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Why Harlan Fiske Stone (Also) Matters

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What One Republican Justice Nominated by a Staunchly Conservative President Would Likely Say About the FBI’s Collection of Domestic Intelligence, the Constitutionality of the Affordable Care Act, The Partisan Judiciary, and the Rights of Religious Minorities Suspected of Disloyalty

by

Eric Schepard

Abstract

This article argues that Harlan Fiske Stone has been largely overlooked in the recent legal literature even though his legacy should influence how we resolve contemporary legal problems. It examines Stone’s archived correspondence, his speeches and opinions, and numerous secondary sources to demonstrate why he is more important now than at any time since his death in 1946.

As Attorney General from 1924-25, Stone’s decision to prohibit the Bureau of Investigation (BI, today’s FBI) from spying on domestic radicals established a framework that should guide the troublesome relationship between domestic intelligence and law enforcement that reemerged after September 11, 2001. As an Associate Justice of the Supreme Court from 1925-41, Stone’s visionary critiques of formalistic, extra-textual interpretations of Congress’s power support the constitutionality of the Affordable Care Act’s individual mandate. Even more importantly, Stone’s devotion to judicial restraint when assessing the constitutionality of laws that he, his Party, and the President who appointed him opposed, contrasts sharply with the troublingly partisan divisions of the current Court. Finally, Stone’s dissent in Minersville v. Gobitis, though largely overlooked in the contemporary legal literature, bravely defended the rights of a religious minority suspected of disloyalty during a surge of national paranoia that closely resembles the public’s current apprehension toward Muslim Americans.

This article also analyzes less attractive aspects of Stone’s legacy, including his appointment of J. Edgar Hoover to head the BI and his opinion upholding the military’s mistreatment of aliens and citizens of Japanese descent during World War II.
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Introduction

Harlan Fiske Stone, Attorney General from 1924 to 1925, Associate Justice of the Supreme Court from 1925 to 1941, and Chief Justice from 1941 to 1946, was one of the most celebrated jurists of his time.\(^1\) However, he has been largely overlooked in our own, even though his legacy should influence how we resolve contemporary legal problems.

As Attorney General, Stone’s decision to prohibit the Bureau of Investigation (BI, today’s FBI) from spying on domestic radicals established a framework that should guide the troublesome relationship between domestic intelligence and law enforcement that reemerged after September 11, 2001. As a Justice, Stone’s visionary critiques of formalistic, extra-textual interpretations of Congress’s power in *United States v. Butler*\(^2\) and other cases justifies the constitutionality of the Affordable Care Act’s\(^3\) individual mandate.\(^4\) Perhaps more importantly, Stone’s commitment to judicial restraint, even when assessing the constitutionality of laws inimical to his Party, the President who appointed him, and his personal beliefs, imbued his decisions with a legitimacy lacking from those of our firmly partisan Court. Finally, Stone’s dissent in *Minersville v. Gobitis,*\(^5\) though largely overlooked in the contemporary legal literature, bravely defended the rights of a religious minority suspected of disloyalty during a surge of national paranoia that closely resembles the public’s current apprehension toward Muslim Americans.

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\(^1\) *See infra* notes 47-50 and accompanying text.
\(^2\) 297 U.S. 1, 78 (1936).
\(^5\) 310 U.S. 586, 601 (1940).
Despite Stone’s significant contributions, recent scholarship has focused primarily on his contemporaries on the Court. Since 1994, at least one book has been devoted in whole or part to all of the major Justices with whom Stone served, including Oliver Wendell Holmes, Louis Brandeis, George Sutherland, Benjamin Cardozo, and Charles Evans Hughes, as well as Felix Frankfurter, Hugo Black, William Douglas, and Robert Jackson. Meanwhile legal journals regularly publish works devoted to Brandeis and Holmes and have recently published pieces devoted to Justices Willis Van Devanter and Pierce Butler, two of Stone’s less distinguished contemporaries. Articles by public intellectuals have also renewed interest in the New Deal era Justices; for example, The New Republic published Why Brandeis Matters, by Jeffery Rosen, a lengthy article that argued persuasively that Brandeis’s views still informed contemporary debates about economics, privacy, and Zionism. Stone, however, has faded from the limelight, an

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6 EDWARD WHITE, OLIVER WENDELL HOLMES, JR. (2006).
7 MELVIN UROFSKY, LOUIS D. BRANDEIS (2009).
afterthought for almost two decades in the legal literature and the primary subject of no book since the 1950s.

Though this article attempts to correct this imbalance, it is not a tribute. It will analyze some of Stone’s less attractive decisions, including his appointment of J. Edgar Hoover to head the BI and his opinion upholding the military’s mistreatment of aliens and citizens of Japanese descent during World War II. For largely good but for ill too, it will introduce Stone to 21st Century audiences and show why he should be more influential now than at any time since his death in 1946.

This article provides a fresh perspective on Stone’s legacy based on correspondence at the Library of Congress’s archives, his opinions, speeches, and secondary sources of information about him—many decades old. It gleans new insights about Stone and demonstrates the significance of his values to some of the legal problems of our time. It also catalogues the major publicly available sources of information about Stone to help initiate an overdue comprehensive reexamination of his life and career in light of recent scholarship on the era in which he lived.16

Part I briefly summarizes the key aspects of Stone’s life and career as well as the flood of major scholarship devoted to him during his life and in the decade after his death. It then speculates on the causes of the noticeable decline in his judicial reputation and the lack of any major recent scholarship devoted to him.

Part II describes Attorney General Stone’s termination of the BI’s domestic spying following the Red Scare and his justification for selecting J. Edgar Hoover to run the BI. It then shows how the FBI’s post 9/11 resumption of clandestine investigations of

16 Other highly pertinent topics that this article does not explore in depth include, among other things, Stone’s leadership style as Chief Justice and his transformation of the law of personal jurisdiction in International Shoe v. Washington, 326 U.S. 310 (1945).
mosques, without evidence of criminal wrongdoing, erodes the wall Stone erected between law enforcement and domestic-intelligence collection to protect the people’s rights and their safety.

Part III briefly situates Stone’s commitment to judicial restraint within the Court’s pre-1937 attacks on Congressional power. It then examines his *Butler* dissent in depth to show how and why its arguments and language should influence a Justice writing an opinion supporting the constitutionality of the Affordable Care Act’s individual mandate.

Part IV documents the authenticity and singularity of Stone’s devotion to judicial restraint by explaining how he upheld laws that conflicted with his personal political/economic beliefs and that directly violated those of his nominating President, Calvin Coolidge. It then argues that today’s firmly partisan Court may need a new Justice Stone—an appointee of a conservative Republican who nonetheless sustains legislation with which he disagrees—to bolster its legitimacy.

Finally, Part V examines the dark side of Stone’s philosophy of restraint as expressed in his opinion upholding a curfew imposed on Japanese Americans during World War II. It contrasts Stone’s decisions in the Japanese internment cases with his famous footnote four in *United States v. Carolene Products*17 and his courageous but less famous dissent in *Gobitis*.18 In that opinion, Stone defended the rights of the Jehovah’s Witnesses, who were widely regarded at the time as a fascist sleeper cell, and reminded the nation that a democracy earns—and does not compel—the loyalty of its citizens.

I. A Brief Overview of Stone’s Life and Afterlife in the Legal Literature

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17 304 U.S. 144, 152 n.4 (1937).
18 310 U.S. 586, 601 (1940).
Harlan Fiske Stone was born in 1872 to farmers who lived in Chesterfield, New Hampshire. After graduating from Amherst College in 1894, a year ahead of his acquaintance, Calvin Coolidge, Stone taught high school science, but his extracurricular observations of a local court developed his interest in practicing law. In 1899, Stone graduated from Columbia Law School, where he later became a beloved professor and then Dean from 1910 until 1923.

During World War I, Stone served—with great humanity, according to his biographer, Alpheus Thomas Mason—on a Board investigating the sincerity of conscientious objectors to the draft. Afterwards he risked his job and reputation by publicly condemning Attorney General A. Mitchell Palmer’s infamous raids against suspected radicals. Nevertheless, he appeared to accept generally the philosophy of the pro-business wing of the Republican Party; in early writings or speeches, he castigated agrarian and labor radicals, doubted the efficacy of activist government, and accepted the legitimacy of the judiciary’s power to protect property rights and overturn economic regulations. In 1923, he resigned as dean to become a partner at the Wall Street firm of Sullivan & Cromwell.

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21 Johnson, supra note 19, at 425. For more information on Stone’s popularity as a teacher, see MASON, supra note 20, at 91-93.
23 KENNETH ACKERMAN, YOUNG J. EDGAR, 6, 356-60 (2007); MASON, supra note at 20, at 113-14. Ackerman mentions that “[o]f all the witnesses, Stone alone had no dog in this fight, no record of representing leftists, no question of credentials. He was the unbiased referee, and he had blown the whistle on the raids, ruling them clearly out of bounds.” ACKERMAN, supra note 23, at 360.
24 See MASON, supra note 20, at 55, 62-63, 115-17, 208; G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 170 (3d ed. 2007) (“ . . . Stone exhibited, in the years before his appointment to the Court, a singularly negative attitude toward [social experimentation]”); Miriam Galston, Activism and Restraint: The Evolution of Harlan Fiske Stone’s Judicial Philosophy, 70 Tul. L. Rev. 137, 144 n.20 (1995) (“Several commentators note that, when his appointment to the Supreme Court was announced, Stone was generally
He did not remain there long. In 1924, Coolidge plucked Stone from his lucrative practice to replace a holdover Attorney General from the Harding Administration who had been implicated in its scandals.\textsuperscript{26} As Attorney General, Stone prohibited the Department of Justice’s (DOJ) BI from spying on radical groups, abolished its General Intelligence Division, and banned wiretapping.\textsuperscript{27} Ironically, however, he is perhaps best known for selecting J. Edgar Hoover, then 29, as the BI’s chief.\textsuperscript{28} In January 1925, less than a year into Stone’s term as Attorney General, Coolidge nominated Stone to the Supreme Court—even though Stone recommended Benjamin Cardozo\textsuperscript{29}—and he was confirmed overwhelmingly the following month.\textsuperscript{30}

Most observers, including, the conservative Chief Justice Taft, who pressed Coolidge to appoint Stone, George Norris, a progressive senator who condemned Coolidge’s nomination of a “Morgan Bank Lawyer,” and Felix Frankfurter, then a Professor at Harvard, assumed that Stone would join the Court’s pro-business wing.\textsuperscript{31} They severely misjudged him. Despite initially siding with the conservatives,\textsuperscript{32} throughout the 1920s and 1930s Stone joined frequently with liberal Justices Brandeis,
Holmes, and Holmes’s replacement, Cardozo, to oppose the Court’s attempts to limit Congressional and state power to regulate the economy. \(^{33}\) Indeed, in the 1930s, when the conservative “Four Horsemen”\(^ {34}\) forged a majority with one or both of the more moderate Justices\(^ {35}\) to strike down New Deal legislation and other government regulations of the economy, Stone’s blistering dissents propelled him to the leadership of the Court’s liberal wing, inspired the New Dealers, and buttressed their suspicion that the Court’s conservative Justices, and not the Constitution itself, had caused their problems.\(^ {36}\)

President Roosevelt’s 1937 attempt to pack the Court with likeminded Justices failed, but natural attrition soon allowed him to appoint men who broadly approved of the New Deal and government regulation of the economy.\(^ {37}\) The Court’s focus then largely shifted to its responsibility (or lack thereof) to protect civil liberties, criminal defendants, and minorities.\(^ {38}\) Stone heralded this transformation in his landmark footnote four in *United States v. Carolene Products*,\(^ {39}\) which declared that the lenient scrutiny to which the Court would henceforth subject economic legislation may not extend to legislation affecting the Bill of Rights, the political process, and discreet and/or insular minorities.

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\(^{34}\) Justices James McReynolds, Sutherland, Van Devanter, and Butler

\(^{35}\) Justice Owen Roberts and Chief Justice Charles Evans Hughes


\(^{37}\) See Currie, *supra* note 33, at 244-334; Allison Dunham, *Mr. Chief Justice Stone, in Mr. Justice: Biographical Studies of Twelve Supreme Court Justices* 425 (Allison Dunham and Philip B. Kurland eds., 1964); Johnson, *supra* note 19, at 429.

