany, defamation was a major weapon."); Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 COLUM. L. REV. 1085 (1942) (describing the Nazi strategy).
124 343 U.S. at 272 (Black, J., dissenting).
125 Id. at 273.
tionally be made a crime.  

Kovacs, Breard, and Feiner might perhaps be explained away, but Beauharnais left no doubt that freedom of expression was in retreat. Murphy and Rutledge were sorely missed. To say the state could forbid statements on political topics of general public interest because they exposed a racial group to "obloquy" seemed to cut deeply into first amendment values.  

Most ominous was the majority's acceptance of an extremely deferential attitude toward legislative judgments that Frankfurter alone had exhibited in the second flag-salute case. To ask only whether the extension of libel laws to matters of public interest was "wilful and purposeless" seemed inconsistent with Frankfurter's own concession in Kovacs that "those liberties . . . which history has attested as the indispensable conditions of an open . . . society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." As Douglas implied, the Court seemed to be saying expression was as subject to regulation as "factories, slums, apartment houses, [and the] production of oil."  

126 Id. at 275. Jackson's dissent, echoing Black's concern for "the right to comment upon matters of public interest," stressed the absence of any showing of clear and present danger, adding that the trial judge had excluded evidence of truth and submitted only the issue of publication to the jury. Id. at 299-305. Justice Reed thought the vague statutory terms "virtue," "derision," and "obloquy" included speech that could not constitutionally be punished. Id. at 280-84. Justice Douglas waved the flag. Id. at 284-87. There was no suggestion that Beauharnais had incited anyone to the commission of crime, provoked a hostile audience to endanger the public peace, or addressed fighting words to any individual within fighting range. See id. at 272-73, 302 (Black and Jackson, JJ., dissenting). For an argument against letting juries decide the "truth" of racial slurs, see Arkes, supra note 123, at 301-02.  


129 Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).  

130 343 U.S. at 286 (Douglas, J., dissenting). See also id. at 269 (Black, J., dissenting) ("Today's case degrades First Amendment freedoms to the 'rational basis' level."). Justice Jackson went to some lengths in his dissent to embrace Holmes's suggestion in Gitlow that the limits the fourteenth amendment imposed on state restrictions of speech might be less stringent than those the first amendment imposed on the United States. Beauharnais, 343 U.S. at 287-95 (Jackson, J., dissenting). See Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting). For criticism of this conclusion, see H. Kalven, supra note 127, at 33-34.
D. The Witch Hunt

A distressing series of decisions upholding measures designed to protect against subversion revealed the full extent of the retreat. World War II had produced its share of questionable limitations on freedom, but restrictions of speech and assembly had not figured prominently among them. Any inference that this was attributable to the educational value of earlier wartime excesses, however, was rudely dispelled by a rising tide of repressive legislation once the crisis was past. Soviet Russia, our former ally, was now perceived as working actively to undermine our government. Communists were imagined under every bed, and Senator Joe McCarthy was the man of the hour.

1. Dennis v. United States

"[S]elf-preservation," wrote Justice Frankfurter, "is the most pervasive aspect of sovereignty." Obviously, said the Chief Justice, Congress can "protect the Government of the United States from armed rebellion." It followed, for six of the eight participating Justices, that leaders of the Communist Party could be jailed under the Smith Act for conspiring to "organize" a society to "advocate" the violent overthrow of the government.

There was no doubt that the Smith Act served a compelling governmental interest. The question, as Vinson noted, was whether the statute was an appropriate means for achieving that goal. Congress had not been content to forbid only rebellion itself, or even its incitement; conspiring to organize persons to advocate overthrow was three steps removed from the

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131 See generally Stone I, supra note 1, passim.
132 See White, supra note 1, at 1145-55 (discussing the World War I Espionage Act cases).
134 Dennis v. United States, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring).
135 Id. at 501 (opinion of Vinson, C.J.).
137 See 341 U.S. at 496-97. Justice Clark, who had previously been in charge of Smith Act prosecutions as Attorney General, did not sit. Id. at 517.
138 Id. at 501.
substantive crime.

The Whitney and Gitlow opinions of the 1920s, which went far to sustain the statute, had been discredited. Yet the case for conviction in Dennis, Frankfurter rightly observed, was much stronger. It would require "excessive tolerance of the legislative judgment" to believe that what Holmes had referred to as the "puny anonymities" in Gitlow "could justify serious concern." In Frankfurter's view, however, Congress could reasonably have found that a tightly organized party of 60,000 members with subversive goals posed "a substantial danger to national security."

Douglas and Black protested that there was no clear and present danger of rebellion. Professing to accept this test, Vinson seemed to read out of it the requirement that the danger be "present." "Obviously, the words cannot mean that . . . the Government . . . must wait until the putsch is about to be executed . . . ." The Chief Justice thus ignored Brandeis's appealing explanation that suppression was impermissible while there was time for discussion. Jackson insisted that the first amendment did not forbid punishment of conspiracy, giving no weight to the fact that the conspiracy charged was one not to overthrow the government, but to organize a group to advocate its overthrow. If the association itself could not be punished, focusing on the more remote conspiracy

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139 Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); see generally Taft, supra note 1, at 82-91 (discussing Gitlow and Whitney).

140 See 341 U.S. at 507 (Vinson, C.J.) (noting that later decisions had "inclined toward" the views expressed by justices Holmes and Brandeis in separate opinions). Justice Frankfurter, in his concurring opinion, stated that "it would be disingenuous to deny that the dissent in Gitlow has been treated with the respect usually accorded to a decision." Id. at 541 (Frankfurter, J., concurring).

141 341 U.S. at 547. See also id. at 547. See also id. at 510 (Vinson, C.J.) ("The situation with which justices Holmes and Brandeis were concerned in Gitlow was a comparatively isolated event, bearing little relation, in their minds, to any substantial threat to the safety of the community."). See Meiklejohn, What Does the First Amendment Mean?, 20 U. CHI. L. REV. 461 (1953) (sharply criticizing Justice Frankfurter's opinion).

142 341 U.S. at 579 (Black, J., dissenting); 341 U.S. at 581 (Douglas, J., dissenting).

143 Id. at 509. See Frank, The United States Supreme Court: 1950-51, 19 U. CHI. L. REV. 165, 189-90 (1952) ("[T]he Vinson opinion claims a lineage from Holmes and Brandeis which it does not have. The voice is Jacob's voice, but the hands are the hands of Esau.") (footnote omitted).

144 Whitney v. California, 274 U.S. 357, 376-77 (1927) (Brandeis, J., concurring) (quoted in Dennis, 341 U.S. at 585-86 (Douglas, J., dissenting)). For a reply to the argument that application of the clear-and-present-danger test would leave the government powerless to protect itself, see Nathan- son, The Communist Trial and the Clear-and-Present-Danger Test, 63 HARV. L. REV. 1167 (1950).

