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Jay S. Bybee

*University of Nevada, Las Vegas – William S. Boyd School of Law*

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## Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment

Jay S. Bybee\*

*There are few cases that contrast more starkly than Justice Robert Jackson's opinion for the Court in West Virginia State Board of Education v. Barnette and Justice Antonin Scalia's majority opinion in Employment Division v. Smith. Although we praise Barnette for its soaring defense of the Free Speech Clause and excoriate Smith for its crabbed reading of the Free Exercise Clause, in fact, Justice Jackson and Justice Scalia are not so far apart. When we read Barnette and Smith in context, we will find that Justice Jackson and Justice Scalia treaded common ground with respect to the First Amendment. Both were devoted to the rule of law, and each feared that the Court would create ad hoc exemptions for those exercising First Amendment rights.*

*Although Justice Scalia's First Amendment opinions show a determined search for rules and a willingness to take a close reading of precedent and history, Justice Scalia has made no effort to deal directly with the text of the First Amendment or to locate it within the larger structure of the Constitution. Justice Scalia has not done for the First Amendment what he has done for separation of powers, federalism or statutory construction. Similarly, Justice Jackson worked very hard at theory, although he never demonstrated Justice Scalia's preoccupation with the text. Justice Jackson, like Justice Scalia, never attempted to offer a broad vision of the First Amendment in the same way that he did for separation of powers or federalism.*

*Despite this dearth of textual exposition and theory from two of the our most driven justices, this Article suggests that there is a theory of the First Amendment, based on a close reading of its text and its place in the larger structure of the Constitution, that brings together*

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\* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I express my profound thanks to Chris Bryant, Shawn Gunnarson, Nelson Lund, Fred Gedicks, Stuart Green, Bill Marshall, Tom McAfee, Steve Smith, and Carl Tobias, all of whom read and commented on this Article. I also appreciate comments I received from participants in a faculty workshop at UNLV and the Federalist Society Faculty Conference. I began this Article while I was on the faculty at Louisiana State University. I would like to thank my research assistants, Christine Arbo (LSU '99) and Anne Levy (UNLV '01) and acknowledge summer research support from the Paul M. Hebert Law Center at LSU and the James E. Rogers Research Grant Fund at UNLV.

*the First Amendment approaches of both Justices. The "power theory" recognizes that the First Amendment bears a distinct form over the remainder of the Bill of Rights. When viewed against the disabilities in Article I, Section 9—where James Madison thought most of the Bill of Rights belonged—the First Amendment emerges as a powerful, but limited, constraint on legislation. As restated in this Article, the "power theory" of the First Amendment is more faithful to the text and structure of the Constitution and both narrower and more profound than our current conception of the First Amendment.*

I.	INTRODUCTION .....	253
II.	ROBERT JACKSON, <i>BARNETTE</i> , AND THE FIRST AMENDMENT .....	261
A.	<i>Pre-Barnette Cases</i> .....	263
1.	First Amendment Rights and Prior Restraints: <i>Lovell, Schneider, and Cantwell</i> .....	265
2.	First Amendment Rights and Religious Exemptions: <i>Gobitis</i> and <i>Jones</i> .....	267
3.	Reversing Course on Exemptions: <i>Murdock</i> and <i>Martin</i> .....	270
B.	<i>Justice Jackson, Barnette, and the Problem of Exemptions</i> .....	276
C.	<i>Post-Barnette</i> .....	287
III.	ANTONIN SCALIA, <i>SMITH</i> , AND THE FIRST AMENDMENT .....	291
A.	<i>Justice Scalia and the Scope of the First Amendment</i> .....	292
1.	The Text and History of the First Amendment .....	293
2.	The Core of the First Amendment .....	296
3.	Overbreadth and Standing .....	302
B.	<i>Justice Scalia, Smith, and the Problem of Exemptions</i> .....	304
1.	<i>Pre-Smith Cases</i> .....	305
2.	<i>Smith</i> .....	308
a.	The Failure of Text and History .....	308
b.	The Rise of Theory .....	312
IV.	COMMON GROUND: A POWER THEORY OF THE FIRST AMENDMENT .....	314
A.	<i>The Constitution and the Allocation of Power</i> .....	315
B.	<i>The Structure of the Bill of Rights</i> .....	322
1.	The Second Through Eighth Amendments: Privileges and Immunities as Rights Held In Personam .....	322
2.	The First Amendment: Disabilities as Rights Held In Rem .....	324
C.	<i>Justice Jackson, Justice Scalia, and the Power Theory</i> .....	328

1. The Power Theory and Exemptions.....	328
2. The Power Theory and the Core of the First Amendment.....	330
3. The Power Theory, Overbreadth, and Standing .....	335
V. CONCLUSION .....	336

## I. INTRODUCTION

In perhaps the most controversial free exercise opinion of the last half-century, Justice Antonin Scalia wrote that the Supreme Court had “never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law . . . of general applicability.”<sup>1</sup> Justice Scalia supported this proposition by quoting sympathetically from one of the most infamous decisions in the Court’s history—the first flag salute case, *Minersville School District v. Gobitis*<sup>2</sup>—which is often mentioned in the company of *Dred Scott v. Sandford*<sup>3</sup> and *Plessy v. Ferguson*.<sup>4</sup> However, Justice Scalia failed to note that the Court overruled *Gobitis*, only three years after it was decided, in *West Virginia State Board of Education v. Barnette*.<sup>5</sup> Justice Scalia’s *Smith* opinion provoked the ire of members of the Court, some of whom have called for its reexamination;<sup>6</sup> the wrath of the academy, bringing

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1. *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). The plaintiffs in *Smith* were fired from their positions as drug rehabilitation counselors for using peyote, a controlled substance. *Id.* at 874. When Oregon denied them unemployment compensation, the plaintiffs claimed that they had used the peyote for religious reasons and that Oregon had violated their rights under the Free Exercise Clause of the First Amendment, which has been made applicable to the states through the Fourteenth Amendment. *Id.* at 874-75; see U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”); *id.* amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).

2. 310 U.S. 586 (1940).

3. 60 U.S. (19 How.) 393 (1856).

4. 163 U.S. 537 (1896); see, e.g., JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 168 (1980) (linking *Gobitis* to *Plessy* and the Japanese Exclusion Cases); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 689 (comparing *Gobitis* to *Plessy*).

5. 319 U.S. 624 (1943).

6. See *City of Boerne v. Flores*, 521 U.S. 507, 544-45 (1997) (O’Connor, J., dissenting); *id.* at 565 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part and concurring in the judgment); *Smith*, 494 U.S. at 892-97 (O’Connor, J., concurring in the judgment); *id.* at 907-09 (Blackmun, J., dissenting).

near acclamation for its overruling;<sup>7</sup> and almost unanimous criticism from Congress and the President in the form of the Religious Freedom Restoration Act (RFRA).<sup>8</sup>

The contrast between the public reaction to Justice Scalia's opinion in *Smith* and Justice Robert Jackson's opinion in *Barnette* could not be more striking. In *Barnette*, the Court removed a "blot" that had resulted from a "spasmodic excess of zeal [and] intricate blundering in analysis and reasoning."<sup>10</sup> *Barnette* was an antidote, the "anti-*Gobitis*"—what *Brown v. Board of Education*<sup>11</sup> was to *Plessy*, or the Fourteenth Amendment was to *Dred Scott*. Like the *Gobitis* children before them, the *Barnettes* were Jehovah's Witnesses, whose religious beliefs forbade them from taking an oath of allegiance to anyone or anything other than Jehovah.<sup>12</sup> Expressly overruling *Gobitis*, Justice Jackson wrote that "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations . . . and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."<sup>13</sup> Whereas even Justice Scalia's ideological supporters criticized *Smith*, Jackson's soaring declaration that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to

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7. See, e.g., James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 115 (1991) ("*Smith* essentially rendered the free exercise clause a dead letter . . ."); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 1 ("*Smith* produced widespread disbelief and outrage."); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) ("The *Smith* decision is undoubtedly the most important development in the law of religious freedom in decades. . . . *Smith* is contrary [to text, history, and precedent and] the deep logic of the First Amendment."); John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV. 567, 577 (1992) ("[T]he fundamental proposition of Justice Scalia's opinion undid the previous fifty years.").

Even those willing to defend the result in *Smith* warn that "[t]he *Smith* opinion itself . . . cannot be readily defended. The decision, as written, is neither persuasive nor well-crafted. It exhibits only a shallow understanding of free exercise jurisprudence and its use of precedent borders on fiction." William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308-09 (1991).

8. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994). In 1997, the Court held that RFRA, at least as applied to the states, was beyond Congress's power under Section 5 of the Fourteenth Amendment. See *Flores*, 521 U.S. at 511-12.

9. *Blot Removed*, TIME, June 21, 1943, at 16.

10. Thomas Reed Powell, *The Flag-Salute Case*, NEW REPUBLIC, July 5, 1943, at 16, 18.

11. 347 U.S. 483 (1954).

12. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943).

13. *Id.* at 642.

confess by word or act their faith therein”<sup>14</sup> has received universal adulation.<sup>15</sup>

Although we praise *Barnette*, we have not understood it, and though we excoriate *Smith*, we have failed to appreciate it. In fact, Justice Jackson and Justice Scalia are not so far apart. Distracted by Jackson’s lofty but malleable rhetoric, we have not read Jackson closely enough to comprehend his view of the First Amendment. Justice Jackson carefully crafted *Barnette* against a series of cases in which the Court had exempted Jehovah’s Witnesses from laws of general applicability.<sup>16</sup> Jackson had dissented in those cases.<sup>17</sup> In *Barnette*, he found a narrow ledge on which he could comfortably stand with five members of the Court—and prevent the Court from sliding further into the abyss of religious exemptions.<sup>18</sup> Justice Jackson found that West Virginia lacked the power to require that students recite the Pledge of Allegiance.<sup>19</sup> If West Virginia had no power to do so, the statute was unconstitutional.<sup>20</sup> It was unconstitutional in *all* of its applications, and not just as applied to religiously motivated individuals, such as the Barnettes.<sup>21</sup> In other words, West Virginia’s law of general applicability could not be generally applied.

Robert Jackson and Antonin Scalia share more than their views on the First Amendment. Both New Yorkers, one of rural and the other of urban origin, Jackson and Scalia both arrived at the Court

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14. *Id.*

15. See, e.g., MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 43 (1996) (calling Jackson’s declaration “a landmark in constitutional law”); DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON CONSTITUTIONAL LAW 590 (2d ed. 1998) (praising Jackson’s “eloquent passages [as] reminiscent of [Justice] Brandeis in [*Whitney v. California*, 274 U.S. 357 (1927)]”); WILLIAM LEE MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC 68, 326 (1985) (calling the passage a “thoroughly Jeffersonian paragraph” to which “the word *eloquent* is often and understandably applied”); GLENDON SCHUBERT, DISPASSIONATE JUSTICE: A SYNTHESIS OF THE JUDICIAL OPINIONS OF ROBERT H. JACKSON 34 (1969) (“Jackson’s opinion includes passages that rank among the great paeans to human liberty . . .”); RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 76-77 (1992) (placing Jackson’s opinion “among the most eloquent pronouncements ever on First Amendment freedoms[;] a haunting passage”); *Blot Removed*, *supra* note 9, at 16 (“In these ringing polysyllables, the U.S. Supreme Court this week reaffirmed its faith in the Bill of Rights . . .”).

16. See SCHUBERT, *supra* note 15, at 32.

17. See *id.*

18. See *id.*; *Barnette*, 319 U.S. at 640.

19. See *Barnette*, 319 U.S. at 641.

20. See *id.* at 642.

21. See *id.* at 641-42.

through long government service.<sup>22</sup> Jackson served as Assistant Attorney General, Solicitor General, and Attorney General, and had declined appointment to the federal circuit court.<sup>23</sup> Scalia served as Assistant Attorney General and as a circuit judge, and received serious consideration for the position of Solicitor General.<sup>24</sup> We know both Justices for their crisp, effective prose, although both occasionally bleed sarcasm, irony, and wit. Perhaps no Justices since Oliver Wendell Holmes have written with such style<sup>25</sup> and supplied us with such aphorisms and other quotable phrases.<sup>26</sup> While Jackson was

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22. THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1995, at 407-08, 512 (Clair Cushman ed., 2d ed. 1995) [hereinafter SUPREME COURT JUSTICES].

23. See *id.* at 406-10; Stephen R. Alton, *Loyal Lieutenant, Able Advocate: The Role of Robert H. Jackson in Franklin D. Roosevelt's Battle with the Supreme Court*, 5 WM. & MARY BILL RTS. J. 527, 528 (1997).

24. See SUPREME COURT JUSTICES, *supra* note 22, at 511-15; Cass Peterson, *Executive Notes*, WASH. POST, Mar. 21, 1981, at A3.

25. Justice Jackson's style has been lauded by commentators. See Proceedings in Memory of Mr. Justice Jackson, 349 U.S. xxvii, xxxiv-xxxv (1955); JEFFREY D. HOCKETT, NEW DEAL JUSTICE: THE CONSTITUTIONAL JURISPRUDENCE OF HUGO L. BLACK, FELIX FRANKFURTER, AND ROBERT H. JACKSON 241 (1996) ("[Jackson's] facility of expression . . . place[s] him in the company of the greatest stylists ever to serve on the Court, including Oliver Wendell Holmes and Benjamin Cardozo."); SCHUBERT, *supra* note 15, at 7 n.21 (quoting Edward Dumbauld, who compared Justice Jackson to Justice Holmes); EDWIN M. YODER, JR., THE UNMAKING OF A WHIG 7, 22 (1990) (stating that Jackson was "a man of storied eloquence whose pen contributed a stock of elegant apothegms," and that he had a "gift for aphoristic eloquence"); Charles Fairman, *Associate Justice of the Supreme Court*, 55 COLUM. L. REV. 445, 445-49 (1955).

Likewise, many commentators have written appreciatively of Justice Scalia's style. See FARBER, ESKRIDGE, & FRICKEY, *supra* note 15, at 31 (comparing Justice Scalia's prose to that of Justice Hugo Black); Charles Fried, *Manners Makyth Man: The Prose Style of Justice Scalia*, 16 HARV. J.L. PUB. & POL'Y 529, 531 (1993) (comparing Justice Scalia to Justice Jackson); Thomas F. Shea, *The Great Dissenters: Parallel Currents in Holmes and Scalia*, 67 MISS. L.J. 397, 425 (1997) (comparing Justice Scalia to Justice Holmes); Robert Post, *Justice for Scalia*, N.Y. REV. BOOKS, June 11, 1998, at 57 (book review) (touting Scalia's "lively prose that fairly jumps from the dreary pages of the Supreme Court reports"); see also Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25 (1994) (comparing Justice Scalia's style of constitutional interpretation to that of Justice Black's).