\(^{38}\) Currie, *supra* note 33, at 244-334.

\(^{39}\) 304 U.S. at 152-53 n.4; see Currie, *supra* note 33, at 244 (“Appropriately, it was Justice Stone—perhaps the principal architect of the whole revolution—who summed it all up in the most clairvoyant and best-known footnote in Supreme Court history . . . . Stone established the Court’s agenda for the next fifty years.”); Urofsky, *supra* note 11, at 11 (“Stone’s footnote [four in Carolene Products] [] has been cited in hundreds of cases . . . .”).
In *Gobitis*, one of the first tests of the Court’s new jurisprudential regime, eight justices agreed that school children did not have a constitutional right to refuse to salute the flag. Justice Stone dissented alone. In a dramatic about-face, three years later, the Court overturned *Gobitis*. But this case was just one of many; scholars writing in the middle of the 20th Century repeatedly observed that Stone’s dissenting opinions and positions became law more than those of any other Justice.

In 1941, as the Senate unanimously confirmed Roosevelt’s nomination of Stone to replace Charles Evans Hughes as Chief Justice, Senator Norris publicly admitted that he had misjudged him. Until Stone’s death of a massive cerebral hemorrhage in 1946, his oft-divided Court dealt most prominently with cases that emerged from World War II.

In *Hirabayashi v. United States*, Stone, writing for a Court united in the result, upheld the military’s imposition of a curfew on citizens and aliens of Japanese descent; in *Korematsu v. United States*, he joined a six-justice majority to uphold their exclusion from the West Coast.

During Stone’s life and immediately after his death, scholars published numerous articles and Samuel Konefsky a full-length book that recognized and examined

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40 310 U.S. at 586.
42 See, e.g., Dunham, *supra* note 37, at 229; Noel T. Dowling, *The Methods of Mr. Justice Stone in Constitutional Cases*, 41 COLUM. L. REV. 1160, 1162 n.3 (1941); Warner W. Gardner, *Mr. Chief Justice Stone*, 59 HARV. L. REV. 1203, 1208 (1946); see also Richard A. Givens, *Chief Justice Stone and the Developing Functions of Judicial Review*, 47 VA. L. REV. 1321, 1324 (1961) (“An impressive number of [Stone’s] dissents have later become law, whereas surprisingly few of his opinions for the Court have been severely shaken by subsequent decisions.”).
43 MASON, *supra* note 20, at 572-73.
45 320 U.S. 81 (1943).
46 323 U.S. 213 (1944).
Stone’s vast contributions to multiple fields of law. Herbert Wechsler, Stone’s former law clerk, credited him as the major figure responsible for transforming into doctrine the theories of judicial restraint and robust protections of civil liberties first developed by Justices Brandeis and Holmes. Warner W. Gardner, another former clerk, recognized him as “. . . among the great Justices in the history of the Supreme Court.”

However, following the publication in 1956 of Mason’s oft praised, although arguably too partial, biography of Stone, in which he declared Stone the equal of Holmes and Brandeis, the pace of Stone’s scholarly examination declined, as did his reputation, at least to an extent. A consensus emerged that as Chief Justice, Stone too freely tolerated dissents and concurrences among his feuding, egotistical brethren, allowed conference discussions to persist too long, administered a slow docket, drifted rightward, and was ultimately eclipsed in importance by Roosevelt appointees Justices (1946); Elliot E. Cheatum, Stone on Conflict of Laws, 46 COLUM. L. REV. 719 (1946); Walter Gelhorn, Stone on Administrative Law, 46 COLUM. L. REV. 734 (1946); Gardner, supra note 42; Roswell Magill, Stone on Taxation, 46 COLUM. L. REV. 747 (1946); Herbert Wechsler, Stone and the Constitution, 46 COLUM. L. REV. 764 (1946); see also Philip B. Kurland, Book Review, 70 HARV. L. REV. 1318, 1324 (1957) (reviewing MASON, supra note 20) (“…everyone seems agreed that Stone was one of the more important jurists of his day.”).

48 KONEFSKY, supra note 27.


50 Wechsler, supra note 47, at 770 (“The decades in question transformed the country: there was a change hardly less than revolutionary in the dominant legal thought. If Justice Stone was a spectator of the social and economic development, his was very close to the major role in the authoritative definition of its impact upon the fundamental law.”); Id. at 771 (“The lines had been drawn by Holmes and reinforced by Brandeis . . . . By 1937, in the shadow of the Court plan, the dissenters had become a majority of the Court. When the changes in personnel had been effected their protest had become the major premises of the Court. If Justice Stone was a junior in the pioneering effort, it fell to him to carry through to victory and then to consolidate the gains.”).

51 SHESOL, supra note 36, at 339.

52 Gardner, supra note 42, at 1203.

53 See, e.g., Johnson, supra note 19, at 434 (describing it as “masterful”); SHAWN FRANCIS PETERS, JUDGING JEHOVAH’S WITNESSES 67 (2000) (describing it as “splendid”); UROFSKY, supra note 11, at 10 n.3 (describing it as “a model of judicial biography”); Galston, supra note 24, at 142 (describing it as “masterful” and “comprehensive”).

54 See Kurland, supra note 47, at 1325 (noting Mason’s “strong bias” on behalf of his subject).

55 MASON, supra note 20.

56 Id. at 774 (“Among the great figures in American constitutional law, only Holmes, Brandeis, and Stone clearly emerged as a team and as a trio of equals.”).

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Black, Douglas, Frankfurter, and Jackson. One scholar, in a 1990 book, praised Stone as the Justice most responsible for ushering in modern constitutional interpretation in a variety of fields. But by the 1990s, most scholars likely agreed generally with one assessment of Stone, which regarded him as a competent Justice who failed to achieve legal immortality in part because of his decisions in the Japanese internment cases.

The indifference toward Stone manifested in various ways. He was not included among the “also rans” in one 1995 ranking of the great justices, let alone the top 10, and had slipped from among the top ranked justices in others polls as well. Meanwhile, articles examining footnote four of Carolene Products, and Stone’s role authoring it,

See, e.g., Henry J. Abraham, Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Clinton 148 (1999) (“...[Stone] lacked the executive capacity, the tactical decisiveness, and marshalling ability of a Taft or Hughes for the center chair. Allowing himself to be drawn into too many endless conference squabbles, he could hardly be regarded as an effective chief.”); Roger K. Newman, Hugo Black: A Biography 353 (1994) (noting that Stone had become much more conservative by 1945); C. Herman Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values 1937-1947 261 (1948) (“The late Justice Stone ended his judicial career well to the right of the Court on which he had once been noted for dissents from the left.”); John Paul Stevens, Five Chiefs 36 (2011) (“Though a brilliant scholar, [Stone] was an exceptionally poor presiding officer during the Court’s deliberations in conference, which sometimes consumed more than two days.”); Urofsky, supra note 11, at 8 (observing that Justices Frankfurter, Black, and Douglas emerged as the leaders on the Stone Court); Frank, supra note 36, at 621 (“As a chief justice, [Stone] was strikingly unsuccessful.”), 623 (noting that Stone failed to unify his Court, excessively tolerated dissenting and concurring opinions, and did not expediently manage the Court’s docket).

See Johnson, supra note 19, at 434 (“Judged against the justices with whom he served, Stone should receive high but not top marks....As a legal writer, he rose to brilliance on occasion, as in his Darby majority opinion or his Gobitis dissent, but his prose did not consistently sparkle as did that of Holmes and Cardozo. And as sensitive as Stone was to civil liberties, he failed to weigh in against the egregious ‘internment’ of Japanese Americans during World War II.”); Frank, supra note 36, at 624 (“...[Stone] was a substantial, but not ground-breaking adherent of the right of man.”); see also Geoffrey Stone, Free Speech in Wartime 298 (2004) (noting Stone’s failure to protest internment despite his previous support for civil liberties).


appeared until the mid 1990s. But the last major piece devoted to Stone’s legal reasoning—on the evolution of his preference for judicial restraint in economic matters—was published in 1995.

Stone has been examined in a recent spate of scholarly examination of the period in which he served on the Court. In the last few years, noted scholar Noah Feldman authored a book about Justices Frankfurter, Jackson, Douglas, and Black that largely reaffirmed the consensus that they led Stone’s fractured Court. Meanwhile, Jeff Shesol’s masterful *Supreme Power* discussed Stone’s prominent role in the Court-packing controversy. Stone was portrayed largely as J. Edgar Hoover’s dupe in a recent biography of Hoover, and in a small part in Clint Eastwood’s 2011 movie about Hoover. Nonetheless, Edward White has rightly observed that the legal academy has lavished more attention and praise on Brandeis and Holmes than on Stone. And recently, it seems, almost all but Stone have received significant scholarly attention.

One can only speculate on the causes of Stone’s neglect. Perhaps scholars believed that Konefsky’s evaluation and Mason’s comprehensive biography said all there is to say. Perhaps scholars had lost interest by the time Stone’s papers became available.

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64 Feldman, *supra* note 11, at 204-205. Feldman does uniquely observe that Stone’s seemingly endless conference-discussions helped develop the other Justices’ coherent jurisprudential theories. Id.

65 Ackerman, *supra* note 35, passim.


67 J. Edgar (Warner Brothers 2011).

68 White, *supra* note 13, at 620.

69 See supra notes 6-14 and accompanying text.

70 William Ross speculates that the lack of a recent biography on Stone accounts for his fade from the limelight. Ross, *supra* note 61, at 427.
to the public in 1975, almost 30 years after his death.\textsuperscript{71} Perhaps Stone’s apparent leftward shift during the New Deal or his apparent rightward shift as Chief Justice alienated those searching for an ideological hero. Perhaps scholars simply thought that other Justices wrote more entertaining opinions.\textsuperscript{72} Perhaps Columbia doesn’t promote its alumni on the Supreme Court as well as Harvard.\textsuperscript{73} In any event, while Stone hasn’t faded into obscurity, as one 1996 article suggested, he has faded from the limelight.\textsuperscript{74}

The next four sections will attempt to return him to center stage.

\textbf{II. “A Menace to Free Institutions”: Attorney General Stone and Domestic Intelligence in the Aftermath of the Red Scare and 9/11}

To understand the most enduring legal precedent Stone established before joining the Court, it is necessary to examine briefly the condition of the DOJ, and its BI, when Stone became Attorney General in 1924. In the Spring of 1919, as paranoia engulfed the nation following the Russian Revolution and a rash of intense labor violence, bombs exploded simultaneously in eight cities, including outside the house of President Woodrow Wilson’s Attorney General A. Mitchell Palmer.\textsuperscript{75} The massive federal investigation that followed failed to apprehend the perpetrators,\textsuperscript{76} but under Palmer’s direction, the BI detained and brutalized thousands of suspected agitators for extended

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\item Elliot A. Brown, Harlan Fiske Stone and His Law Clerks 8 (1965) (unpublished manuscript on file at the Columbia University Law Library).
\item \textit{Id.} at 441 (“Robert C. Post contends that Holmes and Brandeis are more highly regarded than Stone, even though Post believes that Stone was the ‘most modernist’ justice of the 1920s, because ‘Holmes and Brandeis simply write better and smarter opinions than their contemporaries. Their work glows with competence and mastery and style. It leaps off the page, in part because it points so directly to what modern eyes view as essential.’”). Warner W. Gardner, a fervent admirer of Stone, nonetheless considered his prose “rather labored.” Gardner, \textit{supra} note 42, at 1205.
\item \textit{Id.} at 425 n.61 (“Professor Hoffer contends that [t]here's no question that Frankfurter was a relentless promoter, but you have to go beyond Frankfurter. This is a Harvard Law School program, a form of Harvard Law School's absolutely magnificent self-adoration project . . . . Frankfurter taught them how to do it. That's why Holmes is canonized, not [Harlan Fiske] Stone; because Columbia doesn't do it that well.”)
\item \textit{Id.} at 427.
\item \textit{STONE, supra} note 59, at 220-23; \textit{ACKERMAN, supra} note 23, at 20-26.
\item \textit{ACKERMAN, supra} note 23, at 394.
\end{enumerate}
\end{footnotesize}
periods, often without charge or even evidence of their sympathy for radicalism, let alone participation in a crime.\textsuperscript{77} To facilitate the investigation, Palmer established the BI’s Intelligence Division, headed by 24-year-old J. Edgar Hoover. Even after the Red Scare subsided, Hoover’s agents infiltrated and wiretapped suspected radical groups, lawful organizations allegedly influenced by suspected radicals (many of whom were black), and political opponents of the BI.\textsuperscript{78} Fittingly, the BI employed a wide variety of corrupt, partisan, and unqualified agents to execute its unsavory tasks.\textsuperscript{79}

Upon his appointment as Attorney General, Stone abolished the Intelligence Division and prohibited the BI from investigating anything other than violations of the law, which did not and does not include adhering to radical political beliefs.\textsuperscript{80} He justified his reforms in a succinct statement to the press:

There is always the possibility that a secret police system may become a menace to free government and free institutions because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood. The Bureau of Investigation is not concerned with political or other opinions of individuals. It is concerned only with their conduct and then only with such conduct as is forbidden by the laws of the United States. When a police system passes beyond these limits, it is dangerous to the proper administration of justice and to human liberty, which it should be our first concern to cherish.\textsuperscript{81}


\textsuperscript{78} CHURCH COMMITTEE REPORT, \textit{supra} note 77, at 382-83; RHODRI JEFFREYS-JONES, \textit{THE FBI: A HISTORY} 73-74, 84 (2007); RICHARD E. MORGAN, \textit{DOMESTIC INTELLIGENCE: MONITORING DISSERT IN AMERICA} 27-29 (1980); STONE, \textit{supra} note 59, at 222-23.

