THE SHIELD OF RIGHTS, THE SWORD OF DISORDER: ROBERT H. JACKSON AND CIVIL LIBERTIES

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The noted U.S. Constitutional scholar Leonard W. Levy once observed that all Justices who have served on the Supreme Court of the United States have been “activists” in adjudicating Constitutional law. Both the evidence derived from cases as well as the kinds of questions they raise evoke responses filtered through personal perspectives. This quality of judicial decision making on the Court, particularly in controversial disputes, inevitably produces some measure of legislating from the bench.

“Result-oriented jurisprudence or, at the least, judicial activism is nearly inevitable—not praiseworthy, or desirable, but inescapable when the Constitution must be construed,” Levy asserted. Justices do not “knowingly or deliberately read their presuppositions into law.” Yet, “even the best and most impartial Justices, those in whom the judicial temperament is most finely cultivated, cannot escape the influences that have tugged at them all their lives and inescapably color their judgment,” he wrote.

“Personality, the beliefs that make the person, has always made a difference in the Court’s Constitutional adjudication.” That difference often makes Justices activists no matter how they conceive of their duties. ¹

Robert H. Jackson, confirmed as an Associate Justice of the U.S. Supreme Court in 1941, would have accepted Levy’s dictum that personal viewpoint can frame how a judge perceives a given case. But he would have bristled at a description of his own work on the Court as the product of activism. He was convinced that jurists, in accordance with the framers’ expectations, must resolve cases and controversies without independently creating new law. He understood himself as an adherent of the framers’ intentions.

He dismissed jurists who formulated public policy from the bench. Months before he was nominated as an Associate Justice, he had roundly condemned “ill-starred
adventures of the judiciary that...jeopardized its essential usefulness” within the tripartite structure of the federal government, urging instead “the counsels of self-restraint” in deciding cases. “[T]he rule of law is unsafe hands when courts cease to function as courts and become organs for control of policy,” he warned.2

Jackson was, in most instances, an adherent of judicial deference, stoically ceding the function of lawmaking to the elected branches. The U.S. Supreme Court’s opposition to New Deal economic legislation prior to 1937 had convinced him that the judicial role of “self-restraint” was a required in the republican system. Moreover, the Court could not responsibly shed this role to protect civil liberties in the midst of widespread intolerance of a group or an idea. Jackson was willing to endorse judicial intervention only in certain cases involving “interferences with free speech and free assembly” — the foundations of a citizen-controlled government. In his view, this approach followed the framers’ vision of the judiciary as an arbiter of law, not a legislative body. The presumptive guideline of “self restraint” promised to avoid a corruption of this vision while allowing the judiciary to defend the function of self-government. A court “governed by a sense of self-restraint does not thereby become paralyzed,” he counseled. “When the channels of opinion or peaceful persuasion are corrupted or clogged,” then the Supreme Court, ” by intervening, restores the processes of democratic government, it does not disrupt them.”3

Despite these declarations, originally aimed at a previous Court, he would discover that decision making as a member of the tribunal was more complicated, not to mention more frustrating, than he imagined. His career on the bench well illustrated how personal perspective can collide with the process of adjudicating cases to shape judicial opinions. The discipline imposed by self-restraint is only a general framework or outline
for writing opinions, not the substance of them. In numerous cases involving civil liberties Jackson was forced to rely upon a core set of operating assumptions he held throughout his career, both as a government litigator and as a jurist. Later disagreements with colleagues on the bench only forced him apply these assumptions more stridently, but without comprehensive treatment. As revealed by an examination of his extra-judicial writings, unpublished memoranda and speeches, as well as his official opinions, these assumptions routinely informed Jackson’s reasoning in his opinions on civil liberties disputes.

He took pride in examining the facts of each case, precedent and the policy mandates imposed by the elected branches. Jackson’s success at this task is subject to debate. But the ways in which he applied his personal assumptions, combined with his candor in articulating the difficulties he encountered in writing opinions, make him an excellent case study for appraisals of the judicial role. His civil liberties highlight the application of his personal viewpoint to cases before the Court.

Jackson’s apparently variable position in addressing such cases has been a continuing subject of scholarly commentary. Appraisals of his judicial opinions have either emphasized inconsistencies or selectively characterized his examination of such matters. In a sympathetic portrait, for example, one author concluded that “Jackson’s judicial philosophy was not always fully integrated and consistent” and that “he sometimes expressed uncertainty about the best way to apply the constitutional law of a free society.” Another scholar detected a “habit of throwing himself wholeheartedly into battle,” resulting in “opinions that reflect Jackson the Advocate as much as they do Jackson the Judge.” Brandishing “a petulant pen and personality,” his adversarial posture
“made understanding Jackson more difficult” and “hampered full development of his judicial philosophy.” Yet another critique located the basis of Jackson’s jurisprudence in his response to the preferred position doctrine, outlined by Justice Benjamin Cardozo in the 1937 case of *Palko v. Connecticut*, and marshaled as an authoritative canon in a protracted debate among jurists and legal scholars over the incorporation of the Bill of Rights during the 1940’s and 1950’s. Cardozo’s preferred position doctrine called for the Supreme Court’s close attention to state abridgements of First Amendment freedoms, but not necessarily other safeguards included in the Bill of Rights. According to this analysis, Jackson “came to the Court believing in the application of the preferred position doctrine, but he later bitterly denounced it” in both his opinions and other writings prepared before he died in 1954.⁴

One scholar found that Jackson “was fundamentally the same justice” on freedom of speech issues throughout his tenure on the bench. “The pragmatic character of his free speech votes, which stemmed from his attentiveness to the circumstances of the cases before him, was apparent from the outset” of his judicial career. “In essence,” the author noted, “Jackson extended the method of common law to constitutional matters, making use of a judicial technique that emphasized the adaptation of legal principles (in this case, constitutional principles) to meet ‘the endless variations of the facts of cases.’” But the evaluation does not include an assessment of how Jackson was fundamentally the same in multiple decisions involving freedom of speech, much less other civil liberties disputes.⁵

A recent interpretation of the Supreme Court during the years Jackson served on it portrays him as “not animated by a coherent judicial philosophy. His responses to any particular problem coming before him tended to be ad hoc, though after 1946 he could be
counted on the side of order in its contest with freedom.” According to this author, Jackson was more comfortable as a skeptic than as an adherent, often concurring with the majority’s resolution of a case while criticizing its assumptions or analysis.⁶

Yet another author summarized Jackson’s work on the court as the product of a jurist who sought to broker competing interests. His approach to Constitutional questions was one of “resolving conflicts between different actors in society and government.” Although reliable in general terms, this interpretation did not capture the parameters that guided the resolution of such conflicts.⁷

These descriptions of Jackson’s jurisprudence overlook the assumptions underlying his opinions. These assumptions were the foundations of his decision making. They formed the lens through which he sought to discern the individual’s rights within the context of various government actions and in relation to other citizens throughout his career.

I. Principles

A gifted advocate, Jackson earned much praise for his professional competence in Washington, beginning with his first federal position as general counsel for the Bureau of Internal Revenue in 1934. Success with his prosecution of former Treasury Secretary Andrew Mellon in a well-publicized tax fraud case made him a visible member of President Franklin D. Roosevelt’s administrative team. A meteoric series of promotions followed, including appointment as Solicitor General from 1938 to 1940, then as Attorney General and finally, to the Court. He enjoyed many admirers, including his
political mentor, Roosevelt, executive department officials and members of the Supreme Court. Justice Louis Brandeis thought so much of Jackson’s skill while he served as the government’s chief litigator that he was supposedly moved to remark: “Jackson should be Solicitor General for life.”

The effectiveness of his role as an advocate appeared in full relief when he assumed a lead role as a spokesman for Roosevelt’s policy initiatives. He had been an outspoken critic of Supreme Court decisions which struck down New Deal programs in the mid-1930’s and acted as the administration’s key exponent of the 1937 plan to pack the Court with additional Justices. Although the plan failed in Congress, within months a majority on the tribunal began to embrace the administration’s proposals for economic recovery from the Great Depression. Jackson used the Court packing episode for the rest of his life as a touchstone for illustrating the dangerous consequences which can occur when federal judges exceed what he viewed as their traditional, Constitutionally sanctioned boundaries.

Just prior to his nomination to the Court, Jackson’s book-length study, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics*, was released for distribution. This work, ostensibly an assessment of the origins, debates and Constitutional issues associated with the packing plan, also offered the author’s view of the Supreme Court’s prescribed duty within the tripartite structure of the central government. The pre-1937 Supreme Court, Jackson opined, functioned as a “continuous constitutional convention which, without submitting its proposals to any ratification or rejection, could amend the basic law.” In essence, the Court maintained “supremacy over the legislative process,” instead of confining “judicial power to its traditional and proper
sphere.” Since 1937, the Court had followed a contrary pattern of jurisprudence by
upholding economic regulation under the Commerce Clause, an approach that Jackson
contended was explicitly authorized by the Constitution. Federal judges had no choice
but to endorse attempts by the political branches to regulate or stabilize economic life in
the modern world. Lawmakers had responded to their constituent’s demands by adopting
these measures.\textsuperscript{10}

For its part, the Court was obligated to assure voter control and determination of
public policies. This duty was an oversight responsibility, triggered only when the
regular process of republican governance failed. If the Court intervened when
disagreements over fair procedures emerge, it “restores the processes of democratic
government,” he explained. Intervention to preserve fair procedures was an obligation of
the Court. Despite acknowledging that judicial action might be necessary at times, he
insisted that such cases did not belong in the routine docket. “I am far from suggesting
that our civil liberties can be adequately assured by the courts,” he wrote. Some forms of
intolerance were beyond the reach of law, existing as divisive forces at the boundary of
civil order. As of 1941 he was not prepared to accept the proposition that outside
intervention was called for to remedy even blatant racial discrimination. The courts were
passive institutions that “can intervene only sporadically, as isolated cases are brought by
persons with sufficient resources and fortitude to gird for litigation, Jackson wrote.”\textsuperscript{11}

He had underscored the point earlier. In a 1937 speech he declared his conviction
“that the check on democracy must be found in the reasonableness and self-restraints of
popular majorities and not on judicial decisions.” In the following year during hearings
over his nomination as Solicitor General, Jackson even went so far as to label himself as
a “States’ rights partisan,” adding that he would not disturb the division of powers between the central government and the states “unless it were a question whether there should be a federal government or no government at all.” In a 1940 essay Jackson warned that citizens “should not leave the rightings of wrongs to angels sent from Washington.” Federal judicial intervention in civil liberties disputes was neither Constitutionally mandated nor necessary. Majority opinion, expressed through state and local institutions, he argued, would eventually resolve any question about citizenship rights.¹²

He never followed up these observations with a detailed, definitive statement of Constitutional jurisprudence for civil liberties cases. The absence of a systematic digest of his thought would help to create confusion over his judicial opinions and exacerbate uneasy personal relationships with some of his fellow Justices. The nation would learn that for Justice Jackson, judicial intervention to restore processes of republican government usually involved rehabilitating the procedural shields that protected the citizen against arbitrary governmental power or obvious, abusive infringement by other individuals, not substantive readings of the Bill of Rights.