26. Justice Jackson often included such phrases and aphorisms in his opinions. See, e.g., *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the judgment) ("We are not final because we are infallible, but we are infallible only because we are final."); *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 238 (1948) (Jackson, J., concurring) ("It is a matter on which we can find no law but our own prepossessions."); *SEC v. Chenery Corp.*, 332 U.S. 194, 214 (1947) (Jackson, J., dissenting) ("I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'"); *Everson v. Bd. of Educ.*, 330 U.S. 1, 19 (1947) (Jackson, J., dissenting) ("[T]he most fitting precedent is that of Julia who, according to Byron's reports, 'whispering 'I will ne'er consent,'—consented.'"); W.

practical, earthy, and a practitioner's Justice,<sup>27</sup> we have long admired him for his constitutional theory as well.<sup>28</sup> On the other hand, we know Scalia for his sophisticated analysis and passionate appeals to constitutional text and structure.<sup>29</sup> He is not, however, above

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Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943) ("[W]e act in these matters not by authority of our competence but by force of our commissions.").

Justice Scalia also frequently produced such aphorisms and quotable phrases in his opinions. See, e.g., *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District."); *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting) ("[T]his case is not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress."); *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing . . . But this wolf comes as a wolf."); *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., dissenting) ("It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.").

27. See *Douglas v. City of Jeannette*, 319 U.S. 157, 174-75 & n.3 (1943) (Jackson, J., concurring in part and dissenting in part) (explaining that, because the Justices "work in offices affording ample shelter from such importunities and live in homes where we do not personally answer such calls," the dispute over solicitation laws "may be a matter of indifference to our personal creeds"); SCHUBERT, *supra* note 15, at 7 ("Jackson . . . was a very conventional legal thinker."); Paul A. Freund, *Mr. Justice Jackson and Individual Rights*, in MR. JUSTICE JACKSON: FOUR LECTURES IN HIS HONOR 29, 37 (1969) ("Justice Jackson was, above all—and this was one of his great strengths—a case lawyer.").

28. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-38 (1952) (Jackson, J., concurring in the judgment); *H.P. Hood & Sons Inc. v. Du Mond*, 336 U.S. 525, 534-35 (1949); *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 585-86 (1949) (Jackson, J., plurality opinion); *Korematsu v. United States*, 323 U.S. 214, 243-44 (1944) (Jackson, J., dissenting); *Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942); Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945); see also Potter Stewart, *Robert H. Jackson's Influence on Federal-State Relationships*, in MR. JUSTICE JACKSON: FOUR LECTURES IN HIS HONOR, *supra* note 27, at 57, 64 (explaining the importance of Jackson's "vision of our constitutional structure" as it applies to federal-state relationships).

29. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 464-65 (1998) (Scalia, J., concurring in part, dissenting in part); *Printz v. United States*, 521 U.S. 898, 918-25 (1997); *Edmond v. United States*, 520 U.S. 651, 658-65 (1997); *Freytag v. Comm'r*, 501 U.S. 868, 892-922 (1991) (Scalia, J., concurring); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 65-71 (1989) (Scalia, J., concurring); *Mistretta*, 488 U.S. at 422-27 (Scalia, J., dissenting); *Morrison*, 487 U.S. at 697-99 (Scalia, J., dissenting); *Tyler Pipe Indus.*, 483 U.S. at 259-65 (Scalia, J., concurring in part, dissenting in part); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 23-29, 41-44 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law Courts*]; Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 581-97 (1989-90); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-65 (1989); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989) [hereinafter Scalia, *The Rule of Law*]; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881-83 (1983)



recognizing the practical impact of constitutional jurisprudence.<sup>30</sup> Both are traditionalists who harbor a healthy respect for the limits of judicial competence,<sup>31</sup> and both are powerful advocates for the law as a set of rules.<sup>32</sup>

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[hereinafter Scalia, *Standing as an Essential Element*]; see also RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 181-222 (1997); George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1303-08 (1990) (noting that Scalia adjudicates constitutional matters in a manner that resembles statutory construction, by ascertaining the meaning of the text); Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991, 1009 (1994) (acknowledging that Scalia uses textualism to interpret unambiguous constitutional provisions); Symposium: *The Jurisprudence of Justice Antonin Scalia*, 12 CARDOZO L. REV. 1583 (1991) (presenting articles describing Justice Scalia's approach to constitutional matters).

30. See, e.g., Antonin Scalia, *A House with Many Mansions: Categories of Speech Under the First Amendment*, in THE CONSTITUTION, THE LAW, AND FREEDOM OF EXPRESSION 1787-1987, at 9, 19 (James Brewer Stewart ed., 1987) ("We lawyers, constantly dealing with the categories of legal abstractions, sometimes forget that there is really no such thing as a 'First Amendment case.' Lawsuits are not *about* the First Amendment, but about some concrete and fact-bound wrong that was allegedly inflicted upon the plaintiff.").

31. This respect was illustrated by Justice Jackson in many of his opinions and writings. See, e.g., *Craig v. Harney*, 331 U.S. 367, 397 (1947) (Jackson, J., dissenting) ("From our sheltered position, fortified by life tenure . . . it is easy to say that this local judge ought to have shown more fortitude in the face of criticism."); *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting) ("I would not lead people to rely on this Court . . . . The chief restraint upon those who command the physical forces of the country . . . must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history."); Robert H. Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121 (1948); ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 11-13, 79-81 (1955) [hereinafter JACKSON, THE SUPREME COURT]; ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 3-38 (1941); see also SCHUBERT, *supra* note 15, at viii ("The initiative in public policy-making, Jackson thought, ought to lie with Congress and the President, rather than with the Supreme Court or other judges."); Louis L. Jaffe, *Mr. Justice Jackson*, 68 HARV. L. REV. 940, 940-41 (1954-1955) (noting Justice Jackson's belief that the Supreme Court should play only a limited role in certain areas of jurisprudence, such as civil liberties).

For cases that illustrate Justice Scalia's respect for the limits of judicial competence, see, for example, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting) (criticizing "[t]he Imperial Judiciary" and a "Nietzschean vision of us unelected, life-tenured judges . . . leading a Volk"); *Burnham v. Superior Court*, 495 U.S. 604, 627 n.5 (1990) (Scalia, J., plurality opinion) ("The notion that the Constitution, through some penumbra emanating from the Privileges and Immunities Clause and the Commerce Clause, establishes this Court as a Platonic check upon the society's greedy adherence to its traditions can only be described as imperious."); *Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) ("[I]t is simply untenable that there must be a judicial remedy for every constitutional violation. Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are.").

32. For cases illustrating Justice Jackson's advocacy for the law as a set of rules, see, for example, *Youngstown Sheet & Tube Co.*, 343 U.S. at 646 (Jackson, J., concurring) ("[O]urs is a government of laws, not of men, and . . . we submit ourselves to rulers only if under rules"); *Kunz v. New York*, 340 U.S. 290, 299, 309 (1951) (Jackson, J., dissenting) ("This Court's prior decisions, as well as its decisions today, will be searched in vain for clear

When we read *Barnette* and *Smith* in context, we will find that Justice Jackson and Justice Scalia have remarkably similar views on the First Amendment. I first review Justice Jackson's First Amendment opinions in Part II, and then Justice Scalia's in Part III. I focus on two essential First Amendment questions: First, what (substantively) does the First Amendment require or prohibit? And, second, assuming a substantive violation, what should the remedy be? Should the plaintiff be entitled to exemption from the law, or is the law itself unconstitutional? These questions, as both Jackson and Scalia recognized, are related. Our willingness, for example, to declare a state's compulsory school attendance law unconstitutional is integrally related to whether the law is unconstitutional in its entirety or only as applied to the Old World Amish.<sup>33</sup> For both Jackson and Scalia, who share a deep concern with the *rules* of the law, the answer is clear: either the law is unconstitutional in all of its applications, or the law must be obeyed by all those to whom it applies. Otherwise, as Justice Scalia warned, "a private right to ignore generally applicable laws . . . would be courting anarchy."<sup>34</sup>

Throughout Jackson and Scalia's First Amendment opinions, there is one obvious flaw. For all of their concern over constitutional theory and rules of law, neither Justice Jackson nor Justice Scalia ever articulated a vision or theory of the First Amendment based on the text or structure of the Constitution, although both Justices did expound a text-based vision for the separation of powers doctrine and federalism.

In Part IV, I offer, based on a close reading of the text of the First Amendment and its place within the larger structure of the Constitution, an explanation for the role of the First Amendment. This

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standards . . . . It seems hypercritical to strike down local laws on their faces for want of standards when we have no standards."); JACKSON, *THE SUPREME COURT*, *supra* note 31, at 76 ("Liberty . . . is achieved only by a rule of law."); Robert H. Jackson, *The Law Is a Rule for Men to Live By*, 10 *VITAL SPEECHES* 664 (1943).

Justice Scalia's writings evidenced this same advocacy for the law as a set of rules. See, e.g., *Burnham*, 495 U.S. at 626 (Scalia, J., plurality opinion) ("[D]espite the fact that he manages to work the word 'rule' into his formulation, JUSTICE BRENNAN's approach does not establish a rule of law at all, but only a 'totality of the circumstances' test . . ."); Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989) (Scalia, J., plurality opinion) ("[A] rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all."); *Morrison*, 487 U.S. at 733 (Scalia, J., dissenting) ("A government of laws means a government of rules."); Scalia, *The Rule of Law*, *supra* note 29, at 1176 (explaining Scalia's preference for rules of law promulgated by the legislature); see also Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 *HARV. L. REV.* 22, 65 (1992) (calling Justice Scalia "[t]he leading contemporary proponent of the rules-as-democracy argument").

33. See *Wisconsin v. Yoder*, 406 U.S. 205, 220, 234-36 (1972) (exempting Old World Amish from Wisconsin's compulsory education law).

34. *Employment Div. v. Smith*, 494 U.S. 872, 886, 888 (1990).

perspective is thoroughly consistent with Jackson and Scalia's views and, importantly, makes sense of their views as a theoretical, as opposed to an ideological, matter. As I explain, First Amendment rights are unique among those included in the Bill of Rights. Although the other rights protect us from the legitimate activities of government (housing the military, searching for evidence of unlawful conduct, holding criminal and civil proceedings), the First Amendment is a subject matter disability—it forbids the government from enacting certain laws. When government prohibits the free exercise of religion or abridges the freedom of speech or the press, it has acted outside of its authority; it has exercised power that is neither delegated to the federal government nor reserved to the states. The action is *ultra vires*, and the law is void.

I refer to this approach as a “power theory” of the First Amendment and suggest that the power theory will inevitably affect our choice of substantive theories of the First Amendment, although the theory itself does not supply a substantive theory of freedom of religion, speech, or press. Irrespective of the substantive First Amendment theory we adopt, I suggest that the First Amendment, properly conceived, will be both narrower and more profound than our current conception of it. The power theory is narrower because it does not admit that the Constitution requires the judiciary to exempt anyone from laws of general applicability. Accordingly, it is more profound because if the application of a general law violates *anyone's* free exercise of religion or freedom of speech or press, the law is unconstitutional as applied to *everyone*. To state this proposition in terms of the text of the First Amendment: If government cannot compel Jehovah's Witnesses to recite the Pledge of Allegiance, either because the law prohibits the free exercise of religion, or because it abridges the freedom of speech, then government “shall make no [such] law.”<sup>35</sup>

The First Amendment has become a rule against particular kinds of rules.<sup>36</sup> If the First Amendment voids the law entirely, then that strongly favors a limiting view of the First Amendment's scope. Not every incidental burden on religion, speech, and press can be deemed to violate the First Amendment; otherwise, the government would be denuded of its powers. Instead, the power theory holds that, just as “there is no more effective practical guaranty against arbitrary and

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35. See *id.* at 877.

36. See John Harrison, *The Free Exercise Clause as a Rule About Rules*, 15 HARV. J.L. & PUB. POL'Y 169, 169-74 (1992).

unreasonable government than to require that the principles of law which officials would impose upon a minority . . . be imposed generally,"<sup>37</sup> so "we [cannot] give to one sect a privilege that we could not give to all."<sup>38</sup>

## II. ROBERT JACKSON, *BARNETTE*, AND THE FIRST AMENDMENT

For all the praise we have bestowed on *Barnette*, the case remains an enigma. Fifty years after the Court decided *Barnette*, we continue to discuss its place in the canon.<sup>39</sup> Throughout this period, contemporaneous and modern commentators have divided over the question of what *Barnette* holds. Professor Thomas Emerson warned us that "[t]he precise doctrinal basis of Justice Jackson's opinion is not entirely clear," and consequently we have failed to classify the opinion consistently.<sup>40</sup> Leo Pfeffer, for example, praised *Barnette* as "an eloquent and epochal document in the history of the freedom of religion," and then, in the same sentence, said that this was true "although Justice Jackson expressly refused to base the decision on that freedom."<sup>41</sup> Professor Stephen Presser similarly claimed that the Court decided *Barnette* on speech grounds but that "the real issue" was religious freedom.<sup>42</sup> And Judge John Noonan thought *Barnette* was "a ringing endorsement of religious freedom although it went further to endorse freedom of thought of any kind, religious or nonreligious."<sup>43</sup> Some cases and commentators contend that *Barnette* is about the freedom of religion and rests on the Free Exercise Clause.<sup>44</sup> Others argue that it turns on the Free Speech Clause<sup>45</sup> or, perhaps, on an undifferentiated combination of speech and religion.<sup>46</sup>

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37. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

38. *Douglas v. City of Jeannette*, 319 U.S. 157, 180 (1943) (Jackson, J., concurring and dissenting).

39. See, e.g., Lackland H. Bloom Jr., *Barnette and Johnson: A Tale of Two Opinions*, 75 IOWA L. REV. 417, 419-23 (1990); Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675, 680 (1984); Stephen W. Gard, *The Flag Salute Cases and the First Amendment*, 31 CLEVE. ST. L. REV. 419, 421-28 (1982); Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 451-53 (1995); Leora Harpaz, *Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism*, 64 TEX. L. REV. 817, 820-40 (1986).

40. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 29 (1970).

41. LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* 524-25 (1953).

42. See STEPHEN B. PRESSER, *RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED* 150 (1994).

43. Noonan, *supra* note 7, at 574.

44. See *Employment Div. v. Smith*, 494 U.S. 872, 894-95 (1990) (O'Connor, J., concurring in the judgment) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624

Even if we could agree on the constitutional clause at issue in *Barnette*, there is the critical question of remedy. Were the *Barnettes* entitled to exemption from West Virginia's flag salute law, or is the law unconstitutional in all its applications? Some commentators have argued that *Barnette* granted an exemption to the Witness children,<sup>47</sup> while others claim that *Barnette* struck West Virginia's flag salute requirement entirely.<sup>48</sup>

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(1943)) ("[W]e have . . . requir[ed] the government to justify any substantial burden on religiously motivated conduct by a compelling state interest."); *id.* at 902-03 (citing *Barnette*, 319 U.S. at 638) ("[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility . . ."); *Sch. Dist. v. Schempp*, 374 U.S. 203, 264-65, 288-89 (1963) (Brennan, J., concurring) (stating that *Barnette* involved "infringement of the individual's religious liberty" and that "[w]e have held in *Barnette* . . . that a State may [not] require . . . public school students . . . to profess beliefs offensive to religious principles"); HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 204 (6th ed. 1993) (noting that the West Virginia requirement was an "unconstitutional attachment of freedom of religion"); Stephen D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 759 (1996); Madaline Kintner Remmlein, Note, *Constitutional Implications of Compulsory Flag Salute Statutes*, 12 GEO. WASH. L. REV. 70, 78-80 (1943); *see also* Gard, *supra* note 39, at 421 ("[T]he major casebooks almost uniformly treat *Barnette* and *Gobitis* as freedom of religion cases . . .").

45. *See, e.g.*, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469 n.13 (1997) (distinguishing the marketing orders at issue from "the compelled speech in [*Barnette*]"); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) ("[T]he student in public school may not be compelled to salute the flag."); MILLER, *supra* note 15, at 326; Danzig, *supra* note 39, at 680; Robert N. Anderton, Comment, *Just Say No to Judicial Review: The Impact of Oregon v. Smith on the Free Exercise Clause*, 76 IOWA L. REV. 805, 819 (1991); Note, *The Supreme Court of the United States During the October Term, 1942: I*, 43 COLUM. L. REV. 837, 935 (1943); Recent Cases, *Constitutional Law—Power of School Board to Compel Pupils to Salute Flag*, 92 U. PA. L. REV. 103, 104 (1943).

46. *See* *Poe v. Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) ("[T]oday those decisions would probably have gone by reference to the concepts of freedom of expression and conscience assured against state action by the Fourteenth Amendment, concepts that are derived from the explicit guarantees of the First Amendment against federal encroachment upon freedom of speech and belief."); GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 1362 (13th ed. 1997); Thomas A. Rover, Recent Decisions, *Constitutional Law—Resolution of State Board of Education Compelling Salute to Flag Held Unconstitutional*, 32 GEO. L.J. 93, 93 (1943); *see also* ARIENS & DESTRO, *supra* note 15, at 44 (noting the difficulty of differentiating free speech from freedom of religion cases).

47. *See, e.g.*, MILLER, *supra* note 15, at 330-31; Jamar, *supra* note 44, at 759; Donald R. Price & Mark C. Rahdert, *Distributing the First Fruits: Statutory and Constitutional Implications of Tithing in Bankruptcy*, 26 U.C. DAVIS L. REV. 853, 889 n.152 (1993); Remmlein, *supra* note 44, at 80; David Z. Seide, Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. REV. 364, 381 n.96 (1983); Scott J. Ward, Note, *Reconceptualizing Establishment Clause Cases as Free Exercise Class Actions*, 98 YALE L.J. 1739, 1758 n.134 (1989); *see also* Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1407 n.123 (1993) (noting the problem of religious exceptions).

48. Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 160 (1987); Barry A. Fisher, Comment on "The Free Exercise Clause: A Structural Overview and an

To understand *Barnette*, we must view it in the context of the Jehovah's Witness cases that flooded the Supreme Court between 1938 and 1953. These cases, more than any others, defined free speech in the states and redefined (at least temporarily) the free exercise doctrine. Although Justice Jackson was not on the Court when it heard the earliest of these cases, he joined the Court for the 1941 Term and heard the majority of the cases during his thirteen years on the Court.<sup>49</sup>

#### A. *Pre-Barnette Cases*

Unlike the politically charged First Amendment cases the Court faced during World War I,<sup>50</sup> most of the First Amendment cases decided between 1930 and 1950 were apolitical state cases arising out of very ordinary conflicts between states and their citizens. The cases bore none of the urgency of the Espionage Act cases in which the "clear and present danger" standard was forged,<sup>51</sup> but were far more pedestrian, arising out of activities conducted on Main Street between citizens, rather than in more subversive surroundings.

No cases proved more vexing than the Jehovah's Witness cases.<sup>52</sup> The Jehovah's Witnesses believed that all earthly institutions were

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*Appraisal of Recent Developments*", 27 WM. & MARY L. REV. 975, 977 (1985-1986); David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 846 n.263 (1986); Recent Cases, *supra* note 45, at 105.

49. SUPREME COURT JUSTICES, *supra* note 22, at 408.

50. See, e.g., *Pierce v. United States*, 252 U.S. 239, 241-42 (1920); *Schaefer v. United States*, 251 U.S. 466, 468-69 (1920); *Abrams v. United States*, 250 U.S. 616, 617-19 (1919); *Debs v. United States*, 249 U.S. 211, 212-15 (1919); *Frohwerk v. United States*, 249 U.S. 204, 205-210 (1919); *Schenck v. United States*, 249 U.S. 47, 49 (1919); see also *Whitney v. California*, 274 U.S. 357 (1927) (upholding a California criminal syndicalism law that forbids teaching or aiding and abetting crimes or acts of violence to effect political or industrial change or organizing or knowingly becoming a member of a group that so teaches or aids); *Gitlow v. New York*, 268 U.S. 652, 654-55, 672 (1925) (upholding the constitutionality of a New York criminal anarchy law which prohibited the verbal or written distribution of material advocating that organized government be overthrown by force or violence); *Gilbert v. Minnesota*, 254 U.S. 325, 326 (1920) (upholding a Minnesota law which prohibited the "interfer[ence] with or discourag[ement of] the enlistment of men in the military or naval forces of the United States or the state of Minnesota").

51. See *Schenck*, 249 U.S. at 47-52. Although the cases did not usually implicate espionage to the same degree as the earlier cases, raging nationalism and suspicion of the loyalties of certain groups provided a backdrop for the cases decided between 1930 and 1950. See RICHARD W. STEELE, *FREE SPEECH IN THE GOOD WAR* (1999) (reviewing, in chapters three through six, Robert Jackson's tenure as Attorney General).

52. The cases in the Supreme Court through World War II include: *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Taylor v. Mississippi*, 319 U.S. 583 (1943); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Largent v. Texas*, 318 U.S.

controlled by Satan and that the only means of reform was to announce urgently the coming of Jehovah's kingdom.<sup>53</sup> The Witnesses were a strident people, determined to fulfill literally the Biblical injunction to teach the whole world.<sup>54</sup> They aggressively proselyted by canvassing door-to-door and selling their written materials and playing excerpts of speeches on a portable phonograph.<sup>55</sup> Their message antagonized Protestants and Catholics alike from North to South, and they conducted their proselyting in the face of many state and local restrictions on public soliciting.<sup>56</sup> The Witnesses did not recognize the legitimacy of any government whose laws, including those requiring permits or licenses or imposing taxes, conflicted with their proselytizing efforts.<sup>57</sup> They refused to apply for permits to solicit, hold parades, or use sound trucks.<sup>58</sup>

The cases coming before the Court consistently raised two fundamental questions. First, what does the First Amendment prohibit? That is, what is the substantive content of the Free Exercise Clause, the Free Speech Clause, and the Free Press Clause? Second,

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418 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943); *Jones v. Opelika*, 316 U.S. 584 (1942) [hereinafter *Jones I*], *vacated*, 319 U.S. 103 (1943); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

Post-World War II cases involving Jehovah's Witnesses include: *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Marsh v. Alabama*, 326 U.S. 501 (1946); *see also* Hollis W. Barber, *Religious Liberty v. Police Power: Jehovah's Witnesses*, 41 AM. POL. SCI. REV. 226, 226-27 (1947) (describing how the Jehovah's Witnesses' faith lends a new twist to religious exemption jurisprudence); William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997, 997-1004 (1987) (reviewing the role of Jehovah's Witnesses cases in the incorporation of the First Amendment into the Fourteenth Amendment); Edward F. Waite, *The Debt of Constitutional Law to Jehovah's Witnesses*, 28 MINN. L. REV. 209, 216, 246 (1944) (explaining the broadening of constitutional guarantees by a series of Jehovah's Witnesses cases in the 1930s and 1940s).

53. *See* DAVID R. MANWARING, *RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY* 24 (1962); Waite, *supra* note 52, at 212-13.

54. *See* Matthew 28:19-20 ("Go ye therefore, and teach all nations . . .") (King James); MANWARING, *supra* note 53, at 17-26; Barber, *supra* note 52, at 226-27.

55. *See, e.g., Saia*, 334 U.S. at 559; *Cantwell*, 310 U.S. at 301; McAninch, *supra* note 52, at 1002.

56. *See, e.g., Douglas*, 319 U.S. at 171; *Jones I*, 316 U.S. at 584; McAninch, *supra* note 52, at 1002.

57. *See, e.g., Jones I*, 316 U.S. at 588-89; *Schneider*, 308 U.S. at 159; Barber, *supra* note 52, at 227; McAninch, *supra* note 52, at 1003, 1028.

58. *Schneider*, 308 U.S. at 159 ("[Ms. Schneider] did not apply for, or obtain, a permit pursuant to the ordinance because she conscientiously believed that [to do so] would be an act of disobedience to the command of Almighty God."); MANWARING, *supra* note 53, at 26-29.

and not unrelated to the first question: What is the remedy? If we believe that the government has prohibited or abridged the rights protected by the First Amendment, are the complainants exempt from generally applicable, otherwise constitutional provisions, or is the provision unconstitutional in its entirety?

1. First Amendment Rights and Prior Restraints: *Lovell*, *Schneider*, and *Cantwell*

In the earliest Witness cases, *Lovell v. Griffin*,<sup>59</sup> *Schneider v. State*,<sup>60</sup> and *Cantwell v. Connecticut*,<sup>61</sup> the question of exemptions for religiously motivated conduct did not arise, and the Court decided the cases nearly unanimously.<sup>62</sup> In *Lovell*, the Court unanimously held that an ordinance requiring written permission from the City Manager to distribute literature was “invalid on its face” as a violation of the “freedom of the press.”<sup>63</sup> The Court observed that the ordinance “prohibit[ed] the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager.”<sup>64</sup> This requirement subjected pamphlets and leaflets to “license and censorship” akin to “previous restraint upon publication.”<sup>65</sup>

In one of four consolidated cases before the Court in *Schneider*, the Court struck down, as a violation of the rights of free speech and press, a New Jersey city ordinance barring “unlicensed communication . . . from door to door” and requiring Witnesses to obtain a canvassing permit from the Chief of Police.<sup>66</sup> The Court suggested that, while the city might regulate commercial soliciting and fix reasonable hours for canvassing, it had not done so here.<sup>67</sup> Although the petitioner had challenged the ordinance as applied to her, the Court noted that “[i]f it covers the petitioner’s activities it equally applies to one who wishes to present his views on political, social or economic questions.”<sup>68</sup>

In a third case, *Cantwell v. Connecticut*, the Court unanimously overturned the convictions of Witnesses Newton Cantwell and his

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59. 303 U.S. 444 (1938).

60. 308 U.S. 147 (1939).

61. 310 U.S. 296 (1940).

62. The only dissenting vote in any of the cases was Justice McReynolds, who dissented without opinion in *Schneider*, 308 U.S. at 165.

63. *Lovell*, 303 U.S. at 451.

64. *Id.*

65. *Id.* at 451-52.

66. 308 U.S. at 163.

67. *Id.* at 165.

68. *Id.* at 163.



sons.<sup>69</sup> Cantwell was charged with violating a Connecticut statute prohibiting soliciting for religious, charitable, or philanthropic causes without a certificate.<sup>70</sup> The certificate had to be issued by the secretary of the “public welfare council” and might be “revoked at any time.”<sup>71</sup> Cantwell’s son, Jesse, was also charged with common law breach of peace for stopping two men on the street and asking permission to play a phonograph recording that attacked the Catholic Church.<sup>72</sup> Unlike the prior cases, *Cantwell* mentioned the free exercise of religion, although the opinion did not seem to turn on the religious nature of the Cantwells’ activities (apart from the fact that the Connecticut statute itself specifically regulated religious solicitation).<sup>73</sup> Moreover, the Court expressly stated that

[t]he general regulation . . . of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise.<sup>74</sup>

The Court overturned Jesse Cantwell’s breach of peace charge on the accepted ground that his conduct did not constitute “a clear and present danger to a substantial interest of the State.”<sup>75</sup>

In the end, *Cantwell* was only nominally about the free exercise of religion. The case is important because it stated, for the first time, that the free exercise of religion was within the “liberty” protected by the Due Process Clause of the Fourteenth Amendment.<sup>76</sup> Substantively, however, *Cantwell* upheld religious speech as a form of

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69. 310 U.S. 296, 311 (1940).

70. *Id.* at 300-02.

71. *Id.* at 302.

72. *Id.* at 301-03.

73. *Id.* at 310.

74. *Id.* at 305. The Court, rather imprecisely, stated that “wholly deny[ing] the right to preach” would be a “previous and absolute restraint,” and cited a freedom of the press decision, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). See *Cantwell*, 310 U.S. at 304 & n.5; see also *id.* at 306 (“[T]he availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible.”).

75. *Cantwell*, 310 U.S. at 311. The “clear and present danger” phrase belongs to Justice Holmes. See *Schenck v. United States*, 249 U.S. 47, 52 (1919); see also *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Holmes, J., dissenting) (explaining how the clear and present danger test maintains the right of free speech); *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting) (explaining that Congress can only set limits on freedom of expression in a case of clear and present danger).

76. *Cantwell*, 310 U.S. at 303.

speech protected by the Fourteenth Amendment,<sup>77</sup> and it added little to what the Court had previously said in *Lovell* or *Schneider*. It concerned religious liberty only because the Connecticut statute specifically regulated religious canvassing.<sup>78</sup>

## 2. First Amendment Rights and Religious Exemptions: *Gobitis* and *Jones*

The issue of religious exemptions finally came to the fore in *Minersville School District v. Gobitis*.<sup>79</sup> In *Gobitis*, Lillian and William Gobitas<sup>80</sup> were expelled from public school for refusing to salute the flag, a requirement imposed by the local board of education.<sup>81</sup> Their father sought an injunction against the school board rule.<sup>82</sup> The Court did not seriously question the school board's power to adopt the requirement and treated the suit as a request to excuse the children from the flag salute because of their religious convictions.<sup>83</sup> Although the rule was not "an exertion of legislative power for the promotion of some specific need or interest of secular society," the fostering of "[n]ational unity" was a "desirable end[.]"<sup>84</sup> The Court concluded that "the effective means for its attainment are still so uncertain . . . as to preclude us from putting the widely prevalent belief in flag-saluting beyond the pale of legislative power."<sup>85</sup> The remaining issue, Justice Frankfurter said, was to determine "[w]hen . . . the constitutional guarantee compel[s] exemption from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good."<sup>86</sup> The Court concluded that the Gobitases need not "be excused from conduct required of all the other children."<sup>87</sup> As a "historic concept . . . [t]he religious liberty which the Constitution

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77. *Id.* at 304.

