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## The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at *United States v. Classic*\*

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## Roosevelt Court

The period from 1935 to 1945 has been widely recognized as a turning point for the Supreme Court and for constitutional law in general.<sup>1</sup> Of all the changes that occurred during this period, perhaps none has had a more significant effect than the Court's explicit recognition that racial, religious, and ethnic minorities should be accorded a special degree of judicial protection. Footnote four of *United States v. Carolene Products*,<sup>2</sup> undoubtedly the best known expression of the tilt in favor of minority protection,<sup>3</sup> was only one articulation of the new judicial concern.

That the Court's attitude towards both civil rights and minorities changed during this period is beyond question.<sup>4</sup> Although the term "minorities" had some jurisprudential currency prior to the late 1930s, to the majority of the Court it signified economic or regional minorities rather than racial, religious, or ethnic groups.<sup>5</sup> In several cases during the period immediately after World War One, the Court struck down oppressive measures directed against members of ethnic and religious groups. The decisions, however, were based upon individual liberties under the Fourteenth Amendment,<sup>6</sup> not upon the rights of minority groups. Similarly, the Court provided a measure of protection to blacks under specific constitutional guarantees,<sup>7</sup> including the right to counsel,<sup>8</sup> the right to a fairly selected jury,<sup>9</sup> and the right to

1. See generally C. PRITCHETT, *THE ROOSEVELT COURT* (1948); 2 W. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY* 101-56 (1970).

2. 304 U.S. 144, 152 n.4 (1938).

3. Appreciation of the significance of footnote four as a benchmark of modern constitutional law is still developing. Compare J. ELY, *DEMOCRACY AND DISTRUST* 76 (1980) (despite its influence, footnote has not been adequately elaborated) and Cover, *The Origins of Judicial Activism in the Protection of Minorities*, in *THE ROLE OF THE JUDICIARY IN AMERICA* (W. Moore ed. 1981) (forthcoming) (footnote four "first major articulation" by Court of "dichotomous nature of judicial review") with Hamilton & Braden, *The Special Competence of the Supreme Court*, 50 *YALE L.J.* 1319, 1354 (1941) (footnote four only one of several competing theories justifying judicial protection of civil rights).

4. See L. LUSKY, *BY WHAT RIGHT?* 97-123 (1975); A. MASON, *THE SUPREME COURT: PALLADIUM OF FREEDOM* 150-56, 170-71 (1962); Ball, *Judicial Protection of Powerless Minorities*, 59 *IOWA L. REV.* 1059, 1060 & n.4 (1974); Cover, *supra* note 3; cf. Note, *The Negro Citizen in the Supreme Court*, 52 *HARV. L. REV.* 823, 832 (1939) (noting contemporary trend by Court to use power to aid fight for racial equality).

5. Cover, *supra* note 3.

6. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (right to send children to sectarian schools); *Meyer v. Nebraska*, 262 U.S. 390, 400-02 (1923) (right to teach foreign languages in public schools).

7. See *Buchanan v. Warley*, 245 U.S. 60 (1917) (racially exclusive residential ordinance held unconstitutional as violation of right of white vendor to dispose of property); *Guinn v. United States*, 238 U.S. 347 (1915) (literacy test combined with grandfather clause violates Fifteenth Amendment).

8. *Powell v. Alabama*, 287 U.S. 45 (1932) (right to counsel in capital case).

9. *Norris v. Alabama*, 294 U.S. 587 (1935) (right of black suspect to grand and petit jury from which blacks not systematically and arbitrarily excluded).

a trial unimpeded by the threat of mob violence.<sup>10</sup> Yet in cases in which the harm to minority group members violated no specific guarantee of individual liberty, or in which the oppression was defended as an exercise of constitutionally protected liberty, the Court was decidedly insensitive to minority claims.<sup>11</sup>

All of this began to change dramatically in the latter half of the 1930s. In a series of cases involving minorities in the modern sense, the right to speak and the right to distribute literature were greatly expanded.<sup>12</sup> Practices discriminating against blacks were successfully challenged before the Court in the areas of criminal justice,<sup>13</sup> elections,<sup>14</sup> organized labor,<sup>15</sup> transportation,<sup>16</sup> and education.<sup>17</sup> Successful challenges to practices previously upheld as exercises of individual

10. *Moore v. Dempsey*, 261 U.S. 86 (1923).

11. *See, e.g., Grovey v. Townsend*, 295 U.S. 45 (1935) (constitutional for party convention to exclude blacks from voting in primary elections); *Gong Lum v. Rice*, 275 U.S. 78 (1927) (constitutional to exclude Chinese child from white schools); *Corrigan v. Buckley*, 271 U.S. 323 (1926) (racially restrictive housing covenants not state action).

The Court's perceived insensitivity to the status of blacks as a group was described by Arthur Mitchell, a black Congressman from Chicago, in a statement explaining his support for Roosevelt's Court plan:

The Negroes have the least to lose [from the plan], because the courts have always been ready to strike down every measure passed by Congress for the benefit of the Negro, from the Dred Scott decision down to the present, including the Fourteenth Amendment.

It is true that in the *Scottsboro* and *Arkansas* cases the Supreme Court has protected the rights of the individual, but whenever a question of the rights of the masses comes up the Supreme Court has stood in the way as no other organization has done.

N.Y. Times, Mar. 7, 1937, § 1, at 2, col. 4.

12. Several decisions struck down state restrictions challenged by Jehovah's Witnesses. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (compulsory flag salute for religious objectors); *Martin v. Struthers*, 319 U.S. 141 (1943) (municipal ban on door-to-door canvassing); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (license tax upon sale of religious literature); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (license requirement for persons soliciting religious contributions); *Schneider v. State*, 308 U.S. 147 (1939) (municipal ordinances restricting distribution of handbills in streets); *Lovell v. Griffin*, 303 U.S. 444 (1938) (prior licensing requirement for distributing literature); *cf. Herndon v. Lowry*, 301 U.S. 242 (1937) (reversing conviction of black communist agitator for attempting to incite insurrection).

13. Several decisions reversed convictions because blacks had been unconstitutionally excluded from grand and petit juries. *Smith v. Texas*, 311 U.S. 128 (1940); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Hale v. Kentucky*, 303 U.S. 613 (1938). Two other cases overturned convictions of black suspects based on confessions coerced by torture. *Chambers v. Florida*, 309 U.S. 227 (1940); *Brown v. Mississippi*, 297 U.S. 278 (1936).

14. *Smith v. Allwright*, 321 U.S. 649 (1944) (white primary); *Lane v. Wilson*, 307 U.S. 268 (1939) (discriminatory voter registration statute).

15. *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945) (postal clerks); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944) (locomotive firemen); *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944) (same).

16. *Morgan v. Virginia*, 328 U.S. 373 (1946) (passenger buses); *Mitchell v. United States*, 313 U.S. 80 (1941) (railroads).

17. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (law school).

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liberty, most notably restrictive covenants<sup>18</sup> and white primaries,<sup>19</sup> reflected the increased weight given to minority claims. These decisions were significant not only for their holdings but also for their rhetoric. Repeatedly, majority and dissenting opinions attached constitutional significance to the minority status of the claimants.<sup>20</sup>

The changes signaled by footnote four, and manifested by the other cases of the period, did not occur in isolation. Underlying the shift, and influenced by domestic and foreign affairs in the 1930s, was a changing perception of democracy and its weaknesses. As new members were elevated to the Court and sitting Justices altered their thinking, the Court moved toward a new paradigm of tyranny, one in which persecution of minorities by an unrestrained, intolerant majority posed the major threat to democracy. This perspective had roots in a contemporary ideology that similarly stressed the vulnerability of democracy to the exploitation of majority prejudice against minority groups.

This article examines the nature of the emerging ideology as expressed in popular and academic writings in the late 1930s, the manner in which it influenced the thinking of members of the Supreme Court, and the Court's opportunity to express its new understanding in response to a new litigation strategy by the Justice Department. These currents were exemplified in the vital area of election law, which governs the core of the democratic political process. In particular, the article examines the decision in *United States v. Classic*,<sup>21</sup> an election law case decided in 1941; *Classic* demonstrated the divergences of method and approach among adherents of the new ideology and pointed toward further development of constitutional doctrine protecting the rights of minorities.<sup>22</sup>

18. Compare *Shelley v. Kraemer*, 334 U.S. 1 (1948) with *Corrigan v. Buckley*, 271 U.S. 323 (1926).

19. Compare *Smith v. Allwright*, 321 U.S. 649 (1944) with *Grove v. Townsend*, 295 U.S. 45 (1935).

20. *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 94 (1945); *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 198-201 (1944); *id.* at 209 (Murphy, J., concurring); *Martin v. Struthers*, 319 U.S. 141, 146 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105, 115-16 (1943); *Jones v. Opelika*, 316 U.S. 584, 617 (1942) (Murphy, J., dissenting), *vacated*, 319 U.S. 103, 104 (1943); *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 604, 606 (1940) (Stone, J., dissenting); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940); *Chambers v. Florida*, 309 U.S. 227, 236, 238 (1940). *But see West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646-47 (1943) (Frankfurter, J., dissenting) (minority status acknowledged but deemed irrelevant); *Herdon v. Lowry*, 301 U.S. 242, 275-76 (1937) (Van Devanter, J., dissenting) (minority status of black agitator and audience among circumstances relevant to finding probable insurrectionary effect of speech).

21. 313 U.S. 299 (1941).

22. The breadth of the subject and the limited range of source material leave this account as a tentative exploration of one aspect of the Court's intellectual development during this vital period.

## I. Minorities, Majorities, and a New Ideology

The dominant political thought of a generation, as Professor Robert Cover has observed, often is organized around a particular paradigm of tyranny.<sup>23</sup> In general terms, two alternative paradigms have served in political thought over the course of this nation's history to describe the greatest threats to the survival of democracy. One is the threat of autocratic rule by an individual or elite. This view, vigorously expressed in the early part of this century by the populist wing of the Progressive movement,<sup>24</sup> led to political reforms such as the direct primary.<sup>25</sup> The other conception perceives the prospect of unrestrained majority rule as the Achilles heel of democracy. This fear, articulated in varying forms from the Federalist Papers and de Tocqueville to the present time,<sup>26</sup> generated opposition to the Progressive reforms of initiative, referendum, and recall.<sup>27</sup>

Both of these paradigms claimed adherents at the outset of the 1930s.<sup>28</sup> The events of the ensuing decade provided evidence for each school that democracy was seriously threatened, either by dictatorship or by mob rule. At the same time, however, the specific fears of the two schools converged: autocratic dictatorship and unrestrained majority rule were increasingly understood as facets of the same phenomenon—emotionally based mass prejudice against unprotected minorities. As a result, a degree of consensus emerged in the contemporary ideology of the period regarding the threat facing American democracy.

### A. *The Tyranny of the Majority Revisited*

The trauma, deprivation, and conflict of the 1930s shook the confidence of Americans in the strength of unaided democracy as a form of political organization.<sup>29</sup> The course of events at home and

23. Cover, *supra* note 3.

24. See R. HOFSTADTER, *THE AGE OF REFORM* 260-61, 264-65 (1956).

25. A. LOVEJOY, *LA FOLLETTE AND THE ESTABLISHMENT OF THE DIRECT PRIMARY IN WISCONSIN, 1890-1904*, at 36, 57 (1941).

26. *THE FEDERALIST* No. 10 (J. Madison); 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 227-40 (J. Mayer & M. Lerner eds. 1966).

27. J. PASCHAL, *MR. JUSTICE SUTHERLAND* 73-80, 89-90 (1951); G. SUTHERLAND, *THE COURTS AND THE CONSTITUTION*, S. DOC. NO. 970, 62d Cong., 3d Sess. 3-4 (1912).

28. For example, the dangers of unrestrained majority rule had been stressed by Walter Lippmann's analysis of democracy in a series of books published during the mid-1920s. See p. 748 *infra*. On the other hand, progressives inveighed against the influence of elite business interests upon governmental decisionmaking at the expense of the people. H. WALLACE, *NEW FRONTIERS* 42-48 (1934).

29. E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* 126-28, 132 (1973); Rogers, *Book Review*, 24 A.B.A.J. 934 (1938) (reviewing Rappard, *The Crisis of Democracy*).

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abroad raised questions about the ability of democratic government to manage the nation's economic affairs and its ability to compete with other forms of government.<sup>30</sup> By the end of the decade, the very survival of the democratic system was in doubt, and many observers were calling for democracy to become "militant" in the face of conflict abroad and deprivation at home.<sup>31</sup>

It would be impossible to make a comprehensive survey of the reactions by politically active Americans to the events of the 1930s. Nevertheless, the furor over President Roosevelt's 1937 proposal to pack the Court<sup>32</sup> provides a useful starting point for reviewing contemporary thinking about democracy. Whether the Court plan aggravated existing fears or created new ones,<sup>33</sup> it focused popular attention on the analyses of the weaknesses of democracy being advanced by a number of significant contemporary observers.

The Court packing plan evoked objections rooted in both paradigms of tyranny. The most widespread response to the plan was fear of dictatorship in the traditional sense. Conservatives and liberals alike accused Roosevelt of harboring dictatorial ambitions and attempting to subjugate the last independent branch of government.<sup>34</sup> Even persons who could not believe that Roosevelt himself was a potential dictator expressed concern that the plan would allow a future fascist President to assume control over the Court.<sup>35</sup> Accordingly, the plan provoked a barrage of statements defending the Court as a bulwark

30. M. HALLGREN, *SEEDS OF REVOLT* 278-87 (1933); W. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940*, at 275-76 (1963); R. STEEL, *WALTER LIPPMANN AND THE AMERICAN CENTURY* 299 (1980).

31. See, e.g., M. LERNER, *IT IS LATER THAN YOU THINK* 101-04 (1939); Loewenstein, *Militant Democracy and Fundamental Rights*, I, 31 *AM. POLITICAL SCI. REV.* 417, 422-23, 430-32 (1937); MOWIET, *Minorities of Opinion*, 28 *SURVEY GRAPHIC* 83, 189-90 (1939); cf. W. DOUGLAS, *Our Changing World*, in *DEMOCRACY AND FINANCE* 1, 2 (1940) (contending that to compete effectively, democratic government must be "mobile, bold, and intelligent"); A. EKIRCH, *IDEOLOGIES AND UTOPIAS* 238-43 (1969) (discussing shift by some intellectuals toward active defense of democracy); E. PURCELL, *supra* note 29, at 138 (describing growing appeal in late 1930s for reaffirmation and deeper understanding of democratic principles).

32. See J. ALSOP & T. CATLEDGE, *THE 168 DAYS* (1938); L. BAKER, *BACK TO BACK* (1967); R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 176-96 (1941); A. MASON, *HARLAN FISKE STONE* 437-64 (1956).

33. Although many conservatives needed no further proof of Roosevelt's dictatorial aims, see G. WOLFSKILL & J. HUDSON, *ALL BUT THE PEOPLE* 153-56 (1969), the plan did push into open opposition a number of left-wing and moderate intellectuals who had been uneasy about Roosevelt's personality and about the paternalism of the New Deal. A. EKIRCH, *supra* note 31, at 195-205.

34. See generally L. BAKER, *supra* note 32, at 97-99; R. STEEL, *supra* note 30, at 320; G. WOLFSKILL & J. HUDSON, *supra* note 33, at 261-63.

35. See, e.g., L. BAKER, *supra* note 32, at 47-49; Krock, *One Unanswered Argument Against Court Plan*, *N.Y. Times*, Feb. 23, 1937, § 1, at 26, col. 5.

against takeover by an autocratic and oppressive Chief Executive.<sup>36</sup>

The plan also prompted more elaborate and sophisticated criticisms from proponents of a different view of democracy. Perhaps the most influential of these critics, because of the wide syndication of his column and his eminence as a commentator, was Walter Lippmann.<sup>37</sup> Over the preceding decade Lippmann's early Progressivism had been replaced by growing mistrust of majority rule.<sup>38</sup> Lippmann contended that only an educated elite, not the masses, possessed the knowledge and ability to govern a modern state. Democracy was a useful mechanism for the peaceful adjustment of conflicts between groups, thereby maintaining social stability and popular allegiance to the government;<sup>39</sup> this function was threatened by unrestrained majority rule. The key to liberty, therefore, was to dissolve the impact of majorities.<sup>40</sup> The events of the 1930s provided Lippmann with concrete illustrations for his analysis. To Lippmann, the popularity of autocratic figures such as Huey Long<sup>41</sup> demonstrated that democracy could be overthrown if a dictator obtained the support of a majority.<sup>42</sup> The growth of fascism in Europe similarly demonstrated how groups could exploit the rights of free speech and assembly in order to obtain a mandate from the majority to discard democracy and establish a totalitarian regime.<sup>43</sup>

The Court plan gave Lippmann the occasion to bring his analysis of democracy to bear on a highly controversial issue.<sup>44</sup> Majority rule unrestrained by the Court, he argued, would pose a grave danger to free government. Lippmann echoed the popular clamor over the

36. See, e.g., N.Y. Times, Feb. 15, 1937, § 1, at 3, col. 1; N.Y. Times, Feb. 13, 1937, § 1, at 3, col. 4; N.Y. Times, Feb. 7, 1937, § 1, at 32, col. 4.

37. A. EKIRCH, *supra* note 31, at 200; R. STEEL, *supra* note 30, at 280-81, 319-21.

38. See R. STEEL, *supra* note 30, at 211-20, 226-27. Lippmann's change of heart was not unique. See 3 V. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT 401-13 (1930) (emergence of liberal disillusionment with democratic principles after World War One).

39. W. LIPPMANN, THE PHANTOM PUBLIC 33-53, 58-62 (1925); R. STEEL, *supra* note 30, at 212-15, 218.

40. W. LIPPMANN, AMERICAN INQUISITORS 110-11 (1928); R. STEEL, *supra* note 30, at 219.

41. Huey Long, Governor of Louisiana and then United States Senator, developed a political machine whose strength was based not only on mass popular appeal but on totalitarian control over the electoral process, the police, the legislature, and the judiciary. See T. WILLIAMS, HUEY LONG 4-8 (1969). Long's "Share Our Wealth" program rapidly gained popular support across the nation in 1935. *Id.* at 696-701. Long's popular appeal is discussed in R. SWING, FORERUNNERS OF AMERICAN FASCISM 62-107 (1935).

42. Lippmann, *Today and Tomorrow*, N.Y. Herald Tribune, Feb. 5, 1935, § 1, at 19, col. 1.

43. Lippmann, *Constitutional Checks and Balances*, L.A. Times, Apr. 27, 1937, § II, at 4, col. 5.

44. See R. STEEL, *supra* note 30, at 319 (Lippmann wrote 37 columns on issue during five months of Court packing controversy).



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dictatorial threat posed by unrestrained executive power,<sup>45</sup> but contended that the real significance of the plan was rooted in the central political problem of modern democracy, the tendency of the majority to abdicate to dictatorship.

[T]he problem of the future is not what it was when Englishmen set out to restrain their king. The problem of the future is to enable the awakening masses, who have all the ultimate power, to govern themselves without being driven by their own inexperience and their own passing hysterias into disaster and the suicide of democracy.<sup>46</sup>

The susceptibility of majorities to manipulation by dictators, Lippmann argued, was heightened by another distinction between tyranny in 1789 and in 1937: the Founding Fathers “had not seen the new demagoguery based on the radio and the press and other modern instruments of propaganda.”<sup>47</sup> The messianic personal government exemplified by Roosevelt<sup>48</sup> and Long<sup>49</sup> indicated the potential for manipulation of the majority.

The independence of the judiciary, Lippmann contended, was the “vital center” of constitutional democracy and the bulwark against usurpation by a “transient and hysterical majority.”<sup>50</sup> First, the judiciary had the power to protect civil liberties and thus allow an “informed popular will” to prevail over the “ignorant whims of the moment.” Judicial protection of the political process from legislative interference would help ensure that the majority of the moment would not be manipulated into permanently eradicating the process.<sup>51</sup> Second, the Court served as counterweight to the inevitable growth of governmental power over the economy. Lippmann conceded the necessity of broad governmental control over the economy and argued for a double standard of judicial review that would enable the govern-

45. Lippmann, *Today and Tomorrow*, N.Y. Herald Tribune, Feb. 9, 1937, § 1, at 21, col. 1.

46. Lippmann, *supra* note 43.

47. Lippmann, *Today and Tomorrow*, N.Y. Herald Tribune, Feb. 17, 1937, § 1, at 23, col. 1.

48. Lippmann, *Today and Tomorrow*, N.Y. Herald Tribune, June 26, 1937, § 1, at 13, col. 1. Lippmann discerned ominous implications in Roosevelt's willingness to use any means to achieve his ends. *Id.* He predicted that Roosevelt would somehow “muzzle” the independence of the press because it represented the last remaining obstacle to consolidation of his “new and vast” power. *Id.* col. 2.

49. Lippmann, *Today and Tomorrow*, N.Y. Herald Tribune, Feb. 17, 1937, § 1, at 23, col. 1.

50. Lippmann, *Today and Tomorrow*, N.Y. Herald Tribune, Feb. 9, 1937, § 1, at 21, cols. 1, 2.

51. Lippmann, *supra* note 43.

ment to deal with the economy but prevent it from suppressing civil liberties.<sup>52</sup> Nevertheless, he argued that it was necessary to assure to individuals and minorities the right to invoke judicial scrutiny of oppressive governmental regulations in the economic sphere.<sup>53</sup> In both roles, the Court served to moderate what Lippmann perceived to be the central conflict of democracy—the majority versus the minority or individual.

Lippmann's analysis of the weakness of democracy was shared in large part by another well-known syndicated columnist, Dorothy Thompson. She agreed that the greatest danger to democracy lay in the possibility that the majority, in its desire to obtain order and security, would abdicate in favor of personal leadership and authoritarian government.<sup>54</sup> Thompson based her concern on her personal observations of the collapse of constitutional democracy in Europe. She acknowledged that a similar collapse was not imminent in the United States,<sup>55</sup> but argued that the Court plan threatened one of the guarantees against such a scenario.

[T]he prevention against a democracy running away with itself, the prevention against a powerful majority riding roughshod over the temporary minority and selling short the whole future of the country, the prevention against today's majority mortgaging tomorrow's majority, lay in a written constitution and an independent Supreme Court to interpret that Constitution.<sup>56</sup>

Precedent for executive usurpation of the judiciary could be found, she argued, in Huey Long's takeover of the Louisiana Supreme Court in order to nullify any possible judicial resistance to his actions.<sup>57</sup>

The need to restrain majority rule and to protect minorities and individuals was also stressed by other critics of the Court plan. Former President Hoover, in a speech opposing the plan, defended the Court as the sanctuary of the "humblest citizen and the weakest mi-

52. Lippmann, *Today and Tomorrow*, N.Y. Herald Tribune, Feb. 16, 1937, § 1, at 19, cols. 1-2.

53. R. STEEL, *supra* note 30, at 323-24; Lippmann, *Today and Tomorrow*, L.A. Times, July 27, 1937, § II, at 4, col. 6.

54. *Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the Senate Comm. on the Judiciary*, 75th Cong., 1st Sess. 866-67 (1937) (statement of Dorothy Thompson) [hereinafter cited as *Senate Hearings*]. Thompson's analysis was frequently set forth in her books and syndicated columns. See, e.g., D. THOMPSON, LET THE RECORD SPEAK 279 (1939) [hereinafter cited as THOMPSON-RECORD]; D. THOMPSON, DOROTHY THOMPSON'S POLITICAL GUIDE 53-56, 72-73 (1938).

55. *Senate Hearings*, *supra* note 54, at 866.

56. *Id.* at 860.

57. *Id.* at 867-68.

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nority" and noted that liberty was crumbling in the world as nations committed suicide under "persuaders" who professed to be acting in the name of the people.<sup>58</sup> Frederic Coudert, a prominent New York lawyer, stated that the Court was the ultimate defender of fundamental rights against the temporary legislation of passing majorities acting under "the pressure of a rapidly changing and sometimes hysterical public opinion."<sup>59</sup>

The dangers of unrestrained majority rule were recognized not only by opponents but also by many proponents of the Court plan. If the Supreme Court continued to prevent the government from taking the necessary steps to alleviate the economic crisis, New Dealers argued, it would precipitate the abdication of the electorate in favor of efficient totalitarianism.<sup>60</sup> Permitting the New Deal to go forward was necessary in order to outflank authoritarians armed with social welfare programs.<sup>61</sup> Attorney General Homer Cummings expressed this view in 1938 when he advocated raising democracy to its "highest working efficiency" so that "the waters of discontent and the floods of alien propaganda will beat against it in vain."<sup>62</sup> He also recognized the importance of the Court's role in protecting the political process and safeguarding civil liberties.<sup>63</sup>

58. N.Y. Times, Feb. 21, 1937, § 1, at 23, col. 1.

59. N.Y. Times, Feb. 7, 1937, § 1, at 33, col. 1.

60. R. JACKSON, *supra* note 32, at xv; MacLeish, *Foreword* to F. FRANKFURTER, *LAW AND POLITICS* at ix, xv, xxiii (1939); N.Y. Times, Mar. 5, 1937, § 1, at 1, col. 6, & 14, cols. 2-3 (speech by Roosevelt).