He thought of the federal judiciary as an umpire, collectively upholding the traditional norms he identified as established by law and everyday life. His perception of how human beings interacted in ordinary circumstances was derived from his early years in Jamestown, a small western New York town. He was convinced that a search for the resolution of disagreements occurred daily within such communities across the United States. This perception formed another basic principle for him. “Respect for civil rights, tolerance, the will to live and let live, the determination to see fair play is not mere doctrine of legal practitioners—it is the basic tenet of any democratic culture,” Jackson
wrote in a 1940 essay. These values were the medium of civil society, sustaining a collectively beneficial exchange of opinions and leading to a final obedience before majoritarian decision making. They formed a moral sanction for not just citizenship rights, but also the republican form of government. Everyone held an obligation to uphold the liberties of their neighbors. In an essay written while he was Attorney General, Jackson observed that only by teaching this principle “endlessly until it is as much a daily habit of thought with laymen as with lawyers,” could the republic be assured of survival. Instruction in the basic tenets of civility, respect for others and a commitment to the welfare of the community must be provided in the home, in schools and throughout society. A shared commitment to these civic values created the real tools for problem solving, not judicial decisions.13

For all of his much-admired talents as a lawyer and as a Justice, Jackson moved about his professional world largely as a self-contained individual. Paul Freund, a trusted colleague and friend, noted in retrospect that Jackson “retained an inner reserve of privacy, a kind of temple of the spirit, into which strangers and friends were not bidden to enter.” Freund described the distinction as “public and private sectors” that, in Jackson’s view, “called for recognition as fully in the human personality as they do in political economy.” The Justice was especially solicitous of the personal dimensions of belief and intellect, or the “private sectors” of the human personality. Through these dimensions of experience, the individual evolved as an adult personality and acquired the wisdom and prudence necessary to vote for representatives who served in the elected branches of government.14
This aspect of his personality nurtured a related principle. Jackson believed that citizens who engaged in the civil exchange of opinions must possess “a spiritual and inner life that is wholly free” so that they may exercise the capacity to evaluate both the effectiveness of public policy and people who fashion them. They must also be free to “fulfill their potentialities” as individuals. In a 1940 Constitution Day speech he declared that in this country “we affirm the right of every man to invoke those great freedoms enshrined in our Constitutional Bill of Rights which keep inviolate the personality and the conscience and the civil liberties of men.” Four years later, while speaking before the Canadian Bar Association, he explained that those potentialities “include freedom of worship, of conscience and thought, freedom to pursue the sciences, philosophy, the arts, freedom to speak and listen or not, freedom to print,” as well as the “freedom to make a living by honest and socially useful labor.”

Yet Jackson often contradicted his bold declarations championing individual rights with indefinite parameters when he evaluated specific cases. In a 1938 address he stated his belief that the bench and bar could hasten recovery from the Great Depression through an effort to protect citizens against the “irresponsible exercise of economic power.” He pointed out that although this position might strike critics, including several Supreme Court Justices, as radical, in the Anglo-American past “the concept that no man should become strong enough in political power to deprive another of certain rights—political rights—freedom of worship, of speech and of press, trial by jury of his peers and due process of law” was rejected in past centuries by some as extreme or as an exception to common law tradition. In the moment of urging support on behalf of the Roosevelt administration’s policies, listeners could have easily misunderstood the meaning of his
reference to a list of political rights as inherent properties of citizenship, “rescued from
the field of debate, and written into law.” Jackson allowed listeners to conclude that the
entire list of “political rights” were absolute. He would later make clear that this
conclusion was not an accurate summary of his perspective on the Constitution.  

In a 1940 address delivered at the Boston College Law School, he remarked: “As
a result of the generality of the great clauses of the Constitution, different people will
have different notions of their meaning when applied to particular cases.” The problem
was especially acute when cases before the U.S. Supreme Court involved the actions of a
state or a coordinate branch of the federal government and a clear answer was not
prescribed by the text of the document, he continued. In such instances, the Justices must
rely upon two alternative “guides” for a decision. One guide is available through the
examination of precedents. “The other is to look at the legislation in the light of the
economic and social problems out of which it grew, and then to inquire whether its
purpose or effect is such that it is contradicted by the general outline of government
which was planned in 1787.” Such statements hardly settled the issue in general, for
different interpreters may arrive at radically different conclusions from the same passages
of Constitutional text or identical historical evidence. Relying upon the outline of
government planned by the founding generation also easily left the door open for judicial
intervention, depending upon the individual jurist’s treatment of a case.  

In Jackson’s calculus, protecting the private right to think, believe and pursue a
lawful livelihood did not surround an individual with irrevocable shields against all
government action or conflicting claims asserted by other citizens. Although such
freedoms formed the basis of a republican polity, they did not uniformly mandate a judicial protectorate.

If the jurist had no absolute yardstick for such questions, how could civil liberties cases be resolved? A third principle, derived from years of reflection as a federal prosecutor and as a student of the law, provided the answer. Jackson referred to this principle from time to time as a “liberal” legal perspective. In his conception, the term liberal embodied an understanding that legislative responses to contemporary social and economic issues must be recognized as authoritative. These responses included regulation of the economy as well as measures that redistributed the wealth of society, such as the Social Security program. But liberal for him did not imply a preemptive stance against intrusions into individual liberties.

Solicitor General Jackson had given small comfort to those who might have expected a more vigorous defense of civil liberties from the chief federal prosecutor. During a radio speech delivered in November, 1939 he said that “Civil rights are pretty generally safe except in periods of widespread periods of emotional instability.” In those periods various individuals and public officials will call for “suppressing free speech, censoring free press or punishing free opinion.” Jackson deliberately left out the courts as active, countervailing protectors against acts of suppression. “The only cure for this,” he explained, “is a steady and unfrightened public opinion strong enough and expressive enough to show that respect for civil rights is also good politics.”18

Two years later, during a speech before the Federal Bar Association, while serving as Attorney General, he commented on the judge’s role while praising the sitting Chief Justice, Harlan Fiske Stone. He applauded Stone for possessing “a fine native sense
of ordered relations among men” and exercising “a proper balance between property
rights and personal rights, and of what is just and square in a work-a-day world.” Judges
as well as other individuals who wielded power must make decisions as trustees for the
benefit of everyone. Without “the fiduciary principle, old in equity and recognized by
law,” known as “the principle of trusteeship,” added Jackson, “our kind of society cannot
permanently endure.” What a judicial trustee must do to fashion a balance between
property rights and personal rights, Jackson did not say.\(^ {19}\)

Six months before Roosevelt named him to the Court, Jackson remarked that
jurists must be capable of exercising a special vision of statesmanship that transcends
mere knowledge of the law. “To hold a wise balance between stability and progress is the
task of moderate and enlightened judicial statesmen,” he said. Justice Cardozo, who died
in 1938, had exemplified this kind of statesmanship, according to Jackson. Pointing to
what he termed Cardozo’s “liberalism,” he argued that the late jurist “did not try to
extemporize doctrines to supplant customs that were deep in the consciousness of the
race.” Judges must “not cast aside rules vindicated by long usefulness because of some
temporary convenience.” A “willingness to help re-mould the law” must be “coupled
with a deep veneration for the older pattern,” he said. The judicial trustee or statesman, he
said, recognized that “Freedom is never the product of anarchy but is the child of order. It
is only possible for men to be free where there is a social order that sanctions patterns of
conduct which respect freedom.” A quest for social order and stability shaped Jackson’s
thought as much as claims on behalf of individual liberty. Combined with his
assumptions about how local communities function and his commitment to judicial
defERENCE, this quest was a theme in most of his civil liberties opinions.\(^ {20}\)
The liberal judge, as he conceived of the type, was exemplified by such notables as John Marshall, Oliver Wendell Holmes and Benjamin Cardozo. Their liberalism was defined, by opposition to “every arbitrary act of officialdom, by stubbornly maintaining the jurisdiction of the courts over every clash between citizen and official power, and insisting upon the supremacy of an independent judiciary over every justiciable act of officials as well as private citizens,” Jackson wrote in an incomplete essay. The description fit what he saw as his own approach. In a revealing note he added that Holmes’s support for free speech was matched by the latter jurist’s willingness to uphold national prohibition—a Congressional policy.21

Tidy adherence to doctrine—beyond his own presumptions—did not interest him. In an earlier address he acknowledged that a “liberal” jurisprudence could produce inconsistent law—even from the same judge. As he explained, “the judiciary is entrusted with a large measure of discretion in choosing, interpreting and sometimes inventing rules by which controversies are decided.” The judge must concentrate on “deciding individual cases and trust these decisions somehow fit themselves into a pattern that in matters not controlled by legislation will represent the law.”22

II. The Newcomer Weighs In

Throughout his career Jackson kept a steady eye on the strengths and weaknesses of arguments made by opposing sides of legal arguments. In an unpublished article written in 1945, U.S. Circuit Judge Jerome Frank wrote that Jackson was known by some of his contemporaries as a man who “parts his mind in the middle…He’s a Mr. On-the-Other-Hand,” suffering from “impartiality to the point of excess.” Jackson explained his
reluctance to move beyond the “middle” as a trait he shared with most of his contemporaries. He abhorred long-winded treatises on how to do anything. His purpose was to accomplish the task at hand to the best of his ability. Talking about a job did not complete it or improve the result. “I came from people too busy making a living to work life’s annoyances up into a philosophy,” he declared in 1939. “I believe that the mass of Americans rightly feel that no good will come to them from any side in a war of abstract ‘ideologies.’ The way of life of the American is practical, heard-headed and concrete.” He considered this homespun pragmatism to be a civic virtue that underlay the triumph of republic. “A large part of the success of a government in maintaining the confidence of the masses of the people of this county can come only from following the traditional American system of adopting concrete remedies rather than becoming involved in a maze of controversy over theory,” he wrote a year later.23

But after he joined the Court Jackson found that the absence of a highly formalized legal system did not eliminate controversy with his colleagues. He served on the Court during a time when federal judges had lost a commonly agreed upon model of decision making on the bench. The classical legal tradition, geared to encouraging individual will and restraining governmental interference, had collapsed by the time Jackson took his seat on the tribunal. No single, alternative methodology replaced it. Jackson would never build a formal, alternative model. But he would discover that a number of his colleagues on the Court addressed civil liberties in ways that challenged his own assumptions.24

Early in his tenure Jackson found himself in opposition to arguments framed around substantive readings of the Bill of Rights, as well as applications of their
provisions against state and local governments. Justices William O. Douglas and Hugo Black would become the primary agents of such views and thus the targets of his criticism. He initially avoided open disagreements with his colleagues. But a case decided during his first year on the Court presaged future disagreements. In *Edwards v. California* the Justices considered a challenge to a California law that forbade entry into its territory by “any indigent person who is not a resident of the state.” Jackson was moved to offer a concurring opinion that agreed with the majority decision to strike down the statute, but rejected both the grounds for the ruling as well as the holding in Douglas’s concurrence. The majority opinion, written by Justice James Byrnes, found that the law violated the Commerce Clause, while Douglas argued that the Privileges and Immunities Clause of the Fourteenth Amendment protected a fundamental right of citizens to travel freely across state lines. Jackson declared that basing the defendant’s rights on the Commerce Clause “is likely to result eventually either in distorting the commercial law or in denaturing human rights.” He agreed with Douglas that the Privileges and Immunities Clause did have meaning for this case—but this one only. The reason why the Court should reject the law was that it made “a man’s mere property status” a barrier to interstate travel. Such a restriction upon citizenship was a violation of “our heritage of Constitutional privileges and immunities,” Jackson wrote.