78. *Id.* at 305.

79. 310 U.S. 586 (1940).

80. The family name was actually "Gobitas" but was misspelled by a court clerk. For an interesting background on the family and litigation, see PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 15-35 (1988).

81. *Gobitis*, 310 U.S. at 591; see also Richard Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion*, 1977 SUP. CT. REV. 257 (providing a background on the political context for Justice Frankfurter's opinion).

82. *Gobitis*, 310 U.S. at 592.

83. *Id.* at 599-600.

84. *Id.* at 595-97.

85. *Id.* at 598.

86. *Id.* at 593.

87. *Id.* at 595; see also *id.* at 594 ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.").

protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects.”<sup>88</sup> The lone dissenter, Chief Justice Stone, argued for “reasonable accommodation,” or “some sensible adjustment of school discipline in order that the religious convictions of these children may be spared.”<sup>89</sup>

Though *Gobitis* was decided in 1940, the same Term as *Cantwell* and *Schneider*, the cases are quite consistent. Previously, the Court had struck down—nearly unanimously—every statute in which a police chief, city manager, or other public official had to approve the issuing of a permit to canvass or distribute literature.<sup>90</sup> In *Gobitis*, the Court upheld a Pennsylvania flag salute statute that, by contrast, did not give any discretion to public officials.<sup>91</sup> In other early Jehovah’s Witness cases, the Court struck state provisions on the basis of rights of the press (*Lovell*), press and speech (*Schneider*), and speech and religion (*Cantwell*), whereas it upheld the statute in *Gobitis* against a challenge based exclusively on free exercise of religion.<sup>92</sup> In *Lovell*, *Schneider*, and *Cantwell*, the remedy was straightforward: the statutes were held to be unconstitutional.<sup>93</sup> Although the Court took note of the religious motivation for the complainants’ actions, nothing in those cases turned on the fact that the complainants were Jehovah’s Witnesses and religiously motivated.<sup>94</sup> Moreover, in *Gobitis*, the Court expressly rejected religious motivation as a defense to application of the flag salute statute.<sup>95</sup> Until the 1941 Term, the Court had only struck down general applicability statutes challenged under the First Amendment, and it had rejected squarely in *Gobitis* an argument for exemption from an otherwise valid statute.

The first sign of a breach in this scheme came in *Jones v. Opelika* (*Jones I*), which was decided 5-4.<sup>96</sup> What was different about *Jones I* was that the city required a license to sell books, but allowed no

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88. *Id.* at 594.

89. *Id.* at 603, 607 (Stone, C.J., dissenting); *see also id.* at 604 (“If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions . . .”).

90. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. Griffen*, 303 U.S. 444 (1938).

91. *Gobitis*, 310 U.S. at 591.

92. *See Gobitis*, 310 U.S. at 593-94; *Cantwell*, 310 U.S. at 303; *Schneider*, 308 U.S. at 159-60; *Lovell*, 303 U.S. at 451-52.

93. *See Cantwell*, 310 U.S. at 303; *Schneider*, 308 U.S. at 160, 165; *Lovell*, 303 U.S. at 450, 452.

94. *Cantwell*, 310 U.S. at 305-06; *Schneider*, 308 U.S. at 160; *Lovell*, 303 U.S. at 451-52.

95. *Gobitis*, 310 U.S. at 594.

96. 316 U.S. 584 (1942), *vacated*, 319 U.S. 103 (1943).

discretion in its issuance.<sup>97</sup> Justice Reed wrote for a majority that included two new Justices: James Byrnes and Robert Jackson.<sup>98</sup> Justice Reed declared, "When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the State to charge reasonable fees for the privilege of canvassing."<sup>99</sup> The Court noted that communities could choose to exempt the sale of religious books, but "[s]uch an exemption . . . would be a voluntary, not a constitutionally enforced, contribution."<sup>100</sup> The Court declined to strike the entire rule, but it was divided over whether the city could apply the ordinance to the Jehovah's Witnesses.<sup>101</sup> Justice Murphy, in dissent, argued that "the taxes [were] in reality taxes upon the dissemination of religious ideas."<sup>102</sup> This, he argued, should "exempt [any person] from taxation upon the act of distributing information . . . when done solely in an effort to spread knowledge and ideas, with no thought of commercial gain."<sup>103</sup> But more particularly, "[t]hese taxes on petitioners' efforts to preach the 'news of the Kingdom' should be struck down because they burden petitioners' right to worship the Deity in their own fashion and to spread the gospel as they understand it."<sup>104</sup> Justices Black, Douglas, and Murphy dissented separately to indicate that they now believed *Gobitis* to have been wrongly decided and that "[t]he First Amendment does not put the right freely to exercise religion in a subordinate position."<sup>105</sup>

*Jones I* represented the first real split on the Court in the Jehovah's Witness cases. It not only called into question the two-year-old decision in *Gobitis*, it did so on the most confrontational of grounds: whether the Fourteenth Amendment exempted religiously motivated speech or actions from otherwise valid laws.

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97. *Id.* at 593, 598; *see also* *Cox v. New Hampshire*, 312 U.S. 569, 578 (1941) (upholding a parade permit requirement as applied to Jehovah's Witnesses).

98. *Jones I*, 316 U.S. at 585.

99. *Id.* at 597.

100. *Id.* at 598.

101. *Id.* at 599-600; *id.* at 623 (Murphy, J., dissenting).

102. *Id.* at 616 (Murphy, J., dissenting). Murphy was joined by the Chief Justice and Justices Black and Douglas. Chief Justice Stone also dissented on the grounds that the ordinance depended on the judgment of administrative officers and thus ran afoul of the Court's decision in *Lovell v. Griffin*, and that the flat tax bore no relationship to the Witnesses' activities. *Id.* at 601, 608-09 (Stone, C.J., dissenting). The Chief Justice was joined by Justices Black, Douglas, and Murphy.

103. *Id.* at 620-21 (Murphy, J., dissenting).

104. *Id.* at 621 (Murphy, J., dissenting).

105. *Id.* at 624 (Murphy J., dissenting).

### 3. Reversing Course on Exemptions: *Murdock* and *Martin*

By the 1942 Term, the Court reversed course by rehearing *Jones v. Opelika* (*Jones II*)<sup>106</sup> and overturning *Jones I* on the basis of *Murdock v. Pennsylvania*<sup>107</sup> and *Martin v. Struthers*.<sup>108</sup> Although the Court's overruling of *Gobitis* is better known, the most important event in this sequence of cases was the reargument and reversal in *Jones II*.<sup>109</sup> The first *Jones* decision had been decided by a 5-4 vote; the majority included Justice Byrnes, who had just joined the Court.<sup>110</sup> Byrnes resigned after just sixteen months on the Court and was replaced by Wiley Rutledge.<sup>111</sup> Rutledge sided with the *Jones I* dissenters on reargument and in *Murdock* and *Martin*, all three of which were decided by 5-4 votes.<sup>112</sup> The Court's change of heart was really just a change of personnel,<sup>113</sup> but it set the Court squarely on a

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106. *Jones v. Opelika*, 319 U.S. 103 (1943) [hereinafter *Jones II*].

107. 319 U.S. 105 (1943).

108. 319 U.S. 141 (1943). In two brief, unanimous opinions that same Term, the Court struck down Texas ordinances banning the distribution of handbills in *Jamison v. Texas*, 318 U.S. 413, 414 (1943), and an ordinance that left the granting of permits for distribution in the hands of city officials in *Largent v. Texas*, 318 U.S. 418, 422 (1943). In *Jamison*, the Court suggested that religiously motivated leafletting might be treated differently from more commercial distribution: "The states can prohibit the use of the streets for the distribution of purely commercial leaflets . . . . They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity . . . ." 318 U.S. at 417. The latter statement may have been dicta, however, since the statute at issue in the case was clearly overbroad. It made it "unlawful for any person to carry or hold by hand or otherwise, any billboard, show card, placard or advertisement . . . or to scatter or throw any handbills, circulars, cards, newspapers or any advertising device of any description, along or upon any street or sidewalk in the city of Dallas." 318 U.S. at 415 n.2 (quoting the Dallas ordinance at issue in the case).

Additionally, in *Douglas v. City of Jeannette*, 319 U.S. 157, 165-66 (1943), the Court refused to recognize equity jurisdiction to enjoin local officials from enforcing a city ordinance prohibiting solicitation without obtaining a license and paying the license tax. Justice Jackson dissented in both *Murdock* and *Martin* but concurred in *Douglas*, an opinion in which he was joined by Justice Frankfurter.

109. See *Jones II*, 319 U.S. 103 (1943).

110. *Jones I*, 316 U.S. at 611.

111. Byrnes resigned to assist President Roosevelt in the domestic war mobilization effort. Byrnes had joined the Court just before Pearl Harbor and commented, "I don't think I can stand the abstractions of jurisprudence at a time like this." SUPREME COURT JUSTICES, *supra* note 22, at 404; see David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 479 (1983); Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481, 492 & n.42 (1983). The Jehovah's Witness chronology suggests that Justice Byrnes may have contributed more to the Court than he is generally credited with, and that he certainly changed the path of the cases by his truncated tenure.

112. See *Martin v. City of Struthers*, 319 U.S. 141, 152, 157 (1943); *Murdock*, 319 U.S. at 105, 134; *Jones II*, 319 U.S. at 104.

113. See SCHUBERT, *supra* note 15, at 33 n.10; Barber, *supra* note 52, at 247.

collision course with its decision in *Gobitis* and its previous refusal to recognize religious exemptions.

In *Murdock*, the Court struck down a canvass tax that Jehovah's Witnesses had refused to pay.<sup>114</sup> The canvass tax ordinance was different from the ordinances that the Court had previously invalidated in *Lovell* and *Schneider*, in that it did not require any exercise of discretion on the part of city leaders.<sup>115</sup> The tax was plainly imposed on "all persons canvassing for or soliciting . . . merchandise of any kind" within the city.<sup>116</sup> The case most closely analogous was *Jones I*, but the Court had granted rehearing in *Jones I* and vacated it the same day that it decided *Murdock*.<sup>117</sup> In *Murdock*, Justice Douglas wrote for the Court that canvassing was a "form of religious activity [that] occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits."<sup>118</sup> Since the Witnesses' activities were religious, the Court returned to the question it had addressed explicitly in *Gobitis* and implicitly in *Jones I*: Does the Fourteenth Amendment require the states to exempt the religiously motivated activity?<sup>119</sup> Does a city have to excuse religious canvassing from its general tax scheme? The Court carefully noted that it did not address "the validity of a registration system for colporteurs and other solicitors. The cases present a single issue—the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax."<sup>120</sup> According to the Court, although it did not refer to any particular phrase in the First or Fourteenth Amendments, "[t]he constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books."<sup>121</sup> The fact that the tax scheme covered canvassing generally did not dissuade the Court, which said, "A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike."<sup>122</sup>

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114. *Murdock*, 319 U.S. at 108-10, 117.

115. *Id.* at 106.

116. *Id.* But cf. *Poulos v. New Hampshire*, 345 U.S. 395, 402-08, 414 (1953) (upholding a city ordinance requiring a license for religious meetings in public parks where the ordinance was found to be a reasonable time, place, and manner restriction).

117. See *Jones II*, 319 U.S. 103, 104 (1943).

118. *Murdock*, 319 U.S. at 109.

119. See *id.* at 108-10; *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 593 (1940).

120. *Murdock*, 319 U.S. at 110.

121. *Id.* at 111.

122. *Id.* at 115.

Rather unhelpfully, the Court intoned that “[f]reedom of press, freedom of speech, freedom of religion are in a preferred position.”<sup>123</sup> Justice Reed, who dissented, writing for himself and Justices Roberts, Frankfurter, and Jackson, could find no evidence that the tax was oppressive, unequal, levied specifically on “the activities of distributors of informatory publications,” or discriminatorily applied to the Jehovah’s Witnesses.<sup>124</sup> Reed protested that it had “never been thought before that freedom from taxation was a perquisite attaching to the privileges of the First Amendment.”<sup>125</sup>

In *Martin*, the City of Struthers prohibited ringing doorbells or otherwise summoning a home’s occupants for the purpose of distributing handbills or advertisements.<sup>126</sup> The city argued that many of its citizens worked swing shifts and slept during the day; it also claimed that the doorbell ordinance helped prevent daytime burglaries.<sup>127</sup> Ms. Martin, a Witness, had been fined for ringing doorbells in the course of distributing her religious literature.<sup>128</sup> Justice Black, writing for the Court, complained that the ordinance affected the rights of potential listeners.<sup>129</sup> Black said that the ordinance

substitute[d] the judgment of the community for the judgment of the individual householder. . . .

. . . .

While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion.<sup>130</sup>

Although Ms. Martin was canvassing for religious reasons, the Court held the ordinance invalid under the broader rubric of “freedom of speech and press.”<sup>131</sup> The Court’s point about the rights of listeners was new to these cases—and an unwieldy point at that, because any

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123. *Id.* The Court thus broadened the potential application of *Murdock* to all activities covered by the freedom of speech, press, and religion, but it made no effort to explain what was covered by the freedom of speech, for example, and what might be “hucksterism” subject to state taxation.

124. *Id.* at 118 (Reed, J., dissenting).

125. *Id.* at 130 (Reed, J., dissenting); see also *id.* at 135 (Frankfurter & Jackson, JJ., dissenting) (“[A] tax measure is not invalid under the federal Constitution merely because it falls upon persons engaged in activities of a religious nature.”).

126. *Martin v. City of Struthers*, 319 U.S. 141, 142 (1943).

127. *Id.* at 144.

128. *Id.* at 142.

129. *Id.* at 143.

130. *Id.* at 144-45.

131. *Id.* at 149. Justice Murphy, however, who was joined by Justices Douglas and Rutledge, thought the ordinance violated Ms. Martin’s religious freedom. *Id.* at 150-51 (Murphy, J., concurring).

regulation affects both those who speak and putative listeners. Moreover, potential listeners could bypass violating the law by inviting the Witnesses into their homes. The ordinance protected against unwanted speech on the doorstep. The argument sounded remarkably like the Court's attacks on regulations infringing "liberty of contract."<sup>132</sup> And the Court's complaint that the ordinance substituted the community's judgment for individual judgment rang equally disingenuous, because the same may be said of all legislation.

