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## THE ROOSEVELT COURT

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On August 12, 1937, after nearly four and a half years in office, Franklin D. Roosevelt finally named his first appointee to the U.S. Supreme Court. In a move that shocked supporters and opponents alike, the president sent to the Senate the name of Hugo LaFayette Black, the senator from Alabama who had been a vociferous proponent of the New Deal and of Roosevelt's controversial court-packing plan. After Black came one opening after another, and, in the end, Roosevelt made nine appointments to the nation's high court, more than any other chief executive save George Washington.

Contemporaries saw the long list of Roosevelt nominees as proof that the president had won the bitter fight with the Court that had erupted into a constitutional crisis in the spring of 1937. Although there is some recent scholarship to suggest that the Court was not as ideologically opposed to New Deal reform as had previously been assumed,[1] at the time both conservatives and liberals saw the Court as standing athwart Roosevelt's efforts to implement New Deal programs.

The Court, after narrowly approving two state reform measures, a Minnesota mortgage moratorium[2] and a New York milk-pricing statute,[3] seemingly turned against all efforts to deal with the economic crisis. First it invalidated a New York model minimum-wage law that even conservative newspapers and the Republican presidential candidate, Alf M. Landon, considered reasonable.[4] When the Court began to hear cases involving federal legislation in December 1934, the administration not only faced a hostile

bench but also suffered the consequences of sloppy procedures, poor draftsmanship, and inadequate counsel.[5]

The pattern could be discerned in the first case the justices heard, *Panama Refining Company v. Ryan,* in which the Court exposed the administrative inadequacies of section 9(c) of the National Recovery Act, an effort to control so-called hot oil from being sold in interstate commerce.[6] After narrowly and reluctantly approving the New Deal's cancellation of gold clauses,[7] the conservative majority took a highly restrictive view of the interstate nature of railroads and voided the Railroad Retirement Act of 1934.[8] Then on "Black Monday," May 27, 1935, the Court struck at the heart of the New Deal, invalidating the National Industrial Recovery Act and the Frazier-Lemke Mortgage Act and ruling that the president could not remove members of independent regulatory commissions.[9] The following January the Court, by a 6–3 vote, struck down what nearly everyone considered a well-planned and well-administered program, the Agricultural Adjustment Act.[10]

Roosevelt believed that the conservatives on the Supreme Court (the so-called Four Horsemen of James C. McReynolds, George Sutherland, Pierce Butler, and Willis Van Devanter, often joined by Chief Justice Charles Evans Hughes and Owen J. Roberts) based their judicial opinions not on a fair reading of the Constitution but on their own cramped and outmoded economic views. In his proposal to expand the number of justices on the bench, Roosevelt suffered one of the few political defeats of his career. But as countless teachers have told their classes, he lost the battle and won the war. His appointees dominated the Court until the mid-1950s. One should bear in mind that five of the justices who heard and decided *Brown v. Board of Education* in 1954 had been appointed by Franklin Roosevelt, and two of them, Hugo Black and William O. Douglas, served on the high court into the 1970s.

To understand the Roosevelt legacy on the bench, we need to look briefly at the men he appointed and their judicial philosophies, because although they all agreed on the notion that courts should not second-guess the legislative and executive branches on matters of economic policy, they differed widely on other matters, especially the role of the judiciary in protecting individual liberties.

Hugo LaFayette Black of Alabama (1886–1971), Roosevelt's first appointee, joined the Court amid a cloud of controversy. At the time, many people believed Roosevelt had named Black to the Court for supporting the president's court-packing plan. Moreover, because the Senate would not turn down one of its own, Roosevelt in effect humiliated those in the Senate who had not backed the plan by foisting on them a man who apparently lacked

credentials for the bench and whose populist political views irritated conservatives. Robert Jackson later recalled: "I had been rather amused at the President's maneuver, which enabled him to get even with the court and with the Senate, which had beat his plan, at the same time. He knew well enough that the Senate could not reject the nomination because of senatorial courtesy. He knew perfectly well it would go against their grain to confirm it. He knew it would not be welcomed by the court."[11] Then shortly after he had been sworn in, it turned out that Black had once belonged to the Ku Klux Klan. All in all, it hardly made for an auspicious start of a judicial career.[12]

Black grew up in rural Alabama, graduated first in his University of Alabama Law School class, and then, after practicing in his native Ashland for a few years, moved to Birmingham in 1907. To supplement his income, Black also served part-time as a municipal court judge and then for three years full-time as Jefferson County prosecuting attorney. In his most famous case, he investigated and prosecuted several police officers for beating and forcing confessions from black defendants. The experience marked him for life and gave him something no other member of the Court had—litigation experience in criminal law—and as a result he brought a discernible passion to those cases.

In his private practice Black tried hundreds of cases and honed his already considerable talents as a debater and orator, skills that led to his election to the U.S. Senate in 1926. In 1932 Black won a second term and immediately became a staunch defender of Franklin D. Roosevelt's New Deal policies, a position that often put him at odds with his fellow southerners. Most important, both on the Senate floor and as head of several important special committees, Black espoused a view that the federal government had sufficient authority under the commerce clause to enact legislation to deal with the Depression, that in fact Congress could regulate any activity that directly or indirectly affected the national economy, and that the judiciary had no power to interfere with these decisions.

Black went onto the Court with a fairly well-developed judicial philosophy, one that included a clear reading of the constitutional text, limited judicial discretion, the protection of individual rights, and broad powers for the government to address a wide range of economic and social problems. Someone once commented that Black's lasting influence on the Court grew out of his willingness to "reinvent the wheel." Like his friend and ally William O. Douglas, Black had little use for precedent, especially if he thought the case erroneously decided. In his first year alone Black issued eight solo dissents, including an almost unprecedented dissent to a per curiam decision.

At the heart of Black's philosophy lay a populist belief in the Constitution as an infallible guide. He opposed judicial subjectivity; the Constitution did not empower judges to select from competing alternatives. He distrusted experts, and leaving either legislative or judicial decision-making in the hands of so-called experts smacked too much of elitism. He offered instead the imposition of absolutes through a literal reading of the Constitution. This narrowed the scope of judicial discretion, but it also helped to make the judiciary the prime vehicle for guaranteeing the values of those absolutes.[13]

Throughout his career Black searched the text of the Constitution for guidance. He understood that one could not always read the document literally, but he sought the meaning he believed had been intended by the Framers. Thus, despite his populist political views and his strong defense of civil liberties, in many ways Black's was an extremely conservative approach, and indeed he saw himself as a strict constructionist. Black became the jurisprudential leader of the liberal bloc on the Court, a group whose ideas would triumph in the 1960s.

Part of Black's effectiveness derived from the considerable political skills he already possessed and had honed in the Senate. More than any other justice of his time, Black proselytized, "working" the other justices as he had once worked his senatorial colleagues in order to gain a majority. The columnist Irving Brant, an admirer of Black's, reported a story Black told that explained a good deal of his effectiveness. Black would talk about an unnamed senator who said that when he wanted to accomplish something he would introduce two bills—the one he wanted passed and another that made the first one seem conservative. Robert Jackson somewhat disdainfully noted that while these methods were appropriate in a legislative body where one dealt with adversaries, he considered them unsuited to a court where the members were supposed to be colleagues. Stone, according to Jackson, found Black's methods very unsettling, and they caused the chief justice "a great deal of discomfort and dissatisfaction."[14]

In January 1938 Roosevelt made his second appointment to the high court, Stanley Forman Reed of Kentucky (1884–1980). A genial man who lived to be ninety-five years old, he told Potter Stewart that he would not want to live his life over again, inasmuch as "it could not possibly be as good the second time." After graduating from Yale Law School, Reed had built a thriving law practice in Maysville, Kentucky, dabbled in state politics, and helped manage his friend Fred Vinson's congressional campaigns. Then in 1929 he moved to Washington when Herbert Hoover named him counsel to the Federal Farm Board, a position he retained in the Roosevelt administra-

tion. Reed's geniality as well as his passionate belief in the desirability of the federal government's playing a major role in the nation's social and economic life soon caught the attention of the president, who named Reed solicitor general. He performed that role in, at best, a lackluster manner, but in early 1938 Roosevelt named Reed to replace George Sutherland, the second of the Four Horsemen to retire.[15]

Once on the Court, Reed tended to defer to Congress, and a determination of what Congress had intended often proved dispositive for him, whether the issue concerned constitutional, administrative, or statutory interpretation. As with the other Roosevelt appointees, Reed could be considered liberal in that he believed the Court had no right to deny Congress full use of its commerce powers. He had less faith in state and local powers however, and seemed to have had little interest in the protection of individual liberties. One area did arouse his concern, and during his tenure Reed voted often but not in every case to broaden religious rights under the First Amendment. On the whole, his record is marked primarily by inconsistency, a not unfamiliar characteristic of many New Dealers.[16]

Roosevelt's third appointee, Felix Frankfurter (1882–1965), had been named to succeed Benjamin Nathan Cardozo in January 1939 amid high hopes that he would become the intellectual leader of the Court. Solicitor General Robert H. Jackson, in a sentiment echoed by Harlan Stone, claimed that only Frankfurter had the legal resources "to face Chief Justice Hughes in conference and hold his own in discussion." Upon news of his nomination, New Dealers had gathered in the office of Secretary of the Interior Harold Ickes to celebrate, and all those present heartily agreed with Ickes' judgment of the nomination as "the most significant and worthwhile thing the President has done."[17] There is, unfortunately, no way one can predict whether an appointee will be great or mediocre once on the bench, and Frankfurter ranks as one of the great disappointments in modern times.