61. See generally A. SCHLESINGER, *THE POLITICS OF UPHEAVAL* 15-207 (1960) (discussion of Coughlin, Long, fascist sympathizers, left-wing radicals, and other political figures appealing to popular discontent).

62. *SELECTED PAPERS OF HOMER CUMMINGS* 303 (C. Swisher ed. 1939). Earlier writers commenting on the rise of "proto-fascists" such as Huey Long, see note 41 *supra*, and Father Coughlin, see note 99 *infra*, had expressed similar concerns. In a popular novel published in 1935, *It Can't Happen Here*, Thompson's husband, Sinclair Lewis, depicted the collapse of democracy as the electorate voted into office a dictatorial figure similar to Huey Long. He attributed this collapse to the popular desire to satisfy an obsessive materialism at the price of continued democracy. Lewis' scenario was given wide exposure. Beginning in December 1936, twenty-one dramatic productions of a stage version of the novel were produced across the country by the WPA's Federal Theatre. A. EKIRCH, *supra* note 31, at 160.

Raymond Gram Swing of *The Nation* analyzed the appeal of persons such as Long and Coughlin as the result of popular economic despair. Democratic government, he concluded, would have to deal effectively with the economy or it would lose the allegiance of the populace. R. SWING, *supra* note 41, at 22-23; Swing, *The Build-up of Long and Coughlin*, 140 *NATION* 325, 325-26 (1935). Swing's analysis was corroborated by the reflection of one disciple of Huey Long: "If dictatorship in Louisiana, such as was charged to Huey Long, will give to the people of our nation what it gave to the people of my native state, then I am for such a dictatorship." A. SINDLER, *HUEY LONG'S LOUISIANA* 115 (1956).

63. *SELECTED PAPERS OF HOMER CUMMINGS*, *supra* note 62, at 305.

Whether they accepted or opposed Roosevelt's Court plan, many influential commentators in 1937 and 1938 agreed that the majority might constitute a significant political threat to the continuation of a democratic system.<sup>64</sup> The proponents of the plan perceived the danger in the frustration of majority desires, especially in the economic sphere; their reasoning supported restrictions upon the Court's powers. Opponents of the plan, on the other hand, emphasized the perils of indulging the will of the majority, which could be manipulated by charismatic political leaders.

In the wake of the Court plan, the Court retreated from its economic interventionism.<sup>65</sup> At the same time, the need to limit the majority will in dealing with minorities was emphasized by events in Europe and by parallels that could be drawn to the oppression of minorities in the United States.

### B. *Group Conflict and Unrestrained Majoritarianism*

During the Court fight, a number of opponents of the plan defended the Court as the protector of victimized minority groups. They expressed concern about the tendency toward racial, religious, and ethnic oppression in the United States, a theme that would become more insistent as the decade drew to a close. Senator Burton Wheeler of Montana recalled that the federal courts had provided the only resistance to nativist hysteria during World War One, and he warned against tampering with the Court because "there might be another hysteria sweeping the country."<sup>66</sup> The courts, Senator Royal Copeland of New York argued repeatedly, were the "sole protection of our people against political terrorism, religious bigotry, racial persecution and economic tyranny."<sup>67</sup> Massachusetts Senator David Walsh,

64. Concerns about the dangers of fascism and demagoguery were not always expressed in terms of the new paradigm focusing on the dangers of unrestrained majoritarianism. Socialist Max Lerner, editor of *The Nation*, believed that men like Long, Coughlin, and Jersey City Mayor Frank Hague, who strove "to outdo each other in promises," were the individuals most dangerous to democracy. M. LERNER, *supra* note 31, at 110. He viewed these men, however, as mercenaries of the plutocracy. Fascist takeovers, in Lerner's view, were the result of suppression of the civil liberties of the majority by propertied minorities, rather than of the manipulation of majority sentiment. He characterized fascism as the rule of force and wrote that the majority was relegated to the ratification of faits accomplis in engineered plebiscites. *Id.* at 108. Yet even Lerner wrote of the "surrender" of men to the perceived efficiency of fascism and the exploitation of scapegoats to mobilize popular support for fascist takeovers. *Id.* at 36-43.

65. See C. PRITCHETT, *supra* note 1, at 71-90.

66. L. BAKER, *supra* note 32, at 81.

67. N.Y. Times, Feb. 21, 1937, § 1, at 24, col. 1; see N.Y. Times, Mar. 13, 1937, § 1, at 10, col. 1.

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speaking at Carnegie Hall, asserted that the Court's decisions in *Meyer v. Nebraska*<sup>68</sup> and *Pierce v. Society of Sisters*<sup>69</sup> had prevented a hysterical majority from persecuting a minority on ethnic and religious grounds. "Without an independent judiciary," he continued, "I hesitate to even think of denials to minorities of constitutional guarantees if some of the doctrines preached by groups in this country today should be suddenly enacted into law."<sup>70</sup> In a radio speech, conservative publisher Frank Gannett described the opposition of his barber to the Court plan: "I am a Jew, and therefore one of a minority. I realize that if it were not for the Supreme Court, I might be treated here as they treat the Jews in Germany!" Gannett continued, "[M]embers of the colored race must feel the same, for the Supreme Court again and again has protected the rights of colored people."<sup>71</sup> Others similarly emphasized the need for an independent Court to protect the rights of minorities, particularly religious minorities.<sup>72</sup>

In the years following the struggle over the Court plan, events in Europe attracted increasing attention in the United States<sup>73</sup> and contributed to a growing understanding of the exploitation of irrational, emotional forces by European fascist movements. The European example showed that majority tyranny and group hatred were closely related, and that majorities could be induced to give up democracy not only by appeals to their economic desires, but also by the conscious exploitation of their racial and religious animosities.<sup>74</sup>

68. 262 U.S. 390 (1923).

69. 268 U.S. 510 (1925).

70. N.Y. Times, Mar. 13, 1937, § 1, at 10, col. 6.

71. L. BAKER, *supra* note 32, at 80-81; see N.Y. Times, Feb. 22, 1937, § 1, at 6, col. 3 (reporting Gannett speech).

72. See, e.g., N.Y. Times, Feb. 21, 1937, § 1, at 23, col. 1 (Herbert Hoover); N.Y. Times, Feb. 11, 1937, § 1, at 16, col. 3 (Bishop Manning).

73. Hitler's annexation of Austria in March 1938 was followed by large-scale violence and brutality against Jews. In November 1938, the Nazi regime responded to the assassination of a minor German official by a Polish Jew by unleashing a wave of arson, looting, and murder, known as "the night of broken glass," or *Kristallnacht*. These events were widely reported in American newspapers. See A. MORSE, *WHILE SIX MILLION DIED* 199-201, 221-28 (1967). In addition, Americans, particularly those in university circles, were reminded of the events in Europe by a small influx of refugees, who included many of Europe's foremost scholars and artists. See M. DAVIE, *REFUGEES IN AMERICA* 1-46 (1947); L. FERMI, *ILLUSTRIOUS IMMIGRANTS* 4-135 (1968).

74. A symposium on the issues of socialism, fascism, and democracy sponsored by the American Academy for the Advancement of Science in 1935 focused on economic issues and included relatively little discussion of minorities and group hatred. See 180 *ANNALS* 1-182 (1935). But cf. Odum, *Orderly Transitional Democracy*, 180 *ANNALS* 31, 37-38 (1935) (danger of "mass social pathology"); Ward, *The Development of Fascism in the United*

Academic and popular observers stressed that fascism, much like Lippmann's version of democracy gone berserk, was the revolution of the "irrational masses"<sup>75</sup> and the "institutionaliz[ing]" of the mob.<sup>76</sup> National Socialism demonstrated, wrote one commentator, the intimate connection between "the extreme forms of mob rule and the extreme forms of autocratic tyranny."<sup>77</sup> Professor Karl Loewenstein of Amherst, himself a German refugee, described the essential feature of fascism as the "supersession of constitutional government by emotional government." He explained, "[T]he cohesive strength of the dictatorial and authoritarian state is rooted in emotionalism."<sup>78</sup> "In brief, to arouse, to guide, and to use emotionalism in its crudest and its most refined forms is the essence of the fascist technique for which movement and emotion are not only linguistically identical."<sup>79</sup> Dorothy Thompson, who had earlier stressed the economic and nationalistic impulses that led majorities into dictatorship, began to emphasize the irrational aspects of fascism. Hitler, she wrote in 1938, "has a strong sense of the dark, emotional forces in men."<sup>80</sup> She asserted that the new totalitarian states, "mass states, directed by mass organization and mass propaganda and enjoying mass support," represented the revolution of the twentieth century.<sup>81</sup> Others echoed this view of fascism as the stimulation of emotions to a fever pitch by charismatic leaders.<sup>82</sup>

The perception that fascist government rested upon emotional manipulation helped American observers to account for the degradation of minorities, particularly Jews, under fascist regimes. Racism, the source of Hitler's "charismatic power,"<sup>83</sup> was recognized as one of the principal cohesive tools used by the fascists to maintain the hysteria necessary to sustain their power. Some scholars as-

*States*, 180 ANNALS 55, 55-56 (1935) (racial hatred of Negroes more dangerous than anti-Semitism). In contrast, a special issue of *Survey Graphic* in 1939 concentrated on the plight of victimized minority groups, especially the Jews, under Nazi rule. 28 SURVEY GRAPHIC 49-192 (1939); see note 93 *infra*.

75. S. NEUMANN, PERMANENT REVOLUTION 96-117 (1942).

76. E. FREEMAN, CONQUERING THE MAN IN THE STREET 302 (1940). See generally E. LEDERER, STATE OF THE MASSES (1940) (analyzing modern dictatorship's reliance on "institutionalized masses").

77. F. BORKENAU, THE TOTALITARIAN ENEMY 151 (1940).

78. Loewenstein, *supra* note 31, at 418.

79. *Id.* at 423.

80. THOMPSON-RECORD, *supra* note 54, at 241 (based on column dated Oct. 17, 1938).

81. *Id.* at 245 (based on speech delivered Oct. 27, 1938).

82. See, e.g., F. NEUMANN, BEHEMOTH 83, 95-98 (1942); M. RADER, NO COMPROMISE 16-18, 20-26, 32-33, 41 (1939); F. SCHUMAN, THE NAZI DICTATORSHIP 78-84, 91-94 (2d ed. 1936).

83. F. NEUMANN, *supra* note 82, at 98.

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serted that the persecution of minorities arose primarily from the need to create scapegoats,<sup>84</sup> while others explained it as a byproduct of the Nazis' elevation of race to the central organizing principle of society.<sup>85</sup> But most agreed that the persecution of minorities was integrally related to the survival of the European fascist states; as one author put it, anti-Semitism was not only the "outstanding characteristic" of Nazism, but expressed "better and more pronouncedly than any other feature the inner dynamics and the inner logic of the totalitarian revolution."<sup>86</sup> Persecution of minorities, wrote Professor Sigmund Neumann of Wesleyan, was the "cornerstone" of the new order in fascist countries.<sup>87</sup>

Many writers understood that the phenomenon of minority persecution was not unique to the fascist countries. Professor Frederick Schuman, in his classic study of Nazism, described the persecution of minorities as one of the "most ancient, most direct, and most immediately efficacious" devices available to ruling classes seeking to maintain control, because it deflected unrest toward a helpless minority and because the entire community could participate in the persecution.<sup>88</sup> Historian Jacques Barzun, concerned about Nazi ideology, undertook a study of racism in 1937 and concluded that it was a tool for rallying "scattered forces behind something simple and obvious."<sup>89</sup> Anthropologist Ruth Benedict, writing in 1940, examined the history and nature of racism in an effort to answer the question, "Why is there an epidemic of racism in the world today?"<sup>90</sup> Although racism itself was a creation of the modern world, she explained, it was nevertheless another instance of the age-old phenomenon of the suppression and persecution of minorities—the "out-group."<sup>91</sup> Journal-

84. See, e.g., E. FREEMAN, *supra* note 76, at 73-78; M. LERNER, *supra* note 31, at 38, 42-43; S. RAUSHENBUSH, *THE MARCH OF FASCISM* 41, 104 (1939); F. SCHUMAN, *supra* note 82, at 112-13, 312-27; THOMPSON-RECORD, *supra* note 54, at 248 (based on speech delivered Oct. 27, 1938); Janowsky, *Minorities: Pawns of Power*, 28 *SURVEY GRAPHIC* 76, 163-64 (1939); Miller, *Introduction* to D. STRONG, *ORGANIZED ANTI-SEMITISM IN AMERICA* at i (2d ed. 1941).

85. See, e.g., F. NEUMANN, *supra* note 82, at 98-127; M. RADER, *supra* note 82, at 102-03; F. SCHUMAN, *supra* note 82, at 113-15.

86. P. DRUCKER, *THE END OF ECONOMIC MAN* 198-99 (1939).

87. S. NEUMANN, *supra* note 75, at 299.

88. F. SCHUMAN, *supra* note 82, at 312-13.

89. J. BARZUN, *RACE: A STUDY IN MODERN SUPERSTITION* 250 (1937).

90. R. BENEDICT, *RACE: SCIENCE AND POLITICS* at vi (1940).

91. *Id.* at 220-56. In the same vein, the Executive Council of the Society for the Psychological Study of Social Issues released a statement at the 1938 Annual Meeting of the American Psychological Association denouncing the increase in racism in Europe and in the United States, and explained it as a manifestation of the "well-known psychological tendency" for "people to blame others for their own misfortunes." *Id.* at 261-63.

ist Raymond Gram Swing, reflecting upon the "hell" that Europe had become for minorities, echoed Lippmann in arguing that the problem of the twentieth century was "that of majorities learning to give minorities and individuals the rights that are inherently theirs."<sup>92</sup> A special 1939 issue of *Survey Graphic*, edited by Swing and devoted to the dangers that fascism posed to the United States, contained several articles focusing upon the persecution of racial and religious minorities in Europe.<sup>93</sup>

The belief that the contemporary European experience exemplified the general plight of minorities everywhere<sup>94</sup> invited unflattering comparison of the situation of blacks in the United States with that of minorities in Europe. Several observers specifically compared the despised position of Jews in Germany to that of blacks in this country.<sup>95</sup> Others argued that the uninhibited violence directed against Germany's Jews was fundamentally similar to the lynchings and beatings of blacks in the United States.<sup>96</sup> As Swing noted, the "tyranny" and "persecution" for which Europe was being denounced were "duplicated" on a smaller scale in this country.<sup>97</sup>

In addition, the sobering experiences of European countries heightened Americans' sensitivity to the deliberate stimulation of group prejudice in the United States. As one observer wrote, "[o]ne of the most oppressive similarities between ourselves and pre-Hitler Germany is the growth of a campaign of racial intolerance."<sup>98</sup> Commentators looked with alarm upon the increasingly violent anti-Semitism of Father Coughlin,<sup>99</sup> whose statements drew upon the themes of

92. Swing, *Over Here*, 28 SURVEY GRAPHIC 55, 61 (1939). In contrast, according to his biographer, Lippmann, for personal as well as intellectual reasons, was never able truly to grasp the emotional or racist appeal of fascism. R. STEEL, *supra* note 30, at 323, 326. *But see id.* at 330 (Lippmann recognized persecution of Jews as outlet for Nazi greed and aggressiveness that protected Europe from war).

93. *Calling America*, 28 SURVEY GRAPHIC 49-192 (1939) (special issue). Contributors to this issue included Felix Frankfurter, Bertrand Russell, Lewis Gannett, Dorothy Thompson, Alpheus T. Mason, and Archibald MacLeish.

94. On the conceptualization of a "minorities" problem cutting across the experiences of particular minority groups, see Cover, *supra* note 3.

95. R. BENEDICT, *supra* note 90, at 242; F. SCHUMAN, *supra* note 82, at 324; Gannett, *We're Another*, 28 SURVEY GRAPHIC 109, 109-12 (1939).

96. E. FREEMAN, *supra* note 76, at 292-95; M. LERNER, *supra* note 31, at 42; M. RADER, *supra* note 82, at 100, 145; F. SCHUMAN, *supra* note 82, at 313.

97. Swing, *supra* note 92, at 60.

98. S. RAUSHENBUSH, *supra* note 84, at 11.

99. From 1926 to 1940, Father Charles Coughlin, a Catholic priest, broadcast a popular radio show with millions of listeners. During the first half of the 1930s, he was an ardent supporter of Roosevelt and an advocate of "social justice." For a variety of reasons, some personal, he turned violently on Roosevelt and sponsored his own third party presidential candidate in 1936. Following the election, Coughlin became virulently anti-Semitic and pro-fascist. His broadcasts and articles grew increasingly bitter and violent until he was finally silenced in 1942 under the threat of prosecution and pres-



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Nazi rhetoric,<sup>100</sup> and upon the emergence of small but vocal bands of fascists such as the German-American Bund and the Silver Shirts.<sup>101</sup> Even before the outbreak of World War Two, some Americans attributed the rise of anti-Semitism in the United States<sup>102</sup> to deliberate Nazi propaganda.<sup>103</sup> More generally, in 1938 *The Nation* noted the “festering infection of our own racial prejudices—our anti-Negro and anti-Jewish feeling” and attributed it to the growth of regional fascism and the extralegal terrorism that accompanied it.<sup>104</sup> Concern was also expressed about hostility toward other groups, including the increasingly overt and violent sentiment against the Jehovah’s Witnesses,<sup>105</sup> and Mayor Frank Hague’s expulsion of CIO organizers from Jersey City.<sup>106</sup>

sure from the Catholic hierarchy. See S. MARCUS, *FATHER COUGHLIN* (1973); R. SWING, *supra* note 41, at 34-61; C. TULL, *FATHER COUGHLIN AND THE NEW DEAL* (1965).

100. See INSTITUTE FOR PROPAGANDA ANALYSIS, *THE FINE ART OF PROPAGANDA* (1939); W. KERNAN, *THE GHOST OF ROYAL OAK* (1940); D. STRONG, *ORGANIZED ANTI-SEMITISM IN AMERICA* 61-63 (2d ed. 1941); C. TULL, *supra* note 99, at 197, 243-44; Neilson, “Minorities” in *Our Midst*, 28 SURVEY GRAPHIC 101, 103 (1939). Commentators do not agree on the extent to which Coughlin had connections with the German government. Compare A. FRYE, *NAZI GERMANY AND THE AMERICAN HEMISPHERE, 1933-1941*, at 154-55 (1967) (Coughlin may have made actual contact with German representatives in United States) with C. TULL, *supra* note 99, at 244 (no affiliation proved between Coughlin and German government).

101. See D. STRONG, *supra* note 100, at 21-56; Johnson, *The German-American Bund and Nazi Germany: 1936-1941*, STUDIES IN HIST. & Soc’y, Spring 1975, at 31, 37 (“By 1939, a substantial number of Americans feared the presence of an imitation Third Reich in New York, St. Louis, Seattle, or for that matter in any American city.”) For a comprehensive study of eleven anti-revolutionary, anti-Semitic organizations that appeared between 1933 and 1940, see D. STRONG, *supra* note 100. See generally Johnson, *The Rising Tide of Anti-Semitism*, 28 SURVEY GRAPHIC 113 (1939) (describing anti-Semitic organizations and propaganda) [hereinafter cited as *Johnson—Rising Tide*].

102. D. STRONG, *supra* note 100, at 146-47; *Johnson—Rising Tide*, *supra* note 101, at 113; see Memorandum of Discussion at a Conference Called by Justice Felix Frankfurter in Washington, D.C. (Apr. 10, 1939) (Max Lerner Papers, Box 3, Folder 119, Yale University Archives) (illustrating concern of American Jewish leaders, including Frankfurter, about rising anti-Semitism in United States in late 1930s) [hereinafter cited as Memorandum].

103. Socialist Max Lerner, who had previously attributed this phenomenon to economic insecurity, was one of these observers. Memorandum, *supra* note 102, at 7-8, 10. To Lerner, anti-Semitism was “a major weapon in the Nazi arsenal for destroying the democratic structure.” *Id.* at 12. Dr. Alfred Cohn, a philosopher and physician, observed that the Nazis used not only Jews, but all available minority groups, to disrupt and destroy the internal social structure of other countries. *Id.*

Propaganda efforts by Nazi agents in the United States had been investigated in the mid-1930s by a House committee chaired by Rep. John McCormack. SPECIAL HOUSE COMM. ON UN-AMERICAN ACTIVITIES, INVESTIGATION OF NAZI AND OTHER PROPAGANDA, H.R. REP. NO. 153, 74th Cong., 1st Sess. (1935).

104. 146 NATION 633 (1938).

105. A. MASON, *supra* note 32, at 533; Rotnem & Folsom, *Recent Restrictions Upon Religious Liberty*, 36 AM. POLITICAL SCI. REV. 1053, 1061-62 (1942). Attacks on Jehovah’s Witnesses were particularly disturbing because they also had been a special object of persecution in Nazi Germany. J. CONWAY, *THE NAZI PERSECUTION OF THE CHURCHES* 195-99 (1968); J. SIMON, *INDEPENDENT JOURNEY* 206 (1980).

106. Hague’s policy, challenged successfully in *Hague v. CIO*, 307 U.S. 496 (1939),

Some analysts recognized that the stimulation of group conflict had particularly serious consequences for the survival of democracy in a polyglot nation such as the United States. A book entitled *What Mein Kampf Means to America* contended that, in the "mongrel" society the United States had become, "[t]he idea of erecting race prejudice into the central principle of a society" was the "most sinister contradiction" of the "American idea" that could be advanced.<sup>107</sup> In *The March of Fascism*, Stephen Raushenbush warned that Americans were even more prepared for the idea of relegating minorities to second-class citizenship than were pre-Hitler Germans.<sup>108</sup> The treatment of blacks and the ease with which religious intolerance had been inflamed during the 1920s demonstrated the dangerous potential for persecution in America.<sup>109</sup> Raushenbush warned that millions of Americans were still capable of being "stampeded by racialism, bigotry, or fear, or deluded by Messianic promises of work, security, and superiority."<sup>110</sup> Once the process of persecution was underway, he warned, it could not be contained. "[W]ith racialism, as with antireligion or totalitarianism, there is no convenient stopping place between a little social animus and murder."<sup>111</sup> Psychologist Ellis Freeman warned that the "psychological projection of guilt upon scapegoats, one of the prerequisites of Fascism, is carried out already on a grand scale in this country," adding that Americans, like Germans, were very susceptible to agitation by messianic demagogues.<sup>112</sup> Others joined in sounding the alarm.<sup>113</sup>

was widely viewed as a prototype of the suppression of a political minority by a dictator to whom the majority had abdicated political power. See, e.g., M. RADER, *supra* note 82, at 339; S. RAUSHENBUSH, *supra* note 84, at 329-30; 146 NATION 546-47 (1938); *id.* at 633; *id.* at 663; *id.* at 714; Broun, *Shoot the Works*, 93 NEW REPUBLIC 307 (1938). For an analysis of Hague's repressive methods, see D. MCKEAN, THE BOSS at xiii-xviii, 187-201, 227-48, 268-77 (1940). Condemnation of Hague's violations of civil liberties did not come only from liberals; the American Bar Association's new Bill of Rights Committee filed an amicus brief in the Supreme Court case. L. LUSKY, *supra* note 4, at x.

107. F. HACKETT, WHAT MEIN KAMPF MEANS TO AMERICA 188-90 (1941).

108. S. RAUSHENBUSH, *supra* note 84, at 11-15; see *id.* at 329-30 (describing process of destroying civil liberties and attacking minorities).

109. *Id.* at 12-14. Another author wrote that racism was inherently dangerous, and that the practice of lynching showed America's vulnerability to outbreaks of minority persecution similar to those that had occurred in Europe. M. RADER, *supra* note 82, at 100, 117-18, 145.

110. S. RAUSHENBUSH, *supra* note 84, at 333.

111. *Id.* at 117; see *id.* at 126 (anti-Semitism leads to murder, expropriation, and destruction of "principles of minority rights which are essential parts of democracy").