145 341 U.S. at 561-79 (Jackson, J., concurring).
should not have made conviction any easier. Frankfurter’s argument that
it was basically up to Congress to determine the limits of its own power\footnote{Id. at 525-27, 550-52 (Frankfurter, J., concurring).} seemed to confirm the impression left by his dissent in \textit{West Virginia State Board of Education v. Barnette} that he took a dim view of judicial review in general.\footnote{West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 646-71 (1943) (Frankfurter, J., dissenting). \textit{See also Stone II, supra} note 1, at 53-55.} As John Marshall had said, the Framers did not mean to leave the fox in charge of the chickens.\footnote{See \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 178 (1803). \textit{See generally D. Currie, supra} note 1, at 66-74.}

Vinson spoke for four Justices. Despite the contrary views of Frankfurter and Jackson, clear and present danger had become the test of convictions even under statutes specifically directed to subversive speech,\footnote{Compare \textit{Gitlow v. New York}, 268 U.S. 652, 670-71 (1925) with \textit{Dennis v. United States}, 341 U.S. at 516-17.} but it had lost its protective power.\footnote{See R. McCluskey, \textit{supra} note 133, at 197; Mendelson, \textit{Clear and Present Danger — from Schenck to Dennis}, 52 COLUM. L. REV. 313, 330 (1952) ("The remoteness element ... is the heart of the danger test ... ").}

2. \textit{The Privilege Doctrine}

Self-preservation efforts were not restricted to criminal penalties. Suspect organizations were blacklisted by the Attorney General; their members were excluded from government jobs, from union offices, and even — if they were aliens — from the country itself. The Supreme Court went along with most of this, but in the last of such cases during the Vinson period it firmly drew the line.

The tale begins with cases having nothing to do with subversion. In a notorious opinion for the Supreme Judicial Court of Massachusetts, Justice Holmes had denied that the dismissal of a police officer for political activity raised any freedom of expression question because there was "no constitutional right to be a policeman."\footnote{McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).} The Supreme Court had already recognized, however, that to condition the grant of such a "privilege" on surrender of a constitutional right could effectively abridge the right itself. Thus, a foreign corporation could not be required to surrender its right to litigate in federal court or to submit to otherwise unconstitu-
tional taxation or regulation as a condition of doing business within a state. Similarly, when the Vinson Court, by a 4-3 vote in United Public Workers v. Mitchell upheld the Hatch Act's drastic limitation of the political activity of civil-service employees, it did not rest on the ground that there was no right to government employment. Acknowledging that Congress could not exclude Republicans or practicing Catholics from federal jobs, Justice Reed frankly, if deferentially, found the restriction justified by the government's interest in keeping politics out of the civil service.

Consequently, when in 1950 the Justices in American Communications Association v. Douds passed upon a Taft-Hartley Act provision denying access to the National Labor Relations Board to unions whose officers declined to swear they were not Communists, Chief Justice Vinson did not simply brand access to the Board as a "privilege" that could be denied or limited at will. Rather, he set forth an exemplary framework for determining when conditioning government benefits on surrender of a

163 Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 594 (1926); Western Union Tel. Co. v. Kansas, 216 U.S. 1, 34-38 (1910); Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874); D. Currie, supra note 1, at 413 n.74; Fuller I, supra note 1, at 377 n.315; Taft, supra note 1, at 79 n.80. Justice Holmes never seemed to get the point; he dissented in both Western Union, 216 U.S. at 52-56, and Frost, 271 U.S. at 600-02.


166 330 U.S. 75, 94-104 (1947); cf. Ex parte Curtis, 106 U.S. 371 (1881) (upholding ban on one civil servant's acceptance of political contribution from another). See generally D. Currie, supra note 1, at 443-44. Justices Black and Douglas, dissenting in Mitchell, seemed correct in asserting that to deny such fundamental rights to public workers was an extreme means of protecting them from pressure from their superiors. 330 U.S. at 105-15 (Black, J., dissenting); id. at 115-26 (Douglas, J., dissenting) (also criticizing the Court for concluding that employees who had not yet violated the Act had no standing to challenge it and arguing convincingly that the risk of prosecution for activities they would otherwise engage in created an actual controversy within the meaning of Article III). Otherwise, as Professor Borchard had argued, "the only way to determine whether the suspect is a mushroom or a toadstool is to eat it" — scarcely an acceptable course in a "civilized legal system." Borchard, The Constitutionality of Declaratory Judgments, 31 Colum. L. Rev. 561, 585-89 (1931). See generally Taft, supra note 1, at 129-31 (discussing earlier decisions respecting anticipatory relief).


168 See generally Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968); Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960) (both tracing the development of limits on the "privilege" doctrine).

169 Indeed Vinson acknowledged that the provision limited some interests that could not fairly be characterized as privileges, such as the right to enter into union shop contracts or engage in certain strikes or boycotts. Douds, 339 U.S. at 389-90 & n.6.
constitutional right should be treated as a denial of the right itself.\textsuperscript{160}

"Men who hold union offices," wrote Vinson, "often have little choice [under the Act] but to renounce Communism or give up their offices."\textsuperscript{161}

"By exerting pressures on unions to deny office to Communists . . . [the statute] has the . . . necessary effect of discouraging the exercise of political rights protected by the First Amendment\textsuperscript{162} — for not even in \textit{Dennis} would the Court say it could be made a crime simply to be a member of the Communist Party.

To Justice Black this was enough to make the oath requirement unconstitutional.\textsuperscript{163} Vinson was correct, however, that the government need not open all its doors to everyone it cannot put behind bars. On the one hand, the effect of the oath provision on protected conduct was less severe than that of a criminal prohibition. The statute "touched only a relative handful of persons . . . [a]nd it leaves those few who are affected free to maintain their affiliations . . . subject only to possible loss of positions."\textsuperscript{164} On the other hand, the government’s interest was greater because union officers were in a unique position to precipitate crippling political strikes.\textsuperscript{165} Greater restrictions might be placed on "a general with five hundred thousand men at his command" than on the "village constable."\textsuperscript{166} The first amendment requires that one "be permitted to believe what he will" and usually to advocate it, but not "to be the keeper of the arsenal."\textsuperscript{167}

\textsuperscript{160} Id. at 382, 393-412 (1950).
\textsuperscript{161} Id. at 393.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 445-53 (Black, J., dissenting). Justices Douglas, Clark, and Minton did not participate. See id. at 415.
\textsuperscript{164} Id. at 404.
\textsuperscript{165} Id. at 391.
\textsuperscript{166} Id. at 409.
\textsuperscript{167} Id. at 412. "[T]he problem," said Vinson, "is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination . . . that Communists . . . pose continuing threats to th[e] public interest when in positions of union leadership." Id. at 400. In citing for this test a decision dealing with content-neutral regulation of the time, place, or manner of speaking, Chief Justice Vinson seemed to make it easier than it should have been to uphold the restriction; for even an indirect burden laid only upon those professing a particular point of view has a more distorting effect on public debate than any neutral limitation. See \textit{Schneider v. State}, 308 U.S. 147, 161 (1939) (handbilling prohibition). See \textit{generally Stone, Content Regulation and the First Amendment}, 25 \textit{Wm. & Mary L. Rev.} 189 (1983) (supporting a sharp distinction between content-based and content-neutral restrictions on expression). Nevertheless, Professor McCloskey's conclusion that Vinson's opinion "suggested . . . that Congress could use the commerce power to interfere with free speech and association without fear of constitutional hin-
That the balance of interests was more favorable to a measure limited to union officers than to a general prohibition, however, did not compel Vinson's conclusion that the Taft-Hartley provision was constitutional. The statute swept quite broadly, disqualifying unions whose officers were Communist Party members regardless of whether they shared or even knew of the Party's goals. As the Court would soon recognize, mere party membership may be entirely innocent. The statute seemed to limit the liberty of far more persons than was necessary to protect commerce from interruption.\(^\text{168}\)