Born in Vienna, Frankfurter had emigrated to the United States as a child, and his innate brilliance had shone first at the City College of New York and then at the Harvard Law School. Upon graduation he had briefly joined a Wall Street firm, but he soon fled to work with U.S. Attorney Henry L. Stimson; he then followed Stimson into the Roosevelt and Taft administrations. Short, exuberant, a brilliant conversationalist and an inveterate idol-worshipper, Frankfurter soon became the center of a group of young bureaucrats and writers who shared quarters on Nineteenth Street, a place they dubbed the "House of Truth." There Gutzom Borgum sketched his proposed presidential monument, Herbert Croly and Walter Lippmann

expounded on contemporary problems, and Oliver Wendell Holmes and Louis Brandeis dropped by often.

Frankfurter and Holmes fell under each other's spell; the younger man adored Holmes, who reciprocated the sentiment. When Frankfurter accepted a position at the Harvard Law School after World War I, he took responsibility for choosing Holmes's clerks. Holmes appealed to Frankfurter for a number of reasons, but from a jurisprudential point of view, Holmes held high the banner of judicial restraint, a banner that Frankfurter in his own time would also carry.

In many ways, however, the relationship with Brandeis proved more decisive. Brandeis found in Frankfurter a surrogate to carry on his reform work; he urged Frankfurter to take the professorship at Harvard, and he provided a financial subsidy to enable Frankfurter, who lacked an independent income, to devote himself to reform efforts.[18] During the 1920s Frankfurter, through his defense of Sacco and Vanzetti and his writings for *The New Republic,* became a leading reformer in his own right, a man Brandeis called "the most useful lawyer in the United States."

His students also spread Frankfurter's influence. A brilliant teacher, he trained a whole generation of lawyers in administrative law, and when the Depression came and government burgeoned under the New Deal, Frankfurter became a one-man placement agency, staffing one federal office after another with his former students.[19] He also exerted a quiet but effective influence on several New Deal policies through his many contacts not only with leading administration figures but also with President Roosevelt. The two men had known each other since World War I, and during the 1930s Frankfurter became a frequent guest at the White House.[20]

Frankfurter, like Black, went onto the Court with a well-developed judicial philosophy, but one far different from the Alabaman's. Both men believed in judicial restraint, but Frankfurter took what Black considered a much too subjective approach, leaving too great a power in the hands of judges to "interpret" constitutional injunctions. Most importantly, however, Black drew a sharp distinction between economic legislation and restrictions on individual liberties, with judges carrying a special obligation to protect the latter; Frankfurter considered all legislation equal, and demanded that judges defer to the legislative will unless they found a clear-cut constitutional prohibition. The debate between these two views would define much of constitutional history in the last half of the twentieth century.[21]

One week after Frankfurter took his seat, Louis D. Brandeis retired, and to replace him Roosevelt named William Orville Douglas (1898–1980). A true

product of the Pacific Northwest, Douglas had grown up in Yakima, Washington, where he contracted infantile paralysis as a child. Gradually he regained limited use of his legs, but he was still a sickly child at the time of his father's death. He later wrote that in the middle of the funeral he stopped crying only after he looked up and saw Mount Adams in the distance. "Adams stood cool and calm, unperturbed. . . . Adams suddenly seemed to be a friend. Adams subtly became a force for me to tie to, a symbol of stability of strength."[22] Between the strong will of his mother and his own self-determination, Douglas overcame his physical disabilities. He started to hike in the mountains, an experience that not only built up his strength but also turned into a lifelong devotion to the environment. The drive to build himself physically carried over into other areas of his life. The Yakima High School yearbook of 1916 noted that its valedictorian that year had been "born for success."

After graduation from Whitman College, Douglas headed east in the summer of 1922 with $75 in his pocket to attend Columbia Law School. Douglas entered Columbia at a time when its faculty had just begun to explore new areas of legal research that would eventually lead to the "Legal Realism" movement. The Realists believed that in order to understand the law and the behavior of legal institutions, one had to look at individual behavior and use the social sciences to find the real causes of particular actions. Douglas became a devoted adherent to this new philosophy, and after a miserable two years working in a Wall Street law firm, he returned to Columbia as a teacher in 1927. Within a year, however, he resigned to accept a position at the Yale Law School, which, under the leadership of its brilliant young dean Robert M. Hutchins, quickly became the center of Legal Realism, and Douglas one of its star exponents.[23]

His tenure at Yale may have been the most peaceful in his life, but beneath a surface tranquility he remained restless, especially when he looked to Washington and saw the dynamic activities going on under the New Deal umbrella. In 1934 Douglas accepted an assignment from the newly created Securities and Exchange Commission to study protective committees, the agency stockholders use during bankruptcy reorganization to protect their interests. He began commuting between New Haven and Washington, and soon came to the attention of the SEC chair, Joseph P. Kennedy, who arranged for the thirty-seven-year-old Douglas to be named to the commission in 1935. Two years later President Roosevelt named Douglas chair of the SEC.[24]

During these years in Washington, Douglas became part of Franklin D. Roosevelt's inner circle, often joining the weekly poker games at the White

House. Many people speculated that the bright, handsome westerner might have a future in politics. In fact, Douglas had already tired of the game and wanted to return to Yale. When a messenger interrupted a golf game on March 19, 1939, to tell Douglas that the president wanted to see him at the White House, Douglas almost did not go, for he fully expected that Roosevelt was going to ask him to take over the troubled Federal Communications Commission. But after teasing him for a few minutes, Roosevelt offered Douglas the seat on the Supreme Court vacated by Brandeis a month earlier. Roosevelt naturally wanted to make sure that his appointees would support his program, and in Douglas he had a confirmed New Deal liberal, someone who could mix it up with the conservatives, a quick mind, a westerner, and a loyal personal friend.

Douglas, the youngest person ever appointed to the Supreme Court, would establish a record of longevity for service before illness forced him to retire in late 1975. Moreover, no other justice ever engaged in so extensive and public a nonjudicial life. Douglas always claimed that the work of the Court never took more than three or four days a week; he read petitions rapidly, rarely agonized over decisions, could get to the heart of an issue instantly, and wrote his opinions quickly. This left him time for other activities, such as travel, lecturing, writing, climbing mountains, and, as some critics claimed, getting into trouble.

Douglas and Frankfurter had been friends, and friendly rivals, from their days as law school professors, and the younger Douglas had often looked to the more established Frankfurter for advice. Jurisprudentially, the two seemed to share the same basic values, but the shifting agenda of the Court soon highlighted the fact that on the crucial issues to confront the judiciary in the 1940s and 1950s they differed significantly. During his first years on the bench Douglas allied himself with Black, but he eventually proved far more willing and activist than his friend. Douglas, however, provided an able second to Black in the battles shaping up over which direction the Court should take.[25]

Roosevelt made his next appointment to the Court in early 1940, when he named Francis William Murphy (1890–1949) to replace Pierce Butler, and with that appointment sealed the constitutional revolution triggered by the New Deal. After more than two decades of conservative domination, the Court now had a majority committed to the idea that the political branches should determine economic policy, and that courts had no right to pass judgment on the wisdom of those policies. Roosevelt, of course, wanted men on the bench who would endorse New Deal policies, but as the Court's

agenda changed in the later 1940s, several of his appointees seemed to grow more conservative. With Frank Murphy, however, Roosevelt got a thoroughgoing liberal, one who had little use for technical questions and believed that the objectives of law should be justice and human dignity. Even more than Douglas and Black, Murphy cared little for precedents and openly relied on what one commentator has called "visceral jurisprudence." The law knows no finer hour, Murphy wrote, "than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution."[26]

Murphy inherited his radical politics from his father, who had been jailed in his youth for Fenian sympathies, and his devout Catholicism from his mother. From the beginning, he had seen law and politics as intertwined, with law the avenue to political success. In 1923 he won election as a criminal court judge in Detroit, and reformed an antiquated system. Labor and minority groups propelled him into the mayor's office in 1930, and he set about creating a welfare system to help those thrown out of work by the Depression. Roosevelt named Murphy, one of his early backers, as governor-general of the Philippines, but although Murphy proved popular and effective in that job, he saw it as a detour on the way to the White House.

Murphy returned to the country to run for and win the Michigan gubernatorial race in 1936, and shortly after he took office the auto workers began the sit-down strikes of 1937. Company officials immediately went to court to seek injunctions against the strikers, but Murphy refused to enforce the orders. He called out the national guard to maintain peace while he worked behind the scenes to avert outright bloodshed. He succeeded, but both sides accused him of favoring the other, and he lost his reelection bid in 1938. Roosevelt owed Murphy for taking the heat off Washington during the strikes, and so named him attorney general in 1939. Murphy was in that office less than a year, but during his tenure he set up a civil liberties unit that for the first time employed the power of the federal government to protect individual rights. This activity did not sit well with many people, especially southerners, and to some extent Roosevelt kicked Murphy upstairs to the Court. Murphy recognized this and did not really want to go. He still had his sights set on the presidency, and no one had ever gone from the bench to the Oval Office. Murphy also thought he would be on the sidelines, away from the real action. "I fear that my work will be mediocre up there while on the firing line where I have been trained to action I could do much better."[27]

Even Murphy's admirers make no claim that he had special talents as a jurist, and he recognized his own limitations. He felt inferior in the company

of Stone and Black, Douglas and Frankfurter; he knew little constitutional law, and his prior judicial experience had been on a municipal criminal bench. But he learned, and relied on bright clerks to draft his opinions.