But interstate movement, he pointed out, was not an unlimited right. Citing two examples, he pointed out that a citizen “may not, if a fugitive from justice, claim freedom to migrate unmolested, nor may he endanger others by carrying contagion about.” He would cabin Douglas’s application of the amendment to address only the extreme burden the state had placed upon poor citizens. He would not use the case to transform the
Amendment’s provisions into a general protection against state law. “That is the method of common law,” Jackson instructed.26

In a draft passage that he later deleted, Jackson separated himself from Douglas’s opinion with a sharper edge. He explained that “the doctrine which governs my vote is quite different from that of the majority and is not fully expressed by Mr. Justice Douglas.” The defendant’s “right to enter California was one of national citizenship, but I do not think it is appropriate to inquire now as to the extent to which such a right is subject to Congressional control.” That is, the case did not raise the general question of to what degree state action should be restricted by the Constitution.27

In Jones v. Opelika, decided the following year, the Court heard a complaint against municipal license requirements for door-to-door sales by Jehovah’s Witnesses. The Court majority sustained the ordinances. But Black’s dissent claimed the decision “suppresses or tends to suppress the free exercise of a religion practiced by a minority group.” Black and Douglas also joined another dissent by Justice Frank Murphy, who wrote: “Liberty of conscience is too full of meaning for the individuals in this nation to permit taxation to prohibit or substantially impair the spread of religious ideas…”28

Jackson fashioned a strident criticism of the dissenters’ Constitutional argument in a draft concurring opinion that he did not distribute. “We are urged to uphold an absolute and unqualified right to preach one’s religion apparently in any place,” he wrote. But the Court also had to address the consequences for those citizens who were visited by any religious proselytizers. “The right of free speech, free press and free religion in modern society is not the right which Robinson Crusoe may have had,” Jackson contended. Construing the issue in a way he would repeat in future years, he pointed out:
“Rights meet each other and conflict. Our problem is an easy one when one side supports a right and the other a wrong, but when both sides [have] rights which conflict, it is more difficult.” Homeowners had the right not to be disturbed in their places of residence. Moreover, the Court’s action would intrude into a matter traditionally left to state and local governments. Jackson pointed out that government agencies and apartment house managers prohibited salesmen from soliciting business at their respective properties. Members of a church could even have a visitor who interrupted a religious service arrested for disorderly conduct. “There is a time and a place, even for worship,” he wrote.

The draft also revealed Jackson’s solicitous regard for the individual’s privacy—suggesting the concern for defending the personal sphere of experience Paul Freund later detected. “In these days of high-pressure propaganda and drives of all characters to break down the resistance of the individual and overcome his individuality,” Jackson mused, one could withdraw to the home as a last refuge. The “right of sanctuary in the home” must be preserved “in the face of modern pressure methods supported by mechanical devices to dispense argument,” and against any argument that the Free Exercise Clause of the First Amendment should be applied to the states. He pledged that he would change his position if the ordinances led to the “break-down of civil liberties.” But he obviously doubted the likelihood of that prospect. A determination of “the points at which rights conflict and…which one must give way[,] must be revised from time to time,” he wrote. “That is why we should beware of laying down absolute rights which circumstances and time may prove are not so absolute, after all.”
Another case heard the same year raised for Jackson the issues of states’ rights as well as procedural rights for citizens facing judicial action. The dispute was created by the flight of a man and a woman from North Carolina to Nevada, where, after having divorced their respective spouses, they married. They returned to their home state and were subsequently convicted of bigamy. In an opinion written by Douglas the Court upheld the divorce decrees and reversed the convictions. The relatively quick divorce process offered by Nevada to visitors did not control the decision, Douglas concluded, because the Full Faith and Credit Clause gave each state the power to control “domiciliaries” as it wished. Nevada’s divorce law applied to all people who resided within its jurisdiction. Moreover, “society has an interest in the avoidance of polygamous marriages” that would result if the decrees were not validated.

Jackson dissented, arguing that the ruling “nullifies the power of each state to protect its own citizens against the dissolution of marriages” in other states which have simpler divorce laws. The decision “repeals the divorce laws of all the states,” he claimed, because it made Nevada’s court system superior to those in most other jurisdictions. Jackson also deplored the lack of adequate process in the case. One spouse the couple left in North Carolina was notified of the divorce action by a Las Vegas newspaper ad and a mailing to his last known postal box. As a result, he had “never been lawfully summoned by personal services of process.” The Court had unnecessarily interfered with a state’s lawful, traditional powers, opening a serious danger to the rule of law. “This strikes at the orderly functioning of our federal constitutional system,” Jackson wrote. Denouncing Douglas’s use of two precedents to buttress his opinion, Jackson
declared that “our judicial responsibility is for the regularity of the law, not for the regularity of pedigrees.”

If Jackson entertained disagreements with his colleagues over these and other issues, he was hardly alone. As early as the 1942 term the percentage of non-unanimous decisions issued by the Supreme Court had more than doubled the average of the previous decade. By the 1943 term 58 percent of the rulings handed down were non-unanimous. For the rest of the 1940’s and early 1950’s the tribunal would suffer from a divisiveness to which most of the members contributed in varying degrees. Throughout this period the percentage of non-unanimous decisions remained at an average of more than 66 percent per term. Jackson’s dissenting opinions began to increase during his second year on the tribunal, expressing his opposition to what he viewed as a problem with the work of Black and Douglas—making policy by infusing procedural rights with substantive meanings of the jurists’ own making.

III. National Security

Jackson’s adjudication of conflicts between citizens and actions by government officials resulted in a pattern of decision making that befuddled many contemporaries. If he accepted a public policy as reasonable, given the circumstances within which it was conceived and executed, he could arrive at what might appear to be a contradictory conclusion compared to other cases. Beginning with his work as Attorney General, he had maintained that totalitarian menaces around the world posed a new kind of threat. The scope and diabolical intentions of these entities persuaded him that determined
sabotage of republican institutions by “underground movements” must be met with vigorous responses. His willingness to endorse large scale investigations and prosecutions of conspirators for this purpose drew criticisms from contemporaries who argued that the rule of law ordained a different method of analysis. Jackson claimed that the practical realities of the threat must be assessed in any determination of government action.

In a speech before the New York Bar Association in June, 1940, for example, he discussed the problem of the “fifth column,” which he described as “a small corps of foreign agents, cushioned in a much larger group of sympathizers and dupes.” Jackson divided the activities of the fifth column into “espionage and sabotage, on the one hand, and organized propaganda on the other.” He was careful to note that alien residents should not be characterized as enemies simply because of their birthplace. But he also expressed confidence in the government’s “adequate control of the aliens.” A large part of the control of illegal activity committed by the fifth column consisted of what Jackson labeled “preventive measures.” Counter-espionage tactics such as surveillance and infiltration of leadership were vital tools to track “Nazi, Fascist and Communist groups and societies,” he declared. “I do not concede that it is a civil right of a citizen that his government should remain in ignorance of foreign born movements within the country, or that he has a right to conduct political activities in the dark.” Open political debate was available to all citizens; there was no necessity for cloaked discussion of policy matters. “A country which permits open opposition to the government has no duty to remain ignorant of underground movements,” Jackson said.
The “gravity of the abuses threatened by uncontrolled propaganda should not be minimized,” he added, because it “affords a liberty for systematic and unscrupulous indoctrination.” Thus, much like his response to the aggressive use of First Amendment rights by religious proselytizers, he would single out underground movements as undeserving of a First Amendment free speech protection. Included in this category were citizens who lacked a sense of moderation in exercising their rights. “Persons who go about flaunting their rights to be provocative or disagreeable or intemperate in speech are among the chief enemies of liberty we are trying to preserve,” Jackson counseled.\textsuperscript{34}

He was not prepared to mark precisely the boundaries of First Amendment protection in such instances. Instead, he appealed to what he termed “the good sense of the people” as the only sure way to weather “severe storms of foreign pressures.” Public debate and discussion would allow a thorough analysis of any political ideas and give citizens the opportunity to pass judgment on their viability or worthiness. The citizen, free of government influence to assess the merits of ideas, could make a responsible evaluation.\textsuperscript{35}

In January, 1940, shortly after he took office as Attorney General, Jackson appeared to put this notion into practice. He announced that wiretapping would not be used by the Department of Justice to build prosecutions, thus adhering to a 1937 ruling by the Supreme Court in \textit{Nardone v. United States}. In that decision the Court banned the use of evidence culled through electronic eavesdropping in federal criminal cases. Three months later he forbade wiretapping by forbidding U.S. Attorneys from prosecuting any case in which evidence which had been developed by this means. Then, in May, President Roosevelt sent Jackson a memorandum asserting that wiretapping was not
illegal when utilized in cases involving national security. The Attorney General promptly sought from Congress the authorization to pursue investigations of “serious crimes” such as sabotage, espionage, extortion and kidnapping with the tool of wiretapping. “These are the offenses which are accomplished or accompanied by extensive use of the telephone,” he explained.\textsuperscript{36}

A year later, while endorsing a proposal to permit government use of wiretaps, he reversed his previous order at the President’s direction and mustered a legal argument to justify it by offering an interpretation of Section 605 of the Telecommunications Act of 1934. As he explained to Congress in March, 1941, “There is no federal statute that prohibits or punishes wire tapping alone. The only offense under the present law is to intercept any communication and divulge or publish the same.” Jackson admitted that he had violated his own 1940 order by authorizing a wiretap in the investigation of a kidnapping of a child in California. He would repeatedly insist that wiretapping should be used in the investigation of serious crimes. As a safeguard for civil liberties, he suggested, Congress should mandate that in each instance “a written certificate signed by the head of the [executive] department” must be issued. The same distinction between the offenses he claimed justified wiretapping and lesser ones would later appear in his opinions written as a Supreme Court Justice.\textsuperscript{37}

The imposition of military rule over the West Coast of the United States soon after the attack upon Pearl Harbor presented a similar issue of national security and civil liberties. Government policy imposed a curfew upon Japanese-Americans and Japanese aliens. A challenge to the law questioned the legality of military rule in the area. Gordon Hirabayashi, a citizen of Japanese ancestry born in the U.S., refused to obey the curfew.
He also disobeyed an order requiring such persons to assemble at “Civilian Control Stations” in preparation for evacuation and resettlement in camps designated by military authorities. Both orders were issued under the authority of the President’s war powers. Hirabayashi claimed that the orders unconstitutionally delegated legislative power to military commanders in the area. He also argued that even if the military had exercised such power under Congressional direction, the orders would still be unconstitutional under the Fifth Amendment’s Due Process Clause because the orders discriminated between Japanese-Americans and citizens of other ancestry.\(^{38}\)

Jackson joined the Court majority in upholding the orders with a narrow decision rendered on the basis of whether the curfew order was mandated by the necessity of the perceived threat. The objective of protecting military resources against espionage and sabotage created such a mandate, according to the opinion, written by Harlan Fiske Stone. The curfew order issued by the military commander “involved the exercise of his informed judgment.” Given the circumstances, “the danger of espionage and sabotage to our military resources was imminent” and, therefore, “the curfew order was an appropriate measure to meet it.”\(^{39}\)

In a draft concurring opinion never issued, Jackson noted that “the question we face is whether a citizen of the United States may be classified according to ancestry for an unequal treatment before the law.” Admitting the answer would be negative in “normal times of circumstances,” he found the “war power, at least within the limits of good faith and decent judgment, is not susceptible to judicial review.” Such power must be accepted by the Court as valid, absent the obvious evidence it was “perverted or abused.” Jackson’s position gave the widest possible net to military authorities, acting
under Presidential guidance. Based upon “common sense,” he was sure Japanese-Americans “as a whole contained a greater proportion of enemy sympathizers than other racial groups.” Adding a statement he would repeat later in his career, he asserted:

“Nothing in the Constitution requires it to be construed as a suicide pact. It recognizes [the] existence of a war power which it does not define or expressly limit.” The parameters of the power were “wisely left to unfold as future events might call it forth.”

But Jackson balked at bestowing the Court’s blessing upon criminal prosecutions for violations of military orders. He believed the tribunal must “keep free of commitment of the law itself to extra-constitutional steps.” The Court’s role in such cases should be one of neutrality, “neither interfering with military decisions nor becoming committed to acceptance of extra-Constitutional emergency measures into the [b]ody of law and practice of the courts.” By doing so, “we will be a position in the future, as is our duty, to prevent slow erosion of Constitutional freedom.” The Court could act in a subsequent case to stem abuses, if necessary. Meanwhile, the curfew must be obeyed.