Justice Frankfurter, dissenting, questioned whether the Court had focused on the doorbell ringing or the distribution of literature.<sup>133</sup> If it was the former, the Court would bar restrictions on anyone ringing doorbells; if it was the latter, then the Court had created an exception for religiously-motivated actions:

The Court's opinion leaves one in doubt whether prohibition of all bell-ringing and door-knocking would be deemed an infringement of the constitutional protection of speech. It would be fantastic to suggest that a city has power, in the circumstances of modern urban life, to forbid house-to-house canvassing generally, but that the Constitution prohibits the inclusion in such prohibition of door-to-door vending of phylacteries or rosaries or of any printed matter.<sup>134</sup>

Justice Jackson filed a single dissent for both *Murdock* and *Martin*, an opinion in which he was joined by Justice Frankfurter.<sup>135</sup> Jackson recited in greater detail the facts surrounding the Witnesses' activities in these communities.<sup>136</sup> For Jackson, the Court had not appreciated the circumstances that motivated the city ordinances; the

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132. See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 11 (1915); *Lochner v. New York*, 198 U.S. 45, 53-54 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897). Justice Holmes's famous statement that "the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), simply put emerging First Amendment doctrine into *Lochner's* *laissez-faire* mold. See also *McDaniel v. Paty*, 435 U.S. 618, 642 (1978) (Brennan, J., concurring) ("The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls.").

133. *Martin*, 319 U.S. at 153-54 (Frankfurter, J., dissenting).

134. *Id.* at 154 (Frankfurter, J., dissenting). Justice Reed, joined by Justices Roberts and Jackson, found the ordinance a "trivial town police regulation" that did not suppress or censor ideas, speeches, or printed material, but "only the right to call a householder to the door of his house to receive the summoner's message." *Id.* at 154-55 (Reed, J., dissenting). The Court's decision, Justice Reed warned, came close to compelling persons to listen to the Witnesses' message and violated homeowners' "assurance of privacy." *Id.* at 157 (Reed, J., dissenting).

135. See *Douglas v. City of Jeannette*, 319 U.S. 157, 175 (1943) (Jackson, J., concurring and dissenting). Jackson's single opinion concurred in the result in *Douglas* and dissented in *Murdock* and *Martin*. *Id.* at 168.

136. See *id.* at 167-74 (Jackson, J., concurring and dissenting).



Court was simply too far removed from ordinary life.<sup>137</sup> “[W]e work in offices affording ample shelter from such importunities and live in homes where we do not personally answer such calls,” Jackson said.<sup>138</sup> He accused the Court of remoteness: “[T]he Court’s many decisions in this field are at odds with the realities of life in those communities.”<sup>139</sup> In the end, Jackson thought, “[t]he real question is where [the Witnesses’] rights end and the rights of others begin.”<sup>140</sup> This “balance” could not be “met by pronouncement of general propositions with which there is no disagreement.”<sup>141</sup> For Jackson, the problem with the Court’s approach was the carving out of special privileges for religious speech and conduct:

[T]he First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news, or informational ends as well. When limits are reached which such communications must observe, can one go farther under the cloak of religious evangelism? . . . I had not supposed that the rights of secular and non-religious communications were more narrow or in any way inferior to those of avowed religious groups.<sup>142</sup>

Jackson recognized that he was proposing treating religious speech and conduct the same as political, economic, and scientific speech. This raises the question: Why would the First Amendment single out religions for special mention? Jackson, however, had an answer. “Religion needed specific protection because it was subject to attack from a separate quarter.”<sup>143</sup> The First Amendment “was to assure religious teaching as much freedom as secular discussion, rather than to assure it greater license, that led to its separate statement.”<sup>144</sup> He proposed a simple inquiry, a “common-sense test as to whether the Court has struck a proper balance of these rights.”<sup>145</sup> Jackson would ask, what is the effect “if the right given to these Witnesses should be exercised by all sects and denominations”?<sup>146</sup> What the Court

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137. *Id.* at 176-77 (Jackson, J., concurring and dissenting).

138. *Id.* at 174 (Jackson, J., concurring and dissenting).

139. *Id.* (Jackson, J., concurring and dissenting); *see also id.* at 182 (Jackson, J., concurring and dissenting) (“Civil liberties had their origin and must find their ultimate guaranty in the faith of the people. If that faith should be lost, five or nine men in Washington could not long supply its want.”).

140. *Id.* at 178 (Jackson, J., concurring and dissenting).

141. *Id.* at 178-79 (Jackson, J., concurring and dissenting).

142. *Id.* at 179 (Jackson, J., concurring and dissenting).

143. *Id.* (Jackson, J., concurring and dissenting).

144. *Id.* (Jackson, J., concurring and dissenting).

145. *Id.* at 180 (Jackson, J., concurring and dissenting).

146. *Id.* (Jackson, J., concurring and dissenting).

approved for the Witnesses, it must be prepared to approve for all people:

Can we give to one sect a privilege that we could not give to all, merely in the hope that most of them will not resort to it? Religious freedom in the long run does not come from this kind of license to each sect to fix its own limits, but comes of hard-headed fixing of those limits by neutral authority with an eye to the widest freedom to proselyte compatible with the freedom of those subject to proselyting pressures.<sup>147</sup>

Through all of these cases, the particular First Amendment liberty at issue was frequently in question. The Court was remarkably nonchalant about identifying the First Amendment liberty at issue and engaging the constitutional text. In some cases, the Court stated expressly the freedom at issue;<sup>148</sup> in other cases, the Court recited various freedoms without discussing the contours of each.<sup>149</sup> The Court's failure to be more precise is frustrating, but in large measure that failure is a consequence of substantive First Amendment law or, to be more precise, a consequence of substantive Fourteenth Amendment law. By the mid-1940s, the Court was beginning its shift from "absorption" of the substance of the First Amendment through the Due Process Clause of the Fourteenth Amendment to "incorporation" of the First Amendment itself into the Due Process Clause.<sup>150</sup> As I have explained elsewhere, the early state speech, press, and religion cases rested explicitly on substantive due process grounds.<sup>151</sup> Accordingly, the precise term in question in these cases was not "prohibiting," "free exercise of religion," "abridging," or "freedom of speech"—phrases found in the First Amendment—but simply "liberty," the key term in the Due Process Clause.<sup>152</sup> The Due Process Clause had "absorbed" the rights codified in the Bill of Rights, but only later did the Court conclude that the Due Process Clause had actually "incorporated" the text of the amendments themselves.<sup>153</sup> So long as the Court thought

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147. *Id.* (Jackson, J., concurring and dissenting).

148. *See e.g.*, *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594 (1940) (religion).

149. *See, e.g.*, *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (religion, speech, and press); *Largent v. Texas*, 318 U.S. 418, 422 (1943) (same); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04, 308 (1940) (same); *Schneider v. State*, 308 U.S. 147, 160 (1939) (speech and press).

150. *See* Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce and the Origins of Wisconsin v. Yoder*, 25 CAP. U. L. REV. 887, 915-16 (1996).

151. *See id.*; Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1601-04 (1995).

152. *See* Bybee, *supra* note 150, at 915; Bybee, *supra* note 151, at 1601-04.

153. *See* Bybee, *supra* note 151, at 1601-04.

that First Amendment-type rights had been “absorbed” into the Fourteenth Amendment, it had no need to parse the text of the First Amendment or to refer to its history, because the text of the First Amendment did not apply to the states.<sup>154</sup> The process of deciding what rights of speech, press, and religion applied to the states through the Due Process Clause was nearly formless and ahistorical.<sup>155</sup> As Justice Reed noted in his lengthy dissent in *Murdock* (in which he cited extensively to the history of the First Amendment):

It may be said . . . that ours is a too narrow, technical and legalistic approach to the problem of state taxation of the activities of church and press; that we should look not to the expressed or historical meaning of the First Amendment but to the broad principles of free speech and free exercise of religion which pervade our national way of life. It may be that the Fourteenth Amendment guarantees these principles rather than the more definite concept expressed in the First Amendment.<sup>156</sup>

Reed, of course, was only echoing Justice Holmes and presaging Justice Jackson and others, who suggested that the federal government and the state governments were subject to different freedom of speech, press, and religion standards.<sup>157</sup>

#### *B. Justice Jackson, Barnette, and the Problem of Exemptions*

Less than six weeks after Justice Jackson issued his dissent in *Murdock* and *Martin*, he wrote *Barnette*.<sup>158</sup> *Barnette* expressly

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154. See *id.* at 1601-04.

155. See *id.* at 1603.

156. *Murdock v. Pennsylvania*, 319 U.S. 105, 128 (1943) (Reed, J., dissenting).

157. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943). Jackson said that

the test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.

*Id.*; see *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting). Holmes declared:

The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word “liberty” as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States.

*Id.*

158. Although the Court issued the opinions six weeks apart, it heard the arguments on the same day. On the day the Court issued *Barnette*, it also vacated convictions of Witnesses in the District of Columbia for selling magazines without a license in *Busey v. District of Columbia*, 319 U.S. 579 (1943) (per curiam), and in Mississippi for speech encouraging

overruled *Gobitis*, but what did overruling *Gobitis* mean? Were Jehovah's Witness children entitled to exemption? Or was the flag salute requirement unconstitutional (and thus no specific exemption was required for the *Barnettes*)? The record, if judged from various commentaries, is anything but clear.<sup>159</sup> *Barnette* has so bedazzled us with the brilliance of Jackson's phrases—phrases that in and of themselves will support virtually any theory of the First Amendment—that we have been blinded to the larger issue before the Court: If the First Amendment extended to the Jehovah's Witnesses, did it end with the Jehovah's Witnesses? Did the Court's judgment mean that the Jehovah's Witnesses, and the Witnesses alone, were entitled to exemption from West Virginia's flag salute requirement?

Justice Jackson's opinion, though it could have been more carefully crafted, was careful enough to answer this question. However, we have not paid close enough attention to it, and particularly, to the form in which Jackson approached the question. We are not alone in our inattention. *Barnette* was not sufficiently didactic to deter Justice Frankfurter (with whom Justice Jackson had agreed and would agree in nearly every other Jehovah's Witness opinion) from dissenting, and it was sufficiently obtuse that Justice Black and Douglas concurred to reinforce the reasons that they were departing from *Gobitis*.<sup>160</sup> Thus, Jackson's opinion managed to satisfy neither Frankfurter nor Black and Douglas, who had very different conceptions of the First Amendment. In fact, Frankfurter had greater cause to join the reasoning of Jackson's opinion, although Black and Douglas had greater cause to celebrate its prose and result.

A year and a half after the Court decided *Gobitis* and less than one month after Japan attacked Pearl Harbor, the West Virginia State Board of Education adopted a resolution requiring that the flag become a "regular part" of school activities. The Board instructed schools to treat refusal to salute as insubordination, for which the penalty could be expulsion.<sup>161</sup> The resolution recited that the Board held the freedoms in the Bill of Rights and the West Virginia Constitution "in highest regard" and that "one's convictions about the ultimate mystery of the universe and man's relation to it is placed

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disloyalty or tending to create an attitude of disrespect for the flag in *Taylor v. Mississippi*, 319 U.S. 583 (1943).

159. See *supra* text accompanying notes 27-47.

160. See *Barnette*, 319 U.S. at 643, 647 (Frankfurter, J., dissenting).

161. *Id.* at 626 n.2, 629.

beyond the reach of law.”<sup>162</sup> Nevertheless, the Board found (quoting from, but not referring to, *Gobitis*) that “national unity is the basis of national security,” that “the Flag is the symbol of the Nation’s power,” and that West Virginia’s public schools were in a “formative period in the development in citizenship [and] that the Flag is an allowable portion of the program of [publicly supported] schools.”<sup>163</sup> The Board’s resolution seemed well within the legislature’s charge to prescribe courses “for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism.”<sup>164</sup>

Walter Barnette and two other Jehovah’s Witness parents sought an injunction against enforcement of the Board’s resolution.<sup>165</sup> Barnette alleged that, in fact, “[g]reat numbers of children” had been expelled from West Virginia’s schools, that their parents were financially unable to send them to private schools, and that parents faced prosecution for contributing to the delinquency of their children.<sup>166</sup> Despite the Court’s unequivocal decision in *Gobitis*, the three-judge panel of the district court believed that four of the seven Justices who decided *Gobitis* (Chief Justice Stone, plus Justices Black, Douglas, and Murphy, who indicated their departure in *Jones I*) would decide the case differently; therefore, *Gobitis* was no longer binding.<sup>167</sup> The district court thought there was “nothing improper in requiring a flag salute in the schools” as a “ceremony calculated to inspire in the pupils a proper love of country.”<sup>168</sup> But the court recognized that the Jehovah’s Witness children were denied their “religious freedom,” a liberty that could not be “overborne by the police power, unless its exercise presents a clear and present danger to the community.”<sup>169</sup> The

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162. *Id.* at 626-27 n.2 (internal quotations omitted) (quoting W. VA. CODE § 1734 (1941 Supp.)).

163. *Id.* at 627-28 n.2 (internal quotations omitted) (quoting W. VA. CODE § 1734 (1941 Supp.)). The language quoted by the Board appears in *Minersville School District v. Gobitis*, 310 U.S. 586, 595-96 (1940).

164. *Barnette*, 319 U.S. at 626 n.1 (internal quotations omitted) (quoting W. VA. CODE § 1734 (1941 Supp.)).

165. *Id.* at 629.

166. Appellees’ Brief at 11, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (No. 591), reprinted in 40 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 39, 61 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS AND ARGUMENTS].

167. *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D.W. Va. 1942), *aff’d*, 319 U.S. 624 (1943). Judge John J. Parker, Chief Judge of the United States Court of Appeals for the Fourth Circuit, authored the district court’s confident opinion. President Hoover had nominated Parker to the Supreme Court in 1930; when the Senate rejected Parker by two votes, Hoover nominated Owen Roberts. See SUPREME COURT JUSTICES, *supra* note 22, at 367-68.

168. *Barnette*, 47 F. Supp. at 253.