Murphy, however, did develop a jurisprudence, one based on the notion that restrictions on individual liberties required strict scrutiny by the courts, and he also adopted Hugo Black's notion that the liberties protected by the First Amendment held a "preferred position" in the constitutional firmament. Murphy's first opinion indicated the path he would take. New justices may pick their first opinion, and Murphy chose a case overturning a state law that banned virtually all picketing by union members. Although Brandeis had earlier suggested that picketing might be a form of protected speech, this notion did not become law until Murphy's opinion in *Thornhill v. Alabama* (1940). There the new justice extended First Amendment protection to peaceful picketing, and forcefully cited the *Carolene Products* footnote to justify the judiciary's overturning of a law that invaded civil liberties. In 1969 Justice Tom Clark wrote that the opinion was "the bedrock upon which many of the Court's civil rights pronouncements rest."[28] Although Murphy initially appeared willing to follow Frankfurter's lead and joined him in the first flag salute case, he soon gravitated to his natural moorings on the liberal side of the Court, and along with Black and Douglas consistently fought for greater protection of the individual.

On June 2, 1941, Chief Justice Charles Evans Hughes informed Roosevelt of his decision to retire, and, for a number of reasons, Roosevelt had to act quickly in filling not only the Court's center chair but also the seat vacated by James C. McReynolds a few months earlier. Speculation on Hughes's successor had quickly focused on Associate Justice Harlan Fiske Stone and on Attorney General Robert H. Jackson. Roosevelt had in fact promised the next vacancy on the Court to Jackson, one of the most widely respected members of the administration and a member of the president's inner circle of poker friends and advisors. But he had not expected that vacancy to be the center chair, and in the summer of 1941 sound political reasons supported the elevation of Stone, who had first been named to the Court in 1925.

Harlan Fiske Stone (1872–1946), after a brief stint in private practice, had served for many years as dean of the Columbia Law School. In 1923 he returned to private practice with a prestigious Wall Street form, but a year later an old college friend, Calvin Coolidge, named Stone as attorney general and gave him a mandate to clean out the corruption in the Justice Department left from the tenure of Harding's crony, Harry M. Daugherty. Stone won plaudits for his work and according to some sources, his very success led

to his being kicked upstairs to the Supreme Court in 1925. Stone was the first nominee to the high court to appear in person before a Senate committee to answer questions. Liberal senators objected that Stone was too probusiness and that he had been J. P. Morgan's lawyer (Sullivan & Cromwell did count the House of Morgan among its clients). But Stone handled the questions easily, and the Senate confirmed the appointment by a vote of 71–6.

Despite the fears of progressives, Stone soon aligned himself with the liberals on the bench, Holmes and Brandeis in the 1920s, and then with Cardozo when he took Holmes's seat. In the 1920s Stone tended to let Holmes and Brandeis write the stinging dissents against the judicial activism of the Taft Court, but he believed just as passionately as they did in judicial restraint, the idea that courts should not try to second-guess the wisdom of the legislature and that legislation should not be struck down unless it violated a clear constitutional prohibition.

With the retirement of Holmes and the aging of Brandeis, Stone took a more vocal position in the 1930s, and by the time Hughes retired Stone had emerged as the chief opponent of judicial conservatism. During the constitutional struggles over New Deal legislation, Stone had consistently defended the administration's efforts to deal with the Depression, and his views on the proper role of the judiciary and the necessity for judges to practice self-restraint can be found in his dissenting opinion in *United States v. Butler* (1936). There Stone objected to the majority's striking down the Agricultural Adjustment Act, and in his dissent claimed that "the power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government."[29]

Following the constitutional crisis of 1937 (in which Stone opposed Roosevelt's court-packing plan), the fight over economic legislation began to diminish, to be replaced by a concern for civil liberties. One of Stone's great contributions to American constitutional jurisprudence came in what appeared to be a minor case, *United States v. Carolene Products Co.* (1938). A federal law prohibited interstate transportation of "filled milk," skimmed milk mixed with animal fats. The Court had no trouble sustaining the legislation, but in his opinion for the majority Stone wrote what has since become

the most famous footnote in the Court's history. In that note Stone erected the foundation for separate criteria in which to evaluate legislation embodying economic policy and laws that affected civil liberties. The latter restrictions, he declared, are to "be subjected to more exacting judicial scrutiny under the general prohibitions of the 14th Amendment than are most other types of legislation." Moreover, "statutes directed at particular religious . . . or national . . . or racial minorities" as well as "prejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry."[30]

Stone's footnote, which has been cited in hundreds of cases ever since, ratified the change that had taken place following the Court-packing plan; economic legislation would henceforth receive a minimal level of scrutiny, with the justices relying on what came to be known as a rational basis test. As long as the legislature had the power and a reasonable justification for its use, courts would not question the wisdom of that legislation. But when statutes impinged on personal rights, there would be a much higher standard of review. With the *Carolene Products* footnote, the Court underwent a major sea change that would climax with the due process revolution and the civil rights decisions of the Warren Court in the 1950s and 1960s.[31]

While his jurisprudence appealed to the Democrats, Stone's opposition to the court-packing plan and his support of the Supreme Court's prerogatives won approval from conservatives. Newspapers across the political spectrum called for Stone's elevation to the center chair. Then over lunch at the White House, Felix Frankfurter urged his friend the president to name Stone, and to do so at once rather than wait until the fall when the Court convened. Frankfurter had a number of practical Court-related reasons, but his strongest argument concerned not matters of jurisprudence but of politics and international affairs. "It doesn't require prophetic powers," Frankfurter argued, "to be sure that we shall, sooner or later, be in war—I think sooner. It is most important that when war does come, the country should feel that you are a national, the Nation's president, and not a partisan President. Few things would contribute as much to confidence in you as a national and not a partisan President than for you to name a Republican, who has the profession's confidence, as Chief Justice."[32]

Confronted on all sides by this demand, Roosevelt sent Stone's name to the Senate on June 12 and was immediately rewarded with a wave of public approval. *Time* magazine caught the country's mood when it noted: "Last week the U.S. realized how much it liked the idea of a solid man as Chief Justice to follow Charles Evans Hughes. And solid is the word for Chief Justice Stone—

200 lb., with heavy, good-natured features and a benign judicial air. . . . [He] is almost as impressive as a figure of justice as were Taft and Hughes before him."[33] When the nomination came before the Senate on June 27, it received unanimous approval. The redoubtable George W. Norris of Nebraska, who had led the fight against Stone in 1925, now in 1941 made the only speech before the Senate's confirmation of Stone as chief justice. Noting that he had opposed Stone's original appointment to Court, Norris said, "I am now about to perform the one of the most pleasant duties that has ever come to me in my official life when I cast a vote in favor of his elevation to the highest judicial office in our land. . . . It is a great satisfaction to me to rectify, in a very small degree, the wrong I did him years ago."[34]

On the same day that Roosevelt sent Stone's nomination to the Senate, he named two other men to the high court, Robert Houghwout Jackson (1892–1954) to replace Stone as an associate justice, and James Francis Byrnes (1879–1972) to take the seat vacated by the last of the Four Horsemen, James C. McReynolds.

Jackson is, in some ways, one of the least known members of the Court, even though he had a notable career and a facile pen and helped create the modern doctrinal rules for judicial review of economic regulation. Although Jackson did not share the First Amendment views of Black and Douglas, he wrote one of the outstanding defenses of the First Amendment right to free exercise of religion.[35] Jackson was also among the better stylists on the Court in this century. Following one of his early opinions, Judge Jerome Frank, himself a brilliant writer, told Jackson: "I've never admired you as much as now. . . . And I am tickled silly that you spoke in good plain American, just as you did before you became a judge. Ordinary folks like me can understand you."[36]

Born on a western Pennsylvania farm, Robert Jackson was self-educated; he briefly attended Albany Law School, but then qualified for the bar by reading law as an apprentice in a lawyer's office, the last Supreme Court justice to do so. He set up a thriving and varied practice in western New York, and as a fourth-generation Democrat became active in state politics and an advisor to Governor Franklin Roosevelt. After Roosevelt entered the White House in 1933, he brought Jackson to Washington, where the New York lawyer advanced from general counsel at the Bureau of Internal Revenue to solicitor general and then attorney general. Jackson later described his tenure as solicitor general as the happiest part of his life, and he won high marks for his role as the government's chief litigator; Louis Brandeis once commented that Jackson should have been named solicitor general for life.

Many people considered Jackson a possible presidential candidate, and his name was frequently mentioned for the 1940 Democratic nomination until Roosevelt decided to run for a third term. The president had promised Jackson a seat on the Supreme Court when he asked him to head the Justice Department; the next vacancy, however, arose with the resignation of Charles Evans Hughes and Roosevelt felt he had to name Stone to the center chair. A loyal supporter of the president, Jackson agreed, but it appears that Roosevelt may have also assured Jackson that he would elevate him to be chief upon Stone's departure from the Court. Both men assumed that the sixty-nine-year-old Stone would probably not stay on the Court more than five or six years, and that would leave Jackson, then only fifty, a fair amount of time to lead the high court.

Had Jackson been chief justice, he might have been happier on the Court, but his activist nature chafed at the restrictions of judicial propriety. During the war he felt cut off from the great events going on around him, and remarked that the Monday after Pearl Harbor the Court heard arguments about the taxability of greens fees. Although he, like Frankfurter and Douglas, continued secretly to advise Roosevelt,[37] he wanted to do more. Thus he leaped at the opportunity when President Harry S. Truman asked him to head the American prosecutorial team at the Nuremberg trial of Nazi war criminals.

Although Jackson tended to join Frankfurter on many issues, he could not be considered a predictable vote for the conservatives. He parted from Frankfurter, for example, in the second flag salute case; his decision in *Wickard v. Filburn* (1942) is a ringing endorsement of an all-encompassing congressional power over commerce,[38] yet he took a far more restricted view of presidential power during the Korean conflict.[39] Some of his opinions seem quirky, such as his dissent in *Beauharnais v. Illinois* (1952), in which he endorsed the idea of treating racist speech as group libel yet argued that the defendant had a right to a jury trial to prove the truth of the libel.[40]

Jimmy Byrnes sat on the Court for only one term, then resigned to become the so-called assistant president, Roosevelt's special aide during the war. Born in Charleston, South Carolina, Byrnes had little formal schooling, and, like Jackson, had learned his law by reading as an apprentice. Byrnes loved politics; he served in the House of Representatives from 1910 to 1925 and then in the Senate from 1931 to 1941. While in the Senate he became a trusted ally and adviser of the president and was one of the few southern senators besides Black to be fully committed to the New Deal. He also earned Roosevelt's gratitude for working out a face-saving compromise in the after-

math of the court-packing debacle. He urged Roosevelt not to push the bill, especially after Willis Van Devanter resigned. "Why run for a train after you caught it?" he asked.