In another draft opinion on the same case Jackson frankly acknowledged his discomfort with adjudicating it. He could not find a clear, final answer for the dispute in the Constitution. A move to invoke the President’s war powers could very well install an absolute authority, not restricted by such checks and balances. But substituting “the mere personal will or opinion of judges for the personal will of the Executive would be a different kind of absolutism,” he wrote. “If we cannot apply fairly definable legal standards” in such instances, “it would be better in my opinion both for the war and for the law that we refrain altogether from considering the validity of military orders, leaving
them to rest upon the political responsibility of the President, unquestioned and unrationalized by any judicial process.”

Jackson denied that the Fifth Amendment’s Due Process Clause offered definable legal standards for assessing the use of war powers in the Hirabayashi case or any other. The Due Process Clause, he noted in the same memorandum, “has been termed a clause of convenient vagueness.” He considered the clause as an “overworked” portion of fundamental law. “It is difficult to apply to a war power of such indeterminate content a maxim of such indefinite meaning and not come out with any result more respectable than a personal opinion.” The founding generation provided a better standard—one that he would continue to guide him on the bench. The founders were convinced that citizens have “the right to be free of all authority that rules by strength instead of reason,” he continued. “This idea, partly ethical and partly legal, that government is bound to observe the spirit of fair play and continuously to justify itself by pointing to reason rather than to power is about all I can make out of the due process clause.” He confessed that “This is a frail and flexible reed to hang a legal judgment upon, but it is the best we have.” Guided by this notion of due process, Jackson found “there was proper occasion for invoking the war power in the West Coast area as a probable zone of operations and to make it ready for possible hostilities.”

But a year later, in a related case involving military rule on the West Coast Jackson expressed his hostility toward federal policies that denied procedural safeguards guaranteed to citizens under the rule of law, even during national emergencies. In Korematsu v. United States he strongly dissented from the Court’s decision to uphold the arrest of a citizen under a blanket authorization forcing the relocation of Japanese-
Americans. The ruling offended his assumption about how republican government must operate under the Constitution. He pointed out that the military orders made a citizen’s “innocent act” of living in a particular area “a crime merely because the prisoner is the son of parents to whom he had no choice, and belongs to a race from which there is no way to resign.” Quoting Article III, Section 3 of the Constitution, Jackson reminded his colleagues that the federal government was prohibited from punishing treason by “corruption of the blood, or forfeiture except during the life of the person attainted.”

Imposing a military curfew during wartime was one thing, the relocation of citizens on the basis of ethnic identity quite another. He conceded that “defense measures” adopted during a period of war are often “outside the limits that bind civil authority in peace.” Even so, “if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient,” he wrote. The majority’s opinion to embrace military direction of the rule of law was “a far more subtle blow to liberty than the promulgation of the order itself.”

Despite his own objections and those of two other dissenters, Jackson declared that the Supreme Court was not the ultimate barrier to usurpation by military rule. As he had argued in Hirabayashi, the republican system called for action by another quarter. The voters themselves were the final arbiters of how far wartime dangers could justify exception to the rule of law. “I could not lead people to rely upon this Court for a review that seems to me wholly delusive,” he concluded. “If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint.” The “chief restraint” on those who wield such power “must be their
responsibility to the political judgments of their contemporaries and to the moral judgments of history.”

If judicial statesmanship involved confronting the dilemma of weighing social order with personal liberty during World War II, a different challenge severely tested this responsibility after 1945. The emerging Cold War with the Soviet Union spawned anxiety about potential international confrontation as well as extensive litigation over governmental policies implemented for the purpose of national security. The vexing difficulty of these cases forced Jackson to reaffirm his case-by-case analysis, as well as his own operating assumptions.

Potential damage to the nation by Communist Party members and sympathizers made special investigative techniques and legal requirements necessary, according to his assessment. He concurred with a 1950 decision involving the National Labor Relations Act, for example, in agreeing that First Amendment claims did not transcend the measure’s prohibition of “political strikes” by labor organizations. Jackson wrote that the Communist Party “may Constitutionally be treated as something different in law” because of the evil it harbored as an organized, clandestine conspiracy to destroy the national government. At the same time, he emphasized that the decision should not “become a precedent for suppression of any political opposition compatible with our free institutions.” But the act’s requirement of an oath by labor union leaders declaring that they did not believe in Communist Party dogma, for example, struck him as outside the permissible reach of governmental intrusion.

He took pains to explain the distinction. A citizen must be able to exercise the right of deciding public policy. At the same time, the government could lawfully restrict
activities by underground revolutionary groups. “While the governments, state and federal, have expansive powers to curtail action, and some small powers to curtail speech or writing, I think neither has any power, or any pretext, directly or indirectly to attempt foreclosure of any line of thought,” Jackson declared. “Our Constitution relies on our electorate’s complete ideological freedom to nourish independent and responsible intelligence and preserve our democracy from that submissiveness, timidity and herd-mindedness of the masses which would foster a tyranny of mediocrity,” he continued. “The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will.”

He also pointed out how this position squared with his previous opinions in such cases which involved the demarcation between desirable governmental policy and the individual citizen’s rights. “I adhere to views I have heretofore expressed,” Jackson declared. The individual’s right to entertain an unlimited freedom of thought must not be abridged. But in cases which raised issues associated with national security, the Court “must reject as false, claims in the name of civil liberty which, if granted, would paralyze or impair authority to defend the existence of our society.” Justices must also “reject as false, claims in the name of security which would undermine our freedoms and open the way to oppression.”

In the following year the Court upheld the prosecution of a group of Communist Party members under the Smith Act, a measure that exacted punishment for individuals who conspired to commit a range of behaviors associated with advocating “overthrowing or destroying any government of the United States by force or violence” or “the assassination of any officer of such government.” Adopted in 1940 and amended several
times, the law was effectively utilized by federal prosecutors to suppress the Communist Party’s activities. In his concurring opinion, Jackson found that the case “requires us to reappraise, in light of our own times and conditions, constitutional doctrines devised under other circumstances to strike a balance between liberty and authority.” The First Amendment offered no protection for “advocating or teaching overthrow of government by violence or force.”

The group’s assertion that the party members posed “no ‘clear and present danger’ of imminent or foreseeable overthrow” because of their association was not persuasive to him. The Clear and Present Danger test had been formulated a generation earlier by Oliver Wendell Holmes and Louis Brandeis. It called for punishment of speech only if it imminently portended an illegal action. Jackson explained that the test was a “rule of reason” available to judges under Constitutional authority. He noted that the defendants in Dennis argued that no “‘clear and present danger’ of imminent or foreseeable overthrow” existed and thus, they should presumably be shielded by the First Amendment. In cases involving “a hot-headed speech on a street corner, or circulation of a few incendiary pamphlets, or parading by some zealots behind a red flag, or a refusal of a handful of school children to salute our flag,” he continued, jurists may “gather, comprehend and weigh the necessary materials for [a] decision.” They can assess whether the action “is a clear and present danger or a harmless letting off of steam.”

For the case at hand, he found that the conspiratorial objectives of party members undermined the strength of First Amendment protections. Both statutory law and older doctrines of judicial remedy were inadequate to the task. As he wrote in a draft opinion, Jackson was convinced that Congressional provisions for “dealing with revolutionary
radicalism lags at least two generations behind Communist Party technique.’” The national legislature had not effectively addressed the nature of the complexity and scope of the problem. In addition, the laws already in force were written with “such generality and sweep” that the Court must find a “limiting principle” so the Justices could make them “definite and certain enough for specific application without applying to Constitutionally protected activities or matters outside” their purposes. The “Holmes-Brandeis slogans” of the Clear and Present Danger test were aimed at the “prosecution of highly localized movements, acts, speeches or demonstrations.” The nation now faced “a tightly organized, largely secret, rigidly disciplined” organization. Applying the Clear and Present Danger test to Dennis would give the Court no “realistic analysis” of the threat or an aid in reconciling “the threat between liberty and authority which the Communist program precipitates.” So he endorsed the majority’s position that the Clear and Present Danger test’s stipulation of immediate unlawful action should be eliminated. In its place, the Court fashioned a “Grave and Probable Danger” test that emphasized the “gravity of the evil” posed by groups loyal to totalitarian ideologies. The degree of threat, as measured by the Court, warranted an “invasion of free speech.”

In an address delivered in the same year at Buffalo Law School Jackson explained how he conceived of such a restriction of speech under the Constitution. He divided the Bill of Rights into two groups. One group, characterized as “procedural safeguards,” was “addressed to courts and judges and [they] tell us how we shall manage the judicial process.” He included in this group the Fourth, Fifth, Sixth, Seventh and Eighth Amendments. In summary fashion, he added that the remaining provisions “embody political policies essential to a free society, and admonish primarily the political branches
of government.” Tellingly, Jackson allowed an opportunity to expound upon the First Amendment as well as the other “political policies” to pass. Instead, he offered a general statement that assertions of its provisions to state and local government through the Fourteenth Amendment had produced much litigation since 1940. He devoted the majority of the speech to pointing out the vulnerability of civil liberties to restriction during “times of anxiety,” such as wartime and the contemporary tensions generated by the Cold War with the Soviet Union. Jackson pointed out that the “Bill of Rights were all adopted at one time and were designed to present a comprehensive and integrated pattern of a free society. The Constitution assigned no priority among them.” He added that “Each liberty found in our Bill of Rights furnishes a sort of lateral support for every other, and when one is withdrawn or deferred the foundations of all are weakened.” Judges who must make decisions about questions posed in the name of liberties against government actions were obliged to weigh the rights of citizenship versus the duties of authority to preserve order. The challenge “is not between a right and a wrong—that never presents a dilemma. The dilemma is because the conflict is between two rights, each in its own way important.” Jackson predicted that despite momentary failures, “the common sense of the American people will preserve us from all extremes which would destroy our heritage.”

Jackson’s assumption about the procedural limitations upon governmental power led him to reject a 1953 ruling on the indefinite federal detention of a resident alien. Much like his dissent in Korematsu, he found that national security defense measures must not overwhelm such limitations. His opinion focused on government claims that an alien who had traveled to Romania, then returned to the U.S., should be permanently
excluded from entry into the country because he was a national security risk. In the meantime, the man was held at Ellis Island awaiting an offer from a foreign country to accept him. The Attorney General refused to divulge the reasons for the action, stating that disclosure “would be prejudicial to the public interest.” The Court majority upheld both the detention and withholding the reasons for it under the emergency provisions of the Passport Act, adopted by Congress in 1950.\textsuperscript{54}

Jackson dismissed the government’s internment policy as an attack upon a basic right. “Executive imprisonment has been considered oppressive and lawless since John, at Runnymede,” he wrote. The lack of procedural safeguards available to a resident alien threatened the rights of every citizen. Procedural due process “yields less to the times, varies less with conditions, and defers much less to legislative judgment” than substantive versions of the doctrine, Jackson argued. He pointed out that the “most scrupulous observance” of procedural due process “including the right to know a charge, to be confronted with the accuser, to cross-examine informers and to produce evidence in one’s behalf is especially necessary where the occasion of detention is fear of future conduct, rather than crimes committed.” If the procedures followed in this instance were “unfair to citizens, we cannot defend the fairness of them when applied to the more helpless and handicapped alien.” Although Congress possessed authority to exclude certain aliens from this society as it saw fit, Jackson acknowledged, “it may not do so by authorizing United States officers to take without due process of law the life, the liberty or the property of an alien who comes within our jurisdiction.” He made clear his displeasure with the detention by adding: “It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country.”\textsuperscript{55}
In an initial composition of the dissent he summarized the matter in terms of contrasting absolutes. “We must do one of two things, either the Court will sanction the failure of the deportation policy as applied to the petitioner, or it will sanction the failure of habeas corpus to secure a judicial hearing for one detained on grounds of security.” He subsequently volunteered a much more personal view. Although he discarded this material in the final draft, it indicates how Jackson’s position in this case was closely linked with his previous opinions on the bench and in his extra-judicial writings. The “simplicity of my origins and the mediocrity of my attainments leaves me still believing that something in the mysterious order of the universe gives a man, just because he is a human being[,] certain dignities and personal immunities which no man and no government can trample or invade,” he insisted. “Sympathetic as I am with the efforts to protect this country against Communist infiltration, I cannot accept the doctrine that the government may be a party on its soil to the indefinite confinement of any man for secret reasons secretly arrived at.”