\textsuperscript{79} ACKERMAN, \textit{supra} note 23, at 2; MASON, \textit{supra} note 20, at 149.

\textsuperscript{80} CHURCH COMMITTEE REPORT, \textit{supra} note 77, at 388-89; MAX LOWENTHAL, \textit{THE FEDERAL BUREAU OF INVESTIGATION} 297-98 (1950); MASON, \textit{supra} note 20, at 149-51; MORGAN, \textit{supra} note 78, at 30; Samuel J. Rascoff, \textit{Domesticating Intelligence}, 83 S. CAL. L. REV. 575, 600 (2010) (“In response to alleged intelligence abuses by the FBI during the “Red Scare,” then-Attorney General Harlan Fiske Stone . . . mandated that the FBI not be concerned with the opinions of individuals, political or otherwise . . . .”).

\textsuperscript{81} A couple of sources attribute this oft cited quote to a May 10, 1924, article in the \textit{New York Times}. LOWENTHAL, \textit{supra} note 80, at 298, 515; MASON, \textit{supra} note 20, at 153, 826. However, the author, with the assistance of research staff at American University’s Pence Law Library, could not find it in any issue of the \textit{New York Times}. The author found the most contemporaneous source of the quote in a February 1940 letter that Senator George Norris read into the Congressional record. 86 Cong. Rec. 5642 (May 7,
Privately, Stone expressed even greater outrage at the BI’s violations of the rights of innocent civilians. Although Stone did not categorically reject the use of a “secret police,” he wrote to Felix Frankfurter near the end of his tenure as Attorney General: “I could conceive of nothing more despicable nor demoralizing than to have public funds . . . used . . . to shadow[] people who are engaged in legitimate practices in accordance with the constitution of this country and the law of this country.”

Stone also believed his reforms protected more than civil liberties by promoting improved relations between the public and law enforcement:

I am firmly of the opinion that officials of the Department of Justice can more effectively perform their duties by acting the part of gentlemen than by resorting to tactics of a different character . . . . The Agents of the Bureau of Investigation are being impressed with the fact that the real problem of law enforcement is in trying to obtain the cooperation and sympathy of the public and that they cannot hope to get such cooperation until they . . . merit the respect of the public.

Thus Stone placed the BI squarely on the “law-enforcement” side of a wall he erected between law enforcement and domestic-intelligence collection to protect the people’s rights and to protect their safety.

Nonetheless, Stone chose J. Edgar Hoover as the BI’s temporary head in April 1924 and then permanent head that December. During his near 50-year reign over the BI/FBI, Hoover almost compulsively directed agents to investigate political and religious groups without evidence of their participation in criminal activity. In retrospect Stone’s selection of Hoover seems particularly egregious because Stone knew of Hoover’s

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1940). The quote has been cited numerous times, and thus the author will assume that Stone made it publicly.


83 Id. (emphasis added).


participation in the Palmer raids. Indeed one of Hoover’s biographers portrays Stone as Hoover’s dupe. An article trumpeting Stone’s example as a defender of civil liberties for the 21st Century must evaluate his responsibility for appointing Hoover, one of the great “civil-liberties disaster(s)” of the 20th century.

Context tempers the severity of history’s judgment of Stone’s appointment of Hoover. Stone chose Hoover because of his reputation as an honest and effective administrator and his promise to professionalize the BI’s corrupt, incompetent, and partisan agents. Hoover’s excuse for his participation in the Palmer Raids—that he merely followed the orders of his superiors—seemed highly plausible considering that at the time of the Raids, the DOJ had only recently hired Hoover, a then recent law graduate in his mid twenties. Furthermore, Secretary of Commerce Herbert Hoover (no relation) and Mabel Willebrandt, the nation’s chief prohibition officer and first female assistant Attorney General, vouched for Hoover. Indeed, Hoover also convinced Roger Baldwin, the head of the ACLU, of his sincere opposition to surveillance of radicals. A former professor, Stone thought of Hoover as a talented, if ill-tutored pupil, who could thrive under the right guidance.

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86 ACKERMAN, supra note 23, at 6-7, 380; CHURCH COMMITTEE REPORT, supra note 77, at 389.
87 ACKERMAN, supra note 23, at 1-8, 372-81.
89 ACKERMAN, supra note 23, at 2-3, 377; MASON, supra note 20, at 150-51.
90 ACKERMAN, supra note 23, at 7, 377.
91 Id. at 375-78; GENTRY, supra note 84, at 126; MASON, supra note 20, at 150.
93 Indeed, Stone’s and Hoover’s mentor-mentee relationship continued after Stone’s confirmation to the Supreme Court. MASON, supra note 20, at 152; THEOHARIS & COX, supra note 92, at 89.
As Assistant Director [Hoover] has given a fine exhibition of capacity and straightforwardness. He has been zealous in the reform of the Bureau and has done his work with a thoroughness and intelligence which has been most gratifying . . . Of course, it is inevitable that the character of his administration will be affected by the attitude of the Attorney General. If Hoover is given a chance, he will make good in a way which would be gratifying to all those . . . who believe that there is a better way of conducting investigations that the old-fashioned detective methods. “

Frankfurter’s response reminded Stone of Hoover’s participation in the Palmer raids, but Stone replied that Hoover’s superiors would determine whether Hoover used his talents for good or ill:

I note too, [your concerns] about Hoover. I suppose, in his case . . . one must take the fat with the lean. I can only say that I have no question but under my guidance he would carry forward the bureau to better things. Neither he nor any one else in that position would be likely to accomplish that result under an Attorney General who was not sympathetic with the liberal view of what the bureau should do.”

Stone wrote these letters after his nomination to the Supreme Court on January 5, 1925. Perhaps, then, Stone naively believed—or hoped—that similarly conscientious, liberal minded mentors would guide or at least control Hoover in the future. A more thorough investigation of Hoover and his files may have convinced him that Hoover posed a threat regardless of his supervisor.

But Hoover proved Stone correct that under the right circumstances, he would provide much more “fat” than “lean.” In the decade beginning with Stone’s tenure as Attorney General, Hoover accomplished Stone’s goals spectacularly, transforming the BI into a professional, scientific, non-partisan, crime-fighting force that promoted agents

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94 Letter from Harlan Fiske Stone to Felix Frankfurter (Jan. 19, 1925), in Frankfurter Papers, supra note 82, Box 104.
95 Letter from Felix Frankfurter to Harlan Fiske Stone (Jan. 22, 1925), in id.
96 Letter from Harlan Fiske Stone to Felix Frankfurter (Jan. 24, 1925), in id.
97 MASON, supra note 20, at 181.
98 See ACKERMAN, supra note 23, at 7.
based primarily on merit. In addition, Hoover largely curtailed the BI’s intelligence gathering operations, even if its acceptance and maintenance of unsolicited information on radicals provided by outside sources complied only with the letter, and not the spirit, of Stone’s prohibition. Hoover resumed widespread spying in the mid 1930s only after his ultimate superior, President Roosevelt, requested more information on domestic Fascists and Communists. But when Stone wrote Dean Young B. Smith in 1932 that Hoover fought crime using “enlightened methods,” his assessment was largely accurate.

In any event, the full irony of Stone’s selection of Hoover would not emerge until after both men had died. In 1976, in the wake of the Church Committee’s Congressional investigation of intelligence abuses during the Hoover era, Attorney General Edward Levi promulgated guidelines that prevented the FBI from investigating a political or religious group without first producing substantial evidence of its criminal activity. The Levy Guidelines “embodied values similar to those affirmed by Attorney General

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100 ACKERMAN, supra note 23, at 405 (“Edgar mostly stayed away from tracking radical and communists during the late 1920s and early 1930s.”); MORGAN, supra note 77, at 30 (“For the next decade [after Stone appointed Hoover], it seemed the bureau indeed was out of the domestic intelligence business.”); THEOHARRIS & COX, supra note 92, at 92-93; Michael R. Belknap, Blaming it on the Liberals, 68 TEX. L. REV. 1315, 1332-33 (1990) (reviewing WILLIAM W. KELLER, THE LIBERALS AND J. EDGAR HOOVER (1989)) (mentioning that Hoover’s Agency “ . . . largely abandoned the collection of domestic political intelligence for more than a decade” after Stone became Attorney General.); see also Robert Post, Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era, 48 WM. & MARY L. REV. 1, 140 n. 467 (2006) (documenting Hoover’s description of his crackdown against agents’ use of illegal investigative methods); but see GENTRY, supra note 84, at 141 (“Contrary to Hoover’s pledge to both Baldwin and Stone, the Bureau never stopped collecting and filing away information on alleged radicals.”).

101 ACKERMAN, supra note 23, at 405; STONE, supra note 59, at 248.


103 Lininger, supra note 85, at 1214-15.
Harlan Fiske Stone in 1924 when he ordered the FBI to terminate its surveillance of political activities after the abuses of the 1919-20 Red Scare. As Attorney General, Stone inadvertently created a monster as well as the framework for controlling it.

Stone’s wall between domestic intelligence and law enforcement remains vitally relevant. The aftermath of the 9/11 attacks and an apparent uptick in attempted domestic terrorism has forced the FBI and other law enforcement agencies to again assess the extent to which it should collect domestic intelligence. Since then, agencies have expanded their use of electronic surveillance, watch lists, and human intelligence as part of their counterterrorism strategy.