Byrnes's main contribution to the Court appears to have been social; he regularly had the justices over to his house for dinner and then led them in postprandial songs. He wrote only one major opinion, *Edwards v. California* (1941),[41] and fifteen other minor rulings, with no dissents or concurrences, thus leaving a virtually uncharted jurisprudence. Byrnes, like other members of the Stone Court, felt isolated from the great events happening around them. The Court's slow and deliberative pace frustrated him, and he declared, "I don't think I can stand the abstractions of jurisprudence at a time like this." When Roosevelt intimated that he needed Byrnes off the bench, the South Carolinian jumped at the chance.

To replace Byrnes, Roosevelt named his ninth and last appointment to the Court, Wiley Blount Rutledge Jr. (1894–1949). Born in Kentucky, Blount made his home in the Midwest, taught law, and served as dean first at Washington University in St. Louis and then at the University of Iowa. While at Washington in the early 1930s, he solved a tense racial situation at a conference of white and black lawyers. Because Missouri enforced segregation, the African American lawyers could not sit at the same tables as the white participants; Rutledge invited all the minority members to join him at the dean's table. A few years later he gained national attention as being one of the few law school deans to support Roosevelt's court-packing plan, a position that won him more than a little notoriety in conservative Iowa.

Rutledge's name had figured prominently in 1938 and 1939 when vacancies opened on the Supreme Court, but Roosevelt used those opportunities to name Frankfurter and Douglas. However, the president did name Rutledge to the prestigious Court of Appeals for the District of Columbia, which heard many of the cases arising under the National Labor Relations Act. There Rutledge consistently voted on the pro-labor side and also endorsed other New Deal measures. When Byrnes stepped down, Rutledge was a natural choice as his successor.

Unfortunately, Rutledge died of a cerebral hemorrhage at the age of fifty-five after serving on the Court for only six years. During that time he carved out a consistently liberal position, one that took its cue from the double standard enunciated in Stone's *Carolene Products* footnote. Joining Stone, Black, Douglas and Murphy, Rutledge provided the fifth vote necessary to begin the expansion of protected freedoms under the First Amendment. Moreover, he was willing to go beyond Black's position regarding the meaning of the Four-

teenth Amendment's due-process clause. Where Black believed the clause encompassed only the protections enunciated in the Bill of Rights, Rutledge tended to agree with Murphy and Douglas in arguing that it included at least those protections and possibly more. The area in which he had the most impact involved the religion clauses of the First Amendment, and Rutledge played a key role in the several Jehovah's Witnesses cases the Court heard during the early 1940s.

At his death in 1949, just a few months after that of Frank Murphy, articles appeared in the law reviews in a quantity one would associate with a justice with far longer service on the bench. Part of this resulted from Rutledge's friendly and open character; he treated his law clerks well and debated them as democratic equals, and he invited a friend, a Republican who owned a small Jewish delicatessen, to sit with the justices at Harry Truman's inauguration. But another part grew out of the belief that had Rutledge lived longer, he would have been a great justice. As two of his former clerks put it, "Death met him . . . after he had completed his apprenticeship but before he had proceeded far in a master's work."[42] Certainly Rutledge and the other Roosevelt appointees strike one as of a higher level of competence and craftsmanship than those appointed by Harry Truman to take their place.

Jurisprudentially, two things need to be noted about the so-called Roosevelt Court. First, it expanded the reach of the federal commerce power and repudiated any judicial role in economic policy making. Second, and more important, it started the Court on the road to expanding the definition of constitutionally protected rights, and it established the Court not only as the chief interpreter of the Constitution but also as the primary guarantor of individual liberties.

Nearly everyone assumed that the Roosevelt appointees would share his philosophy of government and interpret the Constitution broadly to give Congress and the president, as well as state legislatures, adequate power to meet the nation's needs. In this they did not disappoint the president and his followers. Perhaps the best example of the Roosevelt Court's broad view of the commerce clause is its sustaining the New Deal's agricultural program.

No case had better exemplified the antagonism of the Court conservatives against the New Deal than *United States v. Butler*,[43] in which the majority had struck down the popular agriculture act of 1933. In the act, Congress had intended to do away with the large crop surpluses that depressed farm prices by placing limits on how much individual farmers could grow. In return for their participation in the scheme, farmers would receive a subsidy financed

through a tax on the first processor. In his opinion for the majority Justice Roberts had taken an extremely narrow view of both the commerce and the taxing powers.

Congress "cured" the tax problem in the second AAA by financing the plan through general rather than particular taxes, and following the Court fight in 1937, the new Court had little problem in sustaining the act in *Mulford v. Smith* (1939).[44] In the next few years the Court continued to sustain New Deal legislation, and in 1941, in *United States v. Darby,* Justice Stone effectively killed off the idea of "dual federalism," by which the conservatives had created a no-man's land in which neither the states nor the federal government could act.[45] The question remained, however, whether the states themselves retained any control over local commerce, and the answer appeared to be no.

Roscoe Filburn ran a small chicken farm in Ohio, and each year he planted a few acres of wheat to feed his poultry and livestock. Under the Agricultural Marketing Agreement Act of 1937 (which had been sustained by the Court in 1942), Filburn had signed an allotment agreement allowing him 11.1 acres of wheat, but he actually planted 23 acres and grew 239 bushels beyond his assigned quota. The Agriculture Department invoked the penalty provisions of the law and brought suit to collect the fines.

Filburn defended himself on the grounds that the regulations exceeded the federal powers granted by the commerce clause because the excess wheat had not gone into interstate commerce, but had been grown for and used by his chickens. This argument caused some doubt among at least five justices—Jackson, Murphy, Roberts, Byrnes, and Frankfurter—who were also dissatisfied with the presentations of both the government and Filburn's attorneys. Three members of the Court saw no problem, but for different reasons. Black and Douglas took an extremely expansive view of the commerce power, claiming it had no limitations except those explicitly mentioned in the Constitution. Stone, while agreeing that the constitutional arguments had not been well presented, nonetheless believed that sufficient precedent existed to sustain the law.[46] Interestingly, Robert Jackson, who would eventually write the opinion in the case, disagreed, and, in language that Stone's biographer terms "reminiscent of the Old Guard," complained that he did not see it as a simple matter. "The Constitution drew a line between state and federal power," Jackson wrote, "and here the Congress wants to cross that line admittedly."[47]

After rehearing that fall, Stone assigned the case to Jackson, who proceeded to write one of the Court's strongest opinions upholding the federal com-

merce power. Even though Farmer Filburn's wheat had been intended for his own chickens, "such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. Even if it never did enter the market, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce."[48]

Jackson, despite his earlier doubts, did have precedent on which to rely. Charles Evans Hughes, in his first tenure on the bench, had written in the *Shreveport Cases* that Congress could regulate intrastate rates of railroads if these rates had a substantial effect upon interstate rates.[49] Later, using a similar argument, Chief Justice Taft—whom no one would accuse of being overly sympathetic to federal regulation—had upheld congressional control over the Chicago Board of Trade, since its activities had an impact on interstate commerce.[50] But Jackson's opinion went further, since in the earlier cases Hughes and Taft had required some evidence that the intrastate activities did in fact have an interstate effect, other than that Congress merely said so. "If we are to be brutally frank," Jackson wrote shortly after the opinion came down, "I suspect what we would say is that in any case where Congress thinks there is an effect on interstate commerce, the Court will accept that judgment. All of the efforts to set up formulae to confine the commerce power have failed. When we admit that it is an economic matter, we pretty nearly admit that it is not a matter which courts may judge."[51]

In fact, the notion of an expansive commerce power was hardly new; it had been put forward by Chief Justice John Marshall in the early days of the Republic. But as Paul Murphy points out, in an era of minimal government Marshall had used a broad interpretation of the commerce clause to block out state interference without assuming that the federal government necessarily would act; the New Deal Court, on the other hand, intended to clear the path of state regulation so Congress could legislate far-reaching programs. Nonetheless, when Justice Frank Murphy declared that the government's regulatory power under the commerce clause "was as broad as the economic needs of the nation," commentators praised the statement as being particularly "Marshallian."[52]

But did the states have anything left to control, or had the Court really put an end to the whole notion of federalism? The answer came in the same term, and involved a challenge to California's Agricultural Prorate Act. California farmers grew nearly all of the raisins consumed in the United States, and about 90 percent of the crop entered interstate commerce. The Prorate Act created a state-sponsored monopoly for the marketing of raisins, and all

growers had to comply with its provisions. Each grower could market only 30 percent of his crop in the open market and had to turn over the remainder to a central committee, which controlled the amount of raisins let into the market so as to stabilize prices.

The challenge to the Prorate Act raised three questions for the Court: Did the measure violate the Sherman Antitrust Act? Did it run afoul of the 1937 Agricultural Marketing Agreement Act? Did it transgress the commerce clause? In an opinion for a unanimous Court, Chief Justice Stone upheld the California statute, and in doing so completed the work he had begun in the *Darby* case the previous term. The Sherman Act had no applicability because it applied only to private companies, not to the states. In a federal system, Stone warned, courts should not infer applicability of federal legislation to the states in the absence of an explicit congressional directive. The law also did not interfere with the federal statute; Congress had not totally preempted the field, and the Secretary of Agriculture had testified that the federal and state plans worked harmoniously together.