IV. Freedom of Thought and Republican Government

Jackson could always be provoked into a championing an aggressive judicial posture when government appeared to dictate the content of thought or belief. In *West Virginia State Board v. Barnette*, decided in 1943, he wrote the opinion for a case that involved a challenge, asserted on the basis of religious belief, against a daily pledge and salute to the United States flag mandated for West Virginia public schools. The challengers argued that as Jehovah’s Witnesses, their children should not be compelled to engage in the patriotic ritual. Jackson responded that
the state requirement involved “a compulsion of students to declare a belief,” not an instruction
about the structure and organization of the government. “One’s right to life, liberty and property,
to free speech, a free press, freedom of worship and assembly, and other fundamental rights may
not be submitted to vote; they depend on the outcome of no elections,” he wrote. Although
Jackson listed First Amendment freedoms as examples of such rights in his opinion, he linked his
claim directly to the function of a republican system of governance, and did not invoke a specific
Bill of Rights protection for schoolchildren against state government. “We set up government by
consent of the governed,” Jackson explained, “and the Bill of Rights denies those in power any
legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not
public opinion by authority.”

The required flag pledge and salute struck him as a violation of the private self he
cherished all of his life. By imposing this public ritual, government “invades the sphere of
intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve
from all official control,” Jackson contended. In a ringing conclusion that would be frequently
quoted in subsequent decades, he declared that “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.” Protection of the individual citizen’s liberty of spirit and intellect trumped any
claims public officials might raise to the contrary. Just as significantly, such liberty transcended
arguments on behalf of a specific Constitutional provision. It reflected what Jackson understood
to be the tangible, living expression of sovereign citizenship—of arriving at one’s own beliefs
and opinions without compulsion. Preservation of that right gave the citizen the final prerogative
of determining what the government should or should not do. “I dislike to create a set of
constitutional rights for persons with particular religious views different than for others,” he privately confided to a colleague in a note about the case.58

Despite the broad assertions of the ruling, it actually contained a more restrictive practical meaning. He pointed out that religious belief might not always serve as a conclusive rationale for him as restraint upon governmental action. In addition, resolution of the dispute in Barnette did not depend upon an automatic use of the Fourteenth Amendment’s Due Process Clause. “Much of the vagueness of the due process clause disappears when the specific prohibitions of the First [Amendment] become its standard” in such a dispute, Jackson wrote. A state could regulate a public utility, for example, and “impose all of the restrictions which a legislature may have a ‘rational basis’ for adopting.” But “freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.” In other words, intrusion upon those protections must be justified by the scope of the public good intended for preservation. The First Amendment’s shield could be set aside, given a more persuasive public objective fashioned by government officials. If Jackson could determine a rational link between a limitation on First Amendment rights and a benefit for the larger society, he would sustain the governmental control.59

Two years later, Jackson revealed no patience for what he viewed as governmental suppression of speech without any clear evidence that it threatened the larger community. In this case, he concurred with the majority’s decision to reverse a contempt charge against a labor leader who violated a restraining order issued by a Texas court. State officials had sought the order under a state law requiring that labor organizers apply for an official registration card before soliciting new members. But the defendant ignored the law and addressed a mass meeting of oil company workers, urging them to join a union. In his defense the man argued that the
court’s action restrained the rights of speech and assembly and denied him equal protection of the law.\textsuperscript{60}

Jackson concluded that because the injunction was issued in advance of the address, before the speaker arrived in the state, Texas officials had attempted to shape the content of what listeners would hear. Prior restraint, not a restriction of the First Amendment, drew his ire. He viewed the affair as an attempt to suppress political speech, not regulate a business activity. Although the state could rightfully demand that a citizen apply for a license to conduct an economic pursuit, it “could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views,” Jackson wrote. “The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false.” He added that “Texas did not want to see what [the man] would say or do. I cannot escape the impression that the injunction sought before he reached the state was an effort to forestall him from speaking at all…”\textsuperscript{61}

A 1949 case created by a rogue priest’s incendiary, racist public speech at a Chicago auditorium illustrated his consideration of the practical issues associated with maintaining liberty and order in civil society. City police officers arrested the man for disorderly conduct, an offense for which he was later convicted. The Court majority overturned his conviction on the grounds that the municipal ordinance authorizing such prosecutions violated the free speech provision of the First Amendment. Jackson composed one of his most strident critiques of what he considered to be a false, expansive interpretation of the Bill of Rights without support in either the text of
the Constitution or more than a century and a half of precedent. He claimed that his colleagues in
the majority willfully ignored “fighting words” in the remarks and the presence of two hostile,
unruly crowds of extremists, set at odds over the speech. Such a scene was a “riot” in the
making, severely taxing the ability of police officers to preserve order. The Court, he wrote,
“substituted a dogma of absolute freedom for irresponsible and provocative utterance which
almost completely sterilizes the power of local authorities to keep the peace against this kind of
tactics.”

The speech “was a provocation to immediate breach of the peace and therefore cannot
claim Constitutional immunity from punishment,” Jackson continued. “Under the Constitution as
it has been understood and applied, at least until most recently, the state was within its powers in
taking this action.” He contended that the First Amendment was never regarded by its framers as
an absolute right, overriding concerns about local peace and order in local communities.

By contrast, the Court had vastly extended the reach of the First Amendment in the
case by revising the applicability of the Due Process Clause of the Fourteenth Amendment.
Explaining that he had no quarrel with the evolution of judge-made law since the 1920’s—citing
his opinion in *Barnette* as an example of it—Jackson asserted that the majority’s view of speech
reflected an erroneous, if not dangerous interpretation of the freedom. He pointed out that the
voters themselves had not taken part in creating such a First Amendment theory. The basic
problem stemmed from the Court’s attempt to formulate a new legal doctrine by its own lights.
“I recite the method by which the right to limit the state has been derived only from this Court’s
own assumption of the power,” he wrote. This assumption, “with never a submission of
legislation or amendment into which the people could write any qualification to prevent abuse of

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this liberty” eliminated “the restraint I consider as becoming in exercise of self-given and unappealable power.”

In a draft memorandum, he emphasized that the case did not arise “as a problem of liberty but as a problem of crowd behavior.” Control of “fighting spirit,” as apparent in the priest’s speech, “must be in the local authorities.” City officials “must deal with its incipient stages by closing meetings, clearing streets and taking preventive measure[s], which I think the Constitution does not deny them the power to do.” The majority opinion represented “a paralyzing effect” on elected local leaders based upon the Court’s “appreciation and interpretation of the First and Fourteenth Amendments to the Constitution.”

The choice available was “between liberty with order and anarchy without either,” he wrote in his official position. Resurrecting a statement composed in his draft opinion in Hirabayashi six years earlier, he warned that if the majority failed to “temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”

Three years later he again explored the limits of procedural protections for political speech that threatened to ignite violent responses. Joseph Beaubarnais, a leader of the White Circle League of America, had been convicted under an Illinois law prohibiting various materials that portrayed “depravity, criminality, unchastity, or lack of virtue in a class of citizens, of any race, color, creed or religion…” In a lithograph the defendant had claimed that “If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions…rapes, robberies, knives, guns and marijuana of the negro, surely will.” He appealed his conviction, claiming that the law violated his liberty of speech and press guaranteed against state restriction through the Fourteenth Amendment’s Due Process Clause.
The Court majority upheld the statute and emphasized that “libelous utterances” were not “within the area of constitutionally protected speech.”

In a lengthy dissenting opinion, Jackson acknowledged that although the liberties of speech and press were basic rights of citizenship, they could be restricted by state officials. Study of criminal libel law had convinced him “that the Fourteenth Amendment did not ‘incorporate’ the First, that the powers of Congress and of the State over this subject are not of the same dimensions, and that because Congress probably could not enact this law it does not follow that the States may not.” The distinct powers accorded to the two levels of government permit a “larger latitude” for states under the First Amendment. State officials “have wider range to punish speech which presents clear and present danger of bringing about those evils” they have a right to prevent.

But Jackson also pointed out that the defendant was not given the chance to prove the truth of his assertions, despite what the Justice personally considered to be “reckless and vicious libel.” Beauharnais deserved his day in court to do so. Common law tradition mandated that this “safeguard” be afforded to all libel defendants. “The leaflet was held punishable as criminal libel per se irrespective of its actual or probable consequences” by the Court, Jackson wrote. But “The words themselves do not advocate the commission of any crime.” Thus, the Grave and Probable Danger test, formulated in Dennis, Jackson explained, promised this result.

V. The Religion Clauses

How far he would pursue his defense of the individual’s “private sector” was demonstrated by his acquiescence in the use of the mail as a vehicle for soliciting money on
behalf of fringe religious groups. In a 1946 case he dissented from a ruling that upheld a mail fraud conviction of a family professing their own version of spiritual truth in making such a solicitation. The Court majority held that the defendants’ “belief in their representations and promises” expressed while prospecting for donations could be adjudicated, but the validity of their stated beliefs could not. Jackson was hard-pressed “to reconcile this conclusion with our traditional religious freedoms.” He doubted the Court’s ability to “separate an issue as to what is believed from considerations as to what is believable.” Jackson wrote that some believers in all religious groups use symbolism “with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges. It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches” or whether a teacher’s own belief “induces followers to give him money.” He warned of the implications the ruling left for the individual believer. “Prosecutions of this character could easily degenerate into religious persecution.”

His reluctance to override the government’s regulation of expression also appeared in disputes provoked by citizens claiming Free Exercise Clause protection of door-to-door sales of religious literature. Jackson had already prepared an initial response for such a question in his draft opinion for Jones v. Opelika. A series of 1943 cases involving local regulation of the direct distribution and sale of printed materials moved him to bracket the claims of First Amendment protection of religious expression within a concern for the larger community. The cases all raised a challenge by Jehovah’s Witnesses to local ordinances which required licensing for door-to-door sellers. In Murdock v. Pennsylvania and Martin v. City of Struthers Jackson dissented from the majority’s support of the challengers. He found the Court to have overlooked the disruption caused by aggressive sales and proselytizing. In Douglas v. City of Jeannette he concurred in
reversing a district court’s decision to overturn a municipal ordinance regulating door-to-door sales, but split from the majority’s opinion in support of the challengers because it asserted a Constitutional guarantee for “activity which it is claimed no public authority can either regulate or tax.”

Jackson singled out the tactics employed by the Witnesses as a reason for close review of their First Amendment claims against local licensing. He was not “convinced that we can have freedom of religion only by denying the American’s deep-seated conviction that his home is a refuge from the pulling and hauling of the market place and the street.” Government, he insisted, “cannot let any group ride roughshod over others simply because their ‘consciences’ tell them so.” Jackson accused the Court of “adding a new privilege to override the rights of others [for] what has before been regarded as religious liberty.”