112. E. FREEMAN, *supra* note 76, at 328-29.

113. Professor Clyde Miller of Columbia predicted that the stresses of the postwar period could produce the search for new racial or religious scapegoats in this country against whom popular discontent could be directed. Miller, *supra* note 84, at iv; see M.

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In a 1942 article entitled *Minority Rights and the Public Interest*, Louis Lusky argued that group conflict posed another threat to American democracy.<sup>114</sup> In Lusky's view, the preservation of free government depended upon the ability to instill a sense of political obligation in the populace. This sense of obligation could be maintained only if all groups had access to and participated in the political process, the basic mechanism for resolving conflicting interests. Once a minority was excluded from the democratic process, its members would become alienated and suppression would be necessary to control them. Group prejudice and conflict, by causing the exclusion of minorities from political participation, would therefore lead to the downfall of free government.<sup>115</sup>

### C. *Preserving the Democratic System*

Recognition of the dangers of unrestrained majoritarianism and of exploitation of the majority's emotional desires and antagonisms produced various responses. One suggested antidote was the maintenance of democratic procedures by an independent judiciary. If minorities were guaranteed the right to participate in the political process, they would not resort to extralegal opposition.<sup>116</sup> Substantive protections for minorities were also advocated as a means of thwarting majority tyranny. Even when the integrity of the political process was not impaired, the danger of permitting the majority to single out for mistreatment any particular racial or religious group justified judicial protection of minority rights.<sup>117</sup>

Some commentators took the notion of providing substantive protection for minorities to a somewhat paradoxical conclusion. Recognizing the havoc that agitation by fascist groups could cause, they called for the suppression of speech that did not accept the principles of democracy or that exploited group conflict. Lippmann, pointing to Huey Long's Louisiana, warned against permitting speakers to so-

DAVIE, *supra* note 73, at 371 (recognizing threat to national unity and welfare posed by promotion of ethnic hatred); cf. *Johnson—Rising Tide*, *supra* note 101, at 113 ("Every vulgar and designing scoundrel in America who schemes to substitute dictatorship for democracy casts a greedy eye upon the potentialities of an anti-Semitic campaign.")

114. Lusky, *Minority Rights and the Public Interest*, 52 *YALE L.J.* 1 (1942).

115. *Id.* at 3-6, 20-21.

116. See, e.g., Janowsky, *supra* note 84, at 76-77; Lusky, *supra* note 114, at 5-6, 20-21, 38.

117. Lusky, *supra* note 114, at 21-22, 38-40; cf. Neilson, *supra* note 100, at 103 (safety of all Americans depends on just treatment of minority groups because "[w]e are all in some aspects members of minorities . . . and once the democratic principle is abandoned no one's liberty is assured").

licit a majority mandate to destroy democracy.<sup>118</sup> In light of the rise of fascism, Thompson and Lerner emphasized the need to prevent subversion by fascist groups.<sup>119</sup> Loewenstein also argued for the suppression of fascist sentiments. As an open mass movement, he wrote, fascism could be successful only by using the opportunity for unfettered political organization offered by the "cover of fundamental rights and the rule of law" found in democratic regimes.<sup>120</sup> He described the suicidal error of democracy when faced by such movements:

Democracies are legally bound to allow the emergence and rise of anti-parliamentarian and anti-democratic parties under the condition that they conform outwardly to the principles of legality and free play of public opinion. It is the exaggerated formalism of the rule of law which under the enchantment of formal equality does not see fit to exclude from the game parties that deny the very existence of its rules.<sup>121</sup>

To combat the exploitation of group prejudice, Loewenstein and several other commentators advocated the punishment of group libel.<sup>122</sup>

Although observers in the late 1930s and early 1940s differed in their analyses of democracy and their proffered responses, it is evident that most of them shared the same basic fears. They were apprehensive about unrestrained majoritarianism, persecution of minorities, manipulation of the majority by popular authoritarians, and deliberate use of group prejudice to maintain the cohesiveness of the majority. To

118. Lippmann, *Today and Tomorrow*, N.Y. Herald Tribune, Feb. 5, 1935, § 1, at 19, col. 1; cf. Lippmann, *Today and Tomorrow*, N.Y. Herald Tribune, Mar. 16, 1935, § 1, at 15, cols. 1-2 (democracy has right to suppress speech of those who seek to destroy liberty).

119. M. LERNER, *supra* note 31, at 96, 103 (civil liberties do not include formation of military and semi-military units); THOMPSON-RECORD, *supra* note 54, at 118-19 (democratic principles may not require "gracious hospitality" for agitators directed from abroad who seek to destroy democracy); see Mowrer, *supra* note 31, at 189-90 (protection of democracy may require banning of doctrines that espouse dictatorship).

120. Loewenstein, *supra* note 31, at 423-24.

121. *Id.* at 424. Loewenstein's call for suppression of fascist movements was joined by Freeman. E. FREEMAN, *supra* note 76, at 326-27. *But see* MacLeish, *Freedom to End Freedom*, 28 SURVEY GRAPHIC 117, 117-19 (1939) (fascism cannot be fought by suppressing fascists without destroying democracy).

122. Loewenstein, *Legislative Control of Political Extremism in European Democracies, II*, 38 COLUM. L. REV. 725, 743-45 (1938) (applauding use of group libel laws in Europe); Lusky, *supra* note 114, at 36 (First Amendment does not protect willful aggravation of social conflict, which strikes at foundations of political cohesion of United States); Riesman, *Democracy and Defamation* (pts. 1-2), 42 COLUM. L. REV. 727, 1085 (1942) (supporting use of group libel laws to control exploitation of racism for political ends); cf. S. RAUSHENBUSH, *supra* note 84, at 20-21 (noting that weakness of libel laws makes possible dangerous anti-minority agitation, but stopping short of advocating prohibition of group libel).

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this extent, the explanations of democracy expressed by a wide spectrum of opinion during this period represented a loose consensus regarding contemporary threats to democracy. The two traditional versions of tyranny, autocratic dictatorship and unrestrained majoritarianism, had converged upon one basic diagnosis. This broad consensus, and the divergences within it, exerted significant influence on the Supreme Court and its decisionmaking.

### II. The Court and the Politics of Unreason

The composition of the Supreme Court changed significantly between 1935 and 1940. President Roosevelt made five new appointments, forming the core of what came to be known as the "Roosevelt Court."<sup>123</sup> By the late 1930s, some of these new Justices, and at least one of the sitting Justices, had adopted all or part of the new consensus regarding the vulnerability of democracy to hysterical majoritarianism. Although anti-majoritarianism had been a cornerstone of the ideology of the Court's conservative bloc in the 1930s,<sup>124</sup> the new ideology transformed the nature of the perceived threat posed by unrestrained majority rule. In the latter half of the decade, events in Europe and in the United States generated increased concern about group prejudice and a new sense of urgency about violations of civil liberties.<sup>125</sup> The Justices, however, held differing views regarding the proper role of the judiciary and the balance between individual and social interests. Therefore, different Justices responded to these commonly perceived dangers with divergent approaches to concrete controversies.

123. The appointees, in chronological order, were Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, and Frank Murphy. C. PRITCHETT, *supra* note 1, at 9-10.

124. Justice Sutherland, the intellectual leader of the "Four Horsemen" who struck down major pieces of New Deal legislation, was steeped in a conservative tradition that had long taught that the greatest danger of democratic rule arose from the excesses of majoritarianism. Majority rule, in Sutherland's view, threatened the oppression of the propertied minority. See G. SUTHERLAND, *supra* note 27, at 14-16 (Constitution protects property rights against hasty legislation).

125. Justice Brandeis, in his early dissenting opinions in First Amendment cases, had stressed the need to protect the expression of minority views from "tyrannous, well-meaning majorities." *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting); see *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (framers designed First Amendment to protect against "occasional tyrannies of governing majorities"); *Pierce v. United States*, 252 U.S. 239, 269 (1920) (Brandeis, J., dissenting) (danger that juries will "deny members of small political parties freedom of criticism and of discussion in times when feelings run high"). Brandeis' views, however, though sometimes joined by Holmes, did not command a majority of the Court in the 1920s. In addition, their dissents focused on political minority groups, such as anarchists, rather than on "minorities" within the meaning of *Carolene Products*. See Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 591-93 (1981).

A. *Harlan Fiske Stone*

Heightened awareness of the vulnerability of democracy is particularly evident in the writings and correspondence of Harlan Fiske Stone, the author of footnote four of *Carolene Products*. In the early and middle 1930s, Stone interpreted domestic events in the terms of both paradigms; democracy was endangered both by autocratic rule on the one hand and by majoritarianism on the other. In the late 1930s, his attention focused increasingly on the plight of isolated minority groups and on the protection they should be given by a democratic system.

Stone disapproved of the concentration of power in the federal government,<sup>126</sup> controlled by the Democratic Party, and in the hands of the Chief Executive. He deplored the apparent abdication of authority by Congress in the early New Deal period, when it summarily passed every measure proposed by the President;<sup>127</sup> he opposed the Court packing plan;<sup>128</sup> and he feared that Roosevelt's election for a third term in 1940 would lead to the demise of the two-party system.<sup>129</sup> On the other hand, he had an acute sense of the fragility of democracy in the face of an aroused popular will. Stone believed that the government must have the power to control private economic interests for the general welfare;<sup>130</sup> the Court's resistance to such efforts, he warned in 1936, could precipitate a revolution.<sup>131</sup> He also disliked appeals to the emotions of the populace. In 1938, for example, he displayed irritation at the manner in which the Administration denounced the Nazi treatment of Jews, writing of the "sad spectacle" of government officials "hurling billingsgate at the Nazis in the best Nazi style."<sup>132</sup>

126. A Republican and a friend of Hoover, Stone disagreed with the substance of most New Deal measures. A. MASON, *supra* note 32, at 305, 371, 416, 426, 544. He believed that the welfare measures were undermining the strength and self-reliance of the American people, in contrast to the discipline that Hitler's rule was instilling in Nazi Germany. *Id.* at 544.

127. *Id.* at 371.

128. *Id.* at 446. The Court packing plan led Stone to write, "It almost makes you wonder, whether the democratic form of government can permanently endure, and whether we will not ultimately go the way that so many European countries seem to be going now." *Id.*

129. *Id.* at 548.

130. *Id.* at 322, 344, 360, 371-73.

131. Letter from Irving Brant to Alpheus Mason (July 22, 1951) (Harlan Fiske Stone Papers, Box 83, Library of Congress). Nine years later and delirious after suffering a fatal stroke, Stone moaned repeatedly, "When will the revolution come." *Id.*

132. Letter from Harlan F. Stone to John B. Moore (Dec. 23, 1938) (Harlan Fiske Stone Papers, Box 22, Library of Congress). Stone was sympathetic, however, to the plight of refugees from Nazi Germany. A. MASON, *supra* note 32, at 547.

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The evils and potential dangers of majority prejudice and the victimization of minority groups were brought forcefully to Stone's attention in a series of letters from several correspondents in the late 1930s. Judge Learned Hand wrote to him in 1938 about the emergence in Europe of societies characterized by ant-like uniformity and the rule of the "overwhelmingly powerful group."<sup>133</sup> The letters Stone received from Judge John Bassett Moore<sup>134</sup> addressed these issues in a particularly provocative manner. In March 1939, Moore wrote about the hypocrisy of those who criticized Nazi Germany. "We are now parading and bawling . . . against racial discrimination, and yet there is no people that more flagrantly practices it than our own." Moore pointed to immigration and naturalization laws excluding Chinese, Japanese, and other nonwhites, and added, "Before we excluded them we now and then massacred them." He also pointed to "Jim Crow" laws requiring racial segregation:

[O]nly the other day I saw the complaint of a negro legislator that he had been denied "equal accommodations" on a railway train. Our highest officials coddle and fawn upon negroes in Harlem, but forbear to suggest, much less to demand, that they be put on an equal footing with the whites as regards the suffrage in the South.<sup>135</sup>

Moore subsequently compared the treatment accorded to Jehovah's Witnesses in the United States to the state of affairs in Nazi Germany<sup>136</sup> and wrote sarcastically about the approval given to the harassment of Communists by the Governor of Wisconsin, whose first name was "Heil."<sup>137</sup> According to Moore, the prevalent view of freedom in the United States was that "one is at liberty to agree with those who have the power to proscribe dissent."<sup>138</sup>

133. Letter from Learned Hand to Harlan F. Stone (July 18, 1938) (Harlan Fiske Stone Papers, Box 15, Library of Congress).

134. John Bassett Moore was a prominent scholar of international law who had served as a Judge on the Permanent Court of International Justice at The Hague. 2 WHO WAS WHO IN AMERICA 380 (1950).

135. Letter from John B. Moore to Harlan F. Stone (Mar. 27, 1939) (Harlan Fiske Stone Papers, Box 22, Library of Congress).

136. Letter from John B. Moore to Harlan F. Stone (July 13, 1940) (Harlan Fiske Stone Papers, Box 22, Library of Congress).

137. Letter from John B. Moore to Harlan F. Stone (July 19, 1940) (Harlan Fiske Stone Papers, Box 22, Library of Congress) ("I assume that the Governor does not publicly associate [his name] with Hitler . . . He is himself a genuine American who believes in free speech for all those who do not differ with him.")

138. Letter from John B. Moore to Harlan F. Stone (June 10, 1942) (Harlan Fiske Stone Papers, Box 22, Library of Congress).

The work of Professor Loewenstein<sup>139</sup> also came to Stone's attention. Their contact began in January 1938, when Loewenstein wrote Stone, an alumnus and active trustee of Amherst, introducing himself and thanking Stone for a favorable comment to Brandeis concerning an article by Loewenstein.<sup>140</sup> Loewenstein enclosed reprints of articles he had published in 1937, the year in which *Militant Democracy and Fundamental Rights* appeared.<sup>141</sup> Stone and Loewenstein continued to correspond and occasionally to meet at least until 1942,<sup>142</sup> and Stone appears to have been favorably impressed by Loewenstein's writing.<sup>143</sup>

It is, of course, impossible to determine the extent to which Stone agreed with his correspondents. Nevertheless, it is clear that Stone was developing a new perception of the interaction between majorities and minorities and integrating this perception into his theories of judicial review. Footnote four of his opinion in *Carolene Products*<sup>144</sup> represents one of the earliest expressions of Stone's new approach.

The *Carolene Products* footnote reflects clearly the influence of the developing consensus about democracy. First, the notion that certain civil liberties must be protected in order to preserve the possibility of political change<sup>145</sup> meshes with the view espoused by Lippmann and others that a temporary majority should not be permitted to abrogate political rights.<sup>146</sup> Second, Stone specifies one, and only one, force against which substantive protection was needed, notwith-

139. See pp. 754, 760 *supra*.

140. Letter from Karl Loewenstein to Harlan F. Stone (Jan. 6, 1938) (Harlan Fiske Stone Papers, Box 19, Library of Congress).

141. Loewenstein, *supra* note 31. The following year, another article by Loewenstein about fascism appeared in the *Columbia Law Review*. Loewenstein, *supra* note 122. It seems probable that Stone, a trustee of the review, and Louis Lusky, a former Columbia articles editor and Stone's law clerk that year, read the article.

142. Letter from Harlan F. Stone to Karl Loewenstein (June 3, 1942) (Harlan Fiske Stone Papers, Box 19, Library of Congress).

143. Letter from Harlan F. Stone to Karl Loewenstein (Jan. 18, 1938) (Harlan Fiske Stone Papers, Box 19, Library of Congress); Letter from Harlan F. Stone to Karl Loewenstein (Dec. 17, 1940) (Harlan Fiske Stone Papers, Box 19, Library of Congress).

144. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). The genesis of footnote four, see A. MASON, *supra* note 32, at 512-15, and the theory of judicial review that it contains, see J. ELY, *supra* note 3, have been discussed extensively and need not be reviewed here.

145. The second paragraph of footnote four states:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. 304 U.S. at 152 n.4.

It then refers to cases dealing with restrictions on the right to vote, restraints on the dissemination of information, interferences with political organizations, and prohibitions of peaceable assemblies. *Id.*

146. See pp. 748-51 *supra*.



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standing the unimpeded operation of the political process. That force was group prejudice.<sup>147</sup> Footnote four thus embodies the concern emerging in the late 1930s that democracy was particularly vulnerable to the exploitation of the animosities of the majority toward minority groups. Stone recognized this danger in a letter to Judge Irving Lehman written the day after the *Carolene Products* decision was announced:

I have been deeply concerned about the increasing racial and religious intolerance which seems to bedevil the world, and which I greatly fear may be augmented in this country. For that reason I was greatly disturbed by the attacks on the Court and the Constitution last year, for one consequence of the program of "judicial reform" might well result in breaking down the guaranties of individual liberty.<sup>148</sup>

Louis Lusky, Stone's law clerk in 1938, who authored the first draft of footnote four, attributed the same significance to the passage. In a letter to Stone in 1942, he wrote that the footnote recognized "the relationship between discrimination against minority groups and the disappearance of 'free' government."<sup>149</sup>

Third, footnote four reflects the influence of contemporary thinking by assigning the Court the duty aggressively to protect the political process against group prejudice. During the circulation of his *Carolene Products* draft opinion,<sup>150</sup> Stone hinted that he was prepared to

147. The third paragraph of footnote four states:

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities, . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

304 U.S. at 152 n.4.

148. A. MASON, *supra* note 32, at 515.

149. Letter from Louis Lusky to Harlan F. Stone (Oct. 26, 1942) (Harlan Fiske Stone Papers, Box 19, Library of Congress). Lusky later elaborated further on the link between group prejudice and the collapse of democracy. Lusky, *supra* note 114, at 5-6; see p. 759 *supra*.

150. The first draft of footnote four was worded more strongly than the final version with respect to the necessity for judicial action to counter the corrosive effect of prejudice on the political process. It stated unequivocally, "Different considerations may apply, and one attacking the constitutionality of a statute may be thought to bear a lighter burden, when the legislation aims at restricting the corrective political processes which can ordinarily be expected to bring about repeal of undesirable legislation." With reference to statutes directed at particular religious or racial minorities, the draft declared:

Prejudice against discrete and insular minorities may be a special condition in such situations, which tends seriously to curtail the operation of those political processes

go beyond the specific provisions of the first ten amendments to strike down discriminatory or oppressive legislative action.<sup>151</sup> To Justice Black, who had objected that the opinion still left too much power to the courts, Stone admitted that the "battle of saving proper scope to the legislative power from curtailment by courts is a hard one," but added tartly, "I do not think we aid it by not recognizing the appropriate boundaries of the issues which must be drawn."<sup>152</sup>

In the years immediately following *Carolene Products*, Stone recognized that the suppression of Jehovah's Witnesses exemplified the forces threatening the survival of the democratic process. His dissent in *Minersville School District v. Gobitis*<sup>153</sup> made explicit the link between majority prejudice and the suppression of civil liberties: "History teaches us that there have been but few infringements of personal liberty by the state . . . which have not been directed, as they are now, at politically helpless minorities."<sup>154</sup> Rejecting the majority opinion's deference to the legislature, Stone added, "This seems to me no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will."<sup>155</sup> This analysis of democratic dysfunction resonated with the new consensus in contemporary ideology.

Other members of the Roosevelt Court were altering their perceptions of democracy in the late 1930s along similar lines. Their starting points were not identical to Stone's; it is doubtful that the Roosevelt appointees shared his anxiety about the autocratic implications of Roosevelt's extended presidency.<sup>156</sup> Nevertheless, it appears that many

normally to be relied on to protect minorities, and which may call for a correspondingly more searching judicial scrutiny.

Stone Draft Opinion (2d) at 6 n.4, No. 640 (Apr. 1938) (Harlan Fiske Stone Papers, Box 63, Library of Congress).

151. Chief Justice Hughes objected that the matters raised in the footnote involved different rights but not a different test of validity. Note from Charles Evans Hughes to Harlan F. Stone, No. 640 (Apr. 18, 1938) (Harlan Fiske Stone Papers, Box 63, Library of Congress). Stone replied, "There are, however, possible restraints on liberty and political rights which do not fall within those specific prohibitions [of the first ten amendments] and are forbidden only by the general words of the due process clause of the Fourteenth Amendment." Note from Harlan F. Stone to Charles Evans Hughes, No. 640 (Apr. 19, 1938) (Harlan Fiske Stone Papers, Box 63, Library of Congress).

152. Note from Harlan F. Stone to Hugo Black, No. 640 (Apr. 22, 1938) (Harlan Fiske Stone Papers, Box 63, Library of Congress).

153. 310 U.S. 586 (1940).

154. *Id.* at 604 (Stone, J., dissenting). The majority upheld the constitutionality of compulsory flag salutes in the public schools against a religious challenge by Jehovah's Witnesses.

155. *Id.* at 606.

156. Frankfurter and Douglas both wrote memoranda for Roosevelt justifying his decision to run for a third term. Lash, *A Brahmin of the Law: A Biographical Essay*, in *FROM THE DIARIES OF FELIX FRANKFURTER* 77 (J. Lash ed. 1975).

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of the other Justices came to share Stone's concern about the dangers of unrestrained majoritarianism and, particularly, the threat of group prejudice.

### B. *Felix Frankfurter*

Felix Frankfurter was even more directly conversant with contemporary intellectual currents and events in Europe than Stone. He corresponded regularly with Lippmann until the latter described Hitler as "the authentic voice of a genuinely civilized people" in 1933.<sup>157</sup> He was a close friend of Max Lerner and, until his appointment to the Court, a member of the Board of Directors of Survey Associates, the organization that published *Survey Graphic*.<sup>158</sup> From 1933 to 1934 he spent a year at Oxford, and during the 1930s he was involved in efforts to assist refugees from Europe and make known the horrors of Nazi Germany.<sup>159</sup>

Sensitive to his own Judaism,<sup>160</sup> Frankfurter was deeply troubled by the rise of fascism. As early as 1933, he wrote to Roosevelt from England that the "violence and madness now dominating in Germany . . . make it abundantly clear that the significance of Hitlerism far transcends ferocious anti-semitism and fanatical racism."<sup>161</sup> Concern that the same madness would spread to the United States led him to admonish Lerner in 1936 that nothing was more important than "to inoculate our people against fascist-mindedness."<sup>162</sup> Although anti-Semitism had always been a fact of life for him, he discerned and expressed concern about the unmistakable increase in anti-Semitic ac-

157. R. STEEL, *supra* note 30, at 220-23, 331-32.

158. Frankfurter contributed to a 1939 special issue of *Survey Graphic*, entitled *Calling America*. See note 93 *supra*. Apparently at the request of Frankfurter, Paul Kellogg, editor of *Survey Graphic*, sent the *Calling America* issue to Justice Black. See Letter from Paul Kellogg to Hugo Black (Feb. 15, 1939) (Hugo L. Black Papers, Box 60, Library of Congress).

159. L. BAKER, FELIX FRANKFURTER 197-99 (1969); ROOSEVELT AND FRANKFURTER 449-56 (M. Freedman ed. 1967). Frankfurter, however, has been criticized by some for being too discreet in his criticism of Nazi Germany. L. BAKER, *supra*, at 197.

160. L. BAKER, *supra* note 159, at 197; Lash, *supra* note 156, at 73.

161. Letter from Felix Frankfurter to Franklin D. Roosevelt (Oct. 17, 1933), in ROOSEVELT AND FRANKFURTER, *supra* note 159, at 164. Frankfurter continued, "[T]he attack against the Jew is merely an index to the gospel of force and materialism that explains the present rulers of Germany." *Id.*

162. Letter from Felix Frankfurter to Max Lerner (Mar. 1936) (Max Lerner Papers, Box 3, Folder 117, Yale University Archives). In the same year, he wrote that the democratic faith of many Americans had been invigorated by contemporary events, including "nauseat[ing] . . . 'purges'" in Germany, which had disclosed "the inevitable operations of dictatorship." F. FRANKFURTER, *The Young Men Go to Washington*, in LAW AND POLITICS 238, 238-39 (1939) (magazine article appearing in January 1936).

tivity during the latter half of the 1930s.<sup>163</sup> He also perceived that anti-Semitism was part of the larger phenomenon of social demoralization resulting from group prejudice.<sup>164</sup> For many years a legal adviser to the NAACP,<sup>165</sup> Frankfurter acknowledged that "the colored problem is the most complicated and baffling of all our social problems."<sup>166</sup>

Frankfurter also suggested that the isolation of minorities was linked to the weakening of democratic government. In *Lane v. Wilson*,<sup>167</sup> a decision invalidating Oklahoma's racially discriminatory restrictions on voter registration, he wrote that discrimination had created "a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise."<sup>168</sup> Thus, the effects of group prejudice threatened the social cohesion, the "community of common ideals,"<sup>169</sup> that Frankfurter believed essential in American society.