The key question of course, was whether California's plan crossed into terrain reserved for Congress by the commerce clause. Stone noted that the state plan dealt primarily with regulation of raisins before shipment into interstate commerce and could legitimately be described as a local activity. But that would have been a mechanistic reading of the Constitution and the situation, since the scheme clearly affected interstate commerce. The courts, Stone declared, had to take a realistic view of the facts:[53]

> When Congress has not exerted its power under the commerce clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved.
>
> Such regulations by the state are to be sustained, not because they are "indirect" rather than "direct" . . . not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health, and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress.

In some ways, Stone resurrected a "dual federalism" with this opinion, but one quite different from that used by conservatives in the 1920s and 1930s to strike down both state and federal measures. The conservatives had defined an area of activities that had both a local and an interstate character that in essence could be regulated by neither the states nor the federal government. Stone had put an end to that version of dual federalism in *Darby,* which had given the federal government the power to regulate goods made in local business and then shipped in interstate commerce.

Under Stone's version, the no-man's land became neutral territory, subject to regulation by either the state or federal government. Obviously, and especially after *Wickard v. Filburn,* federal control took precedence, but until Congress acted, the states remained free to establish whatever measures they saw fit. In many ways, Stone did little more than to return to the common sense rule of the nineteenth century, which the Court had enunciated in *Cooley v. Board of Wardens of the Port of Philadelphia* (1851).[54] That case made the Tenth Amendment what the Framers had intended it to be, a statement of the partnership between the states and the federal government, not a means to paralyze both.

In fact, in only two nonunanimous opinions during the Stone years did the Roosevelt Court invalidate state regulation of commerce as impinging on federal authority. In *Southern Pacific Railroad v. Arizona* (1945) the majority voided a state law limiting the size of trains operating within Arizona borders to no more than fourteen passenger cars or seventy freight cars in length. Evidence indicated that the railway unions backing the proposal saw it as a means of increasing jobs, but the official justification emphasized safety concerns, with the hazards to trainmen allegedly greater on overly long trains. The majority deemed the safety rationale slight and dubious, and outweighed by a "national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journeys which it interrupts." If there were to be limits on train size, the Court concluded, they would have to come from Congress.[55] The opinion elicited a strong dissent from Justice Black, joined by Douglas, who condemned the majority for attempting to evaluate the probable dangers to trainmen, a task that properly belonged to the state legislature.[56]

For the most part, the Court did not denigrate the role of the states, and in its role as umpire of the federal system, paid more deference to state prerogatives than some critics thought it would.[57] The only area in which the Court seemed to go too far involved insurance, which since 1869 had been

held to be a matter of state regulation.[58] Then in 1942 the Justice Department secured antitrust indictments against the 196 members of the South-Eastern Underwriters Association, charging them with conspiracies to fix rates. The district court that heard the initial case felt constrained by precedent and dismissed the case, ruling that since insurance fell under state regulation it could not be prosecuted under a federal law. The government brought suit.

Despite internal dissension as to whether the Court should be bound by the 1869 precedent, it seems clear that of the seven members who heard the case, nearly all did in fact consider insurance as part of interstate commerce, and in the end Hugo Black managed to eke out a 4–3 majority to that effect. Rather than look at decisions regarding state power, under which *Paul v. Virginia* would have controlled, Black looked at the record in determining federal authority, and over the years the Court had consistently expanded that power. Black concluded that "no commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of the Congress under the Commerce Clause. We cannot make an exception to the business of insurance."[59]

The decision triggered a chorus of protest, not so much at Black's rationale but at the chaos many people believed would follow. The expected turmoil, however, did not materialize. Congress declined to make insurance regulation a federal function, and in the McCarran Act permitted the states to continue regulation and taxation of the insurance business despite its interstate character. In addition, the act exempted the industry from any federal statute not specifically covering insurance, with the exception of the Sherman Antitrust Act and three other laws. In 1946 the Court unanimously upheld the McCarran Act's premise that insurance, even though interstate in nature, could be jointly governed by the states and the federal government.[60]

As a final note on the ending of the old economic regime, while the Roosevelt Court certainly expanded the meaning of interstate commerce and found that Congress had a wide-ranging authority in this area, it also sustained state regulatory legislation of the type that under the old Court would have been voided through the imposition of dual federalism. The Roosevelt appointees took very seriously the notion of judicial restraint and believed that unless a specific constitutional prohibition existed, Congress and the state legislatures should be free to act. The courts should defer to the wisdom of the legislative choice and not impose their own views; should the legislature be wrong, recourse lay with the people acting through the ballot.

As a result, state legislatures now had a much broader range of authority than they had enjoyed before, and how little the justices saw review of this

authority as within their responsibility can be witnessed in a 1955 opinion by William O. Douglas. The Court by then had indicated it would no longer apply due-process criteria to economic issues. In *Williamson v. Lee Optical Co.* Douglas announced what remains as the judicial standard for review of regulatory legislation. If the legislature had any "rational basis" to warrant the controls, and if the statute did not violate a specific constitutional prohibition, the courts would not intervene.[61] With this case, it could be said that Franklin Roosevelt had completely triumphed over the Four Horsemen.

The Roosevelt Court proved to be one of the most contentious in history, marked by intense personality conflicts[62] as well as by a major jurisprudential dispute. By the time Hugo Black took his seat on the bench a majority of the Court had agreed that the due-process clause of the Fourteenth Amendment "incorporated" at least some of the guarantees in the Bill of Rights and applied them to the states. In *Palko v. Connecticut,* Justice Benjamin N. Cardozo had articulated a philosophy of limited or "selective" incorporation, in which only those rights most important to a scheme of" ordered liberty" would be enforced against the states.[63] Black originally accepted the *Palko* doctrine but gradually came to believe that all of the rights enumerated in the first eight amendments should be incorporated; moreover, he believed that the First Amendment, protecting freedom of expression, held a "preferred" position.

Black objected to the Cardozo position, which Frankfurter championed, because it smacked of natural law and relied too much on the justices' sense of fairness and decency. In criminal cases Frankfurter would ask whether the police conduct "shocked the conscience." Black wanted to know "whose conscience?" and charged that Frankfurter's approach left too much discretion in the hands of the courts to expand or contract rights belonging to the people. Frankfurter, on the other hand, objected to Black's position as historically as well as logically flawed. Much of the language in the Bill of Rights could not be interpreted in a strictly objective manner. What, for example, constituted an "unreasonable" search? Judges had to interpret these words, and such interpretation was a proper judicial function.[64]

Black and Douglas also began developing a new jurisprudence that put First Amendment rights in a "preferred" position, and argued for an "absolutist" interpretation of the prohibition against the abridgment of speech. The First Amendment, in their view, barred all forms of governmental restriction on speech; any other interpretation, they claimed, "can be used to justify the punishment of advocacy." Frankfurter believed that individual lib-

erty and social order had to be balanced in First Amendment cases, and the yardstick would be the Holmes rule of "clear and present danger." Black, on the other hand, saw that doctrine as "the most dangerous of the tests developed by the justices of the Court."[65]

For Frankfurter, the evaluation and balancing implicit in the clear and present danger test fit perfectly with his conception of the judicial function. By rigorously applying the tools of logical analysis, judges would be able to determine when such a danger existed and thus justified state intervention, and when it did not. In this view, explicating First Amendment issues differed not at all from any other constitutional question. In a letter to Stanley Reed, Frankfurter asked, "When one talks about 'preferred,' or 'preferred position,' one means preference of one thing over another. Please tell me what kind of sense it makes that one provision of the Constitution is to be 'preferred' over another. . . . The correlative of 'preference' is 'subordination,' and I know of no calculus to determine when one provision of the Constitution must yield to another, nor do I know of any reason for doing so."[66]

These debates, between selective and total incorporation and between a preferred and nonpreferred reading of the First Amendment, would split the bench throughout the 1940s and 1950s. During the last two decades of the nineteenth century and the first four of the twentieth, the Court had confronted primarily economic issues; starting in the late 1930s, more and more cases involving individual liberties and civil rights appeared on the docket. Although in general the Roosevelt appointees favored such rights, they differed significantly over how the Bill of Rights should be interpreted, which provisions should apply to the states, and how far the Court should be involved in the emerging civil rights struggle.

In 1938, in his famous footnote 4 in the *Carolene Products* case, Justice Stone had suggested that while the courts should defer to the legislature in economic matters, it should impose higher standards of review in cases involving individual liberties and rights. With the significant exception of the Japanese relocation cases, in which the justices blindly deferred to the military,[67] the Court began to implement Stone's test in World War II.

In terms of economic regulation, the justices easily found constitutional justification for every federal measure brought before it, including price controls, rent controls, and restrictions on profiteering.[68] As the Court noted in the *Willingham* case, "A nation which can demand the lives of its men and women in the waging of a war is under no constitutional necessity of providing a system of price controls on the domestic front which will assure each landlord a 'fair return' on his property."[69] Justices willing to sustain strong

governmental power in peacetime could hardly have been expected to rein even stronger policies in the midst of total war.

But what about individual liberties? How would the protection of civil liberties fare with the nation at war? Many people remembered the excesses of the Wilson administration and the willingness of the Court to acquiesce in severe limitations of free speech and press. Fortunately, so did the justices, and two of them, Frank Murphy and Robert Jackson, had taken steps during their terms as attorney general to ensure that such excesses would not be repeated if the United States entered a new war.[70] At the same time, the justices also recognized the government's legitimate need to protect itself.