169. *Id.* at 253-54.

district court could find no such threat and held the Board regulation “void in so far as it applies to children having conscientious scruples against giving such salute and that, as to them, its enforcement should be enjoined.”<sup>170</sup> The district court had found that West Virginia possessed general police power to require the pledge, but must exempt religiously scrupled objectors.<sup>171</sup>

Justice Jackson began his opinion in *Barnette* by narrowing the grounds upon which the Court was ruling.<sup>172</sup> His first point was an important one: The right asserted by the Jehovah’s Witnesses in the case “[did] not bring them into collision with rights asserted by any other individual.”<sup>173</sup> For Justice Jackson at least, this point distinguished *Barnette* from all prior Jehovah’s Witness cases except for *Gobitis*. There was no clash of the canvassing rights of Jehovah’s Witnesses with the rights of pedestrians, homeowners, or others.<sup>174</sup> With this one stroke, Jackson relieved himself of any obligation to reconcile the prior Witness cases and, hence, to reconcile his dissent in *Murdock* and *Martin* with what he was about to write in *Barnette*. Indeed, so complete was this maneuver that Jackson did not cite a single Witness case except for *Gobitis*.<sup>175</sup> Instead, “[t]he sole conflict [was] between authority and rights of the individual.”<sup>176</sup>

Second, Jackson recast the *Barnettes*’ argument as one of compelled belief.<sup>177</sup> Having previously noted that the Jehovah’s Witnesses had resisted the flag salute for religious reasons, Jackson broadened the inquiry to take the focus off of the religious aspects of the conflict between the Witnesses and the Board of Education.<sup>178</sup> The issue was compelled speech, not infringement of religious beliefs. Jackson had only a month earlier voiced his objection to exempting persons because of their religious scruples.<sup>179</sup> Jackson simply eliminated the *religious* aspect of the Witnesses’ objection. On this point Jackson could not have been clearer:

Nor does the issue as we see it turn on one’s possession of particular religious views or the sincerity with which they are held. While

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170. *Id.* at 255.

171. *Id.* at 254-55.

172. *Barnette*, 319 U.S. at 630.

173. *Id.*

174. *Id.* at 630-32.

175. *See id.* at 625-42.

176. *Id.* at 630.

177. *Id.* at 631.

178. *Id.* at 629.

179. *See Douglas v. City of Jeannette*, 319 U.S. 157, 179 (1943) (Jackson, J., concurring and dissenting).

religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.<sup>180</sup>

Third, Jackson returned to a point that the district court in *Barnette* and Frankfurter in *Gobitis* had assumed: Was it within the police power for the Board of Education to require the flag salute?<sup>181</sup> Jackson was unwilling to concede the point. In an important, and probably overlooked paragraph, Jackson challenged this assumption. His rhetorical flourishes are evident here, but subtle. For emphasis, I have italicized the word "power" throughout the passage.

If official *power* exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose *power* to prescribe would no doubt include *power* to amend. Hence validity of the asserted *power* to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of *power* that must be considered independently of any idea we may have as to the utility of the ceremony in question. . . .

. . . It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find *power* to make the salute a legal duty.

. . . We examine rather than assume existence of this *power* . . .<sup>182</sup>

Why would Jackson question the existence of the state's police power in this area? The point was argued in the briefs, but only weakly.<sup>183</sup> The obvious answer lies in what Justice Jackson feared might come out of *Barnette*: clear reinforcement of the idea that religiously motivated persons would not have to obey the rule of law. The solution for Jackson was to find that the West Virginia resolution was not within the state's power. Therefore, the state was powerless to

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180. *Barnette*, 319 U.S. at 634-35.

181. *Id.* at 635 ("The *Gobitis* decision, however, assumed, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule."); see *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 599-600 (1940); *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D.W. Va. 1942), *aff'd*, 319 U.S. 624 (1943).

182. *Barnette*, 319 U.S. at 634-36 (emphasis added).

183. See Appellees' Brief at 50, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (No. 591), reprinted in 40 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 166, at 39, 100; Brief for American Civil Liberties Union at 14, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (No. 591), reprinted in 40 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 166, at 151, 169; Brief of the Committee on the Bill of Rights, of the American Bar Association at 25, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (No. 591), reprinted in 40 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 166, at 205, 238.

impose the requirement on anyone, whether that person objected to the flag salute or not.<sup>184</sup> By focusing on West Virginia's actions, Jackson rendered the Jehovah's Witnesses irrelevant; they became only the occasion for finding the entire law unconstitutional.

Jackson concluded that West Virginia lacked power to enact the statute, but he did so without reference to the state's general police powers.<sup>185</sup> Rather, he declared the First Amendment a disability that "withdrew certain subjects from the vicissitudes of political controversy."<sup>186</sup> The "action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."<sup>187</sup> Note that in this concluding statement, Justice Jackson made no reference whatsoever to the Witnesses or to others who might conscientiously object to the flag salute. The authorities lacked *power* under the First Amendment, which reserved "*all* official control."<sup>188</sup>

If the concurring Justices understood that they were adding something quite different to Jackson's opinion for the Court, they did not make it immediately apparent. Justice Black and Justice Douglas added "reasons for [their] change of view," principal among which was that "the statute . . . fails to accord full scope to the freedom of religion."<sup>189</sup> They offered no comment on the majority opinion.<sup>190</sup> Black and Douglas might have thought that Jackson, who was not on the Court when *Gobitis* was decided, had not adequately explained the overruling, or they might have felt some embarrassment or resentment over a new Justice being entrusted with such an opinion. Black's differences with Jackson could have been personal as well as professional.<sup>191</sup> Black and Douglas clearly believed that the Jehovah's Witnesses, whose "devoutness . . . [was] evidenced by their willingness to suffer persecution and punishment," were at the center of the case.<sup>192</sup> For Black and Douglas "[r]eligious faiths, honestly

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184. See David P. Currie, *The Constitution in the Supreme Court: The Preferred-Position Debate, 1941-1946*, 37 CATH. U. L. REV. 39, 52 (1987).

185. See *Barnette*, 319 U.S. at 642.

186. *Id.* at 638.

187. *Id.* at 642.

188. *Id.*

189. *Id.* at 643 (Black & Douglas, JJ., concurring).

190. *Id.* at 643-44 (Black & Douglas, JJ., concurring).

191. See YODER, *supra* note 25, at 15. Part I of Yoder's book is entitled *Black v. Jackson: A Study in Judicial Enmity*. See *id.* at 3; see also Jaffe, *supra* note 31, at 950.

192. *Barnette*, 319 U.S. at 643 (Black & Douglas, JJ., concurring).



held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which . . . merely regulate time, place or manner of religious activity."<sup>193</sup> Justice Murphy, who concurred separately, thought the resolution infringed freedom of religion and speech.<sup>194</sup>

Justice Frankfurter filed a remarkable dissent, but one that in the end, failed to address Jackson's opinion on its own terms.<sup>195</sup> Instead, Frankfurter asked the same question he had already answered in *Gobitis* and then reiterated the answer.<sup>196</sup> It is quite likely that Jackson would have agreed with Frankfurter on that point, but that question was not the question Jackson had posed.<sup>197</sup> Although Frankfurter briefly questioned whether the Court could sit in judgment on the "political power of each of the forty-eight states,"<sup>198</sup> he wasted no time in returning to the lack of constitutional warrant to create "exceptional immunity from civic measures of general applicability."<sup>199</sup> Frankfurter rendered his opinion nearly irrelevant, except insofar as it stands for the proposition that the First Amendment does not authorize the Court to second-guess the legislature, a position that moved Frankfurter to the margin of the Court.<sup>200</sup>

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193. *Id.* at 643-44 (Black and Douglas, JJ., concurring).

194. *See id.* at 645 (Murphy, J., concurring).

195. *See id.* at 646-71 (Frankfurter, J., dissenting). Justices Roberts and Reed simply indicated that they would adhere to *Gobitis* but did not file a dissenting opinion. *See id.* at 642.

196. *Id.* at 664-70 (Frankfurter, J., dissenting); *see supra* notes 79-88 and accompanying text.

197. *See* Louis B. Boudin, *Freedom of Thought and Religious Liberty Under the Constitution*, *LAWYERS GUILD REV.*, June-July 1944, at 9, 22 ("[T]he real question before the Court being not whether Jehovah's Witnesses' children are entitled to exemptions from the provisions of a law which others are bound to obey, but whether the law in question is such that anybody need obey it. It is difficult to say what Mr. Justice Frankfurter's position would be had the situation not been complicated by the justified fear of equality before the law being turned into special privilege.").

198. *Id.* at 650 (Frankfurter, J., dissenting); *see also id.* at 655 (Frankfurter, J., dissenting) ("Nor does waving the banner of religious freedom relieve us from examining into the power we are asked to deny the states.").

199. *Id.* at 653 (Frankfurter, J., dissenting); *see also id.* at 651 (Frankfurter, J., dissenting) ("Regard for such scruples or beliefs undoubtedly presents one of the most reasonable claims for the exertion of legislative accommodation. . . . But the real question is, who is to make such accommodations, the courts or the legislature?").

200. *See* Joseph P. Lash, *A Brahmin of the Law: A Biographical Essay*, in *FROM THE DIARIES OF FELIX FRANKFURTER* 3, 73 (Joseph P. Lash ed., 1975); Gard, *supra* note 39, at 436 (referring to *Barnette* as the "turning point of Frankfurter's career on the Supreme Court. His leadership was rejected by the Court and he was relegated to the position of a dissenter for his remaining twenty years . . ." (citing H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 147-76 (1981))).

Justice Jackson's methodology raises some very significant questions and has caused more than a little confusion over *Barnette*'s meaning. Why was the Court questioning the *power* of a state government? In our constitutional scheme, the states are *assumed* to possess power until it is demonstrated otherwise.<sup>201</sup> That presumption is reversed with respect to the federal government, which must affirmatively demonstrate the source of its authority. A state's authority may be questioned, of course, but generally the allocation of powers between state government and the people of the state is a matter of state constitutional law to be resolved in state fora. This is not the only means, of course, of finding a state without power, but Jackson's approach was an unusual choice. A state may lack power because the exercise of that power has been committed to the federal government<sup>202</sup> or because the exercise of that power has been forbidden to any government. Justice Jackson's opinion relies on this latter understanding, although he does not explain the point particularly well.<sup>203</sup> I will return to this discussion more formally in Part IV.

The immediate reason Jackson examined West Virginia's "power" was because a finding that West Virginia lacked power would void the entire ordinance just as surely as if the power had been exclusively committed to the federal government. If the Court voided the ordinance, it did not have to give special consideration to the objections of the Jehovah's Witnesses. Jackson's approach also played well with his broader views of the weaknesses of the New Deal Court's approach to state regulation. By the time Jackson reached the Court in 1941, the Court had undone the excesses of substantive

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201. See U.S. CONST. amend. X; THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("But as the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States.").

202. Note Justice Jackson's own opening statement in *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 526 (1949): "This case concerns the power of the State of New York to deny additional facilities to acquire and ship milk in interstate commerce . . ." See also *Terminiello v. Chicago*, 337 U.S. 1, 34 (1949) (Jackson, J., dissenting) (discussing a city's right to control its streets).

Jackson again makes this point: "The desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of the state's power over its internal affairs." *H.P. Hood & Sons, Inc.*, 336 U.S. at 533-34; see also *Beauharnais v. Illinois*, 343 U.S. 250, 294-95 (1952) (advocating greater leeway for state action affecting speech than for federal action).

203. See *Barnette*, 319 U.S. at 641-42; *Dennis v. United States*, 341 U.S. 494, 577-78 (1951) (Jackson, J., concurring) ("I think there was power in Congress to enact this statute and that, as applied in this case, it cannot be held unconstitutional.").

economic due process.<sup>204</sup> In its place, the Court imposed only a requirement of rationality<sup>205</sup>—the Court had become quite solicitous of government regulation. Jackson reacted to this extreme deference.<sup>206</sup> At least in economic matters, Jackson saw Justice Black as a “nearly invariable defender of state regulation” and his “chief antagonist.”<sup>207</sup> For Justice Black, *Barnette* presented a clash of constitutional values, one requiring deference to state actions and the other holding absolute the freedoms of the First Amendment.<sup>208</sup> Had Black written the opinion, *Barnette* would likely have upheld West Virginia’s ordinance except as applied to the Witnesses. Jackson’s opinion circumscribed West Virginia’s powers, and as a consequence, protected the Witness plaintiffs.

Second, why did Justice Jackson’s opinion announce that *Gobitis* was overruled? It was clearly a step that the Court did not have to take. The Court had decided *Gobitis* on the basis of freedom of religion, and it had squarely rejected the Witnesses’ claim to a religious exemption.<sup>209</sup> In *Barnette*, Jackson had offered free speech as an alternative basis for a decision in favor of the Jehovah’s Witnesses and his approach called for striking the law in its entirety.<sup>210</sup> Thus, there was no *legal* reason why the Court should have overruled *Gobitis*. There is ample precedent for the Court deciding similar cases differently by resting the subsequent decision on grounds not presented in the first case.<sup>211</sup>

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204. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 147 (1938).

205. See *id.*

206. See Jaffe, *supra* note 31, at 943. As Professor Jaffe described it, “[I]n his very first term Mr. Justice Jackson blasted out a vehement note of protest against the whole course of judicial tolerance of state action, a course just then reaching its full flower in the reversal of earlier decisions.” *Id.*

207. *Id.* at 950.

208. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 643 (1943) (Black & Douglas, JJ., concurring).

209. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591 (1940).

210. *Barnette*, 319 U.S. at 634, 642.

211. In *United Building & Construction Trades Council v. Mayor*, 465 U.S. 208, 210-23 (1984), for example, the Court struck, on the basis of the Privileges and Immunities Clause, U.S. CONST. art. IV, § 2, cl. 1, a Camden ordinance requiring that at least forty percent of employees working on city construction projects be residents. The previous Term, the Court upheld a similar requirement in Boston in the face of a Commerce Clause challenge. *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 205-15 (1983); see U.S. CONST. art. I, § 8, cl. 3. The Court explained in *United Building* that, in *White*, the plaintiffs had not properly raised the Privileges and Immunities Clause. See *United Building*, 465 U.S. at 214 n.7.

The Court often preserves alternative grounds for future decisions. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 & n.8 (1986) (deciding the case on the basis of the Due Process Clause and reserving judgment on a challenge under the Equal Protection Clause).