Frankfurter maintained that cohesiveness and mutual tolerance depended not only on widely shared economic security,<sup>170</sup> but also on

163. Memorandum, *supra* note 102, at 1, 3, 8; Letter from Max Lerner to Felix Frankfurter (June 10, 1938) (Max Lerner Papers, Box 3, Folder 122, Yale University Archives).

164. Commenting to Justice Stanley Reed in 1944 on Lillian Smith's *Strange Fruit*, a novel depicting the failure of respectable citizens to intervene against terrorism directed against blacks in the rural South, Frankfurter wrote: "I also know that the attitude indicated in the paragraph I have marked is precisely the attitude responsible for the Dreyfus case, and I further know that the Dreyfus case more than any one single factor brought the corrosion in France that led to the awful debacle in 1940." Note from Felix Frankfurter to Stanley Reed (Apr. 25, 1944) (Felix Frankfurter Papers, Box 92, File 1923, Library of Congress); see D. BROGAN, FRANCE UNDER THE REPUBLIC 305-10, 357-87 (1940) (discussion of Dreyfus affair to which Frankfurter's letter referred); cf. Memorandum, *supra* note 102, at 8 (Jews "victims of a strong, generic, nativist prejudice" because "associated in the Southern mind with the alien").

165. R. KLUGER, SIMPLE JUSTICE 115 (1976).

166. Note from Felix Frankfurter to Stanley Reed, *supra* note 164.

167. 307 U.S. 268 (1939).

168. *Id.* at 276.

169. Telegram from Felix Frankfurter to Raymond Moley (Sept. 24, 1935), in ROOSEVELT AND FRANKFURTER, *supra* note 159, at 287. Frankfurter regarded this feature as one of the most important characteristics of the United States. *Id.*; F. FRANKFURTER, *America and the Immigrant*, in LAW AND POLITICS 198, 199 (1939) (shared ideals of American people); FROM THE DIARIES OF FELIX FRANKFURTER 212 (J. Lash ed. 1975) (meaning of American citizenship). Lusk held similar views about the need for social cohesion. Lusk, *supra* note 114, at 39-40.

170. He wrote in 1937, in a draft speech prepared for delivery by Roosevelt:

[U]nless government can succeed in creating conditions under which the great mass of people do feel convinced of justice, economic security and ample scope for human dignity, that tolerance of differences and that general concern for fair play which are the real protection of the individual and minorities will disappear . . . [These qualities] are the natural reflection of magnanimity of spirit in the masses which in turn depends upon generally distributed well-being.

Draft of Constitution Day Speech, in ROOSEVELT AND FRANKFURTER, *supra* note 159, at 409, 414 (speech delivered Sept. 17, 1937); see *id.* at 414-16 (economic distress threatens tolerance and concern for fairness).

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constant education and discussion of American ideals. At a meeting of prominent Jews called by Frankfurter in 1939 to discuss strategies for combating anti-Semitism in the United States, he urged a strategy of drawing on "the innate decencies" of the American people and their faith in democracy. He believed that the public would "balk any attempt to make a minority group the victim of intolerance,"<sup>171</sup> but that they must be educated about the fundamental nature of American society. To combat prejudice, Frankfurter asserted, "we should make clear that all groups in America move in framework of common fellowship." He added that

the Constitution was framed for an indefinite future, for different people and different races. This conception of American democracy which differentiates our society from that, say, of Sweden or Holland, needs to be spelled out and repeated again and again. Otherwise we may permit the emasculation of our democracy into a far more shallow way of life, under which foreign groups do not become citizens, but remain in all realistic essentials merely temporary guests.<sup>172</sup>

While Frankfurter expressed confidence in the innate good sense of the American people, he also evinced a willingness to support strong, arguably repressive measures to enforce the cohesion of American society. For example, as Joseph Lash and Richard Danzig have shown, Frankfurter's desire to mobilize public opinion and his obsession with the flag as a symbol of national unity distorted his opinion upholding the compulsory flag salute in *Minersville School District v. Gobitis*.<sup>173</sup>

171. Memorandum, *supra* note 102, at 8.

172. *Id.* at 10.

173. 310 U.S. 586 (1940); see Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion*, 1977 SUP. CT. REV. 257; Lash, *supra* note 156, at 68-70.

Frankfurter also demonstrated his belief that government had the power to demand adherence to the "principles of the Constitution" by joining Stone's dissent in *Schneiderman v. United States*, 320 U.S. 118, 170 (1943). In that case, the majority refused to permit the revocation of Schneiderman's naturalized citizenship on the ground that he had been a Communist and therefore had lacked attachment to those principles at the time of his naturalization. *Id.* at 131-59. In a note to Stone, Frankfurter asserted that attachment to constitutional principles created "the bond of fellowship of citizens." Note from Felix Frankfurter to Harlan F. Stone (May 31, 1943) (Felix Frankfurter Papers, Box 85, File 1763, Library of Congress). Schneiderman's naturalization, Frankfurter believed, could be valid only if these principles were reduced to trivialities. Liss, *The Schneiderman Case: An Inside View of the Roosevelt Court*, 74 MICH. L. REV. 500, 510, 515-16 (1976).

Many years later, in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), Frankfurter cited both his friend David Riesman and Professor Karl Loewenstein, see note 122 *supra*, to support his decision that the state could constitutionally employ group libel laws to control the political exploitation of racism. 343 U.S. at 259 n.9, 261 n.16.

The role assigned by Frankfurter to the Court reflected his emphasis upon national unity as well as his view that the Court could not, over time, successfully withstand the popular spirit.<sup>174</sup> Despite his concern about the oppression of minorities, he was cautious about judicial creation of substantive protections for them.<sup>175</sup> On the other hand, the Court fulfilled its primary role when it acted to protect the integrity of the political process. In a letter to Stone on the eve of *Gobitis*, Frankfurter acknowledged the fundamental soundness of the judicial role Stone had set forth in the second paragraph of footnote four.<sup>176</sup> The Court, Frankfurter argued, could properly intervene to keep open "all those channels of free expression by which undesirable legislation may be removed" and keep unobstructed "all forms of protest against what are deemed invasions of conscience."<sup>177</sup> He repeated this theme in a 1941 essay arguing that respect for the guarantees of the Bill of Rights would assure that dogmas would be replaced and "the paths to the City of God . . . be kept open."<sup>178</sup>

### C. *Frank Murphy*

Like Frankfurter, Frank Murphy had long experience with the issues of race relations and civil liberties. During his career as local

174. *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 670-71 (1943) (Frankfurter, J., dissenting); F. FRANKFURTER, *Can the Supreme Court Guarantee Toleration?* in LAW AND POLITICS 195, 197 (1939) (essay written in 1925); F. FRANKFURTER, *The Paths Must Be Kept Open*, in OF LAW AND MEN 236, 237 (1956) (essay written in 1941) [hereinafter cited as *Frankfurter-Paths*]; Draft of Constitution Day Speech, *supra* note 170, at 410.

175. Dissenting in the second flag salute case, Frankfurter contended that the state statute should be upheld against a freedom of religion claim by Jehovah's Witnesses. He stressed the divergence between his personal and his judicial position. "One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution," Frankfurter wrote. "Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime." *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 646-47 (1943) (Frankfurter, J., dissenting).

176. See note 145 *supra* (quoting paragraph).

177. Note from Felix Frankfurter to Harlan F. Stone (May 27, 1940) (Harlan Fiske Stone Papers, Box 65, Library of Congress); see Danzig, *supra* note 173, at 269 (discussing circumstances of writing of note).

Nevertheless, Frankfurter rejected the concept that free speech was a "preferred freedom" deserving special judicial protection. See *Kovacs v. Cooper*, 336 U.S. 77, 90-96 (1949) (Frankfurter, J., concurring); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 648-49 (1943) (Frankfurter, J., dissenting). Moreover, Frankfurter's principles of judicial self-restraint led him to dissent from judicially ordered reapportionment of state legislative districts. See *Baker v. Carr*, 369 U.S. 186, 284-88 (1962) (Frankfurter, J., dissenting). He believed, however, that the Court should strike down the disenfranchisement of blacks. *Id.* at 285-86.

178. *Frankfurter-Paths*, *supra* note 174, at 237; cf. Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33, 90 (1931) (need to protect right to air grievances in times of mass panic).

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judge, mayor of Detroit, Governor of Michigan, and Attorney General, Murphy had encountered racism,<sup>179</sup> political demagoguery,<sup>180</sup> labor unrest,<sup>181</sup> and municipal corruption.<sup>182</sup> He was acutely aware of the assaults on democracy throughout the world, and his views regarding the greatest threat to the democratic system changed in tandem with contemporary intellectual currents.

As Governor of Michigan in 1937, he had negotiated with the sit-down strikers at General Motors plants rather than using force.<sup>183</sup> At that time, he viewed widespread economic deprivation as the greatest potential source of upheaval. He warned that popular allegiance to democratic institutions would be in doubt and the threat of dictatorship would persist unless economic conditions were improved.<sup>184</sup> By 1939, when he became Attorney General, his analysis had begun to shift to accommodate a concern about the plight of minorities. Instituting a program to investigate political corruption in the states and cities, including Mayor Hague's political machine, he relied on contemporary rhetoric condemning intolerance and minority persecution.<sup>185</sup> Shortly after the Court repudiated Hague's ejection of CIO organizers,<sup>186</sup> Murphy delivered a speech in Jersey City condemning transgressions by public officials against the rights of "the humblest and most unpopular" minorities. Assisting "in the provocation of race conflict," manhandling union organizers, and denying certain groups the right to distribute literature were forms of "intolerance," which Murphy denounced as "the most un-American, unconstitutional, un-Christian, and undemocratic thing in our life today."<sup>187</sup>

Again reflecting contemporary thinking, Murphy believed that group prejudice posed a special threat to the social fabric of the United

179. As Judge of the Detroit Recorder's Court, Murphy presided in 1925 over the celebrated acquittal of a black man accused of a murder arising out of mob violence following a black doctor's move into a white neighborhood. J. HOWARD, MR. JUSTICE MURPHY 26-28 (1968). During Murphy's political career, blacks were one of his strongest constituencies. *Id.* at 168.

180. During the early 1930s, he maintained contact with Father Coughlin, *see* notes 99-100 *supra*, and attempted to convince the priest to continue his support for the New Deal. J. HOWARD, *supra* note 179, at 83.

181. *See* J. HOWARD, *supra* note 179, at 123-44 (General Motors sit-down strike).

182. *See id.* at 194-95 (initiation of sweeping anti-corruption campaign by Attorney General Murphy).

183. *Id.* at 123-44.

184. *Id.* at 176-79.

185. *See, e.g.,* Murphy, *Civil Liberties and the Cities*, reprinted in 84 CONG. REC. 2371 app. (1939) (speech delivered May 15, 1939); Murphy, *Civil Liberties*, reprinted in 84 CONG. REC. 1352 app. (1939) (radio address delivered Mar. 27, 1939).

186. *Hague v. CIO*, 307 U.S. 496 (1939).

187. Murphy, *The Meaning of Civil Liberty*, reprinted in 84 CONG. REC. 2921, 2922 app. (1939) (address delivered June 21, 1939).

States. Just prior to taking the bench in 1940, he delivered a speech describing the "resurgence of bigotry and intolerance" in Europe and drawing a lesson for the United States. "[T]he virus of antisemitism," a tool of "power-mad men" seeking to gain a popular following, had made itself felt in this country.

The purveyors of hatred, the provokers of division and strife, the swaggering apostles of force and violence are methodically and with premeditation laboring to bring to the United States the same conditions of group hatred and civil war that have destroyed the peace of Europe. . . . Unscrupulously they stir up riots in the city streets, they intimidate peaceful citizens, they invade meetings, and they peddle as truth the malicious lies which people of their ilk have invented to blacken those whom they hate.<sup>188</sup>

By the early 1940s, Murphy's campaign transcended the fight against anti-Semitism.<sup>189</sup> Racial equality had become his most ardent crusade, and he had come to believe that the nation's treatment of minorities was the truest test of its allegiance to the values for which it was fighting.<sup>190</sup> In a speech given in 1944, he warned,

Unless we halt this mounting fury [of racism], the end of this war may witness the unleashing of a pogrom of hate and persecution within the United States far greater and more destructive than that which followed the first World War. Any hope that our civil liberties can long last in such an atmosphere is futile.<sup>191</sup>

Murphy's responses to these threats to democracy also changed with time. As he moved away from reliance on economic remedies, he came to believe that the federal government had an affirmative duty

188. Murphy, *The Challenge of Intolerance*, reprinted in 86 CONG. REC. 81, 82 app. (1940) (address delivered Jan. 7, 1940).

189. *Oyama v. California*, 332 U.S. 633, 650 (1948) (Murphy, J., concurring) (statute directed against Japanese aliens); see J. HOWARD, *supra* note 179, at 352.

190. J. HOWARD, *supra* note 179, at 347-48, 351. Although he voted with the majority to uphold a curfew on all persons of Japanese ancestry in the West Coast military area, Murphy separately concurred to emphasize his misgivings. The curfew, depriving citizens of liberty "because of their particular racial inheritance . . . bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe." *Hirabayashi v. United States*, 320 U.S. 81, 111 (1943) (Murphy, J., concurring).

191. F. Murphy, *The American Way of Life—Can It Survive?* at 8 (1944) (pamphlet, Nat'l Comm. Against Persecution of the Jews) (on file with *Yale Law Journal*). Murphy also wrote at length in his private correspondence about the evils of anti-Semitism, anti-Catholicism, and general intolerance in the United States. See, e.g., Letter from Frank Murphy to Felix Frankfurter (Nov. 23, 1943) (Felix Frankfurter Papers, Box 85, File 1763, Library of Congress).



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to intervene on behalf of the politically helpless.<sup>192</sup> He established the Civil Rights Section of the Department of Justice to provide “*aggressive protection* of fundamental rights inherent in a free people,”<sup>193</sup> and he described this action as “one of the most significant happenings in American legal history.”<sup>194</sup> Following an initial period of caution after he joined the Court, Murphy cast aside judicial restraint with regard to the protection of minorities.<sup>195</sup> Indeed, he occasionally published a concurring opinion for the sole purpose of combating the “virus” of racism.<sup>196</sup>

Yet the use of affirmative government power to protect the “fundamental rights” of minorities was not without ambiguity. Murphy attached paramount importance to the rights of the individual,<sup>197</sup> and at times he expressed an absolutist view of civil liberties. He warned in 1940 that to encroach on the Bill of Rights even in an emergency would “destroy the very democratic principles that we are seeking to preserve” and “yield to the same autocratic psychology that we want to keep out of this country.”<sup>198</sup> But he also believed, at the outset of his tenure as a Justice, that all rights were “derived, essentially, from the purposes of the society in which they exist,”<sup>199</sup> and he was acutely aware of the dangers of group hatred. When he was Attorney General, he commenced a series of investigations and prosecutions against various left- and right-wing groups, including communist and anti-Semitic organizations.<sup>200</sup> His concern about the exploitation of group prejudice led him, as a Justice, to draft a con-

192. J. HOWARD, *supra* note 179, at 203-04.

193. R. CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS I* (1947).

194. Murphy, Letter to President Roosevelt on the Activities of the Department of Justice, 84 CONG. REC. 3308, 3310 app. (1939).

195. See *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 208 (1944) (Murphy, J., concurring) (objecting to majority's decision “solely upon the basis of legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees”).

196. See, e.g., *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 422 (1948) (Murphy, J., concurring); *Oyama v. California*, 332 U.S. 633, 650, 651 (1948) (Murphy, J., concurring); see J. HOWARD, *supra* note 179, at 352.

197. C. PRITCHETT, *supra* note 1, at 259; Gressman, *The Controversial Image of Mr. Justice Murphy*, 47 GEO. L.J. 631, 635, 636, 648 (1959); see p. 810 *infra* (Murphy joined dissent in *United States v. Classic* because rights of criminal defendant overrode protection of electoral process against corruption).

198. Murphy, *In Defense of Democracy*, reprinted in 1940 INTERNATIONAL CONCILIATION 185, 189; see Barnett, *Mr. Justice Murphy, Civil Liberties and the Holmes Tradition*, 32 CORNELL L.Q. 177, 185-86 (1946) (Murphy's view that liberty must be enforced even “for those who would deny liberty to others if they were in power”).

199. J. HOWARD, *supra* note 179, at 232; see pp. 764, 770 *supra* (similar views of Stone and Frankfurter).

200. J. HOWARD, *supra* note 179, at 211-13.

curing opinion in *Cantwell v. Connecticut*<sup>201</sup> because he believed that the majority had not allowed the government sufficient authority to control racial and religious conflict.<sup>202</sup> Similarly, Murphy believed that group defamation was inherently bad and unprotected by the First Amendment.<sup>203</sup>

#### D. *Hugo L. Black*

The deliberate exploitation of racial prejudice for political purposes was not new in Hugo Black's experience. His Alabama background was steeped in the politics of racism and mob violence, and indeed, some of his strongest early political support came from members of the Ku Klux Klan.<sup>204</sup> Although Black's views on race relations were undoubtedly rooted almost entirely in his own experience,<sup>205</sup> he was exposed to the same contemporary ideology as his brethren,<sup>206</sup> and in the latter half of the 1930s he began to adopt the rhetoric of the new consensus. Responding to the furor that followed the revelation in 1937 of his past membership in the Klan, Black delivered a radio speech in which he expressly disavowed any racist or anti-Semitic beliefs.<sup>207</sup> He also warned of the rapidity with which the "flames of prejudice" could cause the suppression of religious freedom and the disruption of communities along racial and religious lines.<sup>208</sup>

Chief Justice Hughes gave opportunities to Black to give substance to his 1937 profession,<sup>209</sup> and Black made good use of one such opportunity in *Chambers v. Florida*,<sup>210</sup> decided in 1940. His opinion declared that "[t]yrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and

201. 310 U.S. 296 (1940) (invalidating licensing scheme for religious canvassers and striking down breach of peace conviction).

202. J. HOWARD, *supra* note 179, at 251. Murphy withheld this opinion after Roberts added language to the majority opinion acknowledging the state's power to punish incitements to racial or religious violence. *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940).

203. J. HOWARD, *supra* note 179, at 251, 255.

204. See generally V. HAMILTON, *HUGO BLACK: THE ALABAMA YEARS* (1972).

205. Interview with John Frank, former law clerk to Justice Black, in Phoenix, Arizona (Nov. 7, 1980).

206. For example, Black received a courtesy copy of the *Calling America* issue of *Survey Graphic*. Letter from Paul Kellogg to Hugo Black, *supra* note 158.

207. See C. WILLIAMS, *HUGO L. BLACK 27-30* (1950) (reprinting speech in entirety).

208. *Id.* at 27-28.

209. Interview with John Frank, *supra* note 205.

210. 309 U.S. 227 (1940). The facts in *Chambers*, involving forced confessions, were strikingly reminiscent of practices Black had exposed in the Birmingham suburb of Bessemer while county prosecutor. J. FRANK, *MR. JUSTICE BLACK 27-29* (1949); V. HAMILTON, *supra* note 204, at 62-64.

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those who differed, who would not conform and who resisted tyranny.”<sup>211</sup> Black described the courts as “havens” for those who suffered because they were “helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.”<sup>212</sup> In 1945, Black warned that the conditions that had “created” fascism abroad, “the placing of some groups in a preferred class of citizenship at the expense of other groups,” had to be avoided in the United States.<sup>213</sup>

Although Black shared his colleagues’ concerns about group hatred, however, his strong belief in the self-regulating democratic process led him to adopt a view of the Court’s role that was more limited in scope than Stone’s. He maintained that the Court should overturn legislative choices, including those that adversely affected minorities, only if a textually clear constitutional guarantee had been violated.<sup>214</sup> Throughout his career, Black’s faith in the majoritarian process remained fundamental to his jurisprudence.<sup>215</sup>

### E. *William O. Douglas*

The views of William O. Douglas are more difficult to reconstruct, in part because during his early legal career he was preoccupied with corporate law.<sup>216</sup> Indeed, one Senator opposed Douglas’ nomination to the Court on the ground that he had not made public his views on the rights of labor and civil liberties.<sup>217</sup> Nevertheless, it is possible to infer a gradual shift of emphasis from his earlier writings. In 1934, he used the word “fascist” to describe the powers he recommended should be given to security holders’ committees in railroad reorganizations.<sup>218</sup> Not yet alive to the implications of fascism, he nevertheless supported the underprivileged. The significance of the Se-

211. 309 U.S. 227, 236 (1940).

212. *Id.* at 241.

213. G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 325 (1977).

214. SNOWISS, *The Legacy of Justice Black*, 1973 SUP. CT. REV. 187, 194-95, 197. In Black’s view, de jure racial inequality and deprivation of voting rights violated clear constitutional guarantees. *Id.* at 194-95.

215. *Id.* at 195, 240. *But see id.* at 246 (later in Black’s career, fear that protest would degenerate into mob violence challenged earlier confidence in self-regulating marketplace of ideas).

216. *See* J. SIMON, *supra* note 105, at 89-90, 105, 132-33.

217. 84 CONG. REC. 3710-11 (1939) (remarks of Sen. Frazier).

218. Douglas argued in a draft of an article that security holders’ protective committees should have “a fascist power.” Letter from William O. Douglas to Jerome Frank (Jan. 3, 1934) (attaching draft of manuscript) (Jerome Frank Papers, Box 11, Folder 72, Yale University Archives). The term was deleted in the published version of the article. *See* Douglas, *Protective Committees in Railroad Reorganizations*, 47 HARV. L. REV. 565, 569 (1934).

curities Act, he wrote during the same year, was that government at last was "taking the side of the helpless, the suckers, the underdogs."<sup>219</sup> Two years later, he linked the need for strong government control over corporate power to averting the threat of totalitarianism. Without such control, the "forces of exploitation" would "breed insecurity" and ultimately despotism.<sup>220</sup> The submergence of individuals into large impersonal corporations in this country and into the state abroad, he stated just prior to joining the Court in 1939, led to preoccupation with "materialistic and mechanistic matters" and destroyed the spiritual and ethical values upon which democracy was based.<sup>221</sup>

In 1940, Douglas turned his attention to broader issues relating to the survival of democracy. Aware of the observations of current affairs made by people like Dorothy Thompson,<sup>222</sup> he warned that, abroad, the world was being "overrun by relentless force" and freedom was being "snuffed out by sheer might."<sup>223</sup> At home, he wrote to a friend, the country was experiencing "terribly dangerous days . . . such as only Lincoln saw."<sup>224</sup> He soon articulated an analysis that echoed very clearly the new consensus about the dangers of minority persecution. In a speech delivered to the Association of the Bar of the City of New York in 1940, Douglas spelled out his vision of the disintegration of democracy in the face of unrestrained majoritarianism. Once an inferior grade of citizenship has been allowed in a nation, he warned, the "downward spiral of disunity" leads to "hate and intolerance" and "the enemies of democracy invariably have risen to power."

Every nonconformist who is beaten, every practitioner of the right of free speech who is jailed, every unpopular exponent of a religious faith who is deprived of his constitutional rights brings every free man a step closer to incarceration or punishment, or discreet and frightened conformity. Infraction of the Bill of Rights knows no terminal points. We know from the experience of other peoples that what starts as suppression of an unpopular minority swings as easily to persecutions on the right or on the left, until few can afford to be nonconformists.<sup>225</sup>

219. Douglas, *Protecting the Investor*, 23 YALE REV. 521, 522 (1934); see J. SIMON, *supra* note 105, at 132-33.

220. W. DOUGLAS, *supra* note 31, at 1 (address delivered Oct. 20, 1936).

221. W. DOUGLAS, *The Democratic Ideal*, in DEMOCRACY AND FINANCE 290, 290-96 (1940) (address delivered Feb. 9, 1939).

222. Letter from William O. Douglas to Howard McNeely (Oct. 29, 1940) (William O. Douglas Papers, Box 29, Library of Congress).

223. W. Douglas, *To What Is This a Commencement?* reprinted in 86 CONG. REC. 3962 app. (1940) (address delivered June 16, 1940).