Nonetheless, with the exception of the Japanese cases, the Court proved extremely reluctant to bless federal measures that impinged on individual rights. It struck down efforts at denaturalization,[71] upheld the rights of pacifists to become citizens,[72] prevented the states from establishing alien control laws,[73] and supported freedom of speech, even by communists and fascists.[74] But when it came to real and not alleged threats, such as the Nazi saboteurs, the justices had no trouble finding sufficient executive authority for a secret military trial.[75]

The Court also began the expansion of religious freedom with the several Jehovah's Witnesses cases, and in a landmark decision the Court reversed itself and found that a mandatory flag salute violated the First Amendment. Justice Jackson, who normally sided with the government on most issues, wrote one of the most ringing declarations of freedom ever penned in the Court: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."[76]

And during the war the Court took a few more steps, begun in the late 1930s, to reject the racist practices that had been condoned since the 1880s. In 1935 the Court had apparently validated black exclusion from primaries,[77] but the new appointees reversed this decision. In *United States v. Classic* (1941), the justices held that Congress could regulate a primary where it constituted part of the overall machinery for selecting federal officials.[78] Classic had been decided on narrow grounds and looked more like a voting fraud case than a civil rights decision. But Thurgood Marshall, the head of the NAACP Legal Defense Fund, gambled that with the more liberal makeup of the Roosevelt Court, he could use it as a weapon against the white primary itself, and the gamble paid off. In 1944 all the justices save Owen Roberts voted to overturn the 1935 *Grovey* decision and to invalidate southern laws preventing blacks from voting in the primaries.[79]

The most notorious civil rights decision involved the activities of Sheriff Claude Screws of Baker County, Georgia, who, with two of his deputies, had taken Robert Hall into custody, handcuffed him, and then beat him to death. Frank Murphy, then attorney general, had been unable to get Georgia authorities to prosecute under state law, so the Justice Department went into court and secured convictions that "under color of law" Screws and his deputies had deprived Hall of rights guaranteed to him by the Fourteenth Amendment.

The case split the Court, not because the justices approved of Screws's behavior, but rather because the underlying legal foundation rested on Reconstruction-era statutes, some of which had been narrowly interpreted by the Court in the 1880s, and even later interpretations had not given the government the scope of authority it claimed in this case.[80] Roberts, Frankfurter, and Jackson, although clearly shocked by the killing and having considered Screws guilty of murder, nonetheless thought the statute unconstitutionally vague; to permit its use would open a Pandora's box of federal interference in matters clearly within the jurisdiction of states. Stone thought the statute so vague as to "incorporate a law library" into it. Only Murphy seemed fully convinced of the statute's constitutionality.[81]

Stone assigned the case to Douglas, who wrote a careful and limiting opinion. The old law could be upheld as constitutional, but only if applied to state officials acting "under color of law." To save the statute from vagueness grounds, Stone suggested that they center the case on the question of whether Screws had acted "willfully." Douglas agreed, and in his opinion held that the law could be applied but he sent the case back for a new trial under clearer criteria of whether the sheriff had acted "willfully" and under "color of law."[82]

Because the Court had not struck the statute down as unconstitutionally vague, it remained alive and on the books for use by the government in later years. Congress corrected many of the defects in the 1964 and 1965 civil rights acts. Scholars have differed on the meaning of the case, with some heralding it as a distinct victory for civil rights and others claiming that it set up significant barriers to racial progress. Years later Thurgood Marshall, by then a member of the high court, said that much as he admired William O. Douglas, he could never forgive him for the *Screws* decision.[83]

Opinions on the Court and its protection of civil liberties during the war vary. While conceding that wartime often abridges individual liberty, Alpheus Mason declared, "Even in the time of greatest stress, the Justices upheld the

citizen's liberty to think, speak, and act to an extent that the nation at peace has sometimes felt it could ill afford to maintain. In this realm Stone's Court almost brought a miracle to pass."[84] At the other end of the spectrum, John Frank claimed that the "dominant lesson of our history in the relation of the judiciary to repression is that the courts love liberty most when it is under pressure least."[85]

The truth may lie somewhere between these poles, but in terms of the Roosevelt Court, we can better understand the war record as part of the changing agenda from economic to individual liberties. All of the president's appointees cared fervently about rights, although they disagreed on how far the Constitution intended the Court to protect those rights or expand their meaning. In the years after the war, that tension continued to play itself out until well into the Warren years.

Initially, the pendulum swung to the Frankfurter side of limited judicial involvement and a restrictive view on incorporation. What had been a conservative bloc of Frankfurter, Reed, and Jackson found itself strengthened by the Truman appointees, Fred Vinson (as chief justice), Harold Burton, Tom Clark, and Sherman Minton—all decent men but intellectually and jurisprudentially far inferior to the Roosevelt appointees. From 1946 until illness forced his retirement in 1962, Frankfurter was able to impose his views of judicial restraint and limited expansion of individual rights on the Court. It was Frankfurter who wrote the 4–3 opinion in 1946 that put off reapportionment of state legislatures for nearly a generation. It was Vinson, supported by Frankfurter, who wrote the speech-restrictive decision in the landmark Cold War case *Dennis v. United States*. And after the generally pro-labor attitude of the New Deal and the Court in the early 1940s, the conservatives began imposing limits on labor, taking their cue from the 1946 Taft-Hartley bill.

But the story is far from one-sided, and in the postwar era one of the great jurisprudential battles of modern times played out as Frankfurter battled Black and Douglas for what they all recognized as the soul of the Court. It is this debate, and its continuing impact, that is the greatest legacy of the Roosevelt Court.

Ever since they had come onto the Court, Hugo Black and Felix Frankfurter had carried on a debate on the meaning of the Fourteenth Amendment's due-process clause. Both men started from the same place—their opposition to the use of substantive due process by earlier courts to strike down reform legislation. For Frankfurter, the answer to this abuse of power lay in judicial restraint and appropriate deference to the policy decisions of

the political branches. But the due-process clause obviously meant something, and as interpreters of the Constitution, judges had to define what this "something" meant.

Black had just gone onto the Court when the *Palko* decision came down and at first subscribed to it. But he grew increasingly uncomfortable with the philosophy and method of selective incorporation and the great power it lodged in the courts. The heart of Black's differences with Frankfurter centered on the great discretion the Frankfurter-Cardozo approach vested in the judiciary. If judges could strike down state laws that failed to meet "civilized standards," then the courts had reverted to a "natural law concept whereby the supreme constitutional law becomes this Court's view of 'civilization' at a given moment." This philosophy, he declared, made everything else in the Constitution "mere surplusage," and allowed the Court to reject all of the provisions of the Bill of Rights and substitute its own idea for what legislatures could or could not do.[86] Black, however, still had difficulty articulating the standards he would apply.

The answer for Black came in a California murder case. Admiral Dewey Adamson, a poor, illiterate black, had twice served time for robbery. He had, however, been out of prison for seventeen years when police arrested him for the murder of an elderly white widow. The only evidence linking Adamson to the crime consisted of six fingerprints on a door leading to the garbage container in the woman's kitchen, which police identified as his. On the advice of his attorney, a veteran of the Los Angeles criminal courts, Adamson did not take the stand in his own defense. Had he done so, the prosecutor could have brought up Adamson's previous record and that would have resulted in a sure conviction. But the prosecutor, as he was allowed to do under California law, pointed out to the jury Adamson's failure to testify, and claimed that this surely proved his guilt. If he had been innocent, the prosecutor declared, it would have taken fifty horses to keep him off the stand. The jury convicted Adamson, and his lawyer on appeal challenged the California statute as violating the Fourteenth Amendment. Allowing comment on the failure to testify was equivalent to forcing a defendant to take the stand; both violated due process.[87]

In conference Frankfurter convinced a majority of his colleagues that the issue had already been decided, and correctly. In *Twining v. New Jersey* (1908) the Court had ruled that a state law permitting comment on a defendant's refusal to testify did not violate procedural fairness.[88] Justice Reed, assigned the opinion, conceded that such behavior by the prosecutor in a federal proceeding would be unacceptable and a violation of the Fifth Amendment. But

it was "settled law" that the self-incrimination law did not apply to the states; it was not "a right of national citizenship, or . . . a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights." In short, it was not one of the fundamental principles inherent in "the concept of ordered liberty" test of *Palko*. "For a state to require testimony from an accused," Reed concluded, "is not necessarily a breach of a state's obligation to give a fair trial."[89]

Black dissented and set forth his belief in the "total incorporation" of the first eight amendments by the Fourteenth. He would consider it the most important opinion of his career. "There I laid it all out. . . . I didn't write until I came to the complete conclusion that I was reasonably sure of myself and my research. It was my work from beginning to end."[90] Just as the Bill of Rights applied objective standards to the behavior of the federal government, so the application of the first eight amendments to the states would provide equally ascertainable criteria by which to judge state action. In a lengthy appendix he presented the historical evidence he had assembled to support this position, an essay most scholars find less than convincing. As might be expected from a former senator, Black relied entirely on the congressional history of the Fourteenth Amendment, the account of what Congress did in drafting it. But amending the Constitution requires ratification by the states, and Black neglected to look at the debates there; neither did he look at the abolitionist antecedents of the amendment.