Three cases decided soon after *Douds* followed its implications by upholding various measures designed to exclude subversives from candidacy for public office, from municipal employment, and from teaching in public schools.\(^\text{169}\) In 1952 the majority went so far as to permit the deportation of long-time resident aliens for mere membership in the Communist Party in the distant past.\(^\text{170}\) In the meantime, however, four of eight participating Justices had found constitutional defects in the Attorney General's blacklist of "subversive" organizations.\(^\text{171}\) In *Wieman v. Updegraff*, decided...
just a few months before Vinson's death, the Court unanimously found the limit.\textsuperscript{172}

Oklahoma had denied public employment to anyone unwilling to swear that he was not a member of any organization on the Attorney General's list.\textsuperscript{173} Without once again facing the divisive issues surrounding the list itself, the Court distinguished its earlier public employment decisions on the ground that the restrictions upheld in those cases had all been read to apply only to those who participated knowingly in proscribed organizations or personally sought to destroy the government by force.\textsuperscript{174} Mere membership in a subversive organization could not be made conclusive.\textsuperscript{175} Thus the Oklahoma provision excluded too many innocent persons.\textsuperscript{176}

This was true enough, though it distinguished neither \textit{Douds} nor the deportation case. Nevertheless, the Court seemed to have changed its tone if not its tune; individual responsibility had not been stressed much in the schoolteacher decision. Repeated exposure to provisions of this sort and to press reports of witch hunting seemed to have heightened the Court's awareness of the dangers that unbridled concern for national security held for first amendment freedoms.\textsuperscript{177}

\begin{itemize}
\item denial of procedural due process. Black added first amendment and bill of attainder arguments as well. \textit{Id.} at 143-46. Burton concurred on nonconstitutional grounds. \textit{Id.} at 124-42. Reed, joined by Vinson and Minton, voted to uphold the order. \textit{Id.} at 199-213; Clark, who as Attorney General had promulgated the challenged list, did not vote. \textit{Id.} at 142.
\item 344 U.S. 183 (1952) (Clark, J.). Justice Burton concurred only in the result. Justice Jackson did not participate. \textit{See id.} at 192.
\item 344 U.S. at 186-87.
\item \textit{Id.} at 188-89.
\item \textit{Id.} at 190 ("A state servant may have joined a proscribed organization unaware of its activities and purposes.").
\item \textit{See id.} at 191 ("Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."). The opinion did not explicitly mention freedom of speech or assembly, concluding only that "[t]he oath offends due process." \textit{Id.} Professor Van Alstyne considers \textit{Wieman} based essentially upon the concept of equality, although the Equal Protection Clause was nowhere mentioned. Van Alstyne, \textit{supra} note 158, at 1454-55. \textit{Cf.} Niemotko v. Maryland, 340 U.S. 268 (1951).
\item See Kalven, \textit{Upon Rereading Mr. Justice Black on the First Amendment}, 14 U.C.L.A. L. REV. 428, 438 (1967) (describing \textit{Wieman} as "an impressive victory at a time when few anti-subversive measures were being found wanting").
\end{itemize}
III. EQUALITY AND PROCESS

A. Race

As I have elsewhere discussed, the Vinson Court put the final kibosh on the exclusion of blacks from primary elections in *Terry v. Adams* in 1953. This decision was as predictable as it was creative, for the period had begun as it ended in *Terry* — with a bold decision holding the state responsible for discrimination by persons with no official governmental power.

*Shelley v. Kraemer* involved two suits to enjoin violations of restrictive covenants forbidding the occupancy of land by persons not of “the Caucasian race.” Without dissent, the Supreme Court set the injunctions aside on the ground that they denied black purchasers equal protection of the laws.

Because the equal protection clause limits only the states, Vinson conceded that the private agreements not to permit black occupancy were not themselves unconstitutional. In *Shelley*, however, the property owners had been willing to disobey their agreements; “but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question.” Ever since the jury discrimination cases of 1880 it had been clear that the fourteenth amendment limited state judicial as well as legislative action, and that, said Vinson, was that.

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179 334 U.S. 1, 4-7 (1948).
180 Reed, Jackson, and Rutledge did not participate. 334 U.S. at 23.
181 Id. at 13 (citing Corrigan v. Buckley, 271 U.S. 323 (1926)).
182 Id. at 19.
183 Id. at 14-18 (citing, e.g., Virginia v. Rives, 100 U.S. 313, 318 (1880)); see also D. CURRIE, *supra* note 1, at 385-86 (discussing *Rives* and *Ex parte* Virginia, 100 U.S. 339, 347 (1880) (Strong, J.) (equal protection clause forbids judicial and executive officers from excluding blacks from juries)).
184 For approving views see Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203, 214 (1949); Frank, *The United States Supreme Court: 1947-48*, 16 U. CHI. L. REV. 1, 23 (1948) [hereinafter Frank, 1947-48] (“[I]t would have been hair-splitting indeed to say that a state may do through its courts what it may not do through its legislature.”).

In a companion case from the District of Columbia, the Court reached the same result on statutory and public-policy grounds without reaching the question whether the fifth amendment’s due process clause imposed limitations on Congress similar to those the equal protection clause imposed on the
Of course, as the Court so laboriously demonstrated, there had been state action. The serious question was whether that action had denied equal protection of the laws. The parties to the covenants, not the state, had made the decision to discriminate on racial grounds. The state’s policy was the racially neutral one of enforcing private agreements. The decision appeared to mean the police could no longer enforce a householder’s decision to invite only whites to his cocktail party. It rings hollow to proclaim private rights while denying the state’s power to protect them; Shelley seemed to deprive the constitutional distinction between public and private action of much of its significance.

In other cases of the period, the Court continued to insist that separate schooling for blacks in fact be equal. A crucial passage in Shelley, however, seemed to foretell the demise of racial segregation itself. It was immaterial, Vinson argued, whether the states would enforce racial cove-

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186 See Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 29 (1959). Earnest efforts have been made to limit Shelley to cases in which the state assists individuals in coercing third parties, Pollak, Racial Discrimination and Judicial Integrity, 108 U. PA. L. REV. 1, 13 (1959), or is not constitutionally barred from interfering with the private discriminatory decision, Henkin, supra note 185, at 498. Neither of these arguments answers the basic objection that the state’s position was racially neutral in Shelley; and neither explains how the state can be said to be any more responsible for the private decision in one case than in the other. Analytically more attractive is the effort in Lewis, The Meaning of State Action, 60 COLUM. L. REV. 1083, 1115-16 (1960), which assimilates Shelley to the white-primary cases, supra note 178, by arguing that private covenants were a private exercise of the public function of zoning. This ordinary use of private ordering, however, seems a far cry from control of the machinery for choosing state officials or from the comprehensive exercise of governmental functions by the company town in Marsh v. Alabama, 326 U.S. 501 (1946). See also Stone II, supra note 1, at 58-61.

187 When Shelley was applied to forbid the grant of damages for violation of a racial covenant in Barrows v. Jackson, 346 U.S. 249 (1953) (Minton, J.), Vinson dissented alone, 346 U.S. at 260-69, although on the crucial issue of state action the cases seemed indistinguishable. More interesting was the Court’s conclusion in Barrows, 346 U.S. at 254-59, that a white seller being sued for violating the covenant had standing to assert the constitutional rights of black purchasers. The general principle that even injured parties may assert only their own rights was a judicially developed “rule of self-restraint,” not a constitutional requirement; and it should be relaxed in Barrows because in such a case “it would be difficult if not impossible for those persons whose rights are asserted to present their grievance before any court.” Id. at 257.

nants that excluded whites as well as those directed against blacks. "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. . . . It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."¹⁸⁹

Two wrongs, in other words, do not make a right; both whites and blacks are denied equal protection if each is denied what the other receives. Brown v. Board of Education, held over for reargument, was not decided until after Vinson's death;¹⁹⁰ but the Justices would have some explaining to do if the separate-but-equal doctrine was to survive.