224. Letter from William O. Douglas to Howard McNeely, *supra* note 222.

225. W. DOUGLAS, *An Age Coming to Birth*, in BEING AN AMERICAN 72, 76 (1948) (ad-

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Joined with the abhorrence to group persecution in Douglas' thought was another theme—the sanctity of the nonconformist. In other statements of this period, he stressed the need to protect not only racial and religious minorities, but above all, the individual conscience, “the smallest minority of all.”<sup>226</sup> As he had emphasized before, the individual was the repository of the cultural and spiritual values upon which democracy rested. Coercive conformity, Douglas believed, destroyed democracy by destroying individual freedom.<sup>227</sup>

This view of democracy led Douglas to part ways with Stone and Frankfurter<sup>228</sup> with regard to the justification for protecting civil liberties. Although he acknowledged the function of rights such as free speech in informing the political process, he rejected the notion that “[t]he minority or the dissenter” is “limited to performance of a political function.”<sup>229</sup> Freedom for the individual conscience deserved absolute protection in order to preserve the values that made democracy possible, and not simply to promote the discovery of political truth or the stability of society.<sup>230</sup>

### F. *An Emerging Consensus*

Further research would probably show that the views of other Justices were influenced by contemporary discussions about democracy, dictatorship, and group conflict. Owen Roberts, in *Hague v. CIO*,<sup>231</sup> upheld a challenge to Mayor Hague's notorious dictatorial control over Jersey City and mandated that government was required to permit

dress delivered Dec. 2, 1940). Douglas consistently condemned the persecution of minority groups. See *Murdock v. Pennsylvania*, 319 U.S. 105, 115-16 (1943) (striking down license taxes on canvassers, partly because of potential for suppressing minorities). In 1944, he warned students at the National Police Academy that the suppression of one minority would precipitate the suppression of others and bring on totalitarianism, and he urged them to have the courage to stand “between an aroused community and an unpopular minority or a suspected person.” W. DOUGLAS, *The Police and Civil Liberties*, in BEING AN AMERICAN 106, 109 (1948) (address delivered Oct. 28, 1944). The following year, he noted instances of community persecution of religious minorities and of free speech and urged audiences to take steps to ensure that hatred directed against racial, religious, and political minorities did not spread in this country. W. DOUGLAS, *Justice for All*, in BEING AN AMERICAN 113, 114 (1948) (address delivered Nov. 28, 1945).

226. W. DOUGLAS, *The Jefferson Philosophy*, in BEING AN AMERICAN 16, 17 (1948) (address delivered June 6, 1943) [hereinafter cited as *Douglas-Jefferson Philosophy*]; W. DOUGLAS, *A Nation of Minorities*, in BEING AN AMERICAN 34, 34 (1948) (address delivered Mar. 1, 1943) [hereinafter cited as *Douglas-Nation of Minorities*].

227. *Douglas-Jefferson Philosophy*, *supra* note 226, at 17-19; *Douglas-Nation of Minorities*, *supra* note 226, at 34-36.

228. See pp. 764, 770 *supra* (views of Stone and Frankfurter).

229. *Douglas-Jefferson Philosophy*, *supra* note 226, at 17.

230. *Id.* at 17-19; *Douglas-Nation of Minorities*, *supra* note 226, at 34-35.

231. 307 U.S. 496 (1939).

free expression in public places,<sup>232</sup> and in *Cantwell v. Connecticut*,<sup>233</sup> protected the rights of Jehovah's Witnesses to proselytize on the public streets.<sup>234</sup> Stanley Reed evinced a concern for race relations in his correspondence<sup>235</sup> and wrote in 1941 that the maintenance of free speech would make possible the "adjustment of social relations through reason."<sup>236</sup> Wiley Rutledge joined Murphy's civil liberties positions more often than any other member of the Court.<sup>237</sup>

The writings, addresses, and opinions of the Justices sitting during the 1940 term demonstrate the apparent emergence of a consensus on the Court that roughly paralleled the developing contemporary ideology. Nevertheless, the origins and significance of this consensus must be kept in perspective. As has already been noted, concern about minorities has always been part of one standard critique of democracy and was forcefully articulated by conservatives such as Sutherland during the Progressive era. Furthermore, as Professor Cover has noted, the modern concept of minorities has roots in the international treaties of the nineteenth and early twentieth centuries and in the accompanying literature,<sup>238</sup> and it also gained currency in the administration of federal benefit programs during the New Deal.<sup>239</sup> The sociological theory of in-groups and out-groups undoubtedly contributed to the notion that persecution of a group is more likely to arise from its isolation, as the writings of Lusky and Benedict indicate.<sup>240</sup> In addition, for some, if not all, of the Justices, awareness of the plight of blacks in this country preceded the developments of the late 1930s.<sup>241</sup>

It is therefore not contended here that popular columnists like Lippmann and Thompson, authors like Raushenbush and Schuman, or

232. *Id.* at 515-16 (Roberts, J.); see p. 757 & note 106 *supra* (discussion of *Hague v. CIO*).

233. 310 U.S. 296 (1940).

234. *Id.* at 304-11 (Roberts, J.).

235. See Letter from Stanley Reed to Felix Frankfurter (July 26, 1941) (Felix Frankfurter Papers, Box 92, File 1921, Library of Congress) (discussing segregation and Reconstruction Civil Rights Cases); Letter from Stanley Reed to Felix Frankfurter (July 6, 1943) (Felix Frankfurter Papers, Box 92, File 1922, Library of Congress) (discussing proper approach in *Smith v. Allwright*, 321 U.S. 649 (1944), in which certiorari had recently been granted).

236. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 320 (1941) (Reed, J., dissenting).

237. C. PRITCHETT, *supra* note 1, at 130-31.

238. Cover, *supra* note 3.

239. *Id.*

240. R. BENEDICT, *supra* note 90, at 249-55; Lusky, *supra* note 114, at 2; see S. RAUSHENBUSH, *supra* note 84, at 329; Miller, *supra* note 84, at i. On the sociological theory of in-groups and out-groups, see R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 183-93 (1949); W. SUMNER, *FOLKWAYS* 12-13, 498-500 (1906).

241. See p. 768 *supra* (Frankfurter); note 179 *supra* (Murphy); p. 774 *supra* (Black).

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events in Europe directly caused the heightened concern by the Court for the protection of civil liberties and minorities. Judicial trends are not so easily explained, and it is unlikely that so permanent a shift as the special concern of the postwar Court for minorities would have persisted had it not been reinforced by other sources.

Nevertheless, the views expressed by the early Roosevelt Court showed the impact of contemporary intellectual currents and reflected a significant change. The concern for minorities ranged across a far broader spectrum of opinion than the narrow conservatism of Sutherland and his cohorts. The defining characteristics of those groups deserving special judicial protection shifted from wealth and geography to race, religion, and ethnic background. In this respect, Stone's phrase "discrete and insular minorities" distinguishes the emerging consensus from the preceding conservative view. Moreover, the Justices of the Roosevelt Court, along with their generation, witnessed events at home and abroad that gave specific content to their concern for the fate of minorities. Stone altered his thinking in light of contemporary events and analyses, and several of the newly appointed Justices appear to have developed a new or intensified concern in the late 1930s for the integrity of civil liberties and for the safety of minorities. The parallel intellectual evolution of a number of Justices suggests the influence of contemporary popular concern about majoritarianism and the fate of minorities.

The newly crystallized analysis of democracy could affect the Roosevelt Court's decisionmaking only by shaping the incremental development of doctrine, case by case. Although agreeing on the contours of the problems facing democracy, the Justices did not always share the same view of the appropriate solutions. Therefore, the Court's decisions affecting minorities or civil liberties necessarily varied with the legal context and with the Justices who formed majorities in particular cases.<sup>242</sup> The gradual manner in which the new concern about minorities matured into a doctrinal basis for constitutional adjudication is the subject of the balance of this article.

### III. The Department of Justice and the Protection of Civil Liberties

The Court's opportunity to give legal expression to the emerging consensus depended on the specific controversies litigated before the

242. In some 77 cases involving issues of civil liberties during the period from February 1940 to the spring of 1946, 45 decisions were rendered by a split Court. Barnett, *supra* note 198, at 179 n.8; see *id.* at 220-21 (general agreement on Court's role but disagreement in particular cases).

Court. It is therefore significant that groups with relatively programmatic litigation strategies were bringing civil liberties claims to the Court with increasing frequency during this period. The persistent efforts of Hayden Covington and Joseph Rutherford on behalf of Jehovah's Witnesses<sup>243</sup> led Harlan Fiske Stone to suggest half-seriously that the Witnesses should be given an endowment "in view of the aid which they give in solving the legal problems of civil liberties."<sup>244</sup> The NAACP's long-run litigation program in the federal courts during the 1930s and 1940s has been extensively chronicled.<sup>245</sup> In the late 1930s, a change in orientation by the Department of Justice towards increased federal protection of the political process and of minorities also brought civil liberties cases—including *United States v. Classic*—to the Court for decision. Officials in the Justice Department were apparently motivated by the same concerns about the suppression of minorities and the preservation of democracy that moved many members of the Court.

#### A. *Expansion of Federal Activity*

During Roosevelt's second term, the Department of Justice began to experiment with using the federal civil rights statutes that had survived the late nineteenth-century retreat from Reconstruction<sup>246</sup> to fight political corruption and to consolidate the legislative accomplishments of the New Deal. In 1937, an extensive federal prosecution was brought against members of the Democratic machine in Kansas City, Missouri, for violating civil rights by tampering with ballots in the 1936 presidential election.<sup>247</sup> A celebrated prosecution was instituted the following year in Harlan County, Kentucky, against more

243. Covington, often assisted by Rutherford, argued or participated in the following decisions: *Schneider v. State*, 308 U.S. 147 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Jones v. Opelika*, 316 U.S. 584 (1942); *Jamison v. Texas*, 318 U.S. 413 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Martin v. Struthers*, 319 U.S. 141 (1943); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Follett v. McCormick*, 321 U.S. 573 (1944); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Saia v. New York*, 334 U.S. 558 (1948).

244. Note from Harlan F. Stone to Charles Evans Hughes (Mar. 24, 1941) (Harlan Fiske Stone Papers, Box 75, Library of Congress).

245. R. KLUGER, *supra* note 165, at 126-284; M. TUSHNET, *Organizational Structure and Legal Strategy: The NAACP's Campaign Against Segregated Education, 1925-1950* (unpublished draft, University of Wisconsin) (on file with *Yale Law Journal*).

246. See pp. 784-86 *infra*.

247. *Walker v. United States*, 92 F.2d 383 (8th Cir. 1937), *cert. denied*, 303 U.S. 644 (1938); *Luteran v. United States*, 93 F.2d 395 (8th Cir. 1937), *cert. denied*, 303 U.S. 644 (1938); *Little v. United States*, 93 F.2d 401 (8th Cir. 1937), *cert. denied*, 303 U.S. 644 (1938); *Neeper v. United States*, 93 F.2d 409 (8th Cir. 1937), *cert. denied*, 303 U.S. 644 (1938); *Cartello v. United States*, 93 F.2d 412 (8th Cir. 1937).



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than twenty coal mining companies and more than forty individuals accused of conspiring to prevent employees from exercising their right to organize under the National Labor Relations Act.<sup>248</sup> Federal prosecutors unsuccessfully attempted to obtain a grand jury indictment of Mayor Hague for his expulsion of CIO organizers from Jersey City.<sup>249</sup> Another prosecution was initiated against the Kansas City machine,<sup>250</sup> and investigations into the Chicago machine and the Hague machine continued.<sup>251</sup> Prosecutions under the federal anti-peonage statutes<sup>252</sup> were commenced, almost all in the South, on behalf of farm tenants, usually black, against white farmers.<sup>253</sup>

Federal efforts on behalf of civil liberties and minority rights received a boost with the appointment of Frank Murphy as Attorney General in 1939. After consultations with members of the ACLU and with Lee Pressman, counsel for the CIO, Murphy ordered the formation of the Civil Liberties Unit on February 3, 1939.<sup>254</sup> Later renamed the Civil Rights Section,<sup>255</sup> and ultimately the Civil Rights Division, the unit was part of the Criminal Division of the Justice Department and initially included a dozen lawyers. Henry A. Schweinhaut, who had been active in the attempt to indict Frank Hague and in the Harlan County prosecution, was named to head it.<sup>256</sup> O. John Rogge, brought into the Department by Murphy to head the Criminal Division in May 1939, took a keen interest in the activities of the section.<sup>257</sup> Although Rogge himself was primarily interested in prosecuting political corruption, he ordered two of the Section's attorneys, Albert Arent and Irwin Langbein, to prepare a lengthy memorandum on possible uses of the civil rights statutes to protect the civil liberties of individuals and minorities.<sup>258</sup> Rogge then circulated this memorandum to all of the United States Attorneys as a guide. This document helped to stimulate prosecutorial activities in addi-

248. *United States v. Mary Helen Coal Corp.* (E.D. Ky. 1938) (unreported) (prosecution ended in hung jury); see [1938] ATT'Y GEN. ANN. REP. 81; [1939] ATT'Y GEN. ANN. REP. 63; R. CARR, *supra* note 193, at 27 n.38, 67-68 & n.29.

249. J. HOWARD, *supra* note 179, at 204.

250. *Id.* at 194-95.

251. Interview with O. John Rogge, former Assistant Attorney General in charge of Criminal Division, by telephone (Dec. 31, 1980).

252. Act of March 2, 1867, ch. 187, 14 Stat. 546 (current version at 42 U.S.C. § 1994 (1976), 18 U.S.C. § 1581 (1976)).

253. See [1937] ATT'Y GEN. ANN. REP. 80-81; [1938] ATT'Y GEN. ANN. REP. 81; [1941] ATT'Y GEN. ANN. REP. 99.

254. J. HOWARD, *supra* note 179, at 203-04.

255. R. CARR, *supra* note 193, at 24 n.35.

256. N.Y. Times, Feb. 4, 1939, § 1, at 2, col. 2.

257. Interview with O. John Rogge, *supra* note 251.

258. *Id.*; see R. CARR, *supra* note 193, at 33.

tion to those initiated directly by the Department in Washington, D.C.<sup>259</sup>

The Justice Department used the civil rights statutes to prosecute in a number of cases of violence against minorities. In a forerunner of *Screws v. United States*,<sup>260</sup> a Georgia policeman was charged with violating the civil rights of a black man by torturing him to obtain a confession.<sup>261</sup> The Department sought indictments in connection with anti-black violence in Detroit and lynchings in Sikeston, Missouri, and other cities<sup>262</sup> and prosecuted local officials whose cooperation or acquiescence contributed to the wave of violence against Jehovah's Witnesses that followed the Court's decision in *Gobitis*.<sup>263</sup> Prosecutions were also brought for deprivations of other individual civil rights. In Alabama, persons were convicted for infringing the right of free speech and press of a newspaper editor,<sup>264</sup> and a Louisiana policeman was indicted for depriving a photographer of his means of livelihood by forcibly preventing him from taking photographs at a polling booth.<sup>265</sup>

The emergence of interest in expanded federal protection of civil rights may be attributed to several factors. It undoubtedly owed its genesis in part to the New Deal's general confidence in the expansion of federal power. The need for the Roosevelt administration to re-

259. Interview with O. John Rogge, *supra* note 251.

260. 325 U.S. 91 (1945) (sustaining conviction of sheriff under federal civil rights statutes for beating prisoner to death).

261. *United States v. Sutherland*, 37 F. Supp. 344 (N.D. Ga. 1940); see Brief for the United States at 45 n.25, *United States v. Classic*, 313 U.S. 299 (1941); [1940] ATT'Y GEN. ANN. REP. 77; R. CARR, *supra* note 193, at 151-54.

262. R. CARR, *supra* note 193, at 163-76; Rotnem, *Clarifications of the Civil Rights Statutes*, 2 BILL RIGHTS REV. 252, 260 (1942) [hereinafter cited as *Rotnem-Clarifications*]; Rotnem, *The Federal Civil Right "Not To Be Lynched"*, 28 WASH. U. L.Q. 57 (1943) [hereinafter cited as *Rotnem-Federal Right*].

The Department also joined a black Congressman from Illinois before the Supreme Court in his successful challenge to the Interstate Commerce Commission's acceptance of segregated and unequal railroad passenger facilities. *Mitchell v. United States*, 313 U.S. 80, 88 (1941) (statutory construction of Interstate Commerce Act); see F. BIDDLE, IN BRIEF AUTHORITY 152-53 (1962); R. KLUGER, *supra* note 165, at 220.

263. *Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943); Rotnem & Folsom, *supra* note 105, at 1061; see p. 766 & note 154 *supra* (discussion of *Gobitis* decision).

264. The conviction was reversed. *Powe v. United States*, 109 F.2d 147 (5th Cir.), *cert. denied*, 309 U.S. 679 (1940) (Congress lacks power to prohibit private infringement of free press).

265. *United States v. Cowan* (E.D. La. 1940) (unreported). The theory behind the prosecution showed the creative use that the Department of Justice intended to make of the civil rights statutes. The indictment alleged that the officer had deprived the victim of the right, protected by the Fourteenth Amendment, to pursue his livelihood, photography. Despite the novelty of the government's theory, the indictment survived a demurrer. Interview with O. John Rogge, *supra* note 251; see Brief for the United States at 45 n.25, *United States v. Classic*, 313 U.S. 299 (1941). The defendant was later acquitted. [1941] ATT'Y GEN. ANN. REP. 98; R. CARR, *supra* note 193, at 86 n.2.

spond to the demands of the New Deal coalition also accounted for some of the increased activity on behalf of labor and blacks.<sup>266</sup> Efforts to assist the latter, however, were necessarily tempered by the influence of the Southern wing of the Democratic Party, which formed a crucial part of the coalition and also dominated the Senate Judiciary Committee.<sup>267</sup> Once the country entered World War Two, propaganda and morale needs made it imperative to control the more violent manifestations of racism.<sup>268</sup> Furthermore, the tilt of the Court in favor of protecting civil liberties and minorities may have encouraged litigation that previously would have had little chance of success.

Finally, the shift within the Department appears in part to have been stimulated by simple idealism and by the heightened awareness of the dangers of group conflict that was central to the emerging contemporary ideology. The creation of a separate unit to protect civil rights, Murphy stated shortly after he became Attorney General, was necessary because "social unrest" had increased the need to protect the civil liberties of "protesting and insecure people."<sup>269</sup> In 1944, Attorney General Biddle explained the new attention to civil liberties in part as a response "to the challenge of the ideals of democracy made by the new ideologies [sic] of Fascism and Communism."<sup>270</sup> Rogge assumed control of the Criminal Division with the express intent of cleaning up political corruption and straightening out the country.<sup>271</sup> Several officials associated with the Civil Rights Section, including Rogge, Victor Rotnem, and Fred Folsom, Jr., wrote articles describing actions taken by the section to protect the rights of minorities identified by race,<sup>272</sup> religion,<sup>273</sup> and economic status.<sup>274</sup> Rotnem

266. Interview with Herbert Wechsler, former assistant to Solicitor General Biddle, by telephone (Nov. 25, 1980). The interest in civil rights of some members of the Roosevelt administration did not go unnoticed in the late 1930s. During the fight over the Court plan, for instance, arch-conservative Senator Carter Glass of Virginia delivered a radio address opposing the plan and attacking those New Deal "incendiaries" who advocated the repeal of segregation and increased federal enforcement of the Civil War amendments. N.Y. Times, Mar. 30, 1937, § 1, at 16, col. 1.

267. R. KLUGER, *supra* note 165, at 234; Interview with Herbert Wechsler, *supra* note 266.

268. F. BIDDLE, *supra* note 262, at 155-56; F. Biddle, Civil Rights and the Federal Law at 23-24 (unpublished lecture delivered at Cornell University, Oct. 4, 1944); *Rotnem—Clarifications*, *supra* note 262, at 260; *Rotnem—Federal Right*, *supra* note 262, at 58.

269. R. CARR, *supra* note 193, at 25; N.Y. Times, Jan. 26, 1939, § 1, at 13, col. 1.

270. Biddle, *supra* note 268, at 21. Like Frankfurter, Biddle was a member of the Board of Directors of Survey Associates. See 28 SURVEY GRAPHIC 51 (1939).

271. Interview with O. John Rogge, *supra* note 251.

272. *Rotnem—Federal Right*, *supra* note 262.

273. *Rotnem—Clarifications*, *supra* note 262, at 260; Rotnem & Folsom, *supra* note 105, at 1061.

274. Rogge, *Justice and Civil Liberties*, 25 A.B.A.J. 1030, 1031 (1939). The annual reports of the Attorney General during this period also show that civil liberties prosecutions focused on the South, that section of the country that was plagued both by the

stressed that federal intervention in cases of racial violence was justified by the perceived failure of state and local law enforcement officials to take steps to control or punish such violence.<sup>275</sup> The section was also particularly interested in extending the civil rights statutes to cover a variety of interferences with electoral rights.<sup>276</sup>

### B. *The Civil Rights Statutes*

The determination to use federal law enforcement power to protect politically powerless groups from oppression was hamstrung by an inadequate statutory arsenal. Although the federal government could sometimes prosecute wrongdoers for violating federal statutes imposing taxes and regulating interstate commerce, these surrogate civil rights prosecutions were inefficient and considered hypocritical by some federal officials.<sup>277</sup> Sections 19<sup>278</sup> and 20<sup>279</sup> of the Criminal Code of 1909 were therefore the mainstays of the federal effort to combat the mistreatment of minorities.

Both statutes had serious limitations as practical tools for the defense of civil rights. By virtue of their broad coverage, both were vulnerable to challenge on grounds of vagueness. In addition, many of the outrages the Department wished to prosecute were committed by private persons.<sup>280</sup> Section 20<sup>281</sup> applied only to the deprivation

breakdown of democratic government and by racial violence. [1937] ATT'Y GEN. ANN. REP. 80-81; [1938] ATT'Y GEN. ANN. REP. 81; [1940] ATT'Y GEN. ANN. REP. 77; [1941] ATT'Y GEN. ANN. REP. 98-100.

275. *Rotnem—Federal Right*, *supra* note 262, at 59-60. A book written by Robert Carr in 1947, relying in part on interviews with former members of the Department, similarly justified the need for federal intervention to protect civil rights in terms analogous to the third paragraph of footnote four. Unpopular, powerless groups that were the victims of private action, Carr explained, generally lacked political strength at the state or local level and could find protection only from the federal government. R. CARR, *supra* note 193, at 21-22.

276. R. CARR, *supra* note 193, at 64; *see* Rogge, *supra* note 274, at 1030.

277. *See*, for example, Robert Jackson's reaction to the prosecutions under such statutes by then-Attorney General Murphy. E. GERHART, *AMERICA'S ADVOCATE* 186-87 (1958).

278. Act of March 4, 1909, ch. 321, § 19, 35 Stat. 1088 (current version at 18 U.S.C. § 241 (1976)) [hereinafter referred to as Section 19].

279. Act of March 4, 1909, ch. 321, § 20, 35 Stat. 1088 (current version at 18 U.S.C. § 242 (1976)) [hereinafter referred to as Section 20].

280. *Rotnem, Criminal Enforcement of Federal Civil Rights*, *LAW. GUILD REV.*, May 1942, at 18, 18.

281. Section 20 provided:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, an inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than one thousand dollars or imprisoned not more than one year or both.

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of legal or constitutional rights “under color of any law,” and arguably only to actions authorized by state law.<sup>282</sup> It was also unclear whether the section was limited to deprivations of rights “on account” of alienage or race.<sup>283</sup> Until early 1941, Section 20 had been used in only four known cases.<sup>284</sup> Section 19,<sup>285</sup> which had been used more often, applied to private persons but was correspondingly limited. It prohibited conspiracies to prevent the enjoyment of rights secured by the Constitution or federal statute. Only a few constitutional rights were protected against private action,<sup>286</sup> including the right to vote,<sup>287</sup> the right to have that vote counted as cast,<sup>288</sup> and according to a dictum in *United States v. Cruikshank*, the right to assemble and petition the federal government.<sup>289</sup> Some federal statutes secured rights against private interference, such as labor’s right to organize, which had been infringed in Harlan County.<sup>290</sup>

Many private wrongs appeared to be beyond the limited scope of Section 19, were missed entirely by Section 20, and therefore seemed beyond the Department’s grasp unless they violated specific federal statutes such as the anti-peonage laws.<sup>291</sup> Soon after its creation, the Civil Rights Section began assessing possible means of overcoming these

282. During this period, the meaning of “under color of law” created persistent confusion in the context of civil actions under the predecessor of 42 U.S.C. § 1983. *See, e.g.*, *Snowden v. Hughes*, 321 U.S. 1, 15-16 (1944) (Frankfurter, J., concurring); *Barney v. City of New York*, 193 U.S. 430, 437-41 (1904). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 937-51 (2d ed. 1973).