What is most interesting in Black's rationale is that in many ways it resembled Frankfurter's own views on limiting judicial power. Black rejected Cardozo's criteria as too vague, in that phrases such as "civilized decency" and "fundamental liberty and justice" could be interpreted by judges to mean many things. This "natural law" theory of the Constitution "degrade[s] the constitutional safeguards of the Bill of Rights and simultaneously appropriate[s] for this Court a broad power which we are not authorized by the Constitution to exercise." The only way to avoid this abuse of judicial power would be to carry out the original intent of the framers of the Fourteenth Amendment, and apply all the protections of the Bill of Rights to the states.[91]

Douglas joined Black's opinion, but Murphy filed a separate dissent in which he attempted to combine elements of both the Frankfurter and Black approaches. He had found Black's essay "exciting reading," but added, "I think you go out of your way—as you always do—to strike down natural law." Murphy wanted to incorporate all of the Bill of Rights, as Black proposed, but he objected to what he saw as the rigidity in Black's approach. There were times when one had to be flexible, when a strict reading of the

first eight amendments would not suffice to provide justice. In those instances Frankfurter's use of due process would allow judges to secure justice. Murphy's reading of Black's opinion was not that wrong. Although Black would later adopt some of Frankfurter's views regarding due process as fundamental fairness, at the time of the Adamson case he told a group of clerks with whom he was having lunch that the due-process clauses of the Fifth and Fourteenth Amendments had "no meaning, except that of emphasis."[92]

Relying on his own historical research, Frankfurter denied that the framers of the Fourteenth Amendment had intended to subsume all of the Bill of Rights.[93] Frankfurter also responded to what he took as the most serious of Black's charges, that the vague criteria of *Palko* left judges too much discretion and protection of rights relied on the mercy of individual subjectivity.[94] He portrayed judging as a process removed from the fray of daily pressures. Protected in their sanctum, justices may engage in that process of discovery that will yield the right answer—not an objective, eternally fixed answer, but the right answer for the time.

Frankfurter did not espouse a moral relativism, but believed that judges in their decisions should reflect the advances that society has made, so that the due-process clause does not mean fairness in terms of 1868, but fairness today. Courts thus help keep the Constitution contemporary, but they must do so cautiously, always following strict intellectual processes and always deferring to those who are in the thick of the battle—the state courts and legislatures—who must in turn be left free to reform their procedures according to their standards of fairness. As Frankfurter noted in another case: "Due process of law requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and change in a progressive society."[95] Thus if the judge adheres to certain methods and standards, it does not matter what the result will be in a particular case, because the process will assure ultimate fairness across the spectrum of cases. "Whatever shortcut to relief may be had in a particular case," Frankfurter wrote a year after *Adamson,* "it is calculated to beget misunderstanding and friction and to that extent detracts from those imponderables which are the ultimate reliance of a civilized system of law."[96] The process and not a particular result is the desideratum of judging.

The great appeal of process jurisprudence is that it attempts to remove idiosyncrasy and individuality from judicial decision-making and replace them with objectivity and consistency. Public faith in the judicial process is

enhanced if the public believes the judges are acting fairly and adhering to a common set of methods and principles in all cases, regardless of the results in specific instances.

Yet can judging ever be quite this impersonal? Would scientific analysis really produce the right results? Oliver Wendell Holmes had declared that the prejudices of judges had as much if not more to do with determining the law than the logic of the syllogism. As Black asked, how did one objectively determine the "canons of decency and fairness" that everyone accepted? Moreover, although one might say that due process is meaningful over a whole gamut of cases, individuals are on trial; individuals must cope with the criminal justice system; individuals must pay the penalties if found guilty; individuals suffer if deprived of their rights.

For Black, total incorporation provided at least a partial answer, in that judges would no longer subjectively determine what rights met the "canons of decency and fairness." There were still questions to answer. Even if one applied the Fourth Amendment to the states, for example, one still had to determine what constituted an "unreasonable search." But the basic rights, the ones enshrined in the Constitution, would be in force and not dependent on whether a handful of judges determined that they met the canon.

Neither approach is without merit, and neither is without flaw. If Frankfurter's method refused to face up to the fact that process jurisprudence involved subjective evaluation, it did have the virtue of recognizing an acceptable diversity in a federal system, and acknowledging that one could have more than one model of a fair and workable system. Its open-ended approach to fairness also permitted judges, always exercising caution, to help keep basic constitutional guarantees current with the times.

Black's approach did do away with some but not all subjectivity, and debates over the reach of the exclusionary rule and expectations of privacy show that interpreting the "canons of decency and fairness" is an ongoing judicial function. Moreover, in many ways Black's rigid adherence to the text led to a cramped view of individual liberty. He would take an uncompromising stand that the First Amendment permitted no abridgement of speech, but because he could find no mention of privacy in the Constitution, he could not support the judicial claim that such a right existed.[97]

In the end Frank Murphy's approach, almost ignored in the battle between Black and Frankfurter, prevailed, and it came into effect in the landmark 1965 case of *Griswold v. Connecticut,* which established a right to privacy that eventually came to be embedded in due process. Although the Court adopted the Cardozo-Frankfurter approach of selective incorporation,

during the Warren years nearly all of the first eight amendment guaranties were applied to the states. But Black's approach proved too rigid, as Murphy had argued, and Frankfurter's notion of due process as fundamental fairness became a useful tool for judges confronting new and unusual situations in the Warren, Burger, and Rehnquist eras.

*Adamson* did not resolve the issue, but merely raised the curtain on what would be an ongoing debate within the Court. While the debate raged, the Roosevelt appointees, who still constituted a majority of the Court until 1955, had to deal with a variety of issues. In the late 1940s and early 1950s they decided a series of cases that began the dismantling of legally sanctioned race discrimination, and which culminated in the landmark decision in 1954 of *Brown v. Board of Education*. During the Cold War, with the exception of Hugo Black and William O. Douglas, the Court proved less than protective of free speech rights, and in the Dennis case it handed down one of the most speech-restrictive decisions of the century. But even as they debated the meaning of incorporation, the Roosevelt Court expanded the meaning of the First Amendment in other areas, notably religion, and laid the basis for the rights explosion of the 1960s and 1970s.[98]

The great steps to protect civil rights and civil liberties would not have been possible without the Frankfurter-Black debate and without the decisions handed down by the Roosevelt appointees. Although it may not have been quite the judicial legacy that Franklin Roosevelt envisioned when he made his choices, it is hard to think of any other group of presidential nominees to the high court that has had such an enduring impact.

## NOTES

1. Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998).

2. *Home Building and Loan Association v. Blaisdell,* 290 U.S. 398 (1934).

3. *Nebbia v. New York,* 291 U.S. 502 (1934).

4. *Morehead v. New York ex rel. Tipaldo,* 298 U.S. 587 (1936).

5. On the matter of poor counsel and draftsmanship, see Peter H. Irons, *The New Deal Lawyers* (Princeton: Princeton University Press, 1982).

6. U.S. 388 (1935).

7. *Norman v. Baltimore & Ohio R.R. Co., Perry v. United States,* 294 U.S. 330 (1935).

8. *Retirement Board v. Alton Railroad Company,* 295 U.S. 330 (1935).

9. *Schechter v. United States,* 295 U.S. 495 (1935); *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555 (1935); *Humphrey's Executor v. United States,* 295 U.S. 602 (1935).

10. *United States v. Butler,* 297 U.S. 1 (1936).

11. Robert H. Jackson Memoir, Columbia Oral History Collection, Columbia University Library.

12. William E. Leuchtenburg, "A Klansman Joins the Court," in *The Supreme Court Reborn* (New York: Oxford University Press, 1995), chap. 7; Roger K. Newman, *Hugo Black: A Biography* (New York: Pantheon, 1944), chaps. 6 and 17.

13. For an excellent discussion of Black's judicial philosophy, see Mark Silverstein, *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making* (Ithaca, N.Y.: Cornell University Press, 1984), especially chap. 4. See also Black's *A Constitutional Faith* (New York: Alfred A. Knopf, 1968).

14. Robert H. Jackson Memoir.

15. Daniel L. Breen, "Stanley Forman Reed," in Melvin I. Urofsky, ed., *The Supreme Court Justices: A Biographical Dictionary* (New York: Garland, 1994), 367. The only full-scale biography, John D. Fassett, *New Deal Justice: The Life of Stanley Reed of Kentucky* (New York: Vantage, 1994), is by a former clerk and is completely uncritical.

16. See William O. Brien, *Justice Reed and the First Amendment: The Religion Clauses* (Washington, D.C.: Georgetown University Press, 1958), and an unpublished dissertation by Mark J. Fitzgerald, "Justice Reed: A Study of a Center Judge" (University of Chicago, 1950).

17. Eugene Gerhart, *America's Advocate: Robert H. Jackson* (Indianapolis: Bobbs-Merrill, 1958), 166; Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* (New York: Viking Press, 1956), 482; Harold L. Ickes, *The Secret Diaries of Harold L. Ickes,* 3 vols. (New York: Simon & Schuster, 1954), 2:552.

18. There has been a great deal made of this relationship, especially by Bruce Murphy in *The Brandeis/Frankfurter Connection* (New York: Oxford University Press, 1982). A somewhat different picture emerges from the correspondence contained in Melvin I. Urofsky and David W. Levy, eds., *"Half Brother, Half Son": The Letters of Louis D. Brandeis to Felix Frankfurter* (Norman: University of Oklahoma Press, 1991).

19. G. Edward White, "Felix Frankfurter, the Old Boy Network, and the New Deal: The Placement of Elite Lawyers in Public Service in the 1930s," *Arkansas Law Review* 39 (1986): 631.

20. Their friendship and interaction can be seen in Max Freedman, ed., *Roosevelt & Frankfurter: Their Correspondence, 1928–1945* (Boston: Atlantic/Little, Brown, 1967).

21. For Frankfurter's pre-Court career and the influences that would shape his jurisprudence, see Michael Parrish, *Felix Frankfurter and His Times: The Reform Years*

(New York: Free Press, 1982); for the Court years, see Melvin I. Urofsky, *Felix Frankfurter, Judicial Restraint and Individual Liberties* (New York: Twayne, 1991).

22. William O. Douglas, *Of Men and Mountains* (New York: Harper & Row, 1950), 29.

23. Laura Kalman, *Legal Realism at Yale, 1927–1960* (Chapel Hill: University of North Carolina Press, 1986), especially chaps. 3 and 4.

24. For Douglas's tenure at the SEC, see Michael E. Parrish, *Securities Regulation and the New Deal* (New Haven: Yale University Press, 1970).