He never accepted the notion that religious liberty allowed a citizen to disrupt the lives of neighbors or overwhelm local management of social order. He stated the same position in a 1948 case involving a local community’s regulation of speech in public places with another dissent. The dispute stemmed from action taken by the chief of police in the city of Lockport, New York. Acting under a city ordinance, the officer refused to issue a Jehovah’s Witness minister a permit so that he could make public addresses with electronic amplification in a public park. Although the police chief had previously furnished the man a permit that allowed him to make speeches in the park on four successive Sundays, he refused to provide a second authorization because of complaints made by other citizens. The man continued to make addresses in the same location and was convicted in local court of violating the ordinance. After having received the case on appeal, the Supreme Court ruled that the vagueness of the ordinance gave the police chief the power of prior restraint over speech, thus overturning the conviction.
The majority’s ruling “seems to me neither judicious nor sound and to endanger the great right of free speech by making it ridiculous and obnoxious, more than the ordinance in question menaces free speech by regulating use of loud-speakers,” Jackson complained. He denied that the case posed a First Amendment issue. The problem was that a citizen decided to place in a city’s “streets, parks and public places, a temporary address system, which certainly has potentialities of annoyance and even injury to park patrons if carelessly handled.” The Court had handed down “a startling perversion of the Constitution to say that it wrests away from the states and their subdivisions all control of public property so that they cannot regulate or prohibit the irresponsible introduction of contrivances of this sort into public places.” He contended that the Court had taken a step toward abolishing the legitimate boundaries of federalism by interfering with local concerns and legislating for the city. Jackson quoted from the majority opinion written by Justice William O. Douglas to complete his point: “It is for the local communities to balance their own interests—that is politics—and what courts should keep out of.”

In a passage included in a draft memorandum, but deleted from his final copy, he resurrected his decade-old assessment of Roosevelt’s Court reform proposal. The Court, he charged, was guilty of imposing its own view of an ordinance. “We can interfere with the state only by applying the due process clause to strike down state action,” Jackson asserted. “The excessive use of the due process clause to put strait jackets on the states was one of the causes of the proposal for reorganization of this Court lately made by President Roosevelt and supported by a substantial number of the present members of the Court.” By striking down the city regulation, the majority had adopted “the same abuses and excesses that we protested against when not vested with authority.”
Jackson continued to argue the point for the rest of his life. In a 1951 letter he compared his criticism of the Court before 1937 with his opposition to rulings such as the Lockport permit decision. He noted that “President Roosevelt’s idea of a ‘liberal’ Court was one that did not project its ideas of economic and social problems into the law. I still agree with that viewpoint.” According to the Justice, “it has become the fashion in some quarters to call ‘liberal’ those who would read their views into the Constitution because the views that they would read in are more agreeable to them than the views which the Court was reading in before the Roosevelt era.”

The same critical eye with which Jackson examined a citizen’s abuse of religious liberty also informed his assessment of governmental initiatives that sanctioned a religious faith. Such actions invaded the private domain he routinely sought to protect. As public sentiment embraced a focus on the family and values endorsed as “traditional” in the decade after World War II, a number of state and local governments adopted specific measures which offered public support for religious instruction. Legal conflict over such actions was inevitable, given the nation’s religious diversity and its Constitutional prohibition against establishment. In the 1947 case of Everson v. Board of Education of Ewing Township, for example, the Court addressed a challenge to a New Jersey law authorizing travel reimbursements for parents of children who were transported to and from parochial schools on a public bus system. Writing for the Court, Justice Hugo Black argued that his interpretation of the religion clauses would provide a resolution for the dispute. Borrowing Thomas Jefferson’s phrase penned in letter to a Connecticut Baptist group, Black wrote that the clause required “a wall of separation between Church and State.” But the Free Exercise Clause, he continued, prohibited the state from excluding people of any faith or non-believers from “receiving the benefits of public welfare
legislation.” The reimbursement program gave the same tax-supported benefit to any parent with children in parochial school. Thus described, the reimbursement program was not a violation of the Establishment Clause.\textsuperscript{77}

Jackson dismissed Black’s conclusion, noting that the “undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters.” In Jackson’s view the reimbursement program was not a public service. It did not include all private schools, for example. The law established a religious test for receiving tax money because most of the recipients were Catholics. The “character of the school, not the needs of the children determine the eligibility of parents for reimbursement,” he wrote.\textsuperscript{78}

In a passage that reflected his understanding of personal faith and thought, Jackson characterized public schools as places where “secular education can be isolated from all religious teaching” while pupils can gain “all needed temporal knowledge.” After the pupil has “has been instructed in worldly wisdom he will be better fitted to choose his religion.” The religious freedom prescribed by the First Amendment, he wrote, “keeps the state out of religion and religion from getting control of public policy or the public purse.” The Court’s decision had “immeasurably compromised” this premise.\textsuperscript{79}

Jackson also used the opportunity to highlight the contrast he perceived between Everson and the Jehovah’s Witnesses cases such as Murdoch v. Pennsylvania. “This Court has gone a long way, if not an unreasonable way, to hold that public business of such paramount importance as maintenance of public order, protection of the privacy of the home, and taxation may not be pursued by a state in such a way that even indirectly will interfere with religious proselyting,” he wrote. The irony struck him as obvious. “Religious teaching cannot be a private
matter when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all.” Jackson also cited *Wickard v. Filburn*, a 1942 Commerce Clause case, for which he composed the Court’s definitive opinion, to point out that “what government subsidizes, it can potentially regulate.”

In *McCollum v. Board of Education*, decided in 1948, the Court rejected an Illinois school district’s policy of giving religious teachers access to public schools for thirty minutes each week so they could instruct pupils with faith-based lessons. Written by Justice William O. Douglas, the decision emphasized the Jeffersonian call for a wall of separation between church and state. Jackson concurred, but repeated a viewpoint he had expressed nearly a decade before by warning that the tribunal “should place some bounds on the demands for interference with local schools that we are empowered or willing to entertain.” The federal judiciary is only called upon to interfere with “local autonomy” when a citizen is forced to accept a religious rite or instruction or taxed to support a religious establishment, he wrote. The Court “must have some flexibility to meet local conditions, some chance to progress by trial and error.”

According to Jackson, a clear-cut rule for banishing all forms of religion in the classroom was neither practical nor reasonable. Religious influences permeated general society and gave meaning to life for most citizens. “Neighborhoods differ in racial, religious and cultural compositions,” he added. “And it must be expected that they will give emphasis to different values and induce different experiments.” In a prescient declaration he added that if the Court embraced a “sweeping constitutional doctrine,” it would become “a super board of education for every school district in the nation.” Control of a vital local issue would pass to a federal court,
thereby eliminating decision making by a citizen majority—the basic feature of republican governance.\textsuperscript{82}

Four years later in a dispute over New York City’s program of released time offered to public school students who sought religious instruction off campus posed a similar question. At specified times, pupils whose parents approved could leave school during regularly scheduled class periods and return to their institutions after their religious classes ended. Students who did not attend such classes remained in the classrooms at their schools. Writing for the majority, Justice William O. Douglas found that the program did not violate the Establishment Clause because the religious teaching did not occur on school grounds and was not paid for by tax dollars.\textsuperscript{83}

In a sarcastic dissent Jackson argued that the released time program was “founded upon a use of the state’s power of coercion, which, for me, determines its unconstitutionality.” Students who do not use the time for its designated purpose are held in “a temporary jail,” he wrote. The opinion implied that the Court had blessed “compulsory godliness.” If any majority could force obedience to its teachings through such a claim, the protections presumably afforded by the First Amendment were worthless in practice. Raising his concern for the individual’s right to intellectual and spiritual freedom as he did in \textit{Barnette v. West Virginia}, Jackson chided the majority for overlooking the fundamental meaning of religious liberty. “The day this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power,” he warned.\textsuperscript{84}

In his conclusion he cited \textit{McCollum}, observing that the “wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected.” A draft of the dissent, later excised, was even more pointed. He took issue with
Douglas’s brief mention of dissenting views in the Court’s ruling. “The stones presently cast by
the Court against dissenters seem to issue from a glass house. I commend a rereading of
Jeffersonian phrases subscribed by some of the present court” in McCollum, Jackson snarled. A
comparison of the two rulings revealed what he termed “an interesting study in judicial
schizophrenia.”85

VI. Procedural Rights and Post-War Criminal Law

Jackson’s duty on the Court was interrupted for the 1945 term while he performed
extrajudicial service as the chief U.S. prosecutor at the international war crimes trials conducted
by the victorious Allied nations in Nuremberg, Germany. His absence irritated his colleagues by
leaving the Court with potential tie votes while he labored at a full-time duty whose time limit
was unknown. In addition, Harlan Fiske Stone’s death in April, 1946, created the circumstances
for a fit of public anger that Jackson would regret. Frustration at not being named the new Chief
Justice, combined with the stress of his responsibilities at Nuremberg, prompted him to send
cablegrams to the judiciary committees in both houses of Congress. He complained of Justice
Hugo Black’s lack of ethics in refusing to recuse himself in a prior case and even suggested that
the Alabamian had influenced President Harry Truman’s appointment of Fred Vinson as the new
Chief Justice. The episode not only further poisoned Jackson’s personal relationship with Black,
it also corroded his interaction with William O. Douglas, already soured before he left for
Germany. Just as significantly, the affair sullied public perception of the Court with a sordid
display of rancor.86

The experience of prosecuting Nazi leaders who had committed mass atrocities
certainly heightened Jackson’s attention to the suppression of the liberties of citizens by
unchecked governmental power. He would refer to the Nuremberg trials and the evidence presented at those proceedings in much of his later writings, including his judicial opinions. But his work in Germany did little to revise the assumptions he had previously applied as a Justice.

Jackson’s defense of procedural rights conferred by law, combined with his reaction to what he considered as unwarranted encroachments into a citizen’s private self, continued to provoke his rejection of select actions taken by governmental officials. In a 1949 case involving a bootlegger, for example, Jackson discussed at length why he opposed an arrest by federal agents. The defendant had transported liquor from Missouri into Oklahoma, thus violating the latter state’s prohibition law. A Court majority upheld the man’s conviction and denied his Fourth Amendment appeal to overturn the conviction. Although the evidence for the charge was produced after the defendant’s vehicle was searched, the Justices concluded that the federal officers who arrested him had probable cause to suspect that he was indeed engaged in illegal activity.  

In a vigorous dissent Jackson described the stop and search of the defendant’s car as “invasions.” Acknowledging that state officials were under no obligation to obey the Fourth Amendment in the same circumstances, he dismissed the inconsistency in the law with an appeal to local autonomy. He wrote that “local excesses or invasions of liberty are more amenable to political correction” than those committed by federal authorities. The Fourth Amendment “was directed only against the…centralized government and any really dangerous threat to the general liberties of the people can come from this source.”

Jackson claimed that the federal officers had no probable cause to arrest the defendant. He singled out the right to be left alone as a freedom that “differs from some of the other rights of the Constitution in that there is no way in which the innocent citizen can invoke
advance protection.” He added: “I am convinced that there are many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts can do nothing, and about which we never hear.” Faced with discretionary search and seizure by federal officers, a citizen has “no opportunity for injunction or appeal to disinterested intervention, a sharp contrast to the freedoms of press or religion for which court may offer relief.” In this case the officers’ search of a vehicle put them “in a position of one who has entered a home: the search at its commencement must be valid and cannot be saved by what it turns up.”

General protection of personal liberty served as the key to his argument. Jackson categorically rejected a preferred freedoms argument, as he explained in a draft of the opinion. He noted that the case raised a question of “determining reasonableness as between the claims of privacy and the claims of law enforcement.” In his view “some discrimination is to be made based on the gravity of the offense as an immediate injury to society.” Following the position he expressed as Attorney General, he contended that the kidnapping of a child, for example, would likely justify an area-wide roadblock and a search of every vehicle driven through it. But illegal searches for control of acts which have “no immediate threat to life and limb” make the liberty of citizenship a hollow vessel. “Among deprivations of rights,” Jackson wrote, “none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart.”