B. Other Classifications

As early as 1915 the Court had held that equal protection precluded the state from limiting the number of aliens a willing employer could hire.¹⁹¹ In 1948 it added that aliens could not be excluded from commercial fishing.¹⁹² A few months earlier the Court had even made a substantial dent in the oppressive alien land laws it had unhesitatingly upheld in earlier


¹⁹⁰ 345 U.S. 972 (1953). The Court had earlier taken the unusual step of inviting petitions for certiorari before a decision had been rendered in a case pending before the Court of Appeals for the District of Columbia. That case raised the same question under the due process clause of the fifth amendment. See Brown v. Board of Educ., 344 U.S. 1, 3 (1952) (per curiam).

¹⁹¹ Truax v. Raich, 239 U.S. 33 (1915). See White, supra note 1, at 1137 n.140 (discussing Truax).

¹⁹² Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (Black, J.). Black wrote for the majority over a dissent by Justice Reed; 334 U.S. at 427-31. Cf. Toomer v. Witsell, 334 U.S. 385, 395-403 (1948) (Vinson, C.J.) (reaching the same conclusion as to citizens of other states under the more explicit privileges and immunities clause of article IV).

The law struck down in Takahashi applied only to aliens "ineligible to citizenship," 334 U.S. at 418, and thus the case has been argued to present the easier case of racial discrimination against alien Japanese. Yet the Court's opinion deals basically with the law as if it excluded all aliens, going to some lengths to refute the state's argument that the limitation to persons ineligible for citizenship justified an otherwise impermissible discrimination. Takahashi, 334 U.S. at 420. See Rosberg, The Protection of Aliens from Discriminatory Treatment by the National Government, 1977 Sup. Ct. Rev. 275, 297-98; cf. Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886); D. Currie, supra note 1, at 387.
years, striking down discrimination against a minor citizen who held paper title on the ground that his father was an alien ineligible for citizenship. Niemotko v. Maryland employed the equal protection clause rather than the free exercise clause to strike down religious discrimination in the issuance of park permits. In other respects, however, the Vinson Court was most unreceptive to arguments that equal protection had been denied.

Kotch v. Pilot Commissioners upheld a state law prescribing rank nepotism in the selection of river pilots; Railway Express Agency v. New York made only the feeblest effort to explain why it might be reasonable to exempt an owner's own messages from a ban on advertising on the exterior of vehicles. MacDougall v. Green summarily dismissed a challenge to a requirement that new political parties seeking to nominate candidates for office obtain petition signatures in at least fifty counties.

See, e.g., Terrace v. Thompson, 263 U.S. 197 (1923); see generally Taft, supra note 1, at 70 (discussing the earlier cases).

Oyama v. California, 332 U.S. 633 (1948) (Vinson, C.J.); Justices Reed, Burton, and Jackson dissented, 332 U.S. at 674-89, the last objecting that "[i]f California has power to forbid certain aliens to own its lands, it must have incidental power to prevent evasion of that prohibition by use of an infant's name to cloak a forbidden ownership." Id. at 684. Justices Black, Douglas, Murphy, and Rutledge concurred, arguing that the prohibition on alien ownership was itself invalid. Id. at 647-74.


330 U.S. 552 (1947) (Black, J., with Rutledge, Reed, Douglas, and Murphy, JJ., dissenting). The allegations of the complaint, accepted as true for purposes of a motion to dismiss, were that only "relatives and friends" of established pilots were accepted into an apprenticeship program that was a prerequisite to state employment. Id. at 555. Citing "the advantages of early experience under friendly supervision . . . the benefits to morale and esprit de corps which family and neighborly tradition might contribute," and "the close association in which pilots must work and live," Justice Black concluded that the measure was not "unrelated" to the legitimate objective of securing "the safest and most efficiently operated pilotage system practicable." Id. at 563-64 (emphasis in original).

336 U.S. 106, 110 (1949) (Douglas, J.) ("The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use."); cf. 336 U.S. at 114-15 (Jackson, J., concurring) ("There is not even a pretense here that the traffic hazard created by the advertising which is forbidden is in any manner or degree more hazardous than that which is permitted."). Justice Jackson also made the interesting argument that the Court should be less deferential in passing upon equal protection than due process claims because a holding that the state had unconstitutionally discriminated left it free to reenact the law in more general form. Id. at 111-12. "The framers of the Constitution knew . . . 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." Id. at 112.

335 U.S. 281, 283 (1948) (per curiam) ("To assume that political power is a function exclusively of numbers is to disregard the practicalities of government"). Justices Douglas, Black, and
though *Carolene Products* had suggested that restrictions on the political process might be subjected to unusually strict scrutiny.\(^{198}\) Most strikingly, *Goesaert v. Cleary* gave the back of the judicial hand to a challenge to the virtual exclusion of women from bartending.\(^{200}\) The contrast with the alien cases was striking. Despite the obvious political weakness of foreigners,\(^{201}\) one might have thought sex more suspect classification than alienage. It seems fair to assume that the citizenship clause of the fourteenth amendment was meant to confer something of value.\(^{202}\)

Murphy dissented. 335 U.S. at 287-91. Justice Rutledge argued, as he had in *Colegrove v. Green*, that the short period before the next election made equitable relief improper. 335 U.S. at 284-87. See *Colegrove v. Green*, 328 U.S. 549, 564-66 (1946); see also *Stone II*, supra note 1, at 67-69 (discussing *Colegrove*).

\(^{198}\) United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); See generally *Hughes I*, supra note 1, at 554-55 (discussing *Carolene Products*); see also *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Stone I*, supra note 1, at 13-14 & n.60 (strict scrutiny of classification affecting “fundamental” right of reproduction). *South v. Peters*, 339 U.S. 276 (1950) (per curiam, over dissent of Douglas and Black, JJ.), decided after the deaths of Murphy and Rutledge, refused even to consider the merits of an equal protection attack on Georgia’s county-unit system for statewide elections despite the system’s obvious departure from equal electoral power for voters in heavily populated counties, saying only that “[f]ederal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state’s geographical distribution of electoral strength among its political subdivisions.” 339 U.S. at 277. Cited for this ambiguous conclusion were both *McDougall*, where the merits had been reached, and *Colegrove*, where three of the majority Justices had termed the issue “political” and the fourth (since deceased) had relied on particular timing problems that the Court did not suggest were present in *Peters*. See also *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (Jackson, J.). In *Waterman*, the Court employed political-question terminology to support the conclusion that the decision whether to allow an airline to operate international flights was unreviewable, essentially because the matters were committed to the President’s discretion. The opinion also reaffirmed the conclusion of three circuit courts in *Hayburn’s Case* that judicial decisions could not constitutionally be subjected to executive review. *Id.* at 113-14. See *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792); see generally D. Currrie, *supra* note 1, at 6-9.

\(^{200}\) 335 U.S. 464 (1948) (Frankfurter, J., over a dissent by Rutledge, Douglas, and Murphy, JJ.). “Michigan could, beyond question, forbid all women from working behind a bar.” *Id.* at 465. The question actually presented, however, was the constitutionality of an exemption for wives and daughters of bar owners. *Id.* The widespread lack of concern over sex discrimination at the time was exemplified by the observation of John P. Frank, normally a fervent advocate of civil rights and liberties, that *Goesaert* “illustrates that equal protection is far indeed from being a serious control over state economic legislation.” Frank, 1948-49, *supra* note 56, at 26.