Perhaps most ominously, the Attorney General has twice issued guidelines that have restructured and partly eroded Stone’s wall between law enforcement and domestic intelligence. First, in an obvious attempt to facilitate FBI surveillance of mosques, Attorney General Ashcroft revised the Levi Guidelines in 2002 to allow agents or informers to infiltrate religious meetings and services without evidence of the group’s participation in criminal activity. In 2008, Attorney General Mukasey reaffirmed the Ashcroft revisions and formally announced that the FBI would once again collect general intelligence, even if unrelated to a criminal investigation. Little evidence exists

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104 STONE, supra note 59, at 553.
105 Rascoff, supra note 80, at 679.
106 The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations § VI(a)-(b) (2002); STONE, supra note 59, at 555-56; Lininger, supra note 85, at 1229-30.
107 See Attorney General’s Guidelines for Domestic FBI Operations 8 (2008); David A. Harris, Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11, 34 N.Y.U. REV. L. & SOC. CHANGE 123, 157-58 (2010) (“From May of 2002 forward, therefore, the FBI no longer needed a basis in fact in order to place informants in a mosque or a church. Rather, these investigations could be undertaken without any prior reason to suspect any illegal conduct by congregants. In 2008, Attorney General Michael Mukasey reaffirmed the Ashcroft position with the new Attorney General’s Guidelines for Domestic FBI Operations.”); Rascoff, supra note 80, at 599.
confirming that these methods have prevented terrorism or major crime. 108 But scholars have argued that the Agency’s tactics may violate the Constitution, 109 chill participation in protected activity, 110 and undermine the trust between law enforcement and the Muslim community that, as Stone likely would have recognized, most effectively prevents domestic terrorism by Islamic radicals. 111

The terrorist threat does exist and there is no simple solution to the complex problems of domestic intelligence. The attacks on 9/11 proved that modern technology and tactics enable today’s terrorists to inflict far more damage than their predecessors from 1919. But it is important to remember that the perpetrators of the Palmer raids believed their methods necessary to defend Americans against mass violence and revolution that threatened American freedoms. 112 Nonetheless, Stone erected his wall because he understood that police infiltration of lawful groups without evidence of criminality often reflects a prejudice that facilitates brutality, discrimination, and repression. Just as importantly, he recognized that a law enforcement agency that shadows people engaged in legitimate practices compromises both the liberties and the security of a public that it is supposed to protect. What Stone wrote to Felix Frankfurter

108 See Lininger, supra note 85, at 1254.
109 Id. at 1231-52.
110 See Stone, supra note 59, at 556 (“[FBI] surveillance, whether open or surreptitious, can have a significant chilling effect on First Amendment freedoms.”); Harris, supra note 107, at 168 (“People at mosques have become cautious and wary in expressing themselves to each other. Trust in fellow congregants has subtly but noticeably worn away and been replaced by suspicion. In short, Muslims have begun to fear that merely being present at their houses of worship, or conspicuously expressing their faith and traditions, could bring the full weight of a government investigation down on them.”).
111 See Harris, supra note 107, at 127-28; Aziz Z. Huq, Private Religious Discrimination, National Security, and the First Amendment, 5 HARV. L. & POL’Y REV. 347, 358 (2011) (listing examples of cooperation between the Muslim community and law enforcement that helped prevent terrorism); Lininger, supra note 85, at 1255.
112 See, e.g., Richard Polenberg, Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech 165 (1999) (mentioning that J. Edgar Hoover remarked that radicals “threaten the happiness of the community, the safety of every individual, and the continuance of every home and fireside. They would destroy the peace of the country and thrust it into a condition of anarchy and lawlessness and immorality that pass imagination.”).
remains vitally true over 85 years later: *nothing* is more troubling to public confidence in law enforcement than using government funds to track people engaged in constitutionally protected activities.

III. “The Only Check Upon Our Exercise of Power Is Our Own Sense of Self-Restraint”: How Justice Stone’s New Deal Opinions Justify the Constitutionality of the Individual Mandate

A. *United States v. Butler*: the Climax of the Court’s pre-1937 Battle Over the Limits of Congressional Power

Stone’s opinions regarding the limits of congressional authority, particularly his dissent in *Butler*, greatly affects the context of the current debate over the constitutionality of the individual mandate. To understand why, it is first necessary to explain briefly the jurisprudence that those opinions rejected.

Before 1937, the Court repeatedly invented extra-textual formal limitations on Congress’s enumerated powers to strike down legislation that regulated areas the Court believed should be reserved to the states. Justice Day’s 1918 opinion in *Hammer v. Dagenhart* exemplified this artificial formalism. *Hammer* struck down Congress’s prohibition on the shipment in interstate commerce of goods produced in factories employing the labor of children under 16. The Court held that Congress’s power to regulate commerce among the states did not encompass the power to regulate goods

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113 297 U.S. at 78 (Stone, J., dissenting).
115 247 U.S. 251 (1918).
116 *See* Millhiser, supra note 114, at 550-51.
117 247 U.S. 251.
118 U.S. CONST. art. 1, § 8, cl. 3.
that caused no harm.\textsuperscript{119} The Court created the category of “goods that caused no harm” to ensure that Congress did not usurp the states’ purportedly exclusive power to regulate manufacturing.\textsuperscript{120} even though, as Justice Holmes explained in his classic dissent, the Constitution itself does not prevent Congress from using its power over interstate commerce to regulate indirectly local activity.\textsuperscript{121}

The conflict over this jurisprudential methodology escalated dramatically as the Court, usually over impassioned dissents, repeatedly struck down the New Deal Congress’s attempts to address the nationwide economic crisis.\textsuperscript{122} As one scholar described it, the Court “. . . revived doctrines that had languished for decades or employed rubrics that had never before been used to invalidate . . . act[s] of Congress.”\textsuperscript{123} Thus, the Court struck down Congressional attempts to regulate wages and working conditions in the coal mining industry\textsuperscript{124} and institute a pension system for railroad workers\textsuperscript{125} as exceeding Congress’s power to enact all laws necessary and proper to regulate commerce among the states.\textsuperscript{126} According to the Court, the extent to which child labor, or working conditions in coal mines, or retirement benefits for railroad workers actually affected interstate commerce did not matter; Congress could not regulate any activity within judicially invented categories of activities that only the states could control.

\textsuperscript{119} Hammer, 247 U.S. at 271-72.
\textsuperscript{120} Id. at 272-76.
\textsuperscript{121} Id. at 277-81 (Holmes, J., dissenting).
\textsuperscript{123} LEUCHTENBURG, supra note 36, at 215.
\textsuperscript{124} Carter, 298 U.S. at 297-310.
\textsuperscript{125} Alton, 295 U.S. at 362-71.
\textsuperscript{126} U.S. CONST. art. 1, § 8, cls. 3, 18.
The battle climaxed early in 1936 in *United States v. Butler*. Justice Roberts’s opinion declared unconstitutional the New Deal’s vitally important and controversial Agricultural Adjustment Act (AAA). As he had done before when the conservative majority struck down economic regulations, Justice Stone passionately dissented.

The AAA was designed to prop up devastatingly depressed prices for agricultural goods by taxing agricultural processors to fund a subsidy for farmers who limited their output. The Court first declined to judge separately the constitutionality of the taxing and spending components of the AAA because the Act inextricably fused them as part of a scheme to regulate agriculture. The Court then settled a long running debate regarding the extent of the Constitution’s grant to Congress of the power “to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . .” The Court ruled that Congress could tax and spend to regulate matters affecting the nation’s general welfare, and not solely matters within the enumerated fields of Article 1, Section 8.

Nevertheless, the Court struck the Act down because it was designed to regulate agriculture, which, the Court maintained, the Constitution granted states the exclusive

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127 297 U.S. 1 (Jan. 6, 1936). Herbert Wechsler remarked that Stone’s dissent in *Butler* “marks in many ways the high moment of the constitutional conflict” between the liberal and conservative justices during the New Deal. Wechsler, *supra* note 47, at 776-77.
128 Butler, 297 U.S. 1; See Ross, *supra* note 36, at 246 n.13 (noting that “a clear majority” of persons surveyed in a Gallup poll disapproved of the AAA); SHESOL, *supra* note 36, at 174-75 (referring to the AAA as a “pillar” of the recovery program and one of the Hundred Days’ “proudest achievements”), 175 (noting that the *New York Times* called the AAA “the most popular measure of the New Deal.”).
129 See, e.g., Colgate v. Harvey, 296 U.S. 404, 436-50 (Stone, J., dissenting).
130 Butler, 297 U.S. at 53-57; see SHESOL, *supra* note 36, at 174 (describing the reasons Congress passed the AAA).
131 Butler, 297 U.S. at 58-61.
132 U.S. CONST. art. 1 § 8, cl. 1.
133 Butler, 297 U.S. at 64-66. For more information on this debate, see, e.g., CURRIE, supra note 33, at 227-31.
power to govern. Only a bright-line rule, the Court insisted, could preserve the power of the states; otherwise Congress could use its taxing and spending power to enact a parade of horrible regulations over all activities under local control. The Court explained, for example, that Congress might use its virtually unlimited power to tax and spend to impose conditions that would restrict the nationwide production of shoes or force garment manufacturers to relocate to smaller cities. But, ultimately, the Court implied that it invalidated the AAA not to limit Congress’s power over the states, but to limit its power to redistribute wealth from one business to another:

If the act before us is a proper exercise of the federal taxing power, evidently the regulation of all industry throughout the United States may be accomplished by similar exercises of the same power. It would be possible to exact money from one branch of an industry and pay it to another branch in every field of activity which lies within the province of the states.

Stone’s dissent emphasized that the majority accepted that Congress may levy a tax on agricultural processors; it disapproved only of Congress providing funds to those farmers who agreed to limit output. Stone challenged the Court’s conclusion that a farmer’s acceptance of Congress’s funds for a specific purpose constituted a coercive “regulation” of agriculture. But ultimately, he deemed the issue of coercion irrelevant.
because “[i]t is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure.”

Indeed Stone argued that the Court’s reasoning—that Congress could spend for the general welfare without imposing purportedly regulatory conditions upon the way the money was spent—could and would unleash a more horrible parade than the one the majority feared:

[the limitation now sanctioned must lead to absurd consequences. The government may give seeds to farmers, but may not condition the gift upon their being planted in places where they are most needed or even planted at all. The government may give money to the unemployed, but may not ask that those who get it shall give labor in return, or even use it to support their families. It may give money to sufferers from earthquake, fire, tornado, pestilence, or flood, but may not impose conditions, health precautions, designed to prevent the spread of disease, or induce the movement of population to safer or more sanitary areas.]

Finally, Stone addressed the heart of the dispute. In doing so, he fashioned perhaps the most compelling plea for restraint ever written when the Court judges the constitutionality of acts passed by Congress. Instead of dwelling on the unjust or absurd legislation that a Congress “lost to all sense of public responsibility” could theoretically enact to determine the limits of Congress’s power to tax and spend, Stone urged the Court to examine the text of the Constitution itself. Stone remarked that the Framers expressly limited Congress’s power to tax and spend to purposes that affect the

was irrelevant. He wrote: “[p]ersuasion, coercion, if you please, is inseparable from the granted power and an incident of it, and that incident is included in the grant. Does not all this mean that whatever the effect, if the payment is persuasive or coercive, ‘the tail goes with the hide’ and is within the constitutionally granted power?] Of course I would admit that the thing could be more specifically stated, but could it have been made any plainer?” Harlan Fiske Stone to Professor Robert L. Hale, June 1, 1939, in Stone Papers, supra note 102, Box 15; MASON, supra note 20, at 409 n.*.

140 Butler, 297 U.S. at 85.
141 Id. at 85-87
142 Id. at 85.
143 Id. at 87.
nation’s general welfare.\textsuperscript{144} Here, however, the Court imposed upon Congress “…limitations, which do not find their origin in any express provision of the Constitution and to which other expressly delegated powers are not subject.”\textsuperscript{145} To the Court’s argument that its unwritten limitations protected the states, Stone replied that the Constitution’s language confirmed that the framers meant to grant Congress extensive national powers.\textsuperscript{146} The people’s representatives, and not the Court, he maintained, decided the ways and the extent to which it would exercise those powers.\textsuperscript{147}

Once Congress’s power to act had been established, Stone argued, the Court’s duty was done.\textsuperscript{148} Stone observed that the people themselves could normally change a dumb law while only its own “sense of self restraint”\textsuperscript{149} prevented the Court from abusing its own power.\textsuperscript{150} Thus, “[f]or the removal of unwise laws from the statute book appeal lies, not to the courts but to the ballot and the processes of democratic government.”\textsuperscript{151}

Indeed, Stone’s masterful closing emphasized that an overly vigilant judiciary ultimately threatened the power of the states, and the liberties of the people, more than an unwise Congress:

A tortured construction of the constitution is not to be justified by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent expenditures which, even if they be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility . . . . [A Court that assumes] it alone must preserv[e] our institutions . . . is far more likely in the long run to obliterate the constituent members of an indestructible union of indestructible states than the frank recognition that language,
even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nationwide economic maladjustment by conditional gifts of money.¹⁵²

Stone’s Butler dissent was the most celebrated of the era.¹⁵³ Together with his dissent later that year in Morehead v. Tipaldo,¹⁵⁴—in which he famously argued that the Court’s own “economic predilections”¹⁵⁵ influenced its decision to strike down a minimum wage law—Stone fermented the New Dealer’s suspicion that only “Court packing” could correct its dishonest and dangerous interpretations of the Constitution.¹⁵⁶ Moreover, the pre-1937 dissents of Justices Stone, Brandeis, and Cardozo doctrinally framed the Court’s post-1937 decisions recognizing Congress’s power under the Commerce Clause and other constitutional provisions to regulate local affairs and even individual decisions that nonetheless substantially affected national economic problems.¹⁵⁷