283. Rogge, *supra* note 274, at 1030.

284. Brief for the United States at 45, *United States v. Classic*, 313 U.S. 299 (1941) (two unreported cases in 1940, case in 1911, and case in 1882).

285. Section 19 provided in pertinent part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . . they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

286. In 1939, these included the right to be free from slavery; the right to accept federal office and perform the duties of that office, *United States v. Patrick*, 54 F. 338 (M.D. Tenn. 1893); the right to inform a federal officer of crimes against the United States, *Motes v. United States*, 178 U.S. 458 (1900); the right to be free from mob violence while being held by a federal officer, *Logan v. United States*, 144 U.S. 263 (1892); the right to be a witness and to be protected as such when giving testimony before a federal court, *Foss v. United States*, 266 F. 881 (9th Cir. 1920); and the right to enjoy execution of a federal court order in one’s favor, *United States v. Lancaster*, 44 F. 885 (W.D. Ga. 1890).

287. *Ex parte Yarbrough*, 110 U.S. 651 (1884).

288. *United States v. Mosley*, 238 U.S. 383 (1915).

289. 92 U.S. 542, 552-53 (1875).

290. R. CARR, *supra* note 193, at 27 & n.38; *see* p. 781 *supra*.

291. *See* note 252 *supra*.

limitations. One proposed doctrinal approach was to expand the reach of Section 19 by relying on the *Cruikshank* dictum, which suggested that the Constitution prohibited private interference with all rights that were "essential to the independent existence and functioning" of the federal government.<sup>292</sup> Another possible approach was to argue that if a state official, motivated by the victim's race, religion, or political views, failed to protect a person from private mistreatment, the inaction deprived the victim of the right of equal protection and was therefore punishable under Section 20.<sup>293</sup> If used creatively, this equal protection analysis would enable Section 20 to reach many wrongs that were otherwise beyond its reach. Finally, Rotnem argued that lynch mobs violated a constitutional right by preventing the victim from asserting his right to a fair trial.<sup>294</sup>

By the early 1940s, then, it appears that officials within the Department of Justice, particularly in the Civil Rights Section, were acting upon a perspective similar to that emerging on the Court. The Department was determined to control the more flagrant manifestations of group prejudice. Department attorneys believed that affirmative federal action was necessary to compensate for the breakdown of state and local government protection resulting from the powerlessness of hated minorities—an analysis parallel to that found in footnote four of *Carolene Products*. To achieve its goals, the Department needed to erode the immunity from federal law traditionally accorded to private action that violated civil rights.

#### IV. Election Law and the New Ideology

*United States v. Classic*,<sup>295</sup> a prosecution by the Justice Department, challenged the Supreme Court to implement the new ideology in the context of election law. Election law is an important testing ground for constitutional theory, both because it directly affects the process of self-rule and because it often involves conflicts between principles that lie at the heart of constitutional, representative government.<sup>296</sup> The choice between principles in a particular election law case will often have an unusually direct relationship to the Court's underlying

292. Rogge, *supra* note 274, at 1030; see p. 785 *supra*.

293. Rotnem—Clarifications, *supra* note 262, at 259-60.

294. Rotnem—Federal Right, *supra* note 262, at 61-70.

295. 313 U.S. 299 (1941).

296. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (free speech versus equal opportunity to participate regardless of wealth); *Baker v. Carr*, 369 U.S. 186 (1962) (majority rule versus values of federalism); *Smith v. Allwright*, 321 U.S. 649 (1944) (effective black political participation versus autonomy of private associational activity).

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assumptions about the nature of democracy. For this reason, the line of voters' rights cases has been compared to an archeological cross-section in which different doctrinal strata reflect a process of ideological and cultural change.<sup>297</sup> *Classic*, decided during the period when the new ideology was gaining acceptance by the Court, dramatically illustrates the process of change.

### A. *Judicial Protection of Private Political Activity*

The significance of *Classic* can only be understood, however, in the context of the Court's prior treatment of voting rights cases. Two central issues were implicated in *Classic*: the scope of federal regulation of the electoral process, and the legality of excluding blacks from the political process by means of the white primary.

#### 1. *Newberry: Keeping the Party Private*

Federal intervention in the electoral process began in earnest during Reconstruction,<sup>298</sup> and after some early resistance,<sup>299</sup> the Court came to support the federal effort to impose order on Southern politics. In *Ex parte Yarbrough*,<sup>300</sup> an 1884 decision, the Court held that the federal government had the power under the Constitution and Section 19 of the Criminal Code to prevent intimidation of voters in federal elections. The opinion in *Yarbrough* was notable not only for its holding but also for its impassioned defense of federal protection of the electoral process against Southern violence and against the corruption in the rest of the country that resulted from the "vast growth of wealth."<sup>301</sup> The Court reaffirmed its position in 1915 in *United States v. Mosley*,<sup>302</sup> holding that the right to vote for federal office and to have that vote counted was a right secured by the Constitution.

*Mosley* was quickly followed, however, by three decisions that considerably narrowed federal power to act against electoral corruption. In *United States v. Gradwell*,<sup>303</sup> the Court held that bribery of voters and procurement of unqualified voters in a West Virginia Republican

297. Claude, *Constitutional Voting Rights and Early U.S. Supreme Court Doctrine*, 51 J. NEGRO HIST. 114, 114 (1966).

298. See generally H. CUMMINGS & C. MCFARLAND, FEDERAL JUSTICE 230-49 (1937).

299. See *United States v. Cruikshank*, 92 U.S. 542 (1875); *United States v. Reese*, 92 U.S. 214 (1875); Claude, *supra* note 297.

300. 110 U.S. 651 (1884).

301. *Id.* at 667.

302. 238 U.S. 383 (1915).

303. 243 U.S. 476 (1917).

senatorial primary were not crimes under Section 19. The Court reasoned that only the rights of the losing candidate had been violated, and that the right to be a candidate in a primary was derived from state law, not federal law or the Constitution.<sup>304</sup> In *United States v. Bathgate*,<sup>305</sup> decided the following year, the Court held that bribery of voters in a general election was also beyond the scope of Section 19 because it did not infringe the personal constitutional right to vote and have the vote counted.<sup>306</sup>

The third case curtailing federal control over the electoral process was *Newberry v. United States*,<sup>307</sup> decided in 1921. Unlike the two previous cases, which turned on statutory construction, *Newberry* was decided on constitutional grounds. The defendant, the successful candidate for the Senate from Michigan, was charged with violating the federal Corrupt Practices Act of 1910<sup>308</sup> by exceeding spending limits imposed on primary campaigns. In sustaining a demurrer to the indictment, the plurality opinion of Justice McReynolds held that regulation of primary elections was beyond the power conferred on Congress by Article I, Section 4, of the Constitution.<sup>309</sup> McReynolds argued that primaries were merely methods by which adherents chose a candidate to compete at the general election and therefore were not "elections" within the meaning of Article I, Section 4.<sup>310</sup> He acknowledged the practical importance of the primary, but dismissed it as irrelevant:

Many things are prerequisites to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these.<sup>311</sup>

McReynolds concluded by noting that the states had police power over abuses at primary elections or conventions, and that Congress' power

304. *Id.* at 488. The Court did not, however, decide whether a primary was an election within the meaning of the Constitution. *Id.*

305. 246 U.S. 220 (1918).

306. *Id.* at 226-27.

307. 256 U.S. 232 (1921).

308. Act of June 25, 1910, ch. 392, 36 Stat. 822, as amended by Act of Aug. 19, 1911, ch. 33, 37 Stat. 25 (repealed 1925).

309. Article I, Section 4, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Places of chusing Senators." See Corwin, *Constitutional Law in 1920-1*, I, 16 AM. POLITICAL SCI. REV. 22, 25 (1922) (McReynolds' reading of Section 4 "unanswered and probably unanswerable").

310. 256 U.S. 232, 250 (1921).

311. *Id.* at 257.



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over general elections gave it sufficient power to protect itself against corruption.<sup>312</sup> *Newberry* completed the retreat from broad federal supervision of the electoral process.<sup>313</sup> Primary elections, the Court maintained, were “purely domestic affairs” of the states,<sup>314</sup> beyond the constitutional powers of Congress. *Newberry*’s narrow construction of Article I, Section 4, restricted congressional power over elections to regulation of the process of balloting in the general election and specifically excluded federal protection of public discussion pertinent to the election.

The limitation of federal power over elections may have reflected the Court’s attachment to the value of autonomy from government.<sup>315</sup> Although curtailing the government’s supervisory power over electoral politics would leave the electoral process more vulnerable to corruption, it would also free candidates and political parties from governmental interference in their political activities and nominating processes. This resistance to government intervention in the political process was consistent with the general laissez-faire trend of decision-making by the Court in economic matters during the 1920s. So long as government was perceived as the greatest threat to liberty, protection of the private political sphere would have priority.

### 2. Grovey: *Keeping the Party White*

A similar impetus can be discerned in the Court’s treatment of the white primary from 1927 to 1935. The white primary developed in the early years of this century as one of the most effective means of excluding blacks from any political power in the South.<sup>316</sup> The Democratic Party was the only significant political party in that region. Exclusion of blacks from its “private” primary elections was therefore de facto disenfranchisement. Preoccupation with excluding blacks from voting had several deleterious effects on the political pro-

312. *Id.* at 258.

313. In three cases decided after *Newberry*, the Court upheld federal control over election-related matters, but in each case it relied on a specific basis for federal power. *Barry v. United States*, 279 U.S. 597 (1929) (Senate power to compel witnesses to testify in investigations concerning corruption in primaries); *United States v. Wurzbach*, 280 U.S. 396 (1930) (Corrupt Practices Act regulating contributions by federal employees in primary campaigns); *Burroughs v. United States*, 290 U.S. 534 (1934) (federal statute regulating interstate committees created to influence presidential elections).

314. 256 U.S. 232, 258 (1921).

315. The *Newberry* opinion concludes that the power to regulate primaries would “infringe upon liberties reserved to the people.” *Id.* Hughes’ argument for the defendant stressed this theme, asserting that Article I, Section 4, did not intend “to detract from the freedom of the people of the States with respect to their political activities.” *Id.* at 234; see *id.* at 236, 238.

316. See V. KEY, *SOUTHERN POLITICS* 619-20 (1949).

cess in the South, including low voter turnouts, dulling of the issues, strong party control by stable cliques, and the divorce of state from national politics.<sup>317</sup>

To preserve the system, it was necessary to discourage any attempt by a Democratic faction to "cheat" by appealing to the black vote.<sup>318</sup> An effort to enlist the power of the state in the enforcement of the system initiated the direct involvement of the Supreme Court with the white primary.<sup>319</sup> When one Democratic faction in Texas appealed to black voters, the other obtained state legislation prohibiting blacks from voting in Democratic primary elections. In *Nixon v. Herndon*,<sup>320</sup> the Court unanimously struck down the Texas statute as a violation of the equal protection clause of the Fourteenth Amendment. Holmes, the author of the Court's opinion, described the case as a "very plain one."<sup>321</sup> Because the statute presented such a "direct and obvious" infringement of the Fourteenth Amendment, Holmes deemed consideration of the Fifteenth Amendment unnecessary.<sup>322</sup> Holmes thereby avoided any conflict with *Newberry* on the question of whether the right to vote was implicated in a primary.

The Texas legislature responded to *Herndon* almost immediately with a new statute giving the state executive committee of each political party the power to prescribe qualifications for party membership. The Democratic state executive committee in turn barred blacks from membership. In *Nixon v. Condon*,<sup>323</sup> this action was also challenged on Fourteenth and Fifteenth Amendment grounds. This time, the Court had to decide whether there was sufficient delegation of

317. *Id.* at 506-08.

318. A "liberal" defense of the white primary was that it was better for all concerned to exclude blacks from politics than to "use" them for political purposes. *See, e.g., Weeks, The White Primary*, 8 *Miss. L.J.* 135, 136 (1935). The exclusion of blacks was reinforced by the extralegal method of "white terror." *See G. MYRDAL, AN AMERICAN DILEMMA* 485-86 (1944).

319. *See V. KEY, supra* note 316, at 621-24.

320. 273 U.S. 536 (1927).

321. Letter from Oliver Wendell Holmes, Jr., to Harold Laski (Mar. 17, 1927), reprinted in 2 *HOLMES-LASKI LETTERS* 927 (M. Howe ed. 1953).

322. 273 U.S. 536, 540-41 (1927). When the opinion in *Herndon* was read from the bench, Holmes stated in an aside, "I know that our good brethren, the negroes of Texas, will now rejoice that they possess at the primary the rights which heretofore they have enjoyed at the general election." Comment, *Nixon v. Condon—Disfranchisement of the Negro in Texas*, 41 *YALE L.J.* 1212, 1216 & n.27 (1932) (relying on unnamed person present at Court when opinion was read). Holmes was both aware of and sensitive to the racial situation in the South, as is evident in his correspondence with Harold Laski. *See 2 HOLMES-LASKI LETTERS* 964, 974, 975, 1265 (M. Howe ed. 1953) (letters of July 23, Aug. 24, and Sept. 1, 1927, and July 10, 1930). His statement about *Herndon*, though characteristically enigmatic, seems to indicate that Holmes did not believe that the vote would materially alter that situation.

323. 286 U.S. 73 (1932).

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authority to make the actions of the party committee into state action. Justice Cardozo, writing for a bare majority of the Court, held for the plaintiffs, but in doing so spun a distinction so fine as to invite further legislation. Cardozo argued that the inherent power to define membership qualifications in a political party rested with the party's state convention. By altering the source of authority within the party, the state had delegated power to the executive committee and made its actions into state action. The membership qualifications therefore violated the Fourteenth Amendment.<sup>324</sup> As in *Herndon*, the Court did not reach the Fifteenth Amendment question. McReynolds, joined by Van Devanter, Sutherland, and Butler, dissented.<sup>325</sup>

The state convention of the Texas Democratic Party then passed its own resolution prohibiting nonwhite participation in primary elections, and the issue returned to the Court. In *Grove v. Townsend*,<sup>326</sup> the Court unanimously held that the exclusion was not state action and therefore not subject to the Fourteenth or Fifteenth Amendments. The opinion, written by Roberts, reasoned that the Democratic Party primary was a private affair because the party paid for the election and provided, counted, and returned the ballots.<sup>327</sup> Roberts rejected the argument that exclusion from the Democratic primary was the equivalent of disenfranchisement in Texas, stating that such an argument confused the "privilege of membership in a party with the right to vote."<sup>328</sup>

It would be too simple to assume that the members of the Court were altogether insensitive to racial issues at the time of the *Grove* decision.<sup>329</sup> On the contrary, there were indications that the Court was beginning to take cognizance of the inequities of the criminal justice system in the South.<sup>330</sup> But in the area of party politics, the

324. *Id.* at 84-89.

325. *Id.* at 89. Commentators were also skeptical about Cardozo's distinction, but differed with regard to the implications of his reasoning. Most agreed that the issue would return to the Court. *See, e.g.,* Evans, *Primary Elections and the Constitution*, 32 MICH. L. REV. 451, 461-62 (1934) (offering four choices of reasoning "[w]hen the Supreme Court faces again the issue"); Note, *The White Primary in Texas Since Nixon v. Condon*, 46 HARV. L. REV. 812, 818 (1933) (predicting that Court would continue to uphold claims of blacks to vote in primary elections); Comment, *supra* note 322, at 1220-21 (predicting that next case would take Cardozo's reasoning to logical conclusion and exclude blacks from primary elections).

326. 295 U.S. 45 (1935).

327. *Id.* at 50.

328. *Id.* at 55.

329. McReynolds reportedly had racist inclinations. F. ROSELL, NINE MEN 252 (1955). Both *Herndon* and *Grove*, however, were unanimous decisions.

330. *Norris v. Alabama*, 294 U.S. 587 (1935), decided by a unanimous Court without McReynolds' participation during the same year as *Grove*, reversed the convictions of

Court was more concerned with the need to protect the private political sphere from government intrusion. A passage from McReynolds' *Condon* dissent illustrates this concern:

Political parties are fruits of voluntary action. Where there is no unlawful purpose, citizens may create them at will and limit their membership as seems wise. The State may not interfere. White men may organize; blacks may do likewise. A woman's party may exclude males. This much is essential to free government . . . . [T]he Legislature [has] refrained from interference with the essential liberty of party associations and recognized their general power to define membership therein.<sup>331</sup>

These sentiments were echoed in *Grovey*. The Court's apprehension was stated explicitly in Roberts' opinion: "We are not prepared to hold that in Texas the state convention of a party has become *a mere instrumentality or agency for expressing the voice or will of the state*."<sup>332</sup> A holding that the Democratic Party's acts were state action, the analysis the Court was asked to use to eliminate the white primary, would in one sense nationalize political parties. It would render the Democratic Party, and political parties generally, subject to both the judicially enforceable restrictions on state action contained in the Constitution and the power of the federal government to pass legislation to implement these restrictions. This outcome was rejected by a Court already hostile to government intervention in the private economic sector.<sup>333</sup>

## B. United States v. Classic: *The Prosecution*

These Supreme Court decisions, limiting federal power to redress corruption and discrimination in the electoral process, formed the background for the Department of Justice's prosecution in *United States v. Classic*. The prosecution was part of the Department's activist program in support of civil liberties.<sup>334</sup> The case arose in Louisiana, where irregularities in the political process had given rise to federal prosecutorial activity on several previous occasions.<sup>335</sup>

one of the Scottsboro Boys on the ground that blacks had been systematically excluded from juries. *Id.* at 589-99. Justice Sutherland, one of the *Condon* dissenters, had written the opinion in *Powell v. Alabama*, 287 U.S. 45 (1932), reversing earlier convictions in the same case because the right to counsel had been denied. *Id.* at 69-73.

331. 286 U.S. 73, 104, 105 (1932).

332. 295 U.S. 45, 54 (1935) (emphasis added).

333. See generally A. MASON, *supra* note 32, at 384-426.

334. See pp. 780-84 *supra*.

335. In response to Long's growing national appeal, in 1935 the federal government withheld funds for Louisiana projects and initiated federal prosecutions of prominent

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### 1. *The Indictment*

As in other Southern states, Louisiana politics during this period were the politics of the Democratic Party. In 1940 the Democratic primary was a fight between the Long machine and the balance of the party. The anti-Longs, led by Sam Houston Jones, were considered the reform candidates, although they had the support of the corrupt New Orleans machine known as the Ring.<sup>336</sup> The activities of the Ring in support of one reform candidate for Congress, T. Hale Boggs, gave rise to the *Classic* prosecution. Operatives of the machine, selected as Commissioners of Election in accordance with Louisiana law, conducted the runoff primary in New Orleans on September 10, 1940. They seized ballots cast for the other candidates and marked them as cast for Boggs. The tampering did not affect the outcome of the election; the actual vote gave Boggs 426 votes to 94 for the Long candidate and 17 for an unaffiliated candidate.<sup>337</sup> In response to pressure from the defeated Long faction, the local United States Attorney, Rene Viosca, filed an indictment against the Ring workers under Sections 19 and 20 just two weeks after the election. Only after he had filed the indictment did Viosca notify the Department of Justice of his action, writing, "In view of the recurring demands in this state that the Federal Government do something about these election matters, I believe that this test case should be brought to a conclusion in order that we may definitely know the extent of Federal jurisdiction."<sup>338</sup>

Although the prosecution seems to have been initiated simply as an attack on electoral irregularities,<sup>339</sup> the implications for the white

Long aides for tax fraud. A. SINDLER, *supra* note 62, at 86. These actions ceased in 1935, after Long's assassination, amid rumors of an agreement between the Roosevelt administration and Louisiana politicians said to have pledged support for the administration. A. SINDLER, *supra* note 62, at 126-28. A number of scandals erupted in 1939 when widespread corruption in state government was exposed. State prosecutions were not forthcoming, however, because prosecutors and judges owed their positions to the Long machine. The federal government intervened. Rogge traveled to Louisiana to direct a series of prosecutions under federal tax, mail fraud, and "hot oil" statutes. R. CARR, *supra* note 193, at 86; A. SINDLER, *supra* note 62, at 137-40; Interview with O. John Rogge, *supra* note 251. In a press release directed primarily at the Long machine, Rogge threatened to prosecute any electoral misconduct in the 1940 primaries under the mail fraud and civil rights statutes. A. SINDLER, *supra* note 62, at 146; Interview with O. John Rogge, *supra* note 251. After the first primary election in 1940, he initiated a prosecution under Section 20 against a police officer charged with assaulting a photographer at a polling place. See p. 782 & note 265 *supra*.

336. A. SINDLER, *supra* note 62, at 162-63.

337. Transcript of Record at 3-4, *United States v. Classic*, 313 U.S. 299 (1941).

338. R. CARR, *supra* note 193, at 86.

339. *Id.*

primary<sup>340</sup> were immediately understood in Washington. After a period of uncertainty, Attorney General Robert Jackson agreed to go through with the prosecution, apparently believing that it could be used to reverse *Newberry*.<sup>341</sup> Francis Biddle, then Solicitor General, later wrote that the case was brought in order to undermine the immunity of the white primary from federal control. Biddle also specifically noted that no blacks were involved,<sup>342</sup> a fact that minimized the political damage the case would cause among Roosevelt's Southern supporters. At the same time, recalls Biddle's assistant, Herbert Wechsler, in fashioning the arguments the Justice Department attorneys considered the implications for fighting political corruption as well as for eliminating the white primary.<sup>343</sup>

As expected, the district court sustained a demurrer to the indictment, citing *Newberry* for the proposition that Congress had no power to control primaries and concluding that the Constitution did not secure the right to vote in a primary.<sup>344</sup> The appeal went directly to the Supreme Court, where it was briefed by Wechsler and James E. Doyle, and argued by the former, filling in for an ailing Biddle.<sup>345</sup>

## 2. *The Justice Department's Brief*

The Department's brief offered two grounds for upholding federal intervention in what had hitherto been considered the private affairs of political parties: Article I, Section 2, of the Constitution, and the

340. See p. 796 *infra*.

341. R. CARR, *supra* note 193, at 86-87. Carr based his assessment on examination of the file for *Classic* at the Department of Justice and on interviews in 1945 with O. John Rogge and Hugh A. Fisher. *Id.* at 86 n.3 & 87 n.4. The Department of Justice has been unable to locate the *Classic* file in response to the author's request under the Freedom of Information Act.

342. F. BIDDLE, *supra* note 262, at 159. This view of *Classic* is supported by Biddle's account of the way he justified to Roosevelt the Department's decision not to become involved in the direct attack on the white primary in *Smith v. Allwright*, 321 U.S. 649 (1944). Roosevelt had asked Biddle about the possibility of an amicus brief in the case, noting that there had been "a good deal of a howl!" about the Department's refusal to do so. Biddle wrote of his response:

I told him that the "howl" came from Walter White of the National Association for the Advancement of Colored People . . . that we had established the right to vote in primaries as a federal right enforceable in the federal courts in the *Classic* case, and that, if we intervened here again, the South would not understand why we were continually taking sides.

F. BIDDLE, *supra* note 262, at 187.

343. Letter from Herbert Wechsler to author (Nov. 5, 1980); Interview with Herbert Wechsler, *supra* note 266. In addition, articles written about *Classic* by members of the Department soon after it was decided cited its implications for the white primary. Folsom, *Federal Elections and the "White Primary"*, 43 COLUM. L. REV. 1026, 1029-35 (1943); Rotnem—Clarifications, *supra* note 262, at 256-57; Rotnem, *supra* note 280, at 23.

344. Transcript of Record at 18, 21, *United States v. Classic*, 313 U.S. 299 (1941).

345. F. BIDDLE, *supra* note 262, at 159; Letter from Herbert Wechsler to author, *supra* note 343.

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equal protection clause of the Fourteenth Amendment. Both arguments carried the potential for sweeping extensions of federal law enforcement power.