\(^{201}\) *See Rosberg*, *supra* note 192, at 301-08.

\(^{202}\) History indeed suggests that citizens were to be protected generally against state discrimination under the privileges and immunities clause of the same amendment. The original sense of equal protection was the narrower one of protection against the wrongs of third parties. *See D. Currrie, supra* note 1, at 342-51 (discussing the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873)). Dissenters during the Vinson period revived the related argument that the equal protection clause was wholly inapplicable to corporations. *See Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576-81 (1949) (Douglas and Black, JJ., dissenting).
C. Procedure

It was not long after Vinson's appointment, in Adamson v. California, that Justice Black made his most ambitious effort to establish that the fourteenth amendment made the entire Bill of Rights applicable to the states. Though joined by Douglas, Murphy, and Rutledge, he fell one vote short. Reaffirming that the privileges and immunities clause protected only rights "inherent in national citizenship" and due process only those "implicit in the concept of ordered liberty," the majority, in an opinion by Justice Reed, adhered to the conclusion reached in Twinning v. New Jersey that state prosecutors and judges might constitutionally comment on the refusal of a criminal defendant to take the stand.


This Court beginning at least as early as 1934...has steadily rejected the due process philosophy enunciated in the Adair-Coppage line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.

Id. at 536.

Even the explicit guarantee of compensation for a federal taking of property was read narrowly in United States v. Caltex, Inc., 344 U.S. 149 (1952) (Vinson, C.J.) (allowing an uncompensated destruction of property to prevent it from falling into enemy hands during World War II). As Douglas and Black objected in dissent, the fact that public necessity justified destroying the property meant only that it could be destroyed with compensation. Id. at 156 (Douglas, J., joined by Black, J., dissenting). The fifth amendment's basis is that when property must be sacrificed for the common good "the public purse, rather than the individual, should bear the loss." Id. A better basis for the decision might have been that, given the presence of the enemy, the value of the property to its owners was close to zero.


332 U.S. at 92 (Douglas, J., joining Black's dissent); 332 U.S. at 123-24 (Murphy, J., joined by Rutledge, J., dissenting). The last two Justices, however, rejected the restrictive aspect of Black's interpretation, refusing to agree that the due process clause only incorporated the Bill of Rights. Id. at 124.

332 U.S. at 53. See D. Currie, supra note 1, at 342-51 (discussing the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873)).

332 U.S. at 54 (quoting Palko v. Connecticut, 302 U.S. 319, 323 (1937)); see also Hughes II, supra note 1, at 804 (discussing Palko).

"It seems quite natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by commenting
Two years later, in *Wolf v. Colorado*, the Court held 6-3 that the fourteenth amendment did not require a state court to exclude evidence obtained by unreasonable search or seizure.208 “The security of one’s privacy against arbitrary intrusion by the police,” Justice Frankfurter acknowledged, was “basic to a free society” and thus “enforceable against the States through the Due Process Clause.”209 There was room for honest difference of opinion, however, whether the exclusion of relevant evidence was an indispensable means of securing it.210 “[M]ost of the English-speaking world” did not so regard it.211 The great Cardozo, noting that the exclusionary rule requires “[t]he criminal . . . to go free because the constable has blundered,” had rejected it for New York.212 Moreover, the rule perversely served to give greatest protection to “those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards” to remit search victims “to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford.”213

Black agreed. Even in federal courts the “exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.”214 The Justices who had joined him in *Adamson*, however, dissented. “Self-scrutiny is a lofty ideal,” said Murphy, but it was visionary to “expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and

upon the defendant’s failure to explain or deny it.” 332 U.S. at 56. See also id. at 60 (Frankfurter, J., concurring) (“Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict.”); Twining v. New Jersey, 211 U.S. 78 (1908); Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671, 700 (1968).

The fifth amendment itself was narrowly construed to permit the United States to require the keeping and production of incriminating records, Shapiro v. United States, 335 U.S. 1 (1948) (Vinson, C.J., over four dissents), and the registration of those engaged in illegal gambling, United States v. Kahriger, 345 U.S. 22, 32-33 (1953) (Reed, J., with two dissents on this issue). See generally Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687 (1951).

209 *Id.* at 27-28.
210 *Id.* at 28-29.
211 *Id.* at 29.
212 *Id.* at 31. See *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.).
213 338 U.S. at 31.
214 *Id.* at 39-40 (Black, J., concurring).
seizure clause . . . ."215 Damage actions were beset with so many difficulties — from the requirement of malice to the difficulty of proving physical harm and the limits of an officer's finances — that they provided a wholly "illusory" deterrent.216 As the Court had said in announcing the exclusionary rule for federal prosecutions in *Weeks v. United States*, if evidence unlawfully seized could be introduced at trial, "the Fourth Amendment . . . might as well be stricken from the Constitution."217

*Wolf* notwithstanding, it was Justice Frankfurter who concluded for a unanimous Court in the 1952 case of *Rochin v. California* that due process forbade a state court to consider evidence obtained by pumping the defendant's stomach against his will.218 Defensively insisting that the "vague contours" of the prevailing criteria did not "make due process of law a matter of judicial caprice,"219 Frankfurter concluded that the conduct of the police in *Rochin* "shocks the conscience."220 "[T]o sanction th[is] brutal conduct . . . would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society."221

This was all very persuasive, but it seemed equally applicable to *Wolf*, where Frankfurter had reached the opposite conclusion. That pumping the defendant's stomach was "shocking" only made it, like any other unreasonable search, unconstitutional. That was not enough, *Wolf* had held, to forbid introducing its fruits as evidence; "[h]ow such arbitrary conduct should be checked was up to the states."222 Frankfurter's argument that

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215 Id. at 42 (Murphy, J., dissenting).
216 Id. at 42-44 (Murphy, J., dissenting).
217 Id. at 42 (quoting *Weeks*, 232 U.S. 383, 393 (1914)). See also 338 U.S. at 40-41 (Douglas, J., dissenting); id. at 47-48 (Rutledge, J., dissenting). For agreement with the dissenters, see Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1 (1950); Frank, 1948-49, supra note 56, at 32 ("The parade was magnificent, but the enemy remained unscathed.").
219 Id. at 170-72.
220 Id. at 172.
221 342 U.S. at 173-74. Black and Douglas concurred, proffering an unconvincing self-incrimination argument even though the Court had long since made clear that the purposes of the fifth-amendment provision applied only to testimonial compulsion. *Id.* at 174-75 (Black, J., concurring); see also id. at 177-79 (Douglas, J., concurring). Justices Murphy and Rutledge were no longer on the Court. See *Holt v. United States*, 218 U.S. 245, 252-53 (1910); see generally *White*, supra note 1, at 1155 n.227.
222 *Wolf*, 338 U.S. at 28.
the numerous decisions excluding coerced confessions were not based solely upon their unreliability only accentuated the tension.\textsuperscript{223} If confessions had to be excluded whenever the methods by which they were obtained "offend[ed] the community's sense of fair play and decency,"\textsuperscript{224} it seemed to follow that the fruits of an unreasonable search should be excluded too.\textsuperscript{225}

As a result of the expansive decisions of the 1930s, the docket was increasingly swollen with other criminal cases, most of which raised only factual questions of no general interest. Shortly before Vinson's death, the Justices took a meat ax to the habeas corpus statute in an effort to relieve themselves of the burden.\textsuperscript{226}

\textsuperscript{223} 342 U.S. at 172-73 (citing, \textit{inter alia}, Brown v. Mississippi, 297 U.S. 278 (1936)); \textit{see generally} Hughes II, supra note 1, at 803-05 (discussing Brown).