B. The Butler Dissent and the Individual Mandate

That power seemed established until recently.¹⁵⁸ In late 2011, the Supreme Court agreed to hear an 11th Circuit case that ruled unconstitutional the Affordable Care Act’s individual mandate.¹⁵⁹ The mandate, which penalizes Americans who do not purchase

¹⁵² Id. at 87-88 (internal punctuation omitted). Indeed, as others have pointed out, federalism is supposed to safeguard of the people’s rights. See, e.g., Peter J. Smith, Federalism, Lochner, and the Individual Mandate, 91 B.U. L. REV. 1723, 1725, n.13 (2011).
¹⁵³ JOHNSON, supra note 19, at 428.
¹⁵⁵ Id. at 633. President Roosevelt used “economic predilections” and other phrases from Stone’s dissents in a fireside chat supporting the court-packing plan. MASON, supra note 20, at 444.
¹⁵⁶ See supra note 36 and accompanying text.
¹⁵⁷ See ROSS, supra note 36, at 246.
¹⁵⁸ See, e.g., Gonzales v. Raich, 545 U.S. 1, 16 (2005) (“Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce.”) (internal quotation marks omitted).
minimum health-insurance coverage, is vitally important to the Act’s larger purpose of expanding access to health insurance to the over 45 million Americans without it.\textsuperscript{160}

The \textit{Butler} opinion, and Stone’s dissent, has already affected one of the central issues of the litigation: whether Congress may enact the individual mandate under its power to tax and spend for the general welfare. The Court has never formally overruled \textit{Butler’s} holding that the general welfare provision does not allow Congress to tax and spend to regulate certain activities purportedly reserved to the states.\textsuperscript{161} Indeed, one district court, after concluding that the individual mandate constituted a “penalty” and not a “tax”—largely because the Affordable Care Act labeled it a “penalty”—cited \textit{Butler} to support its conclusion that the regulatory “penalty” exceeded Congress’s power to tax and spend.\textsuperscript{162} However, without explicitly overruling \textit{Butler}, the Court has generally accepted Stone’s view that Congress may tax and spend to regulate activities national in scope,\textsuperscript{163} which would presumably include the vast interstate market in health insurance.

\textsuperscript{160} Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010) [hereinafter Cucinelli]. As of this writing, two Circuit courts had ruled the mandate constitutional. Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. Nov. 8, 2011); Thomas More Law Center v. Obama, 651 F.3d 529 (6th Cir. June 29, 2011).
\textsuperscript{161} Indeed, one of the district courts that ruled the mandate unconstitutional acknowledged that it was essential to the Act’s larger program. Bondi, 780 F. Supp. 2d at 1298. \textit{See also} Smith, supra note 152, at 1726-27 (explaining how the minimum coverage requirement is essential to expanding access to health insurance); Ryan C. Patterson, \textit{Note, “Are You Serious?”: Examining the Constitutionality of an Individual Mandate for Health Insurance}, 85 NOTRE DAME L. REV. 2003, 2006 (noting that 45.7 million Americans were uninsured in 2007).
\textsuperscript{162} Patterson, supra note 161, at 212 n.75.
\textsuperscript{163} Cucinelli, 728 F. Supp. 2d at 768, 786-88.
\textsuperscript{164} \textit{See, e.g.}, Sonzinsky v. United States, 300 U.S. 506, 512 (1937) (upholding unemployment compensation schemes under Congress’s power to tax and spend); United States v. Sanchez, 340 U.S. 42, 44 (1950) (“[i]t is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed”); \textit{Id}. (“Nor does a tax statute necessarily fail because it touches on activities which Congress might not otherwise regulate.”); Ruth Mason, \textit{Federalism and the Taxing Power}, 99 CAL. L. REV. 975, 1003 (2011) (“The Court's broad interpretations of the taxing power in cases . . . call into question the continued relevance of the Court's \textit{Lochner}-era jurisprudence that construed the power to be constrained by Congress's other enumerated powers.”) Moreover, the \textit{Butler} opinion does not bear directly on the question whether a regulatory “penalty” not labeled a “tax” actually constitutes a “tax.” After all, (somewhat amusingly) though \textit{Butler} ruled that the AAA’s tax, though labeled a tax, was not a tax because of its attachment to the AAA’s spending provision, it did not answer the question whether a “tax” labeled as a “penalty” is actually a “tax.” Butler, 297 U.S. at 55-56 (citing the
In any event, assuming that the individual mandate is not a “tax” merely begs the question whether Congress may impose the “penalty” on those who do not purchase health insurance under its power to enact all laws necessary and proper to regulate commerce among the states. Here, Stone’s reasoning in *Butler* refutes the challengers’ primary argument that the mandate exceeds Congress’s power. The challengers insist that the mandate regulates economic “inactivity,” while formerly, they contend, Congress regulated only economic “activity.” Without formally distinguishing between economic “activity” and “inactivity,” they continue, Congress could use its commerce power to force citizens to do virtually anything, including, they insist, to buy broccoli in order to improve their health.

Justice Stone eloquently invalidated this parade of horribles argument in his *Butler* dissent. As one scholar observed, the *Butler* opinion emerged from “…the same concern that had underlain efforts to limit the commerce power,” and another that the *Butler* opinion “placed the taxing and spending provisions in a special category, doing for

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164 Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L. J. online 1, 6 (2011) (“The principal complaint about the mandate is that Congress should only be able to regulate economic activity, and the mandate is not a regulation of any activity.”); Smith, *supra* note 152, at 1727-28 (“The core of the constitutional attacks on the individual mandate has been the claim that Congress lacks authority under Article 1 to compel individuals, simply by virtue of their status as lawful United States residents . . . to acquire and maintain insurance . . . . First, opponents of the mandate have made a doctrinal claim that Congress lacks power under the Commerce and Necessary and Proper clauses to regulate “inactivity.”). For a list of sources that elaborate on this argument, see *id.* at 1728-29 and accompanying footnotes.

165 Koppelman, *supra* note 164, at 18 (noting that opponents of the individual mandate argue that “[i]f the limitations they demand are not accepted . . . Congress will have the power to do absolutely anything it likes” including the power to “require that people buy and consume broccoli at regular intervals.”) (internal quotations omitted); Smith *supra* note 152, at 1729 (“Second, the plaintiffs have pressed a slippery slope argument, contending that if Congress has authority to compel individuals to purchase health insurance, then Congress can compel individuals to do anything.”).

166 *Currie*, *supra* note 33, at 230.
Congress’s power to tax and spend what Justice Day had done in 1918 [in *Hammer*] for
Congress’s power to regulate interstate commerce.”¹⁶⁷ Indeed, change a few terms and
phrases, and an opinion defending the constitutionality of the individual mandate could
simply clone passages of Stone’s *Butler* dissent.

Once again, a conservative Court will hear arguments against controversial
legislation that a Democratic Congress passed to address a pressing national economic
problem.¹⁶⁸ Once again opponents of Congressional legislation urge that “limitations,
which do not find their origin in any express provision of the Constitution”—this time
between commercial “activity” and “inactivity” instead of “agriculture” and other
activities that promote “the general welfare”—must restrain purportedly unbridled
Congressional power.¹⁶⁹ Once again, the challengers seek a limitation to one of
Congress’s enumerated powers—this time the commerce power instead of the power to
tax and spend—“to which other expressly delegated powers are not subject.”¹⁷⁰ Once
again, they believe the limitation necessary to prevent a parade of hypothetical abuses
that “would be possible only by action of a legislature lost to all sense of public
responsibility” while ignoring the much more terrible consequences that could potentially

¹⁶⁷ MASON, *supra* note 20, at 408.
¹⁶⁸ The December 2011 Kaiser Health Care Tracking Poll showed public opinion of the Affordable Care
Act virtually divided. *Kaiser Health Tracking Poll*, available at
http://www.kff.org/kaiserpolls/upload/8265-F.pdf. One scholar referred to the health care law as “the most
¹⁶⁹ See, e.g., Millhiser, *supra* note 114, at 55-56 (“The many legal challenges to the ACA rely on an
interpretative method that is indistinguishable from that used in *Hammer* and similar cases . . . . [T]hey also
spin complex webs of exemptions and caveats to their extra-constitutional limits on federal power.”); Ilya
Shapiro, *A Long Strange Trip: My First Year Challenging the Constitutionality of Obamacare*, 6 FLA.
INT’L L. REV. 29, 52 (2010) (arguing that a formal distinction between “activity” and “inactivity,” though
imperfect, is essential to preserving Article I’s scheme of limited and enumerated powers).
¹⁷⁰ As others have pointed out, no one doubts Congress’s power to mandate citizens to register for the draft,
report for jury duty, or respond to the census under other enumerated powers. See, e.g., Smith, *supra* note
152, at 1730-31, 1736-37; Millhiser, *supra* note 114, at 56.
emanate from a precedent limiting Congress’s power to act. And once again, they assert these limitations necessary despite two powerful constraints that already limit the possibility of Congressional abuses of power: 1) the text of the Constitution, which allows Congress to tax and spend for only national purposes, and which allows it to regulate under its commerce powers only the economic sphere and 2) the pure self-interest of legislators running for reelection.

Most importantly, once again, opponents of Congressional legislation appeal to federalism to advance political/ideological “predilections” that the Constitution nowhere requires. In a 2009 debate, Professor Jack Balkin reminded David Rivkin Jr. and Lee Casey, two opponents of the mandate, of the appropriate forum to advance those predilections: “What was said during the constitutional struggle over the New Deal is still true today: for objectionable social and economic legislation, however ill-considered, ‘appeal lies not to the courts but to the ballot and to the processes of democratic government.’” Fittingly, Professor Balkin quoted Stone’s dissent in Butler to make

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171 As Professor Koppelman observed “[i]n both child labor and health care contexts, opponents of reform flee from illusory dangers into the jaws of real ones.” Koppelman, supra note 164, at 21. Koppelman and others have documented how a doctrine preventing Congress from regulating inactivity would devastate its ability to address a number of collective action problems that the states cannot address on their own. See Koppelman, supra note 164, at 21; Smith, supra note 152, at 1739-40.

172 See United States v. Morrison 529 U.S. 578, 611 (2000) (allowing Congress to regulate under its power to enact all laws necessary and proper to regulate interstate commerce only “economic endeavors.”); United States v. Lopez, 514 U.S. 549, 573-74 (1995) (Kennedy, J., concurring) (stating that Congress may “regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy”); Millhiser, supra note 114, at 59 (arguing that the Constitution’s text reasonably justifies the formalistic distinction in Morrison and not the activity/inactivity distinction proposed by opponents of the individual mandate).

173 Many have persuasively argued that the unconvincing distinction between “activity and inactivity” proposed by opponents of the individual mandate, while legally framed as necessary to protect the power of the states in a federal system, thinly masks their desire to revive a Lochneresque libertarian political/economic agenda that would restrict the power of the states as well. See, e.g., Smith, supra note 152; Koppelman, supra note 164, at 22-23; Arthur J.R. Baker, Note, Fundamental Mismatch: The Improper Integration of Individual Liberty Rights Into Commerce Clause Analysis of the Patient Protection and Affordable Care Act, 66 U. MIAMI L. REV. 259 (2011).

his point.

A few months after the Butler decision was released, Stone explained to Felix Frankfurter that the Court’s pre-1937 decisions had inflicted an egregious injustice on the Country: “…when our Court sets at naught a plain command of Congress, without the invocation of any identifiable prohibition of the Constitution, and supports it only by platitudinous irrelevancies, it is a matter of transcendent importance.” It remains so today. Hopefully, the Court will heed Stone’s warnings in Butler when contemplating whether the “broccoli” argument justifies limitations on Congress’s ability to address national problems under its enumerated powers. Indeed, here is how a Justice might adopt Stone’s concluding paragraph in Butler in an opinion affirming the constitutionality of the individual mandate.