The brief opened by citing the precedents holding that Article I, Section 2,<sup>346</sup> secured the right of a qualified voter to have his vote counted as cast in a general congressional election. Unlike the rights guaranteed by the Fourteenth and Fifteenth Amendments, the government argued, this right was protected against private as well as state infringement. Relying on the text of Article I, Section 2, the government characterized the guarantee as the “right . . . to choose.”<sup>347</sup> Tampering with ballots in the Louisiana Democratic primary election impaired the right to choose for two reasons. First, the primary election was, by law, an “integral part” of the election because all political parties were required by Louisiana statute to nominate their candidates for Congress in a primary.<sup>348</sup> Second, the Democratic primary in Louisiana was, as a matter of “unbroken practice,” the determinative part of the election process. The government cited statistics demonstrating that the winner of the Democratic primary for Congress was almost invariably the eventual winner. The brief argued that the right to choose therefore must extend at least to the Democratic primary.<sup>349</sup> “Article I, Section 2,” the government stated, “is concerned with realities, not with forms.”<sup>350</sup>

The government’s contention that Article I, Section 2, guaranteed the “right to choose” laid the foundation for the development of rights beyond the specific facts of *Classic*. If taken to its logical conclusion, the government’s argument could provide constitutional protection against private parties as well as government officials for all the activities important in the process of electing representatives, including freedom of speech, assembly, press, and travel. Latent in the “right to choose” was precisely the expansion of federal constitutional rights enforceable against private persons paraded as a list of horrors by McReynolds in *Newberry*.<sup>351</sup>

346. Article I, Section 2, Clause 1, of the Constitution provides: “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”

347. Brief for the United States at 16-17, *United States v. Classic*, 313 U.S. 299 (1941). This characterization was important because the wronged voters had been permitted to cast ballots.

348. *Id.* at 18-22. In addition, a candidate defeated in the primary was legally precluded from running in the general election. *Id.* at 19-22.

349. *Id.* at 22-24.

350. *Id.* at 27.

351. See p. 788 *supra* (quoting McReynolds’ opinion).

The Department also argued for the first time on appeal that the defendants had violated the constitutional right to equal protection of the laws. As Election Commissioners selected from party ranks in accordance with state statute, the defendants were said to be state officers and their action, although contrary to state law, to be state action.<sup>352</sup> Broadening the scope of state action to include such political operatives had significant potential for expanding federal protection of the conduct of elections. The defendants had deprived those voting for the losing candidates of equal protection, the government argued, by willfully failing to count their votes while counting votes cast for another candidate. Equal protection was not limited to racially motivated, continuous, or statutorily ordained discrimination. A single instance was sufficient, so long as the discrimination was "conscious and deliberate."<sup>353</sup> This definition of a violation of equal protection carried the potential for converting almost any arbitrary state treatment into a federal crime and dramatically expanding the reach of federal law enforcement power in the area of civil liberties.

Both angles of the government's argument had ominous implications for the survival of the white primary. First, by contending that party operatives who had been delegated the power to run elections were state officials, the government necessarily implied that they were subject to the equal protection clause and thus to the holding in *Herndon*. Second, the government's other argument bypassed altogether the state action morass of the *Herndon-Condon-Grovey* trilogy by deriving an Article I, Section 2, right that was protected against all comers so long as the voter was qualified under state law. The Fourteenth and Fifteenth Amendments, in turn, ensured that such state law qualifications could not be drawn on racial lines. As a result, state action would no longer be a necessary component of challenges to the white primary.

Although both arguments would accomplish the same result in *Classic*, they represented quite different approaches to the general goal of increasing federal protection for individuals and to the specific aim of outlawing the white primary. Expanding the realm of state action provided more comprehensive protection, including state as well as federal elections, but only at the cost of nationalizing a part of the private political arena. The other approach, protection via Article I, Section 2, provided a narrower scope of constitutional pro-

352. Brief for the United States at 37, *United States v. Classic*, 313 U.S. 299 (1941).

353. *Id.* at 38-39.



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tection, confined to the goal of ensuring that all qualified voters were allowed to vote in a primary for federal office in order to enjoy their “right to choose.” More generally, the state action approach applied existing rights to a new set of actors, while the Article I, Section 2, approach, although narrow, entailed the elaboration of a new constitutional right. The next section explores the way in which the different approaches appealed to the different concerns of the various Justices. It is a tribute to the ingenuity of the Department that the desired result in *Classic* could be obtained through an argument that contained the essential elements of either analysis.

### C. United States v. Classic: *The Decision*

*Classic* was argued on April 7, 1941, and considered in conference on April 12. During the argument, Roberts had pressed Wechsler on whether the government’s argument would not also sanction federal regulation of the nominating conventions of political parties.<sup>354</sup> Douglas’ handwritten notes show that Roberts also expressed doubts during the conference deliberations:

Stone would reverse—Roberts bothered by *Herndon v. Lowry*—If we reverse, says Roberts, & Congress passed law saying negro democrats were excluded from primary & that they should not be, we would have to sustain the law—In *Herndon* state controlled all aspects of primary—Stone says in *Herndon* however defeated candidate could get on ballot—so that difference can be utilized here—<sup>355</sup>

Douglas also recorded the vote.<sup>356</sup> Despite his doubts, Roberts joined Murphy, Douglas, Frankfurter, Reed, and Stone in voting for reversal. Black and Hughes<sup>357</sup> passed, and McReynolds did not participate. There were no dissenters.

354. Interview with Herbert Wechsler, *supra* note 266.

355. Douglas, Handwritten Conference Notes, No. 618 (Apr. 12, 1941) (William O. Douglas Papers, Box 56, Library of Congress). Douglas, or Roberts, probably meant *Nixon v. Herndon*, 273 U.S. 536 (1927), the first white primary case, rather than *Herndon v. Lowry*, 301 U.S. 242 (1937), a case overturning the conviction of a black organizer for the Communist Party for violating a Georgia sedition statute. The confusion may have arisen from the racial overtones of *Lowry*. See *id.* at 275-76 (Van Devanter, J., dissenting) (in deciding whether circumstances created “probable effect” of insurrection, court could consider that blacks would “give unusual credence to [the] inflaming and inciting features” of speech).

356. Record of Vote, No. 618 (William O. Douglas Papers, Box 56, Library of Congress).

357. Hughes had argued *Newberry*, see pp. 788-89 *supra*, before the Supreme Court and had later become embroiled in controversy because he denounced *Newberry*’s conviction as a “miscarriage of justice.” 1 M. PUSEY, CHARLES EVANS HUGHES 389-91 (1951).

### 1. *Stone's Initial Formulation*

Stone produced a draft opinion within two weeks.<sup>358</sup> He adopted much of the Justice Department's reasoning regarding Article I, Section 2,<sup>359</sup> and declined to reach the equal protection argument.<sup>360</sup> Louisiana primaries, Stone wrote, were an integral part of the general election. Not only did Louisiana pay for primaries and regulate their time, place, and manner, but more significantly, only successful primary candidates were permitted to run for Congress in the general election. In addition, Stone accepted the government's contention that the Democratic primary in Louisiana was invariably dispositive of the general election.<sup>361</sup>

Stone also agreed with the government that the "right to choose," secured by Article I, Section 2, against private as well as state action, included not only the right to vote in the general election,<sup>362</sup> but also the right to vote in a primary election if it was an integral part of the procedure of choice or in fact controlled the outcome.<sup>363</sup> "[T]he free choice by the people of representatives in Congress . . . was one of the great purposes of our Constitutional scheme of government," Stone declared. The "integrality" of that choice was guaranteed by the Constitution regardless of whether the election occurred in one or two steps.<sup>364</sup>

For the same reasons, Congress, under its Article I, Section 4, power to regulate the time, place, and manner of elections, had the authority to regulate primaries that were either an integral part of the electoral process or dispositive of the eventual outcome.<sup>365</sup> *Newberry* was there-

He steadfastly refused to take part in the *Classic* decision. Note on galley proof, Charles Evans Hughes to Harlan F. Stone, No. 618 (undated) (Harlan Fiske Stone Papers, Box 66, Library of Congress); Note from Harlan F. Stone to Charles Evans Hughes, No. 618 (May 10, 1941) (Harlan Fiske Stone Papers, Box 66, Library of Congress); Interview with Herbert Wechsler, *supra* note 266.

358. Stone Draft Opinion, No. 618 (undated) (Harlan Fiske Stone Papers, Box 66, Library of Congress). The location of the draft in the file suggests that it must have been circulated by April 24.

359. *Id.* at 6-11.

360. *Id.* at 14.

361. *Id.* at 4-7.

362. *Id.* at 7.

363. *Id.* at 9-10. As Stone pointed out in an explanatory note to Douglas, a primary's actual effect had to be accorded significance because the state statutes remained subject to the interpretation of the state supreme court, which could interpret the statutes differently and eliminate the "integral" status of the primary. But if neither condition was satisfied, the primary did not affect the right to choose representatives in Congress. Note from Harlan F. Stone to William O. Douglas (Apr. 29, 1941) (Harlan Fiske Stone Papers, Box 74, Library of Congress).

364. Stone Draft Opinion, *supra* note 358, at 8.

365. *Id.* at 8-11.

fore overruled. To hold otherwise, Stone continued, would leave Congress “powerless to effect the constitutional purpose.”<sup>366</sup> Stone also found that the “necessary and proper clause” gave Congress the power to regulate primary elections.<sup>367</sup>

Sections 19 and 20, protecting the right to vote in primary elections, were an exercise of that congressional authority. *United States v. Mosley*<sup>368</sup> had held that a conspiracy to prevent the counting of a ballot in a general election was a crime under Section 19; Stone reasoned that the section also prohibited a conspiracy to deny the same right in a primary election.<sup>369</sup> Furthermore, because the defendants were acting under color of state law in counting ballots, recording the count, and certifying the result, their actions were “under color of law” and violated Section 20.<sup>370</sup> Finally, Stone held that the race, color, or alienage provision of Section 20 applied only to the prohibition against discriminatory punishments.<sup>371</sup>

## 2. *The Emergence of Dissent*

Comments from the Justices returned to Stone with the circulated drafts. Frankfurter returned his copy with the note, “I am deeply pleased by this. A fine job—really—without breaking eggs.”<sup>372</sup> Reed adhered to his vote, and Roberts remained persuaded that he understood, writing that he found the opinion “clear and convincing.”<sup>373</sup>

Signs that the decision would not be unanimous appeared along with the praise. Douglas, in particular, was disturbed by the draft. For him, the question of whether a primary in a particular state was in fact tantamount to a final election was irrelevant to the question of whether the Constitution gave Congress the power to regulate a

366. *Id.* at 10.

367. *Id.*

368. 238 U.S. 383 (1915).

369. Stone Draft Opinion, *supra* note 358, at 11.

370. *Id.* at 11-12. In a memorandum sent out on April 24, amending his circulated draft, he addressed the point that the defendants had acted in derogation of state law: “Misuse of power, possessed only because of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.” Stone Memorandum, No. 618 (Apr. 24, 1941) (Harlan Fiske Stone Papers, Box 66, Library of Congress). By defining state action as the delegation of state power under statute, Stone apparently excluded unregulated “private” primaries from the scope of Section 20.

371. Stone Draft Opinion, *supra* note 358, at 12.

372. Note on page 14 of galley proof, Felix Frankfurter to Harlan F. Stone, No. 618 (undated) (Harlan Fiske Stone Papers, Box 66, Library of Congress).

373. Note on page 14 of galley proof, Owen Roberts to Harlan F. Stone, No. 618 (undated) (Harlan Fiske Stone Papers, Box 66, Library of Congress). *But see* p. 805 *infra* (Roberts’ subsequent insistence that *Classic* did not undermine *Grovey*).

primary.<sup>374</sup> After a meeting with Stone, an exchange of letters,<sup>375</sup> and an attempt to write a concurrence,<sup>376</sup> Douglas' doubts hardened into certainties and he decided to dissent.

In his dissent, which he elaborated in successive drafts,<sup>377</sup> Douglas agreed that *Newberry* should be overruled because Article I, Section 4, gave Congress "ample power" to regulate primary elections.<sup>378</sup> However, in the absence of legislation specifically governing conduct in primaries, he disagreed as to the application of Sections 19 and 20. He argued that the principles of criminal law and federal criminal jurisdiction required that a federal offense be "plainly and unmistakably" within the language of a statute. "Civil liberties," he insisted, "are too dear to permit conviction for crimes which are only implied and which can be spelled out only by adding inference to inference."<sup>379</sup> Section 19, he concluded, was not intended to apply to primaries.<sup>380</sup> Finally, Stone's use of the criterion of a primary's actual impact further confirmed Douglas' conviction that Section 19 was fatally vague if applied to primaries. The question of whether acts such as the defendants' violated Section 19 would in some cases depend on a subsequent judicial inquiry into the significance of a particular primary. For criminal liability to hinge on such a procedure violated "the strict standards necessary for the interpretation of a criminal law" and demonstrated that the Court was improperly performing a legislative function.<sup>381</sup>

In a passage added to a subsequent draft dissent, Douglas addressed Stone's argument based on the "right to choose" under Article I, Section 2. "[F]or purposes of the criminal law as contrasted to the interpretation of the Constitution as the source of the implied power of Congress," Douglas wrote, Article I, Sections 2 and 4, in the absence

374. Note from William O. Douglas to Harlan F. Stone, No. 618 (Apr. 24, 1941) (Harlan Fiske Stone Papers, Box 66, Library of Congress).

375. *Id.*; Note from Harlan F. Stone to William O. Douglas, *supra* note 363.

376. Douglas Draft Concurring Opinion (typewritten), No. 618 (William O. Douglas Papers, Box 56, Library of Congress). Two notes attached to the draft indicate that it was never used, but that a copy was sent to Black.

377. Douglas Draft Dissent (typewritten), No. 618 (probably Apr. 29, 1941) (William O. Douglas Papers, Box 56, Library of Congress); Douglas Draft Dissent, No. 618 (May 2, 1941) (William O. Douglas Papers, Box 56, Library of Congress) [hereinafter cited as Douglas May 2 Dissent]; Douglas Draft Dissent, No. 618 (May 7, 1941) (William O. Douglas Papers, Box 56, Library of Congress) [hereinafter cited as Douglas May 7 Dissent]; Douglas Draft Dissent, No. 618 (May 9, 1941) (William O. Douglas Papers, Box 56, Library of Congress) [hereinafter cited as Douglas May 9 Dissent]. The May 9 dissent was the first to be circulated, although a note attached to the May 2 dissent indicates that the latter draft was sent to Black and Murphy.

378. Douglas May 2 Dissent, *supra* note 377, at 1.

379. *Id.* at 2.

380. *Id.* at 4-5.

381. *Id.* at 5-6.

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of any specific legislation by Congress, did not protect the primary election or the nominating convention.<sup>382</sup> Although, as the *Yarbrough* and *Mosley* cases had held,<sup>383</sup> these sections protected the right to vote and the right to have one's vote counted at the general election, Douglas insisted that "they certainly do not *per se* extend to all acts which in their indirect or incidental effect restrain, restrict, or interfere with that choice."<sup>384</sup> Section 19, which extended only to those rights "plainly and directly guaranteed by the Constitution,"<sup>385</sup> therefore could not reach the defendants' conduct in *Classic*. Thus, although Douglas interpreted Article I, Section 4, broadly to give Congress the power to regulate primaries, he apparently rejected Stone's central proposition that Article I, Section 2, was a self-executing guarantee of the right to choose in primary elections.<sup>386</sup> Despite Douglas' somewhat ambiguous phrasing, his disagreement with the majority opinion seems to have had its roots in constitutional interpretation as well as statutory construction.

Stone responded to the dissent with another draft seeking to refute Douglas' apparent conclusion that there was no constitutional right to vote in any primary election. He emphasized the Court's responsibility to construe the Constitution to take account of political reality:

It is hardly the performance of the judicial function to construe a statute, which in terms protects a right . . . to choose a representative in Congress, as applying to an election whose only function is to ratify a choice already made at the primary and as having no application to the primary which is the only effective means of choice.<sup>387</sup>

Formalities aside, Stone argued that the defendants' acts were "plainly within the statute" because they were an "obviously effective" interference with the right to choose.<sup>388</sup>

382. Douglas May 7 Dissent, *supra* note 377, at 3.

383. See p. 787 *supra*.

384. Douglas May 7 Dissent, *supra* note 377, at 3-4.

385. *Id.* at 4.

386. Douglas never stated flatly that Article I, Section 2, did not guarantee the right to vote in a primary. Indeed, his insistence on adhering to strict standards of interpretation for criminal laws and his stress on the absence of congressional legislation would be consistent with a belief that the rights "secured . . . by the Constitution" within the meaning of Section 19 were narrower than the rights constitutionally guaranteed for other purposes. However, Douglas never explicitly made such a clarification, which would have made his argument considerably easier to comprehend and would have permitted civil enforcement of an Article I, Section 2, right to vote in primary elections.

387. Stone Draft Opinion at 13, No. 618 (May 10, 1941) (Harlan Fiske Stone Papers, Box 66, Library of Congress).

388. *Id.*

Douglas continued work on the dissent. On May 19, he inserted a rider into the draft that seemed to distinguish the case before the Court from a federal prosecution directed against a white primary:

There can be put to one side cases where state election officials deprive negro citizens of their right to vote at a general election (*Guinn v. United States* . . .), or at a primary. *Nixon v. Herndon* . . . *Nixon v. Condon* . . . Discrimination on the basis of race or color is plainly outlawed by the Fourteenth Amendment. Since the constitutional mandate is plain, there is no reason why § 19 or § 20 should not be applicable.<sup>389</sup>

On its face, the paragraph's references to earlier cases indicated only that, in Douglas' view, racially based exclusions that could be challenged in a civil action in federal court were also made criminal by Sections 19 or 20. If the paragraph was a more general attempt to distinguish the white primary cases, then it failed to account for the problem of the "private" primary, which had defeated the plaintiffs in *Grovey*.<sup>390</sup> Nevertheless, the passage appears to have been a very significant addition to the opinion. It signaled Douglas' desire to show that, despite his dissent in *Classic*, the white primary was not immune from federal control even in the absence of new legislation.

Frankfurter was disturbed by the dissent. He wrote to Stone that Douglas' opinion was one of those things that "one wishes one had never seen."<sup>391</sup> Attempting to assist Stone in rebutting Douglas' attempt to distinguish the white primary cases, he proposed a passage that indicated that he understood Stone's argument imperfectly:

The Fourteenth Amendment by its prohibition of racial discrimination meant to put all citizens of the United States on a political equality. If interference with a Negro's right to participate in a primary is interference with a right secured by the Constitution, the same interference against citizens who are not Negroes must equally be an interference with the right secured to all citizens by the Constitution.<sup>392</sup>

389. Douglas Handwritten Rider, No. 618 (May 19, 1941) (William O. Douglas Papers, Box 56, Library of Congress). Douglas apparently declined the suggestion of his law clerk that he include a citation to the Fifteenth Amendment. Draft Dissent, "D.S." Annotated Copy, No. 618 (May 20, 1941) (William O. Douglas Papers, Box 56, Library of Congress).

390. See p. 791 *supra*.

391. Note from Felix Frankfurter to Harlan F. Stone, No. 618 (May 21, 1941) (Harlan Fiske Stone Papers, Box 66, Library of Congress).

392. *Id.*

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Like Douglas' amendment, this passage is hard to fathom. *Herndon* had held that interference with a black's participation in a primary was a denial of the right to equal protection of the laws, not of the right to participate in a primary election. Yet Stone's opinion had not reached the government's equal protection argument, relying instead on the right to choose secured by Article I, Section 2. Frankfurter was either confusing the two rights or suggesting that the equal protection argument be considered after all.<sup>393</sup> Stone disregarded the suggestion.<sup>394</sup>

Douglas' dissenting opinion was joined by Black and Murphy. McReynolds and Hughes<sup>395</sup> did not participate. Two of the majority Justices—Roberts and Frankfurter—did not seem fully to understand the basis of the majority opinion. Only Reed seemed to be entirely with Stone, writing to the latter that he agreed “[e]veryday in everyway.”<sup>396</sup> Nevertheless, by a vote of four to three, the Court reversed the lower court's decision to sustain the demurrer to the indictment. Stone undoubtedly breathed a sigh of relief when the decision was announced on May 26 and *Classic* became law.<sup>397</sup>

### 3. *Classic and the White Primary*

Stone's opinion in *Classic* did not specifically refer to *Grovey* or to the white primary. Nevertheless, the implications of *Classic* for Southern politics were almost universally appreciated by commentators after the decision was announced.<sup>398</sup> Moreover, if Douglas' notes<sup>399</sup> are an accurate record of the conference, it appears that the Court was

393. In the May 21 letter, Frankfurter took a position regarding equal protection that differed from his concurrence in *Snowden v. Hughes*, 321 U.S. 1, 16-17 (1944) (arbitrary refusal by election official to certify primary nominee, illegal under state law, not a denial of equal protection).

394. In response to Douglas' draft dissent, Stone added the argument that it was “no extension of the criminal statute, as it was not of the civil statute in *Nixon v. Herndon* . . . to find a violation of it in a new method of interference with the right which its words protect.” Stone Memorandum, No. 618 (May 22, 1941) (Harlan Fiske Stone Papers, Box 66, Library of Congress).

395. Wechsler recalls that either Stone or Frankfurter told him that Hughes thought that *Classic* was correctly decided. Interview with Herbert Wechsler, *supra* note 266.

396. Note from Stanley Reed to Harlan F. Stone (undated), on back of Stone Memorandum, *supra* note 394.

397. Despite the defection of the dissenters, Stone was apparently pleased with his opinion. Letter from Harlan F. Stone to Sterling Carr (June 5, 1941) (Harlan Fiske Stone Papers, Box 9, Library of Congress).

398. See, e.g., Folsom, *supra* note 343, at 1029-35; Lusky, *supra* note 114, at 16 n.46; Rotnem—Clarifications, *supra* note 262, at 256-57; Rotnem, *supra* note 280, at 23; 41 COLUM. L. REV. 1101, 1103 (1941); 4 LA. L. REV. 133, 136-37 (1941); 20 N.C. L. REV. 93, 96 n.15 (1941).

399. See p. 797 *supra* (reporting Roberts' concerns about *Herndon*).

alerted from the beginning that the future of the white primary was connected to the outcome of the case.

Stone appears clearly to have understood these implications. Soon after the decision in *Smith v. Allwright*<sup>400</sup> declaring white primaries unconstitutional, he wrote that he had believed *Grovey* to be doomed when he wrote the *Classic* opinion.<sup>401</sup> Stone's opinion in *Classic* also cites a source used in the government's brief,<sup>402</sup> an article on *Suffrage in the South* appearing in 1940 in *Survey Graphic* that strongly criticized the *Grovey* decision for ratifying the disenfranchisement of blacks.<sup>403</sup> In addition, three days after the conference on *Classic*, Stone wrote to Judge Moore praising a recent article by Moore.<sup>404</sup> The article had concluded with an attack on the disenfranchisement of blacks by deliberate and ingenious legislation, "the constitutionality of which has been upheld by our courts."<sup>405</sup> Douglas, too, apparently appreciated the effect the majority opinion would have upon the foundations of *Grovey*. In his "Negro voter" paragraph,<sup>406</sup> he attempted to provide an alternative path to the goal of eliminating the exclusion of Southern blacks from the franchise.

Other Justices, however, seem to have perceived no necessary connection between *Classic* and the demise of the white primary. Roberts, author of the Court's opinion in *Grovey*, believed that *Classic* had left the white primary untouched. He seems to have been satisfied by Stone's distinction of *Herndon* at the conference. Stone relied on Louisiana law, which made the primary an integral part of the election by confining the general election to winners of primaries.<sup>407</sup> But

400. 321 U.S. 649 (1944).

401. Note from Harlan F. Stone to Stanley Reed (Apr. 5, 1944) (Harlan Fiske Stone Papers, Box 76, Library of Congress).

402. 313 U.S. 299, 314 n.2 (1941) (one of three sources for "discussion of the practical effect of the primary in controlling or restricting election of candidates at general elections"); see Brief for the United States at 23 n.9, *United States v. Classic*, 313 U.S. 299 (1941).

403. Stoney, *Suffrage in the South*, 29 SURVEY GRAPHIC 163, 164 (1940).

404. Letter from Harlan F. Stone to John B. Moore (Apr. 15, 1941) (Harlan Fiske Stone Papers, Box 22, Library of Congress).

405. Moore, *What of the Night*, 17 VA. Q. REV. 75, 88 (1941). The passage stated: We prate of race equality and this we do while excluding from the United States, with very limited exceptions, various classes of aliens, and particularly the Chinese and Japanese, not as individuals but on grounds of race; nor do I hear from any quarter, either from our professed philanthropists or from politicians, practical or otherwise, any proposal that this discrimination shall be abolished. In reality race equality, especially in the sense of equal representation, is deliberately and ingeniously denied in much of our legislation, the constitutionality of which has been upheld by our courts.

This passage is strikingly similar to a paragraph in an earlier letter from Moore to Stone. See p. 763 *supra* (quoting from letter).