\textsuperscript{224} 342 U.S. at 173.


\textsuperscript{226} \textit{See}, e.g., Brown v. Allen, 344 U.S. 443 (1953) (permitting federal court on habeas corpus to reexamine nonjurisdictional issues decided by state court); Hart, \textit{The Time Chart of the Justices}, 73 Harv. L. Rev. 84 (1959) (tracing evolution of Court's habeas corpus jurisdiction with emphasis on \textit{Brown}).

Among the more interesting procedural decisions of the Vinson era in non-criminal matters were United States \textit{ex rel.} Knauff v. Shaughnessy, 338 U.S. 537 (1950) (Minton, J.) (holding that an alien could be denied entry into the United States without a hearing if admission would be prejudicial to the interests of the United States), and Shaughnessy v. United States \textit{ex rel.} Mezei, 345 U.S. 206 (1953) (Clark, J.) (allowing indefinite detention of an alien without a hearing at the discretion of the Attorney General on a confidential finding that entry would be prejudicial to the security of the United States).

The basis for these conclusions seemed to be that the admission of aliens was a "privilege" rather than a "right." \textit{Knauff}, 338 U.S. at 542. Thus, the aliens' admission was apparently neither "liberty" nor "property" under the due process clause. As Jackson observed in a dissent in \textit{Mezei}, it was hard to deny that a person confined to Ellis Island had been deprived of liberty. 345 U.S. at 220-21 (Jackson, J., joined by Frankfurter, J., dissenting). Justices Black and Douglas also dissented. 345 U.S. at 216-18. Contrast the solicitude shown by the Court during the same period for resident aliens subjected to discriminatory treatment by state law. \textit{See} supra text accompanying notes 191-94; \textit{see also} the criticism of \textit{Knauff} and \textit{Mezei} in Henkin, \textit{The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny}, 100 Harv. L. Rev. 853, 858-63 (1987).

At the same time, limiting its earlier distressing conclusion that personal jurisdiction over the defendant was not necessary in divorce cases, see Williams v. North Carolina, 317 U.S. 287 (1942) (\textit{Stone II}, supra note 1, at 66-67), the Justices held that a court without personal jurisdiction could not cut off a spouse's right to alimony, Estin v. Estin, 334 U.S. 541 (1948) (Douglas, J.), or to

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IV. The Steel Seizure Case

On April 5, 1952, at the height of the Korean War, the Steelworkers' Union gave notice of a nationwide strike. Three days later, to assure continued production of essential war materials, President Truman directed the Secretary of Commerce to take possession of the steel mills. In *Youngstown Sheet & Tube Company v. Sawyer*, the Supreme Court held that he had acted beyond his power.\(^{227}\)

Four of the six Justices in the majority concluded that Congress had forbidden the seizure. An amendment to the Taft-Hartley Act that would have authorized seizure in national emergency cases had been rejected in favor of a provision for enjoining the strike itself. "The authoritatively expressed purpose of Congress to disallow such power to the President," said Justice Frankfurter, "could not be more decisive if it had been written into . . . the Labor Management Relations Act."\(^{228}\)


The Court deviated from the general trend toward permitting any interested state to apply its own law to decide a controversy when it held that the full faith and credit clause required a policyholder's state to defer to the law of the state of incorporation in determining the validity of a clause in a fraternal insurance policy limiting the time for suit. *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947) (Burton, J., over four dissents); see also *Hughes v. Fetter*, 341 U.S. 609 (1951) (Black, J.) (holding that state where both parties resided could not refuse to entertain a wrongful death action based on law of the place of the wrong but stressing that the forum had not attempted to apply its own law). See generally B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 253-58, 283-311 (1963); *Stone II*, supra note 1, at 64-66; *Hughes I*, supra note 1, at 549-53; *Harper, The Supreme Court and the Conflict of Laws*, 47 COLUM. L. REV. 883, 895-900 (1947); Reece, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339 (1952).


\(^{226}\) 343 U.S. at 602 (Frankfurter, J., concurring); see also *id.* at 634, 639 (Jackson, J., concurring) ("Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure."); *id.* at 655, 660 (Burton, J., concurring) ("Congress . . . has prescribed for the President specific procedures, exclusive of seizure, for . . . meeting the present type of emergency."); *id.* at 660, 662 (Clark, J., concurring in the judgment) ("where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures"). For approving views of this line of reasoning see Corwin, *The Steel Seizure Case: A Judicial Brick without Straw*, 53 COLUM. L. REV. 53, 65 (1953); Kauper, *The Steel
It may have been stretching things to find a prohibition in mere failure to authorize seizure, but Justice Jackson was correct that the President's power is "at its lowest ebb" when he acts contrary to "the expressed or implied will of Congress." Although the Constitution grants the President authority that Congress cannot take from him, no one denied that Congress could limit any Presidential power to seize private property. Article II's command that the President "take care that the laws be faithfully executed" and Article VI's designation of federal statutes as "supreme law of the land" confirm the implication that the laws which Article I empowers Congress to enact bind the President as well as everyone else.

Justice Black's "opinion of the Court," however, took a broader approach. No statute, he wrote, justified the President's action; his authority

Seizure Case: Congress, the President, and the Supreme Court, 51 Mich. L. Rev. 141, 180 (1952).

229 343 U.S. at 637. Other decisions of the Vinson period tended to confirm Jackson's converse principle that executive power "is at its maximum" when exercised in accordance with congressional authorization. See, e.g., Lichter v. United States, 334 U.S. 742, 784-86 (1948) (Burton, J.) (invoking the purpose and "factual background" of the statute (including practice under prior legislation) to supply adequate standards for the recovery of "excessive profits" from government contractors); Fahey v. Mallonee, 332 U.S. 245, 250 (1947) (Jackson, J.) (upholding delegation of authority to appoint conservators for failing banks because the "accumulated experience of supervisors" acting under state law had "established well-defined practices" to guide the executive decision); United States ex rel. Knaff v. Shaughnessy, 338 U.S. 537, 542-43 (1950) (upholding authorization to exclude alien whose entry, as characterized by the United States Attorney General, "would be prejudicial to the interests of the United States" because the right to exclude aliens "is inherent in the executive power to control . . . foreign affairs"). Cf. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (upholding congressional delegation of foreign policy matter to the President); see generally Hughes I, supra note 1, at 518 n.72 (discussing Curtiss-Wright).

230 Ex parte Milligan, 71 U.S. (4 Wall.) 2, 139-40 (1866) (Chase, C.J., concurring). See generally W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 128-29 (1916); D. CURRIE, supra note 1, at 292 n.31 (discussing Milligan).

231 See Youngstown Steel & Tube Co. v. Sawyer, 343 U.S. 579, 643 (Jackson, J., concurring) (stressing that Article I empowered Congress "to raise and support armies" and "to provide and maintain a navy"); id. at 660-61 (Clark, J., concurring) (quoting Little v. Barreme (The Flying Fish), 6 U.S. (2 Cranch) 170 (1804) (enforcing congressional limitation on seizure of vessels to enforce laws against trading with French ports). See also U.S. Const. art I, § 8, cl. 18 ("The Congress shall have power . . . To make all Laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.").