A tortured construction of the constitution is not to be justified by recourse to extreme examples of reckless congressional regulation which might occur if courts could not prevent legislation which, even if they be thought to effect commerce, would be possible only by action of a legislature lost to all sense of public responsibility . . . . [A Court that assumes] it alone must preserv[e] our institutions . . . is far more likely in the long run to obliterate the power of the states and the liberty of the people, than the frank recognition that language, even of a constitution, may mean what it says: That the power to enact all laws necessary and proper to regulate commerce among the states necessarily includes the power to enact an individual mandate as an essential component of legislation that expands access to the vast and often indispensable interstate market in health insurance.

IV. Denying His Own “Predilections”: Why Stone’s Restraint Should Guide the Partisan Judiciary

Stone was not the only great dissenter of his era. Holmes, his replacement Cardozo, as well as Brandeis also wrote landmark pre-1937 dissents that passionately

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175 Butler, 297 U.S. at 79.
176 Letter from Harlan Fiske Stone to Felix Frankfurter (Apr. 9, 1936), in Stone Papers, supra note 102, Box 13; SHESOL, supra note 36, at 212.
advocated for judicial restraint toward economic regulations. But Stone’s restraint—defined here as writing or joining opinions upholding legislation with which he or his party disagreed—resonates so powerfully because of its unimpeachable authenticity; neither he nor the conservative Republican who appointed him supported the New Deal. Holmes, an appointee of Theodore Roosevelt, an unabashedly progressive Republican, was essentially agnostic about government regulation of the economy. Brandeis, though perhaps not enthusiastic about the New Deal itself, was appointed by a Democrat and deeply believed in robust government regulation to protect the vulnerable. And among the Justices, Cardozo—whom the relatively moderate Republican, Herbert Hoover, nominated in large part to avoid a confirmation controversy with a Democratic Senate—sympathized most with the New Deal.

In contrast, Stone’s nominating president, Calvin Coolidge, whom Stone vigorously served as Attorney General and supported in the 1924 presidential campaign, was perhaps the most economically conservative president of the 20th century. Multiple biographers have documented President Coolidge’s staunch belief in

179 ABRAMHAM, supra note 57, at 118 (noting that Theodore Roosevelt, who was determined to appoint justices who shared his views, apparently believed Holmes was too conservative).
180 Mason succinctly distinguished between Holmes’s and Stone’s approach to government regulation in his biography of Stone: “Holmes said: ‘[t]hey can’t do it, but let them try.’ Stone said, ‘[t]hey should not do it, but judges are not the ones to oppose.’” MASON, supra note 20, at 332. For more information on Holmes’s purported nihilism, see, e.g., David Luban, Justice Holmes and the Metaphysics of Judicial Restraint, 44 DUKE L.J. 449, 475 (1994) (“Holmes qualifies as a moral nihilist; indeed, he advanced the moral nihilist’s typical reduction of value judgments to tastes and naked preferences . . . .”).
181 ABRAMHAM, supra note 57, at 135-36; MASON, supra note 20, at 349 (“While Holmes would uphold legislation as not unconstitutional, Brandeis upheld it as constitutional and desirable.”); UROFSKY, supra note 7, at 691.
182 POLLENBERG, supra note 9, at 168, 195 (“Cardozo, Louis D. Brandeis, and Harlan Fiske Stone were the most liberal members of the Court, and of the three Cardozo was most sympathetic to what Roosevelt was trying to accomplish.”).
183 MASON, supra note 20, at 174-79.
small government, low taxes, and the unconstitutionality of the very policies—price, wage, and other business regulations—that Stone voted to uphold as a Justice.\footnote{DAVID GREENBERG, CALVIN COOLIDGE 12 (2006) ("In important ways Coolidge’s economic philosophy did resemble the old laissez-faire doctrine: he favored regulating business lightly, cutting taxes, [and] containing federal expenditures . . ."); DONALD R. McCOY, CALVIN COOLIDGE: THE QUIET PRESIDENT 315 (1967) ("For the federal government to fix farm prices, regulate workers’ hours and wages, and tell businessmen how to run their businesses was clearly unconstitutional to Coolidge . . .").} Indeed, Coolidge’s 1924 campaign manager, William Butler, initiated the litigation that killed the AAA.\footnote{SIMON, supra note 10, at 274.} Furthermore, Stone informally advised Republican President Hoover as part of his Medicine Ball Cabinet\footnote{SHESOL, supra note 36, at 226 (advise to Landon).} and informally assisted him and the Republican’s 1936 presidential nominee in their campaigns against Roosevelt.\footnote{See ABRAHAM, supra note 57, at 189-91 (describing the moderation of president Eisenhower, who nominated Justices Warren and Brennan). Blackmun approaches more closely full-fledged judicial apostasy, although neither he nor Nixon, his appointing president, can accurately be described as ideological devotees. See id. 251-53, 260-61. George H. W. Bush, though perhaps disappointed for political reasons when Justice Souter turned out more liberal than expected, was himself a moderate as well. See id. 303-09 (describing Bush I’s moderation and his nomination of Souter).} 

Stone has not been the only Justice to frustrate the wishes or expectations of his or her nominating President once confirmed to the politically unaccountable Court. But relatively moderate Presidents Eisenhower, Nixon, Ford, or George H. W. Bush appointed the most famous judicial apostates—Justices Warren, Brennan, Blackmun, Stevens, and Souter.\footnote{MASON, supra note 20, at 286 (advise to Hoover); SHESOL, supra note 36, at 226 (advise to Landon).} Meanwhile, President Reagan’s non-conformist appointees—Justices O’Connor and Kennedy—became relative moderates themselves.\footnote{Id. at 281-89 (describing Reagan’s nomination of O’Connor and her moderation on the Court), 303 ("With the possible exception of some of Justice O’Connor’s votes in crucial gender-related cases, and some First Amendment freedom-of-expression stances by Justices Scalia and Kennedy, the Reagan appointed quartet . . . has broadly lived up to the former president’s expectations . . .").} Except perhaps for the arch-conservative Justice McReynolds, an Attorney General for his appointing president, Democrat Woodrow Wilson,\footnote{Id. at 133.} no justice of the 20th Century championed a jurisprudence diametrically opposed to the political philosophy of the
president who appointed him, let alone in whose administration he served.\footnote{Indeed Blackmun never met Nixon before nominating him, nor had Ford met Stevens. \textit{Id.} at 260, 276. Blackmun’s indifference toward Nixon—Blackmun declared Nixon “didn’t know me from Adam’s off ox”—contrasts starkly with Stone’s loyalty to Coolidge and Hoover. \textit{Id.} at 260.} It is almost impossible to envision a comparable scenario occurring today. The extent of Stone’s apostasy is comparable to a hypothetical in which Presidents Lyndon Johnson or Franklin Roosevelt appoints a justice with views akin to Justice Scalia, or Presidents Reagan or George W. Bush selects a justice with views akin to Justice Ginsburg.

Yet Stone’s jurisprudence defied more than his nominating president. The Great Depression spurred Stone to modify his thinking on government intervention in the economy,\footnote{See, \textit{infra} note 198 and accompanying text.} but his general suspicion of activist government and the New Deal in particular persisted. He penned his \textit{Butler} dissent to approve the constitutionality of a policy, the AAA, which he considered “foolish, if not vicious.”\footnote{Gardner, \textit{supra} note 42, at 1204. For more on Stone’s opposition to the AAA, see, e.g., Letter from Harlan Fiske Stone to Franklin W. Fort (Jan. 11, 1936), \textit{in Stone Papers, supra} note 102, Box 82, (“If you could arrange it so that the Constitution would provide that the Supreme Court could condemn laws they thinks unwise, I believe I could write a powerful opinion against the AAA.”); Letter from Harlan Fiske Stone to Helen Stone (sister) (Jan. 16, 1936), \textit{in id.} Box 82, (“Personally, I have no use for the A.A.A. law, by that didn’t mean that it was unconstitutional.”); Letter from Harlan Fiske Stone to Judge John Bassett Moore (Feb. 8, 1936) \textit{in id.} Box 22, (“The people . . . do not yet realize what [the AAA] did to our markets . . . to say nothing of its effect on the morale of the farmer.”); \textit{MASON, supra} note 20, at 416-18; \textit{SHESOL, supra} note 36, at 191 (citing sources noting that Stone deplored the AAA).} In addition, though Stone acknowledged the reasonableness of a minimum wage, he shared the same “predilections” against it as the majority justices against whom he dissented in \textit{Tipaldo}.\footnote{Letter from Harlan Fiske Stone to Irving Brant (June 13, 1936), \textit{in Stone Papers, supra} note 102, Box 7, (“I have a good deal of skepticism about the satisfactory operation of price fixing schemes, but in my mind that is something with which courts have nothing to do . . . . Judicial labors would be intolerable . . . if they placed on me the responsibility of choice of economic theories about which reasonable men may differ.”); \textit{MASON, supra} note 20, at 305 (“Stone’s republican convictions were strong. His social and economic views were in general accord with those of his right-wing colleagues.”), 544 (noting Stone’s disapproval of the New Deal), 555 (noting Stone’s personal distaste for the minimum wage); \textit{SHESOL, supra} note 36, at 193 (describing Stone’s disapproval of the New Deal); \textit{ROSS, supra} note 36, at 91-92 (noting Stone’s opposition to the minimum wage).} In a September 1935 letter to Herbert Hoover, Stone remarked that “the country would be startled if it could know, in some detail, the truth about the bureaucracy
which is being built up and the way in which it is operating.”  

To the end, he remained a loyal Republican. Indeed, he noted that the Court’s invalidation of the AAA robbed the Republicans of an effective weapon in the 1936 Presidential campaign.

Stone’s personal opposition to economic regulations should not be overstated. He emerged as the New Deal’s most passionate judicial champion in part because the devastation wrought by the Great Depression may have changed his views on limiting economic liberty in a modern, industrial, and interdependent economy. Indeed, he gave a (quite resonant) address in 1934 at the University of Michigan Law School warning that “[i]n a changing economy, mere material gain to the individual may not in itself be the social good it was once conceived to be.” Stone’s speech emphasized particularly that corporate lawyers must become more than the “obsequious servant of business . . . tainted . . . with the morals and manners of the market place in its anti-social manifestations.” He asked why “a Bar which has done so much to develop and refine the technique of business organization, to provide skillfully devised methods for financing industry . . . has does relatively little to remedy the evils of the investment market . . . .” Later, he remarked in a letter to Irving Brant, a leading constitutional commentator that “the dead hand of economic theories of a century ago” may not suit

196 Stone’s son speculated that Stone wouldn’t retire from the Court until a Republican could appoint his successor. MASON, supra note 20, at 800.
197 Letter from Harlan Fiske Stone to the Honorable Franklin W. Fort (Jan. 11, 1936), in Stone Papers, supra note 102, Box 82; SHESOL, supra note 36, at 188.
198 See MASON, supra note 20, at 369-75.
199 Harlan Fiske Stone, The Public Influence of the Bar, 48 HARV. L REV 1, 1, 4 (1934).
200 Id. at 7.
201 Id.
202 SHESOL, supra note 36, at 225.
changing economic conditions. The Great Depression of Stone’s era, like our current economic troubles, cast doubt on a faith in unregulated capitalism.

But Stone cared most about maintaining the Court’s legitimacy and the proper function of a judge in a democracy. Though Stone, like every other Justice, opposed President Roosevelt’s Court-packing plan, privately he acknowledged that the Court had brought the trouble on itself. He recognized that when the Court, in fealty to a particular ideology, twists the language of the Constitution to overturn Congressional legislation, the political branches will treat it as one.

Justice Stone’s warning regarding the Court’s institutional legitimacy reverberates powerfully in our highly partisan times. As Jeffrey Rosen recently explained:

> Ever since Bush v. Gore, we’ve come to expect that federal courts will divide along predictable ideological lines: Judges appointed by Democrats are supposed to vote for Democratic priorities, while judges appointed by Republicans are supposed to prefer Republican priorities. In short, many people now assume judicial institutions will behave like legislative ones.