406. See p. 802 *supra* (quoting paragraph).

407. See p. 797 *supra* (reporting Stone's argument at conference).



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he did not address the fact that, in both *Herndon* and *Classic*, the Democratic primary was in practice dispositive of the outcome and thus implicated the constitutional right to choose. Accepting Stone's inadequate but plausible explanation, Roberts was made party to the effective overruling of his own opinion in *Grovey*. Dissenting strongly three years later in *Allwright*, he objected to the majority's suggestion that *Classic* had undermined *Grovey*: "I[n] fairness, it should rather have adopted the open and frank way of saying what it was doing than, after the event, characterize its past action as overruling *Grovey v. Townsend*, though those less sapient never realized the fact."<sup>408</sup>

Frankfurter may have recognized the logical inconsistency of *Classic* with *Grovey*,<sup>409</sup> but during the rancor surrounding the drafting of the opinion in *Allwright*, he insisted that the Court in *Classic* had been "careful to withhold" any inferences regarding *Grovey* and had done nothing to undermine its continued vitality.<sup>410</sup> Reed, while he was laboring with the white primary issue as author of the majority opinion in *Allwright*, believed that resolution of the problem was aided by *Classic*, but apparently did not view it as completely dispositive.<sup>411</sup>

### D. *Division Within the Consensus*

The Court in *Classic* was divided on three general issues, along lines that did not always follow the split between the majority and minority. First, the Justices disagreed as to the Court's responsibility for initiating remedial action in the two areas implicated in *Classic*: the integrity of the political process and the protection of minorities. Second, the Court was divided as to the appropriate means to redress the exclusion of blacks from participation in the political process. Third, the Justices differed about the proper resolution of the con-

408. 321 U.S. 649, 670 (1944); see A. Mason, *supra* note 32, at 616-17.

409. See p. 802 *supra* (quoting Frankfurter's suggested addition to opinion in *Classic*).

410. Note from Felix Frankfurter to Harlan F. Stone (Mar. 18, 1944) (Harlan F. Stone Papers, Box 74, Library of Congress). Frankfurter disagreed strongly with the manner in which Reed was approaching the problem of overruling *Grovey* in *Smith v. Allwright*. He believed that the tone of Reed's opinion in *Allwright* was too placatory and equivocal, and he argued for a strong statement acknowledging that the Court had simply been wrong in *Grovey*. He disputed Reed's claim that *Grovey* had been whittled away over time and denied that *Classic* had done anything to undermine its strength. *Id.*; Note from Felix Frankfurter to Harlan F. Stone (Mar. 17, 1944) (Harlan Fiske Stone Papers, Box 74, Library of Congress).

411. Reed "reread and reflected upon Cruikshank, the Slaughter House, Civil Rights Cases, *Classic*, *Berea*, and *Gong Lum*" and concluded that "[t]he Texas primary case will take a little of all of them for its settlement." Letter from Stanley Reed to Felix Frankfurter (July 6, 1943) (Felix Frankfurter Papers, Box 92, File 1922, Library of Congress).

flict between individual rights and the affirmative measures necessary to protect the democratic process. These three questions were inescapable corollaries of the new ideology. Divisions on the Court resulted from the difficulties of implementing the new commitment to protect democracy from the excesses of the majority.<sup>412</sup>

### 1. *The Role of the Court*

With regard to the role of the Court, Stone's opinion was clearly the progeny of footnote four of *Carolene Products*.<sup>413</sup> In *Classic*, Stone reaffirmed his belief that the Court had primary responsibility to use the Constitution to protect the political process<sup>414</sup> and ensure the participation of minorities in that process. The white primary, which Stone apparently viewed as a target of the *Classic* opinion,<sup>415</sup> epitomized the fusion of democratic dysfunction and racism. In some respects, it was the incarnation of the very sort of tyranny outlined by Lippmann, Thompson, and others. Stone was unwilling to leave the systematic exclusion of blacks from political participation to Congress for resolution. Presumably he did not expect that the party that profited from the white primary and dominated the Congress to take the steps necessary to rectify the situation. His view that the Court was the only branch of government with the resolve and the tools to take the necessary affirmative action found expression in *Classic*.

Roberts apparently joined the majority in *Classic* because he shared Stone's belief that the Court was ultimately responsible for providing affirmative protection to the democratic process. In *Hague v. CIO*,<sup>416</sup> he had similarly accepted judicial intervention to curb politically motivated suppression of speech. But his opinion in *Grovey*, the fears he voiced at the *Classic* conference, and his later dissent in *Allwright*<sup>417</sup> together demonstrate that Roberts did not believe that group oppression justified judicial intervention into the private political sphere. Roberts focused exclusively on protecting the mechanisms of the political process; for him, *Grovey* was still the law.

Frankfurter also differed from Stone regarding the proper role of the Court. He agreed that the Court should be the ultimate pro-

412. See note 242 *supra* (split decisions by Court on civil liberties cases).

413. 304 U.S. 144, 152 n.4 (1938); see notes 145 & 147 *supra* (quoting second and third paragraphs).

414. S. KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT 215 (1945).

415. See p. 804 *supra*.

416. 307 U.S. 496 (1939).

417. 321 U.S. 649, 666 (1944) (Roberts, J., dissenting).

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lector of the political process, but did not share Stone's belief that the Court should protect minorities against the results of that process.<sup>418</sup> Nevertheless, unlike Roberts, Frankfurter did not view the protection of minorities and the protection of the political process as separate issues. For Frankfurter, judicial protection of the integrity of the democratic process necessarily involved vigorous efforts to ensure that racial discrimination did not exclude any group from that process. As he wrote to Stone, he believed that the Fourteenth Amendment was intended primarily to ensure political equality.<sup>419</sup> In contrast to the deference to the legislature that he voiced in *Gobitis*,<sup>420</sup> Frankfurter acknowledged in *Classic* the judiciary's prerogative in the area where the integrity of the democratic process and the oppression of minorities clearly intersected.

The dissenters in *Classic*—Douglas, Black, and Murphy—reflected the New Deal's hostility to judicial review in their insistence that Congress was the branch of government with the power and responsibility to protect the political process. The white primary issue, however, renders problematic their position with regard to the responsibility of the Court. The dissenting opinion strongly implies that, having acknowledged Congress' power to regulate primaries, the dissenters had relegated the future of the white primary to Congress. But the political realities of 1941 made it highly implausible to expect a Democratic Congress to abolish the white primary by exercising its powers under Article I, Section 4. Less than three years after *Classic*, all three dissenters joined the Court in striking down the white primary in *Allwright*.

It is difficult to believe that Murphy, given his preoccupation with "intolerance," would be party to any prolongation of the white primary. Murphy did not formally join the *Classic* dissent until May 23;<sup>421</sup> he may have believed that Douglas' "Negro voter" amendment of May 19<sup>422</sup> had successfully distinguished the white primary problem. Similarly, Douglas and Black presumably believed that the rider, which suggested that the exclusion of blacks from primary elections violated Sections 19 and 20, provided a satisfactory justification for judicial relief. Thus, the dissenters seem to have assigned primary

418. See p. 770 *supra*.

419. Note from Felix Frankfurter to Harlan F. Stone, *supra* note 391.

420. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 597-600 (1940); see p. 769 *supra*.

421. Note from Frank Murphy to William O. Douglas, No. 618 (May 23, 1941) (William O. Douglas Papers, Box 56, Library of Congress).

422. See p. 802 *supra* (quoting paragraph).

responsibility to the Court for abolishing the white primary while keeping Congress as the primary guardian of the political process.<sup>423</sup>

## 2. *The Methodology of Judicial Intervention*

Most of the Justices, including the three dissenters in *Classic*, thus seemed to concede that the Court had ultimate responsibility for taking action to ensure black participation in the electoral process. In its brief, the Department of Justice had given the Court two possible doctrinal avenues for attacking the white primary. First, the Court could find that the right to vote in a primary was secured by Article I, Section 2. Second, it could hold that the actions of the defendants were state action, subject to the restrictions of the Fourteenth Amendment. The Justices did not agree on which avenue was more appropriate.

Stone's opinion in *Classic* did not choose between the two approaches.<sup>424</sup> His concern that the holding in *Classic* be independent of Louisiana law suggests that he placed primary reliance on the Article I, Section 2, approach. Moreover, Stone was unlikely to be enthusiastic about the movement towards the nationalization of political parties entailed by the state action approach;<sup>425</sup> he disapproved of the concentration of power in the federal government and the hegemony of the Democratic Party. On the other hand, the Article I, Section 2, analysis applied only to federal elections and would thus not eradicate the white primary. To be satisfied, Stone would somehow have to integrate the two approaches; *Classic* could not be the last word for him.

The "Negro voter" amendment in Douglas' dissent does not set forth the reasoning underlying the conclusion that white primaries are unconstitutional. The reference to the Fourteenth Amendment suggests, however, that Douglas had implicitly adopted a state action approach rather than relying on Article I, Section 2. An intention to rely on state action in future white primary cases may help to

423. That Douglas made such a distinction is supported by his dissent in *United States v. Saylor*, 322 U.S. 385, 390 (1944) (Douglas J., dissenting), announced a month after Douglas had joined the majority in *Allwright* in holding that the primary was state action under the Fifteenth Amendment. In *Saylor*, joined by Black and Reed, Douglas restated his position in *Classic* that most electoral corruption did not violate a federal right until Congress had expressly made it a federal offense. *Id.* at 392.

424. 313 U.S. 299, 318-19 (1941) (Article I, Section 2, protects "right to choose"); *id.* at 325-26 (violation of voters' rights by election officials was "state action"). Stone declined to pass on the equal protection argument because his finding on Article I, Section 2, made it unnecessary and because the issue had not been raised in district court. *Id.* at 329.

425. *Cf. Hague v. CIO*, 307 U.S. 496, 520 n.1 (1939) (Stone, J.) (privileges and immunities clause to be narrowly construed to prevent excessive congressional and judicial restriction of state action).

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explain Douglas' puzzling failure to challenge the use of Section 20, which extended only to action "under color of law,"<sup>426</sup> to support the indictments.<sup>427</sup> The dissenters, supporters of the New Deal, probably did not share Stone's unease about the expansion of public power over political parties. Finding state action would subject political parties to existing constitutional obligations rather than allow the courts to create new ones.

To use the state action approach successfully to eliminate the white primary, however, the dissenters would have to move beyond Stone's definition of state action, for purposes of Section 20, as the actual delegation of power under state statute.<sup>428</sup> If they did not do so, their position would be vulnerable to obstructionist efforts to withdraw all state involvement in white primaries.<sup>429</sup> Moreover, varying degrees of limited state involvement would create line-drawing difficulties. As the Court's handling of *Nixon v. Condon* made clear,<sup>430</sup> the state action determination could be as vague and troublesome as the classification of primaries required by Stone's Article I, Section 2, approach. The dissenters could ensure that their state action approach would be both effective and free from the vagueness problem they had attacked in *Classic* only by adopting a flat rule that all party primary elections were state action regardless of the actual extent of state involvement. Such a rule would imply a new theory of state action that encompassed the performance of public functions similar to those conducted by the state.

There is no direct evidence that the dissenters contemplated this theory of state action at the time of *Classic*, but the theory would provide a basis for eliminating the white primary without accepting Stone's analysis. An inclusive rule about primaries would also be consistent with Douglas' acknowledgment that Congress could regulate all primary elections, regardless of the degree of state involvement in the primary or the primary's effect on the general election. It may be no accident that in 1946 Black was the author of *Marsh v. Alabama*,<sup>431</sup>

426. See note 281 *supra* (quoting Section 20).

427. Section 20 is briefly mentioned in the "Negro voter" amendment, 313 U.S. at 332 (Douglas, J., dissenting), and in an inconsequential footnote, *id.* at 332 n.1.

428. See note 370 *supra*.

429. Some Southern Democrats later attempted unsuccessfully to evade the mandate of *Allwright* by eliminating all state involvement in primary elections. See *Elmore v. Rice*, 72 F. Supp. 516 (E.D.S.C.), *aff'd*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948); *Brown v. Baskin*, 78 F. Supp. 933 (E.D.S.C. 1948), *aff'd*, 174 F.2d 391 (4th Cir. 1949); *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.), *aff'd*, 336 U.S. 933 (1949); V. Key, *supra* note 316, at 625-43.

430. See pp. 790-91 & note 325 *supra*.

431. 326 U.S. 501 (1946). *But see* Snowiss, *supra* note 214, at 243 (Black's rejection of expanded concepts of state action in racial discrimination cases in 1960s).

the first clear exposition of the public function theory of state action, and it is significant that a version of the public function theory was used to condemn the white primary in *Allwright* and the "private" primary in *Terry v. Adams*.<sup>432</sup>

### 3. *Individual Rights and the Maintenance of Free Government*

The last area of fundamental disagreement in *Classic* concerned the proper balance between individual rights and the government's exercise of power to protect minorities and the political process. From the narrow perspective of criminal procedure, Douglas' dissent in *Classic* was probably correct. Prosecution under undeniably vague and antiquated Reconstruction statutes, one of which had apparently been used only four times since its enactment, for insignificant ballot tampering in a minor election was at best a dubious exercise of prosecutorial discretion. Indeed, Stone himself had previously aired similar views about the danger of prosecutions under vague federal statutes.<sup>433</sup>

Nevertheless, it is not surprising that Stone would be unmoved by the defendants' claim of foul. He took a more utilitarian view of the need to protect civil liberties than Douglas, and recognized the need to protect democracy from the dangers of unrestrained majoritarianism.<sup>434</sup> The result in *Classic* was also consistent with Frankfurter's willingness to countenance stern measures against perceived threats to the democratic process.

On the other hand, Douglas justified the protection of civil liberties in absolute terms and for their own sake; civil liberties were "too dear" to permit anything less than strict standards for the construction of criminal statutes.<sup>435</sup> This stance was entirely consistent with his repeated insistence on the protection of the individual, the "smallest minority," as the repository of the values necessary for the survival of democracy. Murphy, who joined the dissent, also attached great importance to the rights of individuals. Yet, although Douglas insisted on protecting individual civil liberties, he was apparently willing to subject political parties to all the restrictions of the Fourteenth Amendment in order to protect the interests of blacks. The dissenting opinion seems to value individual rights and collective

432. 345 U.S. 461, 468-70 (1953) (Black, J.); *id.* at 484 (Clark, J., concurring).

433. *Hines v. Davidowitz*, 312 U.S. 52, 74-75 (1941) (Stone, J., dissenting).

434. Compare p. 764 *supra* (Stone's view that civil liberties preserve proper functioning of political process) with p. 777 *supra* (Douglas' view that individual freedoms deserve absolute protection, not simply means to political ends).

435. 313 U.S. 299, 332 (1941) (Douglas, J., dissenting).

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rights differently, cherishing individual freedom, but accepting increased government regulation over private organizational structures.

### 4. *Fundamental Agreement and the Rule of Law*

The three areas of disagreement show that the Court's new consensus about the subversive power of racist politics was not automatically translated into judicial decisions. Members of the Court were beginning to appreciate that manipulation of the majority's irrational fears and hatreds posed a grave threat to the survival of democracy. The Justices all agreed that the passive mentality of *Newberry* was obsolete, and it is striking that scarcely six years after *Grovey* no Justice invoked the dangers of government intrusion into the private political sphere. Once the Court moved beyond complete exclusion of the federal government from this arena, dissension arose with regard to the precise nature of the threat facing democracy and the proper means and institutions for dealing with that threat. The Court's choice was either to take judicial action or to find constitutional justification for legislative intervention.

The creativity of the Department of Justice also contributed to the cleavage on the Court. Seeking the translation into law of the new consensus regarding the threat of unrestrained, racially motivated majoritarianism, the Department gave the Court two possible approaches to affirmative federal action. In the end, the fundamental difference between the majority, asserting a self-executing right under Article I, Section 2, and the dissent, favoring the development of a broader notion of state action, reflected the two alternatives presented by the government. This divergence was constructive; it kept the content of the emerging legal principles flexible and thus facilitated the ongoing process of developing an affirmative federal program against group hatred and the persecution of minorities.

In sum, the substantive content of the Court's reorientation made possible, and perhaps inevitable, the dissension that appeared in *Classic*. There was no single means of implementing the consensus that racist politics posed a threat to democracy and required government action. Despite their differences, however, Stone and Douglas were writing about the same problem and were aiming ultimately at the same result. It is appropriate that Douglas' opinion was first written as a concurrence; both opinions grew out of a perception of politics and democracy that differs radically from the perception underlying *Newberry* and *Grovey*.

In *Classic*, the Court's new ideology appears in two ways, in the

holding and in the broader implications for government regulation of private activity. The Court held that private political primaries, including the white primary, could be brought under government control. But the Court in *Classic* did more than give the government permission to proceed with its case. It also signaled that a wider range of social conduct, including conduct by hitherto private parties, would be held subject to the immutable rule of law embodied in the Constitution. Just as the concept that tyranny was the betrayal of the people by corrupt leaders gave way to the paradigm of hysterical majoritarianism, so too the old notion that the Constitution protected persons only against the government was replaced in *Classic* by a view that the Constitution protected minorities against the majority, regardless of whether the government was directly involved. Alexander Pekelis, writing a few years after *Classic*, described the concept of constitutional protection against "private governments" that appears in Stone's opinion as a "huge reservoir of new constitutional power" that opened "breath-taking constitutional vistas."<sup>436</sup>

#### E. *The Aftermath: Smith v. Allwright*

The effect of *Classic* on the white primary was, as Pritchett has described it, similar to that of a "delayed-action bomb."<sup>437</sup> The implications of *Classic* were widely understood in the legal community immediately after the decision was announced.<sup>438</sup> Thurgood Marshall and William Hastie of the NAACP, recognizing the opportunity, arranged for the dismissal of a pending appeal challenging the white primary and brought a new suit, *Smith v. Allwright*,<sup>439</sup> based on the reasoning in *Classic*.<sup>440</sup> Biddle and Wechsler at the Justice Department declined to join the direct attack on the white primary, both because they had sought to convince the Court in *Classic* that *Grovey* could be distinguished, and because their involvement would create problems with the conservative Senate Judiciary Committee.<sup>441</sup>

*Allwright* created even sharper disputes within the Court than *Classic* had caused. Jackson and Black joined Roberts in voting to affirm the demurrer in the first conference vote. According to Murphy's conference notes, Jackson was particularly disturbed about the com-

436. A. PEKELIS, *LAW AND SOCIAL ACTION* 113 (1950).

437. C. PRITCHETT, *supra* note 1, at 123.

438. *See* note 398 *supra*.

439. 321 U.S. 649 (1944) (attack on Texas white primary scheme upheld in *Grovey*).

440. Marshall, *The Rise and Collapse of the "White Democratic Primary"*, 26 J. NEGRO EDUC. 249, 252-53 (1957).

441. R. KLUGER, *supra* note 165, at 234; *see* note 342 *supra*.



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peting right to form groups, and both Jackson and Rutledge were concerned about the general implications of judicial supervision of state elections.<sup>442</sup> Still more dissension followed Stone's assignment of the Court's opinion to Frankfurter. In an extraordinary display of political sensitivity, Jackson prevailed upon Stone to reassign the opinion because Frankfurter was Jewish, from New England, and generally viewed as unsympathetic to the Southern wing of the Democratic Party.<sup>443</sup> The task of gracefully overruling *Grovey*, a precedent only nine years old, was given to Reed.

Rather than being graceful, Reed's opinion was an awkward combination of the reasoning of Stone's opinion in *Classic* and the state action approach latent in the *Classic* dissent. Reed acknowledged that the only material difference between *Grovey* and *Allwright* was that the *Classic* decision had intervened. Apparently ignoring *Classic*'s emphasis on the dispositiveness of the primary, Reed did not mention Article I, Section 2, or the "right to choose." *Classic*, Reed proclaimed, had fused the primary and general elections into "a single instrumentality" for choosing officials. The "unitary character of the electoral process" recognized in *Classic* did not by itself bestow "state action" status upon the exclusion of blacks from the primary, but it created the possibility that state delegation to a party of the power to exclude persons from a primary election might make the party's action into state action.<sup>444</sup> Reed seemed to assert that a state action finding depended on the state's statutory involvement in primary elections and emphasized that Texas legislation had rendered the primary an integral part of the general election. Therefore, he concluded, the statutory delegation to the Texas Democratic Party of the authority to determine the qualifications of primary voters—which in *Grovey* had not generated a state action finding—was state action within the meaning of the Fifteenth Amendment.<sup>445</sup>

While Reed's opinion won the support of Jackson and Black, it drew strong criticism from Frankfurter, who believed that Reed was too concerned about "appeasement."<sup>446</sup> For Frankfurter, a "compelling regard for the Constitution as a dynamic scheme of government" justified a frank reversal of *Grovey*.<sup>447</sup> The Fourteenth and Fifteenth

442. J. HOWARD, *supra* note 179, at 356.

443. A. MASON, *supra* note 32, at 614-15.

444. *Smith v. Allwright*, 321 U.S. 649, 660 (1944).

445. *Id.* at 664.

446. Note from Felix Frankfurter to Harlan F. Stone (Mar. 17, 1944) (Harlan Fiske Stone Papers, Box 74, Library of Congress) (attaching draft concurrence).

447. *Id.*

Amendments, he wrote in a memorandum circulated in response to Reed's draft, were violated whenever "free access to the electoral process" was denied on the basis of race, regardless of how "attenuated the relation of the machinery of the State to the machinery of the party may be" or "by whatever political mechanism the result is achieved." As "trustees" of the principles of those amendments, Frankfurter continued, the Court had the duty of assuring "equality of participation in the political processes by which the nation is governed."<sup>448</sup> Accordingly, Frankfurter concurred separately without opinion.

The decision, fulfilling the implicit promise of *Classic*, effectively destroyed the white primary.<sup>449</sup> Although several Southern states attempted various devices to evade the decision, these efforts were consistently rebuffed by lower federal courts<sup>450</sup> and, much later, by the Court itself in *Terry v. Adams*.<sup>451</sup> Faced with legislation purporting to withdraw all state involvement from primary elections, the lower courts were not impeded by the intricacies of the Court's opinion in *Allwright* and struck down the exclusion of blacks from Democratic primary elections regardless of the state's involvement.<sup>452</sup>

## Conclusion

The *Classic* decision exemplifies the change in the Court's orientation in the decade from 1935 to 1945. The formalism of the Court's election law decisions during the preceding period was founded on resistance to government interference with activities in the private political sphere. In the 1930s, the emergence of fascism in Europe and political developments at home generated a new concern that democracy could not depend for its survival on the self-executing protections built into the democratic process. Emphasizing the danger that unrestrained majorities posed to minorities and to the preservation of free, democratic government, the new perception of politics recognized that democracy was particularly vulnerable to the exploitation of racism for political ends. This analysis generated an emerg-

448. *Id.* Frankfurter sent his suggestions to Stone first, and circulated them to the other Justices the following day. Note from Felix Frankfurter to Harlan F. Stone (Mar. 18, 1944) (Harlan Fiske Stone Papers, Box 74, Library of Congress).

449. The decision in *Allwright* was followed by a significant, though not universal, increase in the level of black voting in the South. P. WATTERS & R. CLEGHORN, *CLIMBING JACOB'S LADDER* 26-31 (1967).

450. See note 429 *supra*.

451. 345 U.S. 461 (1953).

452. See, e.g., *Elmore v. Rice*, 72 F. Supp. 516, 526-28 (E.D.S.C.), *aff'd*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948).

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ing consensus that the Constitution must be construed to provide greater protection for democracy against the corrosive force of racism in both the public and private spheres.

*Classic* also demonstrates the difficulty of translating this new understanding into judicial protection of the electoral process. Although the Justices had begun to absorb contemporary ideology concerning the weaknesses of democracy, they could not agree on the specific legal measures that should follow from their new consensus. Yet these difficulties did not necessarily represent a poverty of theory or, as Pritchett would describe it, a weakness of liberalism.<sup>453</sup> Rather, the disagreements represented the growing pains of a new body of legal doctrine based on a fundamental shift in perception. The impetus behind *Classic* contributed in later cases to the process of ending legally sanctioned racial inequality in America. Taken on its own terms, *Classic* remains a remarkable statement by a Court coming to terms with new and desperate political realities.

453. C. PRITCHETT, *supra* note 1, at 264-67.

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Donald S. Collat, *Discrimination in the Coverage of Retirement Plans*  
William V. Dunlap and E. Michael Paul Thomas, *Tort Actions for Cancer: Deterrence, Compensation, and Environmental Carcinogenesis*

Frances H. Foster, *Towards a Uniform Standard: The Effect of Close Corporation and Partnership Restrictive Agreements on Federal Estate Tax Valuation*

Deborah Leavy, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*

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