232 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 154-62 (1803) (emphasizing the executive's amenability to congressional enactments by concluding that an Act of Congress required the Secretary of State to deliver Marbury's commission).
as Commander-in-Chief did not reach so far; see note 233 and the order could not be sustained on the basis of the

several constitutional provisions that grant executive power to the President . . . . [T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. 234

In Black's view, more was involved than the President's duty to obey statutes actually passed by Congress: Apart from the Constitution's own grants of authority over foreign affairs and the armed forces, the President may act only on the basis of legislation. Both the grant of legislative authority to Congress and the enumeration of executive powers suggest this conclusion, and the history of the Constitution supports it. Congress was empowered to raise and support armies, for example, so that the Executive would not do so. 235 Jackson added another powerful argument by juxtaposing the President's duty to execute the laws with an early understanding of the due process clause. "One [provision] gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men. . . . " 236

233 See also Jackson's concurrence, 343 U.S. at 641-46 (similarly rejecting the argument based on the President's authority as commander-in-chief).

234 343 U.S. at 587. Justice Clark, concurring in the judgment on the ground that Congress had forbidden the seizure, expressly disagreed with Black's broader conclusion: "[T]he Constitution does grant to the President extensive authority in times of grave and imperative national emergency." Id. at 662.

235 See The Federalist Nos. 24, 26, 28 (A. Hamilton); Currie, The Distribution of Powers After Bowers, 1986 Sup. Ct. Rev. 19, 21-26; cf. Youngstown, 343 U.S. at 644 (Jackson, J., concurring) ("While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command."). Justice Douglas made the analogous argument that a seizure not authorized by statute would undermine the express constitutional requirement of a congressional appropriation for the expenditure of federal funds. "The branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure . . . ." Id. at 631 (Douglas, J., concurring) (referring to U.S. Const. art. I, § 9).

236 343 U.S. at 646 (Jackson, J., concurring). See also D. Currie, supra note 1, at 272 n.268; Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366 (1911). Without commenting on Jackson's use of due process, Professor Corwin criticized Justice Black's argument as "a purely arbitrary construct created out of hand for the purpose of disposing of this
Chief Justice Vinson, speaking also for Reed and Minton, seemed to suggest in dissent that the President's authority was not limited to commanding the armed forces and executing the laws: Article II gave him the entire "executive power" of the United States.\footnote{237} If Vinson meant to embrace the Solicitor General's argument that the President's powers were not, like those of Congress and the courts, limited by the enumeration that followed,\footnote{238} Jackson had an answer for him. "If that be true, it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones."\footnote{239} Although the text of Article II is not as explicit on this point as are Articles I and III,\footnote{240} Jackson was aided by evidence of the framers' purposes in concluding that the vesting of "executive power" in the President was not "a grant in bulk of all conceivable executive power," but rather "an allocation to the presidential office of the generic powers thereafter stated."\footnote{241}

particular case . . . altogether devoid of historical verification." Corwin, supra note 228, at 64-65. \textit{But see Taft, supra note 230, at 139-47} (taking issue with Theodore Roosevelt's view that the President might "do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws": "The President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise.")\footnote{237} 343 U.S. at 681 (Vinson, C.J., dissenting).

\footnote{238} \textit{Id.} at 640 (Jackson, J., concurring) (quoting from the Government's brief).

\footnote{239} \textit{Id.} at 640-41 (Jackson, J., concurring) (adding that "[t]he example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image"). \textit{Id.} at 641. \textit{See also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65-66} (M. Farrand rev. ed. 1937) ("Mr. Wilson . . . did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers . . . . The only powers he conceived strictly Executive were those of executing the laws, and appointing officers . . . ."); Kauper, \textit{supra} note 228, at 175-77 (reading Vinson as basing his opinion solely on the President's authority to execute the laws).

\footnote{240} \textit{See U.S. CONST.} art. I, § 1 ("[a]ll legislative Powers herein granted shall be vested in a Congress of the United States . . . ."); \textit{U.S. CONST.} art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); \textit{U.S. CONST.} art. III, § 2 ("The judicial Power shall extend to [certain enumerated classes of cases and controversies]"); \textit{7 WORKS OF ALEXANDER HAMILTON} 80 (1951) (arguing that the "different modes of expression in regard to the [executive and legislative] powers confirm the inference that the authority vested in the President is not limited to the specific cases of executive power delineated in Article II").

\footnote{241} 343 U.S. at 641 (Jackson, J., concurring). \textit{See, e.g., THE FEDERALIST Nos.} 24, 26, 28 (A. Hamilton); Corwin, \textit{supra} note 228, at 53 ("The records of the Constitutional Convention make it clear that the purposes of this clause were simply to settle the question whether the executive branch should be plural or single and to give the executive a title.").
Vinson's principal argument was that, in seizing the steel mills, the President had acted within his constitutional authority to execute statutes providing both for military procurement and for combating inflation. None of these statutes provided explicitly for the seizure of private property in order to accomplish their purposes. In Vinson's view, however, Article II empowered the President to employ all suitable means of enforcing the laws that Congress had not forbidden.\(^{242}\)

Past decisions lent some credence to this contention. The Court had hinted in *Little v. Barreme (The Flying Fish)* that the President might have enforced the trade laws by seizure if Congress had been silent;\(^{243}\) *In re Neagle* upheld Presidential authority to appoint marshals to protect federal judges who applied the laws;\(^{244}\) *In re Debs* sustained the President's right to seek an injunction against a strike that threatened to interrupt commerce and the mails.\(^{245}\) Black did not respond to the invocation of these precedents. Even if one concedes that the President may not be limited strictly to enforcement methods spelled out by statute, however, a line must be drawn somewhere if anything is to remain of the principle that only Congress shall make the laws.\(^{246}\)

The greater part of Vinson's dissenting opinion was devoted to an ambitious effort to demonstrate a historical understanding that the President might take emergency action without express statutory authority.\(^{247}\) While Black rightly protested that one violation of the Constitution cannot justify another,\(^{248}\) Frankfurter appropriately acknowledged that long-accepted

\(^{242}\) 343 U.S. at 701-02 (Vinson, C.J., dissenting).
\(^{243}\) 6 U.S. (2 Cranch) 170, 177-78 (1804) (quoted in Youngstown, 343 U.S. at 660 (Clark, J., concurring in the judgment)).
\(^{244}\) 135 U.S. 1, 63-68 (1890); *see generally Fuller I, supra* note 1, at 344 n.117 (discussing *Neagle*).
\(^{245}\) 158 U.S. 564 (1895); *see generally Fuller I, supra* note 1, at 343-46 (discussing *Debs*). In his dissent Vinson relied on both *Neagle* and *Debs*, 343 U.S. at 687-88, 702 (Vinson, C.J., joined by Reed and Minton, J.J., dissenting).
\(^{246}\) *See* Kauper, *supra* note 228, at 150 (denying that the precedents supported a general Presidential "power to implement the legislative policy . . . by resorting to measures not embraced within the remedial and enforcement scheme provided by Congress"). "Perhaps in a time of emergency it might appear appropriate to conscript manpower for industry, to levy additional taxes to finance the legislative program, to impose more severe penalties on those who violate the laws. But it would hardly be contended that presidential prerogative would extend to these areas of legislative authority." *Id.* at 181.
\(^{247}\) 343 U.S. at 683-700 (Vinson, C.J., dissenting).
\(^{248}\) *Id.* at 588-89. *See also* Kauper, *supra* note 228, at 179 ("[P]rior self-serving assertions of
practice could establish a "gloss" on the Constitution itself.\textsuperscript{249} The Court had often relied on the understanding of other branches to support the constitutionality of challenged actions.\textsuperscript{250}