And some statistics largely corroborate him. As Justice Breyer has mentioned, polls showed a growing suspicion that the Court decides cases on political and not legal grounds even before the four most recent appointees cemented the Court’s current partisan division. Now, as the New York Times has reported, for the first time, the Court’s majority of Republican appointees and minority of Democratic appointees

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203 Letter from Stone to Brant, supra note 194; ROSS, supra note 36, at 91-92.
204 Letter from Harlan Fiske Stone to Irving Brant (Apr. 20, 1937), in Stone Papers, supra note 102, Box 7, (“it would be a disaster to increase the number of the Court over its present number, and I very much hope that it will not occur.”).
205 Warner W. Gardner, Harlan Fiske Stone: The View From Below, SUPREME CT. HIST. SOC’Y Q., vol. XXII, number 2, p.10 (2001) (“I remember, however, a fairly long conversation on the Court plan of 1936. He . . . thoroughly opposed . . . such an improvised reform of the Court. But his opposition was tempered by a human thought that this was precisely what he had been warning his colleagues against . . . .”); SIESOL, supra note 36, at 338-39.
usually vote along partisan lines in most controversial cases. And this conservative majority, like the one in the 30s, has been repeatedly criticized for overturning precedent and finding unconstitutional acts passed by Congress.

And this conservative majority, like the one in the 30s, has been repeatedly criticized for overturning precedent and finding unconstitutional acts passed by Congress. No one has yet seriously proposed any remedies for the Court’s conservative activism, let alone one as drastic as Court packing. A Court that survived the blatantly partisan *Bush v. Gore* decision without debilitating protest may assume that the public has accepted almost entirely the legitimacy of its power to govern, if not its decisions. But scholars have repeatedly observed that perceived partisanship can severely damage the Court and as Justice Breyer has warned, it should never take its perceived legitimacy for granted. That legitimacy will teeter even more precariously if a bare majority of Republican-appointed Justices overturns one of the most significant acts passed by a Democratic Congress since the New Deal on grounds not supported by the Constitution’s text or longstanding precedent.

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210 Koppelman, *supra* note 164, at 1-2 & nn.1, 5. Indeed, recent empirical analysis “suggest[s] that how Americans think about the Supreme Court is perhaps not so different from how they think about the rest of the federal government.” David Fontana and Donald Braman, *Supreme Anxiety: Do controversial court decisions really inspire the backlash liberals fear?*, THE NEW REPUBLIC, Feb. 2, 2012, at 9.  
211 See, e.g., David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO L. J. 723, 778-79 (2009) (“It is often suggested that the Supreme Court enjoys a finite store of some intangible resource known as legitimacy, which can be cultivated over time but also depleted in a variety of ways. Legitimacy may be depleted, for example, by decisions that . . . smack of blatant partisanship or unprincipled vacillation, or otherwise blur the distinction between legal decisionmaking and ordinary political decisionmaking upon which courts stake their claim to obedience.”) (internal citations omitted); David Cole, *The Liberal Legacy of Bush v. Gore*, 94 GEO L. J. 1427, 1430-31 (2006) (“As an unelected body in a democratic polity, without the means to enforce its own judgments, the judiciary more than any other branch of government must rely on the authority of its legitimacy. And its legitimacy, in turn, rests on the perception that it is not simply a political institution, but that it is guided by constitutional principle and law that rises above—and constrains—everyday partisan political decisionmaking. The Court is at its most vulnerable where it is seen as deciding cases without a basis in constitutional principle because then there appears to be little to differentiate it from the political branches.”).  
212 BREYER, *supra* note 207, at 214.
This Court may need a new Justice Stone, another appointee of a conservative Republican who, regardless of his own political/ideological “predilections,” will champion restraint when judging acts of Congress. Indeed, it needs a Justice who recognizes, like Stone did, that his or her ideological predilections necessitates liberal application of that restraint, lest the Court become in the eyes of the people and the eyes of the law, just another political body. But purportedly implacable partisan divisions—including, most prominently, the Conservative movement’s apprehension about “another Souter” joining the Court—has prompted scrutiny of judicial nominations that would likely prevent a Republican President from nominating a modern-day Stone. All in all, Stone’s devotion to transcending partisanship on the Court may be his most anachronistic judicial quality.

V. *Hirabayashi* and *Gobitis*: Neglecting and Protecting Minorities Suspected of Disloyalty

   A. Hirabayashi: The Dark Side of Restraint

   Unfortunately Stone’s commitment to judicial restraint, so widely applauded in economic areas, helped justify some of the Court’s most widely reviled opinions on civil liberties in wartime. Stone’s opinion in *Hirabayashi* upheld, without a dissent, a wartime curfew imposed on aliens and citizens of Japanese descent, and he joined Justice Black’s opinion for six justices in *Korematsu* upholding the military’s exclusion from the

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213 See *SHESOL*, supra note 36, at 395.
214 See JEFFREY TOOBIN, THE NINE 340 (2007) (“For the movement conservatives, the problem with [Bush nominee Harriet] Miers was not her lack of qualifications but their own lack of certainty that she would follow their agenda on the Court”); Henry S. Cohn, Book Review, 53 FED. LAW. 54, 55 (Sept. 2006) (“During the Harriet Myers debate, commentators on the right feared that she might become “another Souter” and urged the second President Bush to switch to a nominee with known conservative views.”). Indeed, “[i]n Souter’s office hangs a portrait of a justice who held similar views—New Hampshire’s Harlan Fiske Stone.” Id.
215 320 U.S. at 81.
West Coast of all persons of Japanese ancestry.\footnote{216} In \textit{Hirabayashi}, Stone reasoned that the Fourteenth Amendment’s equal protection clause applies only to state governments.\footnote{217} The Court thus had to uphold as legitimate any rational exercise of the Executive’s constitutionally granted power to wage war.\footnote{218} Stone then accepted as rational the military’s belief that the targeted curfew would hinder disloyal citizens plotting to assist a potential invasion of the West Coast.\footnote{219} As he noted in one particularly obtuse passage: “There is support for the view that social, economic and political conditions which have prevailed since the close of the last century . . . have intensified [the Japanese’s] solidarity and have in large measure prevented their assimilation as an integral part of the white population.”\footnote{220} In Stone’s opinion, discrimination against the Japanese that prevented their assimilation justified further discrimination against them.\footnote{221}

As both Mason and Konefsky have explained, the \textit{Hirabayashi} decision emerged from the same philosophy of judicial restraint that inspired Stone’s decisions about economic matters.\footnote{222} The revulsion Stone expressed in private conference toward the military’s abuse of the Japanese did not overcome his unsubstantiated suspicion that Japanese-Americans had assisted the attack on Pearl Harbor, nor his inclination to defer to the other branches’ preferences for responding to national crises—this time a feared

\begin{footnotes}
\item[216] 323 U.S. at 213.
\item[217] \textit{Hirabayashi}, 320 U.S. at 100.
\item[218] \textit{Id.} at 93, 101-02.
\item[219] \textit{Id.} at 101-02.
\item[220] \textit{Id.} at 96.
\item[221] \textit{See Jerry Kang, Denying Prejudice: Internment, Redress, and Denial, 51 UCLA L. REV. 933, 947-48 (2004).}
\item[222] \textit{KONEFSKY, supra} note 27, at 252-53 (“...it may be said that the \textit{Hirabayashi} case was decided more on the basis of criteria which Chief Justice Stone has espoused in the commercial field than on the basis of principles for which he has called in the civil rights cases.”); \textit{MASON, supra} note 20, at 683 (“The core of Stone’s wartime jurisprudence was still the same as that which had prompted him eight years earlier to uphold the assertion of national authority over the economic life of the nation.”).
\end{footnotes}
invasion, instead of a depression. A wrongly perceived military necessity provoked Stone to rescind the protection the Court offered to discreet and insular minorities in his footnote four of Carolene Products.

Ironically, Stone’s Hirabayashi opinion included one of the Court’s most forceful denunciations of racial discrimination in an era in which Plessy v. Ferguson remained good law: “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” Unfortunately this passage, which could have introduced a great dissent announcing a principal of racial equality, wound up buried in an opinion that did the opposite. Yet even so, it may have laid the groundwork for the Court’s future attack against racial discrimination. As Noah Feldman has observed, “[Stone’s] principal of equality remained on the books alongside his situational justification for discriminatory treatment; eventually it paved the way to judicial rejection of segregation.”

Stone died soon after the Japanese internment cases, which may have prevented reconsideration upon more sober reflection. And it is easy to forget that the era shapes the Justice; as Chief Justice, Stone hesitated to hinder potentially the war effort, and legal luminaries like Holmes and Brandeis tolerated or endorsed invidious

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223 Peter Irons, The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court, 45 (1990); Stone, supra note 59, at 298. See also Eric L. Muller, Hirabayashi and the Invasion Evasion, 88 N.C. L. Rev. 1333 (2010) (arguing that the government’s lawyers in Hirabayashi knowingly and deliberately overstated the threat of a Japanese invasion of the west coast).
224 304 U.S. at 152 n.4.
225 163 U.S. 537 (1896) (upholding separate but equal).
226 320 U.S. at 100.
227 Feldman, supra note 11, at 241.
228 Indeed Stone would later disagree with views he expressed in speeches he gave before joining the Court. Mason, supra note 20, at 124.
229 Id. at 681.
230 See, e.g., Holmes’s opinion in Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding mandatory sterilization in part because “[t]hree generations of imbeciles are enough.”). It must be noted that both Justices Stone and Brandeis joined with Holmes’s opinion.
discrimination under much less precarious circumstances. Indeed, two of the Court’s other champions of civil liberties, Justices Black and Douglas, similarly voted to uphold the curfew and internment.\textsuperscript{232} Perhaps Justice Stanley Reed’s letter to Stone best defends Stone’s \textit{Hirabayashi} opinion: “It seems to me that you have stated a very difficult situation in a way that will preserve rights in different cases and at the same time enable the military forces to function. It is a thankless job but you have done it well.”\textsuperscript{233}

Nonetheless, Stone’s legacy will be forever tarnished by his failure to confront the unfortunate misconception that the necessities of war can justify the violation of cherished values.\textsuperscript{234} Indeed, Stone lapsed even further when he cited the \textit{Hirabayashi} opinion in judicial conference to justify \textit{Korematsu}.\textsuperscript{235} And as Justice Stevens observed in his recent book, Stone “may have bent the rule of law in response to perceived military necessity”\textsuperscript{236} in \textit{Ex parte Quirin},\textsuperscript{237} and \textit{In re Yamashita},\textsuperscript{238} his two other significant World War II related opinions.

\textbf{B. Gobitis: Protecting Liberties “which tend to inspire patriotism and love of country.”}

Stone’s 1943 \textit{Hirabayashi} opinion perplexes even more because three years prior, as wartime hysteria percolated, Stone abandoned his restraint to author perhaps the Court’s most heroic defense of the rights of a purportedly disloyal minority. In \textit{Gobitis},

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\textsuperscript{231} \textit{See} Christopher A. Bracey, \textit{Louis Brandeis and the Race Question}, 52 ALA. L. REV. 859, 861 (2001) (arguing that Brandeis was “complicit[] in rendering judicial decisions that reinforced core principles of the segregation regime.”).
\textsuperscript{232} \textit{See}, \textit{e.g.}, FELDMAN, \textit{supra} note 11, at 243-54; STONE, \textit{supra} note 59, at 304.
\textsuperscript{233} Letter from Justice Stanley Reed to Harlan Fiske Stone (June 3, 1943), \textit{in Stone Papers, supra} note 102, Box 68; MASON, \textit{supra} note 20, at 676.
\textsuperscript{234} \textit{See} BREYER, \textit{supra} note 207, at 193 (“\textit{Korematsu’s} impact as precedent likely consists of what it failed to do: make clear that there are at least some actions that the Constitution forbids presidents and their military delegates to take, even in wartime.”)
\textsuperscript{235} IRONS, \textit{supra} note 223, at 322.
\textsuperscript{236} STEVENS, \textit{supra} note 57, at 36.
\textsuperscript{237} 317 U.S. 1 (1942) (rejecting challenges to death sentences imposed on putative German saboteurs).
\textsuperscript{238} 327 U.S 1 (1946) (upholding death sentence imposed by a military tribunal on a Japanese general who commanded soldiers that committed atrocities).
\end{quote}
the Court decided that the First Amendment as incorporated against the states by the Fourteenth Amendment, did not protect school children of the Jehovah’s Witness faith from expulsion for refusing, on religious grounds, to participate in their public school’s mandatory flag salute. Stone dissented alone.