In a concurring opinion written for a different case decided in the same year, Jackson explained again why he would uphold regulatory action by state and federal governments to facilitate order and peaceful interaction among citizens. Regulation might require restrictions of the time, place, content and method of expressing those rights, according to his estimation. The vagueness of due process did not provide an adequate constitutional measurement of such
restriction. He contrasted the application of the Due Process Clause with the Equal Protection Clause, expressing his own position. “My philosophy as to the relative readiness with which we should resort to these two clauses is almost diametrically opposed to the philosophy which prevails on this Court,” he wrote. The tribunal rarely sustained complaints based upon equal protection, but frequently employed due process “to strike down measures taken by municipalities to deal with activities in their streets and public places which the local authorities consider to create hazards, annoyances or discomforts to their inhabitants. And I have frequently dissented when I thought local power was improperly denied.”

Privately, the matter festered in his thoughts. In a letter written to a friend in December, 1949, Jackson confessed that “One sits here and wonders whether our people have forgotten what federalism means…” He doubted “whether even the bar knows what the place of the judicial process is, when one sees so many lawyers frankly urging a use of it that is only comparable to the use we complained of in the famous Court fight.”

Despite such pessimistic appraisals, his own assumptions about federalism and procedural due process remained consistently on display. His opinion for a 1953 case that raised a challenge to the placement of a microphone in a suspected bookmaker’s home was a typical example. Local police officers in California had entered the home several times to install the device surreptitiously without a warrant so they could record conversations between the suspect and his wife. Jackson, author of the Court’s majority opinion, denounced the use of “frightening instruments of surveillance and invasion of privacy.” He found that “Few police measures have come to our attention that more flagrantly, deliberately and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government…” But Jackson was not willing to reverse the defendant’s conviction. Instead, he found that the charge
was sustained by the evidence—however obtained. But the defendant could still pursue a legal redress against an illegal search under federal statutes.\footnote{93}

In a draft passage deleted from the final text, he explained that the “sorry misbehavior of the officers does not mean that a conviction based on their testimony can be set aside by us.” Evidence produced by an “illegal search,” he contended, “is not inherently incredible like that turned out by coercing a confession. Indeed, an unlawful search may yield the most reliable evidence, and in this case there is no apparent reason why this jury could not have believed the officers despite the methods used to overhear petitioner’s conversations.”\footnote{94}

Jackson adhered to \textit{Wolf v. Colorado}, decided four years earlier, allowing the use of evidence from illegal searches in federal court. He pointed out that only sixteen states had followed the federal rule of excluding illegally obtained evidence when \textit{Wolf} was decided. In his opinion, “to upset state convictions even before the states have had an adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power.” More importantly, the Supreme Court itself had been “inconstant and inconsistent” on the issue. The Court would be guilty of introducing “vague and subjective distinctions” into criminal law in the states if it proceeded to apply a new rule of procedure for police work.\footnote{95}

Sometimes the juxtaposition of upholding state autonomy and adhering to existing procedural protections in criminal cases exacted an anguished silence. For example, a case taken up during the 1946 term involved the spectacle of a botched official execution. The Court’s decision would determine the fate of an African-American man who had been sentenced to death by a Louisiana court. At the appointed time of execution, the system controlling the state’s electric chair had malfunctioned and failed to deliver a lethal current. The defendant’s attorneys appealed the state’s attempt to carry out a second attempt at execution, protesting that it would
violate the Fifth Amendment’s barrier against double jeopardy as well as the Eighth Amendment’s prohibition against cruel and unusual punishment.96

Jackson joined the five-Justice majority in upholding the state’s decision to proceed with a second execution. In a concurring opinion that did not appear in the official ruling, he spelled out his disagreement with the minority side. He wrote that “judges are servants, not masters, of society and it is society’s laws that should govern judges. So long as society adheres to its policy of death penalties, it is for us in individual cases to apply the policy of the law…” The failure of the electric chair did not somehow turn authority over the case to the federal government. States had retained reserved powers since the Constitution was adopted. He noted that the framers’ “purpose of adopting a federal instead of a unitary form of government was to allow each state to retain some individuality in such matters.” Justices who proposed that the Court should intervene in the case could not clearly explain the Constitutional basis for their position. “There is a world of difference to me between what a state in decency ought to do and what we as a matter of constitutional law may compel it to do,” Jackson argued. “And nothing demonstrates the lack of fixed standards of due process by which we are assuming to direct the conduct of state courts more than the opinions in this case which wage a battle over the catchword ‘decency.’” A Justice should follow “a disciplined and impersonal decency which expresses society’s will and the policy of the law—a quite different thing from personal bias or dislike.”97

Five years later, in Williams v. United States, Jackson arrived at a similar conclusion in a case involving a Miami police officer who was charged with attempting to beat confessions from four men who were suspected of having stolen property from a lumber company. The officer and several colleagues were found to have committed this action while working as private
security guards for the company during a period when they were not on regular duty. The complaint was based upon a federal statute that prohibited the “deprivation of any rights, privileges or immunities secured or protected by the Constitution and laws of the United States” as well as the Due Process Clause of the Fourteenth Amendment. The Court affirmed the conviction with an opinion written by William O. Douglas.\textsuperscript{98}

While pondering the Williams case, Jackson explained his dissatisfaction with the majority’s position in a memorandum that he did not issue as an official dissent. “Like other judges, I am impressed that the acts of the defendant were reprehensible and ought to be punished,” Jackson wrote. “It is a shame of the state that it did not promptly do so and I think the shame would eventually force action in cases of this kind if the federal government would not rush in and seize the case and the headlines.” He complained that “Those who are so zealous for civil rights constantly eulogize one or two of the selected paragraphs of the Bill of Rights, which they set up as the authorization of the complete disregard of the remaining ones.” The nation’s founders, “as part of the Bill of Rights, included the Tenth Amendment,” Jackson continued. “They regarded this as a protection for our liberties fit to stand on a par with any of the other Amendments.” The majority opinion, he wrote, sanctioned a broad range of federal intervention against state and local public officials in the name of civil rights, a change in Constitutional law that “is to my mind a greater blow at liberty in this country than anything the interpretation will prevent.” The ruling will fuel “demands for enlarged appropriations to enforce it and the creation of what will be indistinguishable from a federal police.”\textsuperscript{99}

In another version of the memorandum, he added: “That the friendless, propertyless and illiterate are the chief victims of this form of oppression not only appeals to my own sympathy for the underdog but brings into being powerful and vocal pressure groups which insist
on the use of federal power at any price to stop it.” But as “Bad as the third degree is, I think we
should not use the judicial power to transfer this process to the Federal Government.” The case
implicated the “shortcomings of popular government” because local officials failed to curtail
such behavior by public officers, not “the propriety of judicial action.” In the final case decision
Jackson dissented simply by referring to his opinion in the 1945 case of Screws v. United States.
In that dissent Jackson argued that the state of Georgia, not the federal government, was
responsible for prosecuting three local police officers in the brutal murder of an African-
American man arrested for tire theft.100

One month after Williams was decided, a separate case involving poor defendants
drew a decidedly different response. The legal argument raised what Jackson decided was a
necessity to intervene into the state judicial process because of gross violations of procedural
safeguards. Four African-American men had been found guilty of rape in a Florida court. The
U.S. Supreme Court reversed the conviction in a per curiam ruling. Jackson added a concurrence,
explaining why he accepted the majority’s verdict but not the reasoning. He specifically
dismissed the majority’s reliance upon racial discrimination against the defendants in jury
selection as a matter of “theoretical importance.” The real problem appeared in the “prejudicial
influences outside the courtroom,” he observed. Those influences exerted “such force that the
conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a
legal gesture to register a verdict already dictated by the press and the public opinion which it
generated.” Newspaper owners and editors had aroused public hostility to any claims of
innocence by the accused men, even to the point of falsely announcing that the defendants had
confessed. The First Amendment right of the press, Jackson wrote, “may not deprive accused
persons of their right to a fair trial.” Although glossing over the problems of a segregated society,
he found that the formal court proceedings had not provided a fair hearing of evidence and effective cross-examination. “These convictions,” Jackson concluded, “accompanying by such events, do not meet any civilized conception of due process of law.”

VII. Racial Segregation

By 1952 the Court had begun to consider a number of direct challenges to segregation in public schools. Initially unwilling to issue an edict that would overturn a practice enforced by laws in 17 states, accepted by Congress and sanctioned by a Supreme Court precedent, Jackson mulled over the arguments asserted by the plaintiffs. While doing so he even sought advice from Stanford University law professor Charles Fairman. Jackson wrote to Fairman and referred to his own discussion of federal judicial intrusion into local affairs published more than a decade earlier. “I really did, and still believe the doctrine on which the Roosevelt fight against the Old Court was based—in part that it had expanded the Fourteenth Amendment to take an unjustified judicial control over social and economic affairs,” Jackson explained. He listed a number of legal questions raised by a possible decision to strike down the practice of school segregation, including an assessment of the original meaning of the Fourteenth Amendment and the effect of Congressional acquiescence in allowing such schools to exist, as well as the likely impact a ruling against segregation in schools would have elsewhere in society.

Jackson discussed the matter at length with the new Chief Justice, Earl Warren. He eventually agreed to join a majority opinion in Brown v. Board of Education, ending segregation in public school. How he arrived at a conclusion that allowed him to accept Warren’s opinion is as significant as his endorsement of it. In a draft concurrence, revised several times but never
issued, Jackson developed an analysis allowing him to approve a judicial intervention into local communities, despite a routine opposition to it throughout his tenure as a Justice.\textsuperscript{103}

He first wrote an overview of the extent of popular opinion supporting segregation, emphasizing that public attitudes reflect “fears, prides and prejudices which this Court cannot eradicate” by a ruling. “The plain fact is that the questions of constitutional interpretation and of the limitations on responsible use of judicial power in a federal system implicit in these cases are as far-reaching as any that have been before the Court since its establishment,” he added.\textsuperscript{104}

Jackson could find no grounds for overturning the practice by study of either the original intention behind the Fourteenth Amendment’s Due Process and Equal Protection Clauses or their interpretation since the Reconstruction era. Existing federal law did not condemn segregation. “I simply cannot find in the conventional material of constitutional interpretation any justification for saying that…maintaining segregated schools any state or District of Columbia can be judicially decreed, up to the date of this decision, to have violated the Fourteenth Amendment.”\textsuperscript{105}

He added that the Amendment gave Congress the power to enforce its provisions, but lawmakers had not used it as a tool for abolishing segregated schools. The Court could not be a substitute for action the Congress had been unwilling to take. By “embarking upon a widespread reform of social customs and habits of countless communities we must face the limitations on the nature and effectiveness of the judicial process,” Jackson warned. Previous Supreme Court rulings requiring equality in separate facilities have been “an empty pronouncement” because the tribunal could not apply sanctions against individuals who were not before it in a specific litigation. The Court might strike down laws which maintain segregated schools, but only the “Congress can enact a policy binding on all state and district.” Given the national legislature’s
inaction on the matter, the suits urged “that we must act because our representative system has failed,” Jackson declared. But such a claim alone could not overcome either the separation of powers specified by the Constitution and accepted as longstanding doctrine or his own commitment to local autonomy. “The premise is not a sound basis for judicial action,” he wrote.106

Next, he turned his attention to racial distinctions. In previous decades jurists made “reasonable classifications” of its inhabitants, according to the reality of everyday social life. Equal protection, Jackson continued, “requires that the classifications of different groups rest upon real and not upon feigned distinctions, that the distinctions have some rational relation to the subject matter for which the classification is adopted, and that the differences in treatment between classes shall not go beyond what is reasonable in the light of the relevant differences.” A “factual assumption” about African-Americans” by earlier jurists identified “differences between the Negro and the white races, viewed as a whole, such as to warrant separate classification and discrimination.” But, in a key assertion, Jackson acknowledged that the “handicap of inheritance and environment has been too widely overcome today to warrant these earlier presumptions based on race alone.”