Many of the examples Vinson cited to establish such an understanding, however, missed the mark. In suppressing the Whiskey Rebellion and in blockading the Confederacy, Washington and Lincoln had relied on express statutory authority to use armed force to suppress insurrection.\textsuperscript{251} Adams's issuance of an extradition warrant served to implement a treaty.\textsuperscript{252} The Louisiana Purchase was accomplished by treaty under the explicit terms of Article II.\textsuperscript{253} The Emancipation Proclamation was a battlefield measure of the Commander-in-Chief applying only to slaves behind enemy lines, and Black acknowledged that the President had broad powers "in a theater of war."\textsuperscript{254} Even Franklin Roosevelt's dramatic closing of the banks in 1933 was explicitly based on purported statutory authority, not on powers derived from the Constitution itself.\textsuperscript{255} A handful of recent seizures not clearly supported by statute, as Frankfurter argued, can hardly serve as adequate authority for defining the President's constitutional position.\textsuperscript{249}

\textsuperscript{249} 343 U.S. at 610 (Frankfurter, J., concurring) ("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.") See also Taft, supra note 1, at 135-36 (discussing Myers v. United States, 272 U.S. 52 (1926) (reporting a longstanding practice of having postal treaties concluded by the Postmaster General).


\textsuperscript{251} See Prize Cases, 67 U.S. (2 Black) 635 (1863); see generally D. Currie, supra note 1, at 273-76 (discussing the Prize Cases).

\textsuperscript{252} See 10 ANNALS OF CONG. 613-14 (1800) (quoted in Youngstown, 343 U.S. at 684). John Marshall, then a member of Congress, argued that until Congress acts, "it seems the duty of the Executive department to execute the contract by any means it possesses." Id. at 614.

\textsuperscript{253} Treaty for the Cession of Louisiana, April 30, 1803, United States-France, 18 Stat. 232. See U.S. CONST. art. II, § 2 ("The President... shall have Power, by and with the Advice and Consent of the Senate, to make Treaties... ").

\textsuperscript{254} Sawyer, 343 U.S. at 587; see Proclamation of Sept. 22, 1862, in 6 J. Richardson, A Compilation of the Messages and Papers of the Presidents 96 (1900).

\textsuperscript{255} 343 U.S. at 647-48 n.16 (Jackson, J., concurring); see Rosenman, The Public Papers and Addresses of Franklin D. Roosevelt 4 (1933); Culp, Executive Power in Emergencies, 31 Mich. L. Rev. 1066, 1078 & n.54 (1933) (expressing doubts about the adequacy of the statute invoked).
hardly constituted longstanding acquiescence in the existence of general emergency authority.\textsuperscript{256}

Because four of the majority Justices believed that Congress had forbidden the seizure, the question of Presidential authority to employ means of law enforcement neither authorized nor forbidden was not definitively answered. \textit{Youngstown} nonetheless stands as an eloquent reminder that the President must obey the law and that in general he may act only on the basis of statute.

\section*{V. Conclusion}

The opinions of Reed, Burton, Vinson, Minton, and Clark tended to be colorless in both substance and style, and they set the dominant tone of the period. Black and Douglas, joined by Murphy and Rutledge until their deaths in 1949, regularly argued in dissent for greater protection of those interests singled out by Justice Stone in the \textit{Carolene Products} case: those guaranteed by specific provisions of the Bill of Rights, the integrity of the political process, and the rights of discrete and insular minorities.\textsuperscript{257}

Most interesting in terms of both style and substance were the relatively unpredictable Jackson and Frankfurter. The latter, who shared Jefferson's view that each Justice should write an opinion in important constitutional cases,\textsuperscript{258} left us a legacy of no fewer than thirty-five concurring and forty-two dissenting opinions during the Vinson years, affording an unusually comprehensive picture of his views.\textsuperscript{259} His voting pattern was equally striking, for though justifiably known as an apostle of judicial restraint,\textsuperscript{260} he managed to dissent with some frequency from decisions re-

\textsuperscript{256} 343 U.S. at 613 (contrasting United States v. Midwest Oil Co., 236 U.S. 459 (1915), where the Court deferred to a longstanding practice of withdrawing public lands from sale despite a statute making them available for purchase).

\textsuperscript{257} United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938); \textit{see also Hughes I, supra} note 1, at 554-55. \textit{See C. Pritchett, Civil Liberties and the Vinson Court} 20 (1954) ("[T]he Court over which Vinson presided, if tested by the proportion of nonunanimous decisions handed down, was more divided than any in Supreme Court history.").

\textsuperscript{258} \textit{See American Communications Ass'n v. Douds}, 339 U.S. 382, 418 (1950). For Jefferson's views, \textit{see D. Currie, supra} note 1, at 196 n.11.

\textsuperscript{259} \textit{See Frank, 1947-48, supra} note 184, at 51 (complaining that "more often the special opinion seemed expression for its own sake, without anything really worth saying").

\textsuperscript{260} \textit{See supra} notes 115-30, 134-51 and accompanying text (discussing \textit{Beauharnais v. Illinois} and \textit{Dennis v. United States}); \textit{see also Stone II, supra} note 1, at 52-55 (discussing West Virginia
jecting claims based upon the first, fourth, and fifth amendments. Once he even dissented from a decision broadly construing the federal tax power. In many of these cases he was joined by Jackson, who also wrote a series of highly original and spicy separate opinions.

One of these was a dissent, joined only by Justice Douglas, in the undeservedly neglected case of *Ray v. Blair*, where the majority upheld an Alabama statute requiring candidates in party primaries for Presidential electors to support whomever their party convention might select. Quoting from the Federalist Papers, Jackson unimpeachably insisted that the whole purpose of the Electoral College was to interpose the independent judgment of the elector between the people and the choice of a president. The majority relied on the fact that the system had never worked as intended; as early as 1826 a Senate committee had lamented that electors had bartered away that judgment in exchange for votes from the very


See, e.g., his concurrences in Kahriger, 345 U.S. at 34-36; Youngstown, 343 U.S. 634-55; Dennis, 341 U.S. at 561-79; Railway Express, 336 U.S. 111-17; Woods, 333 U.S. 146-47.

Id. at 231, 232 & n.* (Jackson, J., joined by Douglas, J., dissenting) (citing THE FEDERALIST No. 68, at 441-42 (A. Hamilton) (Earle ed. 1937)) ("It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation . . . ."). Compare Roger Sherman's objections to a proposed amendment that would have recognized the people's right "to instruct their Representatives" in Congress.

This cannot be admitted to be just, because it would destroy the object of their meeting. I think, when the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation . . . .

1 ANNALS OF CONG. 763-64 (J. Gales ed. 1789).
Protesting that "powers or discretions granted to federal officials by the Federal Constitution" cannot be "forfeited . . . for disuse," Jackson persuasively added that there was a difference between allowing and requiring them to do so.266

Ray v. Blair is a sobering reminder of the limited capacity of law to affect human behavior.

265 343 U.S. at 228 & n.15 (quoting S. Rep. No. 22, 19th Cong., 1st Sess. 4 (1826)) ("'Electors, therefore, have not answered the design of their institution. They are not the independent body and superior characters which they were intended to be. . . . They have degenerated into mere agents . . . .'"). This report can hardly be viewed as a ringing endorsement of the practice in question.

266 343 U.S. at 233-35.