25. Douglas wrote what amounted to a three-volume autobiography, consisting of *Of Men and Mountains; Go East, Young Man: The Early Years* (New York: Random House, 1974); and *The Court Years: 1939–1975* (New York: Random House, 1980). The best biography is James F. Simon, *Independent Journey: The Life of William O. Douglas* (New York: Harper & Row, 1980).

26. Quoted in Peter Irons, "Frank Murphy," in Urofsky, *Supreme Court Justices,* 331.

27. Frank Murphy to Bishop William Murphy, 8 January 1940, in Sidney Fine, *Frank Murphy: The Washington Years* (Ann Arbor: University of Michigan Press, 1984), 133.

28. *Thornhill v. Alabama,* 310 U.S. 88 (1940); the Brandeis suggestion is in *Senn v. Tile Layers Protective Union,* 301 U.S. 468, 478 (1937). The *Thornhill* opinion proved to be both influential and enduring; it has been cited in more than three hundred subsequent opinions.

29. U.S. 1, 78–79 (1936).

30. U.S. 144, 152-53 (1938).

31. According to Daniel P. Currie, in his twenty years on the bench Stone "had done more perhaps than any other justice to bring constitutional law into the twentieth century. We are indebted to him for one of the most effective protests against the old order [his *Butler* dissent] and for the authoritative program of the new." *The Constitution in the Supreme Court: The Second Century, 1888–1986* (Chicago: University of Chicago Press, 1990), 334.

32. Felix Frankfurter, memorandum on the chief justiceship cited in Mason, *Stone*, 566–567; see also Frankfurter to Stone, 3 July 1941, Harlan Fiske Stone Papers, Manuscript Division, Library of Congress, Washington, D.C.

33. *Time,* 23 June 1941; for a sampling of the overwhelming approval that met the nomination, see Mason, *Stone,* 568–573.

34. *Congressional Record,* 77th Cong., 1st Sess. (27 June 1941), 5618.

35. *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943).

36. Frank to Jackson, 27 November 1941, Robert H. Jackson Papers, Manuscript Division, Library of Congress, Washington, D.C. See also the appraisal by Arthur Krock in his column in the *New York Times,* 15 June 1943. For an example of Jack-

son's style and wit, see his apology for a previous error in *McGrath v. Kristensen,* 340 U.S. 162, 177–178 (1950).

37. For the extrajudicial activities of Jackson and other justices during the war, see Melvin I. Urofsky, "*Inter Arma Silent Leges*: Extrajudicial Activity, Patriotism and the Rule of Law," in Daniel R. Ernst and Victor Jew, eds., *Total War and the Law: New Perspectives on World War II* (East Lansing: Michigan State University Press, in press).

38. U.S. 111 (1942).

39. *Youngstown Sheet & Tube Co. et al. v. Sawyer,* 343 U.S. 579 (1952).

40. U.S. 250 (1952).

41. U.S. 160 (1941), upholding as fundamental the right to travel within the country.

42. Victory Brudney and Richard F. Wolfson, "Mr. Justice Rutledge: Law Clerks' Reflections," *Indiana Law Journal* 25 (1950): 455.

43. U.S. 1 (1936).

44. U.S. 38 (1939). Roberts, in fact, wrote the opinion in this case, another example of his reversing prior positions. He later noted, "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy." Owen J. Roberts, *The Court and the Constitution* (Cambridge, Mass.: Harvard University Press, 1951), 61.

45. U.S. 100 (1941)

46. Stone, Memorandum to the Court, 25 May 1942, Jackson Papers; Reed took no part in the discussion or decision of this case.

47. Mason, *Stone,* 594; Jackson to Stone, 25 May 1942, Stone Papers. Douglas believed there were sufficient precedents to uphold the law. Douglas to Jackson, 25 May 1942, William O. Douglas Papers, Manuscript Division, Library of Congress, Washington, D.C.

48. Wickard v. Filburn, 317 U.S. 111, 128 (1942).

49. U.S. 342 (1914).

50. *Chicago Board of Trade v. Olsen,* 262 U.S. 1 (1923).

51. Jackson to Sherman Minton, 21 December 1942, Jackson Papers. Stone evinced a similar sentiment; see Stone to Sterling Carr, 11 January 1943, Stone Papers.

52. Paul L. Murphy, *The Constitution in Crisis Times, 1918–1969* (New York: Harper & Row, 1972), 168; *American Power & Light Co. v. S.E.C.,* 328 U.S. 90, 141 (1946).

53. *Parker v. Brown,* 317 U.S. 341, 362–363 (1942).

54. How. 299 (1851).

55. U.S. 761, 776 (1945).

56. *Id.* at 784 (Black dissenting).

57. See Melvin I. Urofsky, *Division and Discord: The Supreme Court under Stone and Vinson, 1941–1953* (Columbia: University of South Carolina Press, 1997), chap. 4.

58. *Paul v. Virginia,* 8 Wall. 168 (1869).

59. *United States v. South-Eastern Underwriters Association,* 322 U.S. 533, 553 (1944); Reed and Roberts took no part in the decision.

60. *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408 (1946); *Robertson v. California,* 328 U.S. 440 (1946).

61. U.S. 483 (1955).

62. See Urofsky, *Division and Discord,* 33–46.

63. U.S. 319 (1937).

64. For a fuller discussion of the debate and of Frankfurter's views, see Melvin I. Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties* (New York: Twayne, 1991), especially chap. 6.

65. Black, *Constitutional Faith,* 50, 52.

66. Frankfurter to Reed, 7 February 1956, Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.

67. The classic work on the Japanese cases is Peter H. Irons, *Justice at War* (New York: Oxford University Press, 1983). See also the U.S. Commission on Wartime Relocation, *Personal Justice Denied* (Washington, D.C.: U.S. Government Printing Office, 1983), and for a less hostile approach, Page Smith, *Democracy on Trial: The Japanese-American Evacuation and Relocation in World War II* (New York: Simon & Schuster, 1995).

68. *Yakus v. United States,* 321 U.S. 414 (1944); *Steuart and Co. v. Bowles,* 322 U.S. 398 (1944); *Bowles v. Willingham,* 321 U.S. 503 (1944); *Lichter v. United States,* 334 U.S. 742 (1948).

69. U.S. at 518.

70. Murphy, *Constitution in Crisis Times,* 176–178; Frank Murphy's tenure as attorney general is detailed in Fine, *Murphy,* chaps. 1–7.

71. *Schneiderman v. United States,* 320 U.S. 119 (1943); *Baumgartner v. United States,* 322 U.S. 665 (1944); *Bridges v. Wixon,* 326 U.S. 135 (1945).

72. *Girouard v. United States,* 328 U.S. 61 (1946).

73. *Hines v. Davidowitz,* 312 U.S. 52 (1941).

74. *Hartzel v. United States,* 322 U.S. 680 (1944); *Viereck v. United States,* 318 U.S. 236 (1943); *Keegan v. United States,* 325 U.S. 478 (1945).

75. *Ex parte Quirin,* 317 U.S. 1 (1942).

76. *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 642 (1943). For an analysis of the various Witness cases, see Edward F. Waite, "The Debt of Constitutional Law to Jehovah's Witnesses," *Minnesota Law Review* 28 (1944): 209.

77. *Grovey v. Townsend,* 295 U.S. 45 (1935).

78. U.S. 299 (1941).

79. *Smith v. Allwright,* 321 U.S. 649 (1944).

80. *Civil Rights Cases,* 109 U.S. 3 (1993); *Logan v. United States,* 144 U.S. 263 (1892); *United States v. Powell,* 212 U.S. 564 (1909).

81. Conference notes, 4 November 1944, Jackson MSS; Frankfurter to Stone, 30 November 1944, Frankfurter MSS, Harvard Law School; Fine, *Murphy,* 396–403.

82. Stone to Douglas, 25 November 1944, Stone MSS; *Screws v. United States,* 325 U.S. 91 (1945). The federal government was unsuccessful in its second attempt to convict Screws, who had in the meantime become something of a local hero. He later won election to the state senate.

83. Robert Carr, *Federal Protection of Civil Liberties* (Ithaca, N.Y.: Cornell University Press, 1947), 114; Herman Belz et al., *The American Constitution,* 7th ed. (New York: W. W. Norton, 1991), 597; author's interview with Justice Marshall, 17 May 1988.

84. Mason, *Stone,* 698. Paul Murphy joins in this judgment (*Constitution in Crisis Times,* 247) but adds the caveat that this was the most popular war in the nation's history; thus the type of civil liberties challenges present in the Civil War, World War I, and Vietnam were absent.

85. John P. Frank, "Review and Basic Liberties," in Edmond Cahn, ed., *Supreme Court and Supreme Law* (Bloomington: Indiana University Press, 1954), 114.

86. Black to Conference, 23 March 1945, Felix Frankfurter Papers, Harvard Law School.

87. *Adamson v. California,* 332 U.S. 46 (1947).

88. U.S. 78 (1908).

89. U.S. at 50–51, 54.

90. Roger K. Newman, *Hugo Black: A Biography* (New York: Pantheon, 1994), 3552.

91. U.S. at 68, 70.

92. Fine, *Murphy,* 503–504; the Murphy dissent is at 332 U.S. at 123.

93. For a brilliant exposition of the argument that the men who drafted the Fourteenth Amendment did, in fact, mean to incorporate all of the Bill of Rights, see Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998).

94. U.S. at 67–68.

95. *Rochin v. v. California,* 342 U.S. 165, 172 (1952).

96. *Uveges v. Pennsylvania,* 335 U.S. 437, 449–450 (1948).

97. See Black's dissent in *Griswold v. Connecticut,* 381 U.S. 479, 507 (1965).

98. Urofsky, *Division and Discord,* chaps. 6–9.