Arguing that “It is neither novel nor radical doctrine that statutes once held constitutional may become invalid by reason of changing conditions,” he reached a basis upon which he could join the majority. Segregation in public schools must be abolished because the differences between the races had begun to disappear and would continue to do so. “I am convinced that present-day conditions require us to strike from our books the doctrine of separate-but-equal facilities and to hold invalid provisions of state constitutions or statutes which
classify persons for separate treatment in matters of education based solely on possession of colored blood,” Jackson concluded. 107

His professed optimism about “Negro progress under segregation” may strike latter-day readers as naïve, at best. But he believed the point in earnest. In private correspondence Jackson reiterated his personal belief that state-imposed segregation was vestige of the past, already disappearing from 20th Century life. Challenges to segregation in institutions of higher education portended the future. This group of cases, he wrote, “shows pretty conclusively that the segregation system is breaking down of its own weight and that a little time will end it in nearly all states.” The practical reality of the 1950’s, as he saw it, guaranteed a permanent change in the status of African-Americans, even if representative government was not yet prepared to bless the transition. This reality created the legitimate basis for agreeing with the Court’s ruling in Brown v. Board of Education. 108

The Brown ruling squared with Robert Jackson’s penchant for focusing on the circumstances of a given case and the balance he sought between personal liberty and social order. He had arrived at a conclusion that bridged the requirement for a stable rule of law with the needs of society. Although not rigidly deferential to the elected branches of the central government, his position represented a decision that at least reflected the trusteeship position he believed a liberal judge should exemplify.

VIII. A Final Message

In an oral history interview conducted over a series of sessions in the early 1950’s, Jackson reflected upon his many years of intellectual wrestling with such cases. He said he
believed “there ought to be a certain adherence to precedent” and that judges should “approach each case without, predilections.” But, he pointed out, some cases posed a daunting challenge. “In constitutional matters it’s very difficult to draw the line as to where your views of good policy end and your views of law begin,” especially when “applying the Bill of Rights, where you have simply a series of majestic generalities which you have to apply to concrete situations.” He also seemed to agree with Leonard Levy’s comments about the influence of a Justice’s predilections. “Many of our cases turn on your views of political policy, governmental policy,” Jackson declared. “I don’t mean whether you’re a Republican or a Democrat, but perhaps whether you’re a strict constructionist, or a liberal constructionist, or whether you believe in the policy that a given statute will promote. Your view of the Bill of Rights and the balance that must be drawn between authority and liberty, between stability and progress, will affect your decisions.”

But in a series of essays written for delivery as the 1955 Godkin Lectures at Harvard and published after his death, Jackson insisted that the corpus of his work would “demonstrate the consistency” of his outlook. “Perhaps the most delicate, difficult and shifting of all balances which the Court is expected to maintain is that between liberty and authority,” he wrote. “Judicial power to nullify a law duly passed by the representative process is a restriction upon the power of the majority to govern the country…” The Court, he continued, “from time to time makes and alters the law of the Constitution.” If the tribunal “goes too far in interfering with the process of the majority, it will again encounter a drive against its power or personnel” much like the 1937 court-packing plan. “My philosophy has been and continues to be that such an institution…cannot and should not try to seize the initiative in shaping the policy of the law, either by constitutional interpretation or by statutory construction.”
Jackson’s treatment of civil liberties disputes prevented him from winning a permanent majority of his colleagues to his side. As the Court increasingly favored substantive readings of the Bill of Rights in challenges made by individuals against actions undertaken by government, he was left to mount a rear-guard defense of what he believed was the core role of the federal judiciary. As a result, he appeared to be a conservative who opposed the truism that fundamental law changes over time. But he retained a conviction that both the Constitution and legal tradition required a “neutral” position on the bench, reaffirming procedural protections, despite powerful calls for federal judicial intervention on an array of civil liberties causes during his tenure as a Justice.

He was fully aware that he had composed variable answers for similar cases. A year before he died, in an address on the life and career of Justice Louis Brandeis, Jackson delivered remarks that he could have easily applied to his own service on the Court. The jurist worthy of the title, Jackson stated, “rejects the cynicism which teaches that really there is no law, only a manipulation of words that are the whim of the judge and his opinion, symbols to rationalize his predilections.” The purpose of law, “as an intellectual discipline and as a body of guiding authority, is to confine the eccentricities of the judge to a minimum and to substitute so far as it is humanly possible the impersonal standards of law.” Like his subject, he was willing to jettison the guidance of both precedent and legal tradition when the circumstances of a specific case clearly required it. Brandeis “did not carry respect for precedent to the point of abdication—but he did—as all judges should—accept certain traditional restraints on his personal judgment.” Within the limitations imposed by the assumptions he brought to the Court, Robert Jackson met the standard he outlined as well as he would have demanded from anyone else.111
3 Jackson, Struggle, 285.
Jackson repeatedly professed his loyalty to Roosevelt. In comments before a hometown crowd in May, 1940, for example, he said: “My public life has been wholly due to the confidence shown in me by the President of the United States.” 

Jamestown Evening Journal, May 8, 1940, Clipping.

Box 39, RHJP. The Robert H. Jackson Center, a non-profit institution located in Jamestown, New York, maintains a Web site with biographical information, documents and other materials. The address is: <www.roberthjackson.org>. Jackson was the last individual appointed to the Court without having graduated from a law school.


Jackson, The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics (New York: Alfred A. Knopf, 1941). x-xi, xvi. Evidence from Jackson’s papers suggests that Paul Freund, a faculty member at Harvard Law School and a former Justice Department attorney, as well as Louis Jaffe, dean at the University of Buffalo School of Law, were responsible for writing major sections of this book. Jackson to Freund, November 18, 1939 and May 21, 1940; Jaffe to Jackson, December 20, 1939 and December 21, 1939; Freund to Jackson, November 20, 1939 and November 27, 1939. Box 55, RHJP.

Jackson, Struggle. 285.
12 Hearings before a Subcommittee of the Senate Committee on the Judiciary. 75th Congress, Third Session. Nomination of Robert H. Jackson to be Solicitor General of the United States. Part II, 107, 121, Part 1, 23, 24, 27 (Capitals in the original); I Bill of Rights Review (Summer, 1940) 36. Clipping in RHJP, Box 54. See also, Attorney General Jackson’s speech in honor of the Court’s 150th anniversary in 309 U.S., especially iv; “Speech for Constitution Day Celebration,” September 14, 1940. (Typescript) Box 40, RHJP.

13 Bill of Rights Review, 34.


15 Constitution Day Speech, September 17, 1940. Typescript. Box 40, RHJP; Address Delivered before the Annual Meeting of the Canadian Bar Association, February 19, 1944. Typescript. Box 42, RHJP.


17 Jackson, “A Square Deal for the Court,” Address at Boston College Law School, April 9, 1940. Typescript. Box 39, RHJP. Jackson’s remarks aimed at Wendell Wilkie (who would later be selected as the Republican Presidential candidate that year) attracted most public attention. See New York Times, April 10, 1940, 50; Freund, “Mr. Justice Jackson” 36.

18 Jackson, “Is Our Constitutional Government in Danger?” November 2, 1939 (Typescript). Box 39, RHJP.

19 Address at the Twentieth Anniversary Dinner of the Federal Bar Association, January 20, 1940. (Typescript). Box 55, RHJP.

20 Address in acceptance of the Cardozo Memorial Award presented by Tau Epsilon Rho Law Fraternity, February 22, 1941 (Typescript). Box 41, RHJP. Jackson had appeared before Cardozo at both the New York Court of Appeals and the U.S. Supreme Court.


25 314 U.S. 160, 182, 185-186. (Edwards v. California) 1941. For general studies of the Court from 1941 to 1953, see Melvin I. Urofsky, Division and

26 314 U.S. 184.
28 316 U.S. 584. Black’s dissent is at 623, Murphy’s is at 611. The Court included Bowden v. Fort Smith and Jobin v. Arizona in the decision.
29 Jackson, Undated Memorandum, Jones v. Opelika. 316 U.S. 584 (1942). (Typescript). Box 123, RHJP.
30 Jackson, Jones v. Opelika Memorandum.
34 “A Program for Internal Defense.” In a letter to an American Civil Liberties Union official, Attorney General Jackson dismissed worries about the government’s centralized collection of information on individuals suspected of subversive actions. Much of the information “is probably valueless, some of which is perhaps malicious, and none of which can be the basis of a prosecution without proper authorization” and thus will not “menace civil liberties,” he wrote. Jackson also pointed out that the ACLU excluded Communists from its membership. Jackson to Roger Baldwin, April 6, 1940. Box 93, RHJP.
38 320 U.S. 81 Hirabayashi v. United States (1943).
39 320 U.S. 103-104.
40 Jackson, Memorandum, Hirabayashi v. United States, May 17, 1943. (Typescript). Box 128, RHJP.
41 Jackson, Memorandum, May 17, 1943.
90. Jackson also underscored his opposition to a preferred freedoms doctrine. “We cannot give some constitutional rights a preferred position without relegating others to a deferred position,” he wrote. His dissent included specific references to Murdock v. Pennsylvania, 319 U.S. 105 and Saia v. New York, 334 U.S. 558 as examples of other Justices’ opinions which embraced such a doctrine.


92. Jackson to Paul Freund, December 20, 1949. Box 13, RHJP.


95. 347 U.S. 135; Jackson, Undated Memorandum on Irvine v. California. (Typescript). Box 185, RHJP.


98. 341 U.S. 97. See also, other aspects of the case addressed by the Court at 341 U.S. 58 and at 70.


Jackson to Charles Fairman, March 13, 1950. Box 12, RHJP. See also Jackson to Fairman, February 28, 1950. For a solid examination of the background of Brown, including deliberations among the Justices, see Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* (New York: Random House, 2004, Vintage Books edition) 585-702. The Justices had avoided direct examinations of public school segregation in previous cases. See *McLaurin v. Oklahoma State Regents* 339 U.S. 637 (1950) and *Sweatt v. Painter* 339 U.S. 629 (1950). But they had overturned the all-white primary in Texas (*Smith v. Allwright* 321 U.S. 649 [1944]) and upheld the applicability of a remnant of the Civil Rights Act of 1866 (*Screws v. United States* 325 U.S. 91 [1945]). In a 1948 case that challenged the applicability of Michigan’s civil rights statute, an African-American woman who was denied boat passage from Michigan to a Canadian island claimed that the action was based upon her race. The Court upheld her victory in state court. Jackson dissented, but not because of his endorsement of a flagrant act of discrimination. He ignored the race-based complaint, emphasizing that the Commerce Clause governed international travel of goods and people. In a draft opinion he wrote: “Once the fact of either foreign or interstate commerce is admitted,” precedent “requires the conclusion that state regulations of this kind, either requiring segregation or forbidding it, cannot be upheld.” *Bob-Lo Excursion Co. v. Michigan* (333 U.S. 28); see also, Jackson, Undated Memorandum. RHJP, Box 145.


Jackson Memorandum, March 15, 1954.

Jackson Memorandum, March 15, 1954.

Jackson Memorandum, March 15, 1954.

Jackson to Charles Fairman, April 5, 1950. RHJP, Box 167.