Justice Frankfurter’s opinion maintained that religious minorities must comply with generally applicable rules not aimed at promoting or restricting religious belief or dissemination of those beliefs. Thus, he continued, the Court must weigh the individual’s interest in freedom of conscience with the majority’s equally, if not more important, interest in promoting loyalty by requiring the flag salute. In an ironic homage to John Marshall’s famous line from *Marbury v. Madison*, Frankfurter argued: “It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy… [s]o to hold would in effect make us the school board for the country.”

Frankfurter concluded by reminding the Gobitis family of another forum in which they could pursue their interests:

But to the legislature no less than to the courts is committed the guardianship of deeply cherished liberties . . . . To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.

Frankfurter’s encomiums to judicial restraint and the democratic process, of course, purposely evoked Stone’s opinion in *Butler*. Indeed, Frankfurter, who expressed to Stone

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239 310 U.S. at 586, 592-93, 600.
240 *Id.* at 593-95.
241 *Id.* at 595-98.
242 “It is emphatically the province and duty of the judicial department to say what the law is.” 5 U.S. 137, 177 (1803) (overturning an act of Congress for the first time).
243 310 U.S. at 598.
244 *Id.* at 600.
personal opposition to the school board’s actions, hoped that his Stone impersonation would sway him to join a unanimous opinion rallying the public around the flag as a patriotic symbol shortly after Germany’s abrupt conquest of France shocked and demoralized the Country.\textsuperscript{245} Stone himself was well aware of the national panic; as he wrote his brother shortly before the publication of \textit{Gobitis} “[p]erhaps we are experiencing now some of the emotions which afflicted those who saw the barbarians break down the Roman Empire.”\textsuperscript{246} But Frankfurter again misjudged Stone, who responded to those fears with a sense of patriotism far different from the one Frankfurter favored.

Stone maintained that the very existence of the First Amendment demanded exceptions to the government’s normal power to compel citizens to violate their religious conscience.\textsuperscript{247} Thus, the government regulation must yield, he wrote, if it can use means less restrictive to free speech or religion to accomplish its legitimate ends of inculcating loyalty.\textsuperscript{248} And here, Stone believed coercion unnecessary because more tolerant, and effective, methods to achieve that end were available: “Without recourse to such compulsion, the state is free to compel attendance at school and require teaching by instruction and study of all in our history and in the structure of government, including the guarantees of civil liberty which tend to inspire patriotism and love of country.”\textsuperscript{249}

Stone’s reasoning, of course, blatantly substituted his judgment for that of the school officials. He felt compelled to intervene because directing the Gobitis family to seek redress from the legislature surrendered “the constitutional protection of the liberty

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\footnote{245} Letter from Felix Frankfurter to Harlan Fiske Stone (May 27, 1940), \textit{in Stone Papers, supra} note 102, Box 65; \textit{MASON, supra} note 20, at 526-27.
\footnote{246} Letter from Harlan Fiske Stone to Lauson Stone (brother) (May 21, 1940), \textit{id.,} Box 4.
\footnote{247} \textit{Gobitis,} 310 U.S. at 602-03.
\footnote{248} \textit{Id.} at 603-04.
\footnote{249} \textit{Id.} at 604.
\end{footnotes}
of small minorities to the popular will.” It was “helpless minorities” like the Witnesses, who entertain in good faith an unusual religious belief, that the Constitution empowered the Court to protect from “legislative efforts to secure conformity of belief.” For ultimately, Stone affirmed:

The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to the justice and moderation without which no free government can exist.

Stone, who had argued so vigorously that the Constitution does not mandate a particular economic ideology, recognized nonetheless that it did explicitly protect some personal liberties of the minority from the will of the majority.

It is hard now to appreciate the importance of Stone’s <em>Gobitis</em> dissent. Doctrinally, it cited and clarified Stone’s landmark footnote four in <em>Carolene Products</em>, which formally recognized the Court’s duty to protect the rights of politically helpless minorities. In addition, it synthesized existing caselaw into the now familiarly strict standard by which the Court assesses the constitutionality of laws that may compromise the First Amendment.

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250 Id. at 606.
251 Id.
252 Id. at 606-07.
253 See MASON, supra note 20, at 530.
254 310 U.S. at 606 (citing 304 U.S. at 152 n.4); Vincent Blasi & Seana v. Shiffrin, <em>West Virginia State Board of Education v. Barnette</em>, in <em>CONSTITUTIONAL LAW STORIES</em> 442 (Michael C. Dorf ed., 2004) (“Stone’s dissenting opinion is best considered an extension of his effort . . . in the <em>Caroline Products</em> cases to mark out a sphere of constitutional controversy in which an independent judiciary has a major role to play”); FELDMAN, supra note 11, at 184 (“In 1940, the idea that the Court should protect minorities from the majority was not the commonplace it would later become. Stone had first introduced it in 1937, burying it in a footnote.”); KONFESKY, supra note 27, at 218 (“What was dictum and buried in a footnote in his opinion in the <em>Caroline Products Co.</em> case concerning the judiciary’s role in civil rights cases is made central in his dissent in the <em>Gobitis</em> case.”).
255 310 U.S. at 603 (“In the cases just mentioned the Court was of opinion that there were ways enough to secure the legitimate state end without infringing the asserted immunity . . . .”); ROSS, supra note 36, at 189
But perhaps most importantly, Stone’s *Gobitis* dissent is one of the Court’s most powerful defenses of a minority group under general suspicion of disloyalty in the proximity of wartime.\(^{256}\) The Witnesses’ insularity and uncommon religious practices, including, most prominently, their refusal to salute the flag, sparked rumors that they were a Fifth Column, or, in today’s parlance, a “terrorist sleeper cell,”\(^{257}\) allied with the fascists or communists who had recently conquered much of Europe.\(^{258}\) A wave of vigilantism against the Witnesses, which began shortly before the opinions’ publication, peaked in response to it,\(^{259}\) designating *Gobitis* one of the few Supreme Court decisions directly responsible for inciting mob violence.\(^{260}\) Indeed, the Witnesses were so unpopular that the DOJ’s Civil Rights Division abandoned hopes of convicting the vigilante perpetrators in trials by local juries.\(^{261}\)

As Noah Feldman put it, “the Coolidge appointee . . . out-liberaled” the recent Roosevelt appointees Justices Black, Douglas, and Murphy,\(^{262}\) who, influenced by widespread editorial praise for Stone’s dissent\(^{263}\) publicly admitted their *Gobitis* mistake
in a 1942 opinion. In 1943, after the violence against the Witnesses had ebbed and Justices Jackson and Rutledge replaced two members of the *Gobitis* majority, Chief Justice Stone mentored Justice Jackson as he wrote *West Virginia v. Barnette*, which overturned *Gobitis*. Jackson’s landmark opinion established one of the most enduring principles in Supreme Court history: “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.” But its arguments and even some of its language “echoed . . . Stone’s *Gobitis* dissent.”

Recent reexaminations of the *Gobitis* story temper a 2003 article’s assessment that the case has been “largely forgotten.” Yet despite Stone’s brave contradiction of every other Justice, the eloquence of his opinion, and the unprecedented speed at which his dissenting position became law, the legal academy has largely overlooked his

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264 Jones v. City of Opelika, 316 U.S. 584, 623-34 (1942) (Murphy, J., dissenting).
265 IRONS, supra note 223, at 23; MASON, supra note 20, at 533; PETERS, supra note 53, at 9.
266 Johnson, supra note 19, at 432.
268 Barnette, 319 U.S. at 642; Johnson, supra note 19, at 432.
269 *See, e.g.*, William P. Marshall, Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory, 72 OHIO ST. L. J. 1251, 1259 (2011) (*Barnette* “is rightly celebrated as one of the greatest First Amendment decisions in American history”).
270 Barnette, 319 U.S. at 642. Professor John Q. Barrett believes Jackson’s words “. . . form a central part of our civic constitution. They remind us of our freedom, in our earliest years in school and throughout life, to believe devoutly and practice sincerely the ideas and faiths that call to us. *Recollections*, supra note 267, at 796.
271 Johnson, supra note 19, at 432. In particular, Jackson reiterated Stone’s argument that permitting dissent promoted patriotism. “To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.” Barnette, 319 U.S. at 641.
272 *See, e.g.*, Blasi & Shifrin, supra note 254, at 433-75; FELDMAN, supra note 11, at 179-86; PETERS, supra note 53 passim; Tsai, supra note 263.
274 As Akhil Reed Amar recently put it: “Think about the audacity of someone to be alone against every other Justice. He says to the rest of them, in effect, ‘You are all wrong, and I’m right, I’m as right as right can be. History will prove that.’” Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 PEPP. L. REV. 75, 82 (2011) (emphasis added).
Gobitis dissent, particularly compared to the great dissents of Justice Harlan or Justice Holmes, or Justice Jackson’s opinion in Barnette.

Stone’s Gobitis dissent richly deserves greater recognition. Stone contributed in other cases to “the rights of man” during his tenure on the Court, but the Gobitis opinion resonates particularly clearly at another time of war as much of the public suspects another religious minority—Muslim Americans—of disloyalty to America and its values. Stone’s opinion recognized that a democracy earns loyalty via persuasion, and instruction in the values, including freedom of the mind, that distinguish our form of government from that of the forces that marched through Europe in Stone’s time, or that have terrorized this country in ours.

VI. Stone’s Legacy

Melvin Urofsky, author of a recent Brandeis biography, defined a great Justice as “the author of important opinions that continue to shape American jurisprudence.” According to that standard, Harlan Fiske Stone, now more than ever, deserves recognition as a great jurist. His decision to prohibit the BI from spying on radicals and

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276 Anita Krishnakumar, On the Evolution of the Canonical Dissent, 52 RUTGERS L. REV. 781, 811 & n.152 (2000) (“...it would be a mistake to consider the [Gobitis] dissent canonical given that it is rarely cited or quoted by later Courts.”). See also id. at 781-82, 808 (explaining that the Gobitis dissent has not been canonized).
277 See, e.g., Robert M Cover, The Origins of Judicial Activism in the Protection of Minorities, 91 YALE L. J. 1287, 1307 (1982) (“Stone's decision . . . in United States v. Classic, [313 U.S. 299 1941]—though not a race case—was immediately understood to be a breakthrough for minority rights . . . .”).
278 See, e.g., Warren D. Camp, Child Custody Disputes in Families of Muslim Tradition, 49 FAM. CT. REV. 582, 582 (2011) (noting that a 2009 poll showed that 44% of non-Muslims believe that Muslims’ religious beliefs are too extreme and less than half believe that U.S. Muslims are loyal to the United States); Huq, supra note 111, at 350 (“National polling data from the past five years suggests that a majority of Americans have categorically negative views of Islam and their Muslim co-citizens.”).
279 See MASON, supra note 20, at 529 (“Loyalty is a beautify idea [Stone] said in effect, but you cannot create it by compulsion and force.”).
280 UROFSKY, supra note 7, at Xii.
his dissents in *Butler* and other pre-1937 cases established the framework for resolving crucial policy and legal debates. His devotion to restraint and non-partisanship should continue to guide the conscience of the judiciary. His mistakes in *Hirabayashi* remind us how easily wartime paranoia and prejudice can compromise cherished values, like the tolerance Stone championed so eloquently in *Gobitis*. As Stone’s law clerk, Bennett Boskey,\textsuperscript{281} correctly predicted in 1946, “time, I think will prove the[] durability” of Stone’s opinions.\textsuperscript{282}

Though Felix Frankfurter often misjudged Stone, he got one thing about him right. When Stone fatigued of dissenting, Frankfurter reminded him “…you are an educator, even more so on the Supreme Court than you were off it. And you are the last person who needs to be told that education, particularly when the whole nation is your class, involves saying the same old thing in a new and fresh and powerful form.”\textsuperscript{283} Stone believed his influence peaked as a teacher.\textsuperscript{284} The nation remains his classroom, hopefully receptive, even today, to his insights in a new and fresh and powerful form.

\textsuperscript{282} *Id.* at 1203.
\textsuperscript{283} Letter from Felix Frankfurter to Harlan Fiske Stone (Mar. 28, 1932), in *Stone Papers*, supra note 100, Box 62; MASON, *supra* note 20, at 310.
\textsuperscript{284} MASON, *supra* note 20, at 90.