Although there was no legal reason for overruling *Gobitis*, there surely were political reasons. Justice Jackson knew he could get six votes (including his own) for annulling the law. He also must have calculated, though, that there were five votes for exempting the Witnesses, and that it was unlikely that Justices Black, Douglas, and Murphy would join an opinion that did not defend their announced defection from *Gobitis*. Jackson found the one ledge upon which he could stand with that group; otherwise, Jackson would have had to either file a dissent or file his opinion as a concurrence in the judgment. Neither of these were good options. Jackson knew that his natural allies on the Court were Roberts, Frankfurter, and Reed, and that he found considerable opposition—both professionally and personally—from Justices Black and Douglas.<sup>212</sup> Jackson had to declare *Gobitis* overruled to ensure that he wrote the opinion for the Court.<sup>213</sup>

Third, the entire scene is complicated by the Court's evolving incorporation doctrine. In its early state decisions, the Court carefully invoked general principles of the Due Process Clause of the Fourteenth Amendment without ascribing such principles to the text of the First Amendment.<sup>214</sup> As that became more difficult to do, the Court finally merged the freedoms of religion, speech, press, and petition guaranteed the individual against the federal government by the First Amendment into the freedoms guaranteed the individual against the states by the Due Process Clause of the Fourteenth.<sup>215</sup> The Court made that process formal in Justice Black's decision in *Everson* four years after *Barnette*.<sup>216</sup> Justice Jackson's decision in *Barnette*

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212. See YODER, *supra* note 25, at 3-104 (describing ongoing conflicts between Justices Jackson and Black). For an interesting tabulation of the Justices' votes for and against the Witnesses, see Barber, *supra* note 52, at 244-46.

213. See Roald Mykkeltvedt, *Employment Division v. Smith: Creating Anxiety by Relieving Tension*, 58 TENN. L. REV. 603, 612 n.54 (1991) ("Justice Jackson's rationale in *Barnette* was intended to provide a 'fig leaf' for members of the *Gobitis* majority who wished to change sides in the controversy.").

214. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (assuming "[f]or present purposes . . . that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States"); see also Bybee, *supra* note 150, at 915-18 (discussing this passage); Bybee, *supra* note 151, at 1601-04 (same).

215. Bybee, *supra* note 151, at 1603-04.

216. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) ("The First Amendment, as made applicable to the states by the Fourteenth, commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .'" (alteration in original) (citation omitted)); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that the prohibitions of "the first ten amendments . . . are deemed equally specific when held to be embraced within the Fourteenth").

took the Court partially to that position,<sup>217</sup> but resisted finding the standards of the First and Fourteenth Amendments identical. Jackson read the First Amendment literally.<sup>218</sup> For years he maintained that the First Amendment demanded more exacting care of the federal government than the Fourteenth Amendment required of the states.<sup>219</sup> Jackson's ally on the Court, Justice Frankfurter, also fought the movement from absorption to incorporation.<sup>220</sup> This repositioning of the Court's incorporation doctrine made it more difficult to locate the Jehovah's Witness cases within any particular clause of the First Amendment. It consequently made it difficult to determine the precise grounds for the state speech cases and complicated any attempt to categorize *Barnette*. At the time, the Fourteenth Amendment was a more amorphous vehicle, providing the Court sufficient grounds for its judgments, without making rigorous textual demands on the Court.

Finally, this reading of *Barnette* harmonizes Jackson's vigorous dissent in *Murdock* and *Martin* with his opinion in *Barnette* in a way that exemption theories of *Barnette* cannot do. I suspect that Jackson recognized his marginal position among the majority, so the articulate Jackson did not wish to be more didactic in his opposition to exemptions for Jehovah's Witness children than he had to be.<sup>221</sup> Jackson's record the following Term in another pair of Jehovah's Witness cases suggests that he remained firmly allied with Frankfurter and opposed to special exemptions.<sup>222</sup> But no matter how we parse

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217. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943); see *supra* note 157 (quoting the relevant language from *Barnette*). Justice Jackson subsequently recanted the position he took in *Barnette* on incorporation:

Whence we are to derive metes and bounds of the state power is a subject to the confusion of which, I regret to say, I have contributed . . . . The history of criminal libel in America convinces me that the Fourteenth Amendment did not "incorporate" the First, that the powers of Congress and of the States over this subject are not of the same dimensions.

*Beauharnais v. Illinois*, 343 U.S. 250, 288 (1952) (Jackson, J., dissenting).

218. See *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534 (1949) ("[T]he Bill of Rights amendments were framed only as a limitation upon the powers of Congress.").

219. See *Beauharnais*, 343 U.S. at 288-95 (Jackson, J., dissenting); *Terminiello v. Chicago*, 337 U.S. 1, 28-29 (1949) (Jackson, J., dissenting). In lectures authored just before his death, Justice Jackson opined that "the Fourteenth Amendment has been considerably abused" and referred to the "process of incorporation or impregnation." JACKSON, *THE SUPREME COURT*, *supra* note 31, at 68.

220. Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

221. See SCHUBERT, *supra* note 15, at 32.

222. In *Prince v. Massachusetts*, Massachusetts charged Sarah Prince with violating its child labor laws for permitting her nine-year-old niece to distribute magazines. 321 U.S. 158, 159-60 (1944). The Court upheld the conviction, finding that "[t]he right to practice religion freely does not include liberty to expose . . . the child to . . . ill health." *Id.* at 166-67.

*Barnette*, the simple overruling of *Gobitis* and the affirming of an injunction holding the law “void . . . as to [the plaintiffs]”<sup>223</sup> creates ambiguity and confusion where none need have existed.

### C. *Post-Barnette*

*Barnette* represents the apogee of Jackson’s career as a defender of civil liberties. He had never before written, and would never again author, an opinion in favor of the Witnesses.<sup>224</sup> His subsequent writings on the First Amendment reveal a cautious, traditional approach to the Amendment that was often out of step with the Roosevelt Court. When the Court released its grip on the federal government’s economic legislation in 1937, the New Deal and new state economic regulation, together with wartime measures, flourished under the Court’s approving eye.<sup>225</sup> Regulation created friction points between government and people and created a greater potential for the infringement of core constitutional values.<sup>226</sup> For the progressives on the Court—Black, Douglas, Murphy, and Rutledge—their absolutist views on the First Amendment compensated for their broad approval of economic regulation.<sup>227</sup> On both points, they had moved well beyond what Jackson regarded as the proper boundaries of constitutional government,<sup>228</sup> although, post-*Barnette*, it was Jackson who most frequently found himself in the margins.

Jackson’s First Amendment opinions reveal two concerns with the direction in which the Court was headed. His rejection of exemptions from general laws was part of his broader concern with the lack of predictability in the Court’s pronouncements. “Liberty,” he wrote in his Harvard Godkin Lectures, “is achieved only by a rule of

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Massachusetts’ law was “within the state’s police power . . . against [a claim] that religious scruples dictate contrary action.” *Id.* at 169. Justice Jackson concurred in the judgment, but argued that the Court’s reasoning was inconsistent with *Murdock*. *See id.* at 177 (Jackson, J., concurring). Justices Roberts and Frankfurter joined his opinion.

In *Follett v. Town of McCormick*, Frankfurter and Jackson joined Justice Roberts’ dissent from the Court’s judgment striking down a South Carolina municipal ordinance imposing a license tax on book sellers insofar as it applied to Jehovah’s Witnesses. 321 U.S. 573, 579-83 (1944). Roberts wrote that Follett’s religious beliefs, “however earnestly and honestly held, [do] not entitle [him] to be free of contribution to the cost of government.” *Id.* at 583 (Roberts, J., dissenting).

223. *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 255 (S.D.W. Va. 1942), *aff’d*, 319 U.S. 624 (1943).

224. *See* SCHUBERT, *supra* note 15, at 32.

225. *See* Stewart, *supra* note 28, at 65.

226. *See id.*

227. *See id.*

228. *See id.* at 72-73.

law.”<sup>229</sup> As he observed in *Douglas*, “Forthright observance of rights presupposes their forthright definition.”<sup>230</sup> Exempting the Jehovah’s Witnesses from taxing schemes in *Murdock*, but subjecting them to child labor laws in *Prince*, reinforced in Jackson’s mind the ad hoc nature of the Court’s judgments.<sup>231</sup> Jackson expressed his frustration in his dissent in *Kunz*:

This Court’s prior decisions . . . will be searched in vain for clear standards by which it . . . distinguish[es] legitimate speaking from that acknowledged to be outside of constitutional protection. . . .

. . . .  
 . . . It seems hypercritical to strike down local laws on their faces for want of standards when we have no standards.<sup>232</sup>

He contrasted the malleability of the Court’s Due Process judgments against what he thought was the greater ease of application in the Equal Protection Clause:

The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. Even its provident use against municipal regulations frequently disables all government—state, municipal and federal—from dealing with the conduct in question because the requirement of due process is also applicable to State and Federal Governments. Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.

Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. . . . The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.<sup>233</sup>

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229. JACKSON, THE SUPREME COURT, *supra* note 31, at 76; *see also* *Terminiello v. Chicago*, 337 U.S. 1, 31, 37 (1949) (Jackson, J., dissenting) (“[F]reedom of speech exists only under law and not independently of it. . . . The choice is not between order and liberty. It is between liberty with order and anarchy without either.”).

230. *Douglas v. City of Jeannette*, 319 U.S. 157, 182 (1943) (Jackson, J., concurring and dissenting).

231. *Prince v. Massachusetts*, 321 U.S. 158, 169-70 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105, 116-17 (1943).

232. *Kunz v. New York*, 340 U.S. 290, 299, 309 (1951) (Jackson, J., dissenting); *see also Douglas*, 319 U.S. at 177 (Jackson, J., concurring and dissenting) (“[The] opinions suggest that there are evils in this conduct that a municipality may do something about. But neither [opinion] identifies it, nor lays down any workable guide in so doing.”).

233. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); *see also Brown v. Allen*, 344 U.S. 443, 535 (1953) (Jackson, J., concurring) (“Rightly or wrongly, the belief is widely held by the practicing profession that this Court no

As *Barnette* evidenced, Jackson firmly believed that the Due Process Clause of the Fourteenth Amendment, as informed by the First Amendment, protects religious liberty and freedom of speech, press, and petition, and that the Court had “authority . . . by force of [its] commission[]” to strike down state legislation.<sup>234</sup> But he also believed that the First Amendment did not privilege speech, press, and religion over other individual and collective interests.<sup>235</sup> Moreover, the Court had to give the states more leeway to secure order than the federal government required. If Black and Douglas insisted on a literal reading of the phrase “no law,” Jackson was just as adamant that any literal reading of the First Amendment only barred “Congress.”<sup>236</sup> In dissent in *Terminiello*, Jackson pointed out that the First Amendment put Congress on notice that it is “exclude[d]” from legislating on matters “touch[ing] free speech, no matter how obscene, treasonable, defamatory, inciting or provoking.”<sup>237</sup> By contrast, the Due Process Clause of the Fourteenth Amendment “gave no notice to the people that its adoption would strip their local governments of power to deal with . . . peace and order.”<sup>238</sup> The Court had “soar[ed] aloof” from the real problems faced by the states.<sup>239</sup>

This brings me to a second, related point. In tension with his desire for standards or rules of judgment, Jackson had what Paul Freund called “a dialectical mind—recognizing principles in collision.”<sup>240</sup> Jackson saw, in the exemptive scheme the Court was creating, the exalting of religion and speech over other legitimate community interests.<sup>241</sup> Here Jackson’s practical philosophy suggested to him that the Court’s theory was remote from community realities.<sup>242</sup>

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longer respects impersonal rules of law but is guided in these matters by personal impressions.”); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (referring to the “cryptic and abstract words of the Due Process Clause”); JACKSON, *THE SUPREME COURT*, *supra* note 31, at 69-70 (criticizing the use of the Due Process Clause in state cases).

234. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1945).

235. *Id.*; see *Beauharnais v. Illinois*, 343 U.S. 250, 295 (1952).

236. *Terminiello v. Chicago*, 337 U.S. 1, 28 (1949) (Jackson, J., dissenting).

237. *Id.* (Jackson, J., dissenting).

238. *Id.* at 28-29 (Jackson, J., dissenting).

239. *Id.* at 29 (Jackson, J., dissenting).

240. Freund, *supra* note 27, at 36. A good example of this dialectic is Jackson’s opening statement in *Thomas v. Collins*: “As frequently is the case, this controversy is determined as soon as it is decided which of two well-established, but at times overlapping, constitutional principles will be applied to it.” 323 U.S. 516, 544 (1945) (Jackson, J., concurring).

241. See JACKSON, *THE SUPREME COURT*, *supra* note 31, at 76-77.

242. See, e.g., *Kunz v. New York*, 340 U.S. 290, 309 n.8 (1951) (Jackson, J., dissenting) (pointing out that the Court itself was protected by statute from “loud, threatening, or abusive language in the Supreme Court Building or grounds” and that the



So long as the government sought to “compel [a person] to utter what is not in his mind”<sup>243</sup> or to “judicially examin[e] other people’s faiths,”<sup>244</sup> Jackson would have no part of it. But “state action affecting speech . . . should be weighed against and reconciled with these conflicting social interests.”<sup>245</sup>

According to Jackson, the First Amendment protected religious exercise from state intrusion on conduct *as religious exercise*, but it did not privilege conduct by religionists, any more than the Free Speech Clause shielded conduct by Democrats, Republicans, or Communists that, when undertaken by persons not politically motivated, was subject to state regulation.<sup>246</sup> In large measure, the First Amendment applied principally when governments attempted to regulate religion *qua* religion or speech *qua* speech, but not religion or speech *qua* something else.<sup>247</sup> Jackson joined the Court to strike down rules that actually regulated speech or religion.<sup>248</sup> He questioned a Court that would hold attempts to regulate commercial activity that incidentally affected speech or religion unconstitutional—activity that could be either religiously or secularly motivated.<sup>249</sup> This gave Jackson a rough

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“contrast between the standards set up for cities and those for ourselves” was “exalted artistry”); *Douglas v. City of Jeannette*, 319 U.S. 157, 175 n.3 (1943) (“I cannot help wondering whether the Justices of the Supreme Court are quite aware of the effect of organized front-door intrusions upon people who are not sheltered from zealots and impostors by a staff of servants or the locked entrance of an apartment house.” (internal quotations omitted) (quoting ZECHARIAH CHAFEE, *FREEDOM OF SPEECH IN THE UNITED STATES* 407 (1941)); see also *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment.”).

243. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943).

244. *United States v. Ballard*, 322 U.S. 78, 95 (1944) (Jackson, J., dissenting).

245. *Beauharnais v. Illinois*, 343 U.S. 250, 295 (1952) (Jackson, J., dissenting); see also *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (“Freedom of speech for Kovacs does not . . . include freedom to use sound amplifiers to drown out the natural speech of others.”); *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring in the judgment) (“[L]imits begin to operate whenever activities begin to affect or collide with liberties of others or of the public.”); *Douglas*, 319 U.S. at 178 (Jackson, J., concurring and dissenting) (“The real question is where their rights end and the rights of others begin.”).

246. See *Dennis v. United States*, 339 U.S. 162, 173, 175 (1950) (Jackson, J., concurring in the judgment) (arguing that, in light of a prior decision, the Court must affirm the conviction unless it intended to “create a special exemption for Communists. . . . [S]o long as accused persons who are Republicans, Dixiecrats, Socialists, or Democrats must put up with such a jury, it will have to do for Communists.”).

247. See *Am. Communications Ass’n v. Douds*, 339 U.S. 382, 434-37, 443-44 (1950) (Jackson, J., concurring in part and dissenting in part); *Saia v. New York*, 334 U.S. 558, 566, 568-69 (1948) (Jackson, J., dissenting).

248. See *Thomas v. Collins*, 323 U.S. 516, 544-45 (1945) (Jackson, J., concurring).

249. See *Prince*, 321 U.S. at 178 (“All such money-raising activities on a public scale are, I think, Caesar’s affairs and may be regulated by the state so long as it does not

rule of decision: Closely examine statutes that really were about religion or speech, but leave in place those that were about something else—noise, doorbell-ringing, licenses to sell merchandise, and taxes.

Jackson remained contented to work within the Holmes-Brandeis formulation of the First Amendment. He made no attempt to refine the formulation.<sup>250</sup> Rather, his reforms affected when the First Amendment was applicable at all. Jackson was willing to give the First Amendment its due—*Barnette* serves as ample evidence of this—but he was deeply concerned that the First Amendment was becoming a sword in the hands of a small group of citizens unwilling to yield to the larger will of the community. Justice Jackson surely did not regret his decision in *Barnette*, although he disagreed with the stridency of the Court's subsequent decisions and no doubt regretted *Barnette*'s contribution to that cause. For Jackson, the First Amendment may have been a "fixed star in our constitutional constellation,"<sup>251</sup> but the Court had "[s]o . . . fixe[d] its eyes" that it was "in some danger" of "walk[ing] into a well from looking at the stars."<sup>252</sup>

### III. ANTONIN SCALIA, *SMITH*, AND THE FIRST AMENDMENT

By the time Robert Jackson reached the Court in 1941, First Amendment jurisprudence represented a fledgling market, dominated by sedition and prior restraint cases and testing the relationship between the First and Fourteenth Amendments. By the time Antonin Scalia arrived at the Court in 1986, the First Amendment was an entire industry, firmly established in the Court's docket, reaching all aspects of government activities: schools, employment, commerce, and the military. The corpus of First Amendment law in 1986 bore only a loose relationship to the Holmes-Brandeis formula and required far more sophisticated classification of the speech and the government's motives for regulating speech, religion, and related activities. Thus, if Jackson was writing on a barely used slate, Scalia was writing on a slate crammed with judicial opinions and cluttered with academic theories written in the margins.

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discriminate against one because he is doing them for a religious purpose." His support for the early Jehovah's Witnesses cases is not inconsistent with this analysis. The unlimited discretion vested in city officials invoked not only the possibility of prior restraints, but *unequal* restraints as well.

250. See EUGENE C. GERHART, *SUPREME COURT JUSTICE JACKSON: LAWYERS' JUDGE* 68 (1961).

251. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

252. *Terminiello v. Chicago*, 337 U.S. 1, 14 (1949) (Jackson, J., dissenting) (internal quotations omitted) (quoting "[a]n old proverb").

In the time between Jackson's departure and Scalia's arrival, not only had the Court expanded the coverage of the First Amendment, it had moved from a more absolutist First Amendment approach to a more relativist approach requiring classification of the expression and a balancing of various interests.<sup>253</sup> In the previous Part, I discussed Justice Jackson's opinions as a chronological development. I did so because the First Amendment was in a developing stage and because the Jehovah's Witness cases provided a natural vehicle for observing that development in *Barnette*. In this section, I approach Justice Scalia's opinions topically. The First Amendment has become a complex area in which cases are classified according to various criteria for regulating expression, including content restrictions<sup>254</sup> and non-content related time, place, or manner restrictions.<sup>255</sup>

#### A. Justice Scalia and the Scope of the First Amendment

Justice Scalia's First Amendment jurisprudence begins from the premise that the "there are few areas of constitutional law in which it is less possible to discern a consistent pattern of decision—or even a consistent analytical approach," a problem that "dat[ed] back to the adoption of the Bill of Rights."<sup>256</sup> Consequently, Justice Scalia has accepted that the First Amendment, at least as he found it in the pages of the *United States Reports*, divides the First Amendment into categories of speech, each of which may demand a weighing of different interests.<sup>257</sup>

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253. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 963-72 (1987); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1483 n.8 (1975).

254. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-73 (1976) (commercial speech); *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969) (speech that tends to incite unlawful conduct); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-83 (1964) (libelous speech); *Roth v. United States*, 354 U.S. 476, 481-85 (1957) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942) (fighting words).

255. *Widmar v. Vincent*, 454 U.S. 263, 267-77 (1981) (religious use of public buildings); *Greer v. Spock*, 424 U.S. 828, 834-38 (1976) (protests on military bases); *Hudgens v. NLRB*, 424 U.S. 507, 512-21 (1976) (picketing on private property); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-07 (1969) (protests in public schools); *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (conduct as symbolic speech); *Adderley v. Florida*, 385 U.S. 39, 44-48 (1966) (demonstrating on public property); *Schneider v. State*, 308 U.S. 147, 160 (1939) (leafletting on public streets).

256. Scalia, *supra* note 30, at 9.

257. See Scalia, *supra* note 30, at 9 ("[First Amendment] law displays an enormous evolution in the last fifty years."); Scalia, *Common-Law Courts*, *supra* note 29, at 42 ("All government represents a balance between individual freedom and social order. . .").

# 1. The Text and History of the First Amendment

Consistency has never been a virtue of the Supreme Court's jurisprudence with respect to the great clauses of the Constitution. Scalia has made it his particular legacy to impose greater certitude on the Court's cases by finding those rules that restrain the government, including the courts. "A government of laws means a government of rules," he wrote in *Morrison v. Olson*.<sup>258</sup> And rules, as least as far as constitutional judgments are concerned, must begin with the text. But Scalia's "New Textualism"<sup>259</sup> is strangely wanting in the First Amendment area. Surprisingly, Justice Scalia has not even attempted, much less brought to the First Amendment, the kind of careful parsing of text and structure that he has imposed on separation of powers or federalism, for example.<sup>260</sup> This is not to say that Scalia has not attempted to bring principles or rules to the First Amendment—*Employment Division v. Smith* is strong evidence to the contrary—but he draws these principles "from the long accepted practices of the American people" and not from "a text as indeterminate as the First Amendment's preservation of the 'freedom of speech.'"<sup>261</sup>

Scalia recently accused the Court of "neglect[ing] to cite the constitutional text" in First Amendment cases,<sup>262</sup> yet his own First Amendment jurisprudence has suffered from similar defects. His majority opinion in *R.A.V. v. City of St. Paul*, for example, does not even quote the First Amendment in text or footnote.<sup>263</sup> On at least two occasions his opinions have suggested that the text of the First Amendment was relevant to the decision, but in each case he made no further mention of the text.<sup>264</sup> Only rarely has Justice Scalia drawn any

258. 487 U.S. 654, 733 (1988) (Scalia, J., dissenting).

259. See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

260. See, e.g., cases cited *supra* note 21.

261. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in the judgment); see also Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 688 (1996) (Scalia, J., dissenting) ("The constitutional text is assuredly as susceptible of one meaning as of the other; in that circumstance, what constitutes a 'law abridging the freedom of speech' is either a matter of history or else it is a matter of opinion."); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 378 (1995) (Scalia, J., dissenting) ("Where the meaning of a constitutional text (such as 'the freedom of speech') is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine.").

262. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 595 (1998) (Scalia, J., concurring in the judgment).

263. 505 U.S. 377, 379-96 (1992).

264. See Bd. of Educ. v. Grumet, 512 U.S. 687, 732 (1994) (Scalia, J., dissenting) ("Once this Court has abandoned text and history as guides, nothing prevents it from calling

meaning from demanding, precise readings of the First Amendment, and his efforts to do so are modest and even token.<sup>265</sup>

The Justice's First Amendment opinions, like his Due Process opinions, have drawn from history.<sup>266</sup> Justice Scalia, whose philosophical aversion to proving intent through legislative history is well known,<sup>267</sup> has rarely delved into materials from the founding era except to show long-held practices. Scalia looks for evidence of historical practice as his guide to meaning, rather than examining historical materials as proof of the meaning of the text; generally it is *praxis*, not *exegesis*, that Scalia draws from history. "[W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down."<sup>268</sup> Scalia has looked to the "undeviating acceptance" of religious exemption from taxes in "all 50 States and the National Government before, during, and after the

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religious toleration the establishment of religion."); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 33 (1989) ("I dissent because I find no basis in the text of the Constitution, the decisions of this Court, or the traditions of our people. . .").

265. See *Finley*, 524 U.S. at 595 (Scalia, J., concurring in the judgment) (quoting the First Amendment and defining the term "abridge"—"Congress did not *abridge* the speech of those who disdain the beliefs and values of the American public, nor did it *abridge* indecent speech."); *Umbehr*, 518 U.S. at 688 (Scalia, J., dissenting) ("[W]hat constitutes a 'law abridging the freedom of speech' is either a matter of history or else it is a matter of opinion."); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) ("It is no answer to say that the Establishment Clause tempers religious speech. By its terms that Clause applies only to the words and acts of *government*."); *Cnty. for Creative Non-Violence v. Watt*, 703 F.2d 586, 622 (D.C. Cir. 1983) (en banc) (per curiam) (Scalia, J., dissenting) ("[W]hen the Constitution said 'speech' it meant speech and not all forms of expression."), *rev'd sub nom. Clark v. Cnty. for Creative Non-Violence*, 468 U.S. 288 (1984); see also *Chisom v. Roemer*, 501 U.S. 380, 409 (1991) (Scalia, J., dissenting) (referring, by way of a grammatical analogy, to the Right of Petition Clause as two separate rights, a right of assembly and a right of petition).

266. See *Burnham v. Superior Court*, 495 U.S. 604 (1990) (Scalia J., plurality opinion); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (Scalia, J., plurality opinion).

267. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting).

268. *Rutan v. Republican Party*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting); see also *Umbehr*, 518 U.S. at 688 (Scalia, J., dissenting) ("The constitutional text is assuredly as susceptible of one meaning as of the other; in that circumstance, what constitutes a 'law abridging the freedom of speech' is either a matter of history or else it is a matter of opinion."); *Grumet*, 512 U.S. at 751 (Scalia, J., dissenting) ("The foremost principle I would apply is fidelity to the longstanding traditions of our people, which surely provide the diversity of treatment that JUSTICE O'CONNOR seeks, but do not leave us to our own devices."); *Burson v. Freeman*, 504 U.S. 191, 214 (1992) (Scalia, J., concurring in the judgment) ("Because restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot, [Tennessee's restrictions do] not restrict speech in a traditional public forum." (citation omitted)).

framing of the First Amendment's Religion Clauses."<sup>269</sup> Aside from "state legislative practices prevalent at the time the First Amendment was adopted," Scalia believes that "more relevant still are the state legislative practices at the time the Fourteenth Amendment was adopted, since it is most improbable that that adoption was meant to overturn any existing national consensus regarding free speech."<sup>270</sup>

It is disappointing that for all of Justice Scalia's decrying of the Court's departure from text, he would not acknowledge his own failure to rely on the text and offer a theory in lieu of text. Given the Due Process origins of First Amendment jurisprudence, however, it is not surprising that Justice Scalia would find state historical practices more useful than the text of the Fourteenth Amendment.<sup>271</sup> One suspects that, if pressed for his position, Justice Scalia would harbor severe doubts about the doctrine of selective incorporation, but he has resigned himself to the fact of incorporation. His approach to First Amendment questions is reminiscent of the absorption of Justices Holmes, Brandeis, Jackson, and Frankfurter,<sup>272</sup> rather than Justice Black's jot-for-jot incorporation. Perhaps Justice Scalia has recognized that the Court's foray into jot-for-jot incorporation has so far departed from the original meaning of either the First or the Fourteenth Amendment that the actual text of the First Amendment is largely irrelevant,<sup>273</sup> and only historical practices can aid the Court.<sup>274</sup> Justice Scalia's methodology has resigned itself to incorporation and has moved on to questions of substance. The debate over the First Amendment's meaning has become part of the larger debate over whether the Due Process Clause must find meaning in historical principles and practices or may look to more modern concepts of due process.

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269. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 35 (1989) (Scalia, J., dissenting) (internal quotations omitted) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 676-77 (1970)).

270. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring part and concurring in the judgment). For a discussion of Scalia's use of historical tradition, see A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409 (1999).

271. See Bybee, *supra* note 150, at 915-18; *supra* text accompanying notes 148-159.

272. See Frankfurter, *supra* note 220, at 747-48.

273. See Scalia, *supra* note 30, at 11 ("It has been established (though that did not occur until 1925) that the Fourteenth Amendment extends the prohibitions of the First Amendment to the states—so that the text now reads, in effect, '*The Government shall make no law.*'").

274. Compare *City of Boerne v. Flores*, 521 U.S. 507, 538-44 (1997) (Scalia, J., concurring) (relying on early state practices), with *id.* at 549-64 (O'Connor, J., dissenting) (relying on early state practices and the writings of the Framers of the First Amendment).

## 2. The Core of the First Amendment

If, for Justice Scalia, the text of the First Amendment is “indeterminate,” he nevertheless believes the “core offense” to the First Amendment is the “suppressing [of] particular political ideas.”<sup>275</sup> “The premise of our Bill of Rights,” he has argued, “is that there are some things—even some seemingly *desirable* things—that government cannot be trusted to do.”<sup>276</sup> Thus, “there is no such thing as too much speech.”<sup>277</sup> Dissenting in *Austin v. Michigan Chamber of Commerce*, Justice Scalia protested that a prohibition on corporate expenditures in state elections was not “even a *desirable* objective, much less . . . a compelling state interest.”<sup>278</sup> For Justice Scalia, the use of corporate monies to influence elections was the use of monies accumulated through voluntary association and stood to counter government speech.<sup>279</sup> “To eliminate voluntary associations—not only including powerful ones, but *especially* including powerful ones—from the public debate is either to augment the always dominant power of government or to impoverish the public debate.”<sup>280</sup> Since the government itself is not barred by the First Amendment from expressing its own views, the government may criticize the content of speech so long as it does not regulate it.<sup>281</sup>

If *political* speech is the core of the First Amendment, it is also political *speech*, not political acts that invoke its protection. After a series of cases was decided that reaffirmed the notion that speech is burdened by political patronage,<sup>282</sup> Justice Scalia objected that patronage did not violate the freedom of speech. According to Scalia, the First Amendment “restrain[s] transient majorities from impairing long-recognized personal liberties,” it restricts the government “as lawmaker, i.e., as the regulator of private conduct,” but it does not restrain the government in the same way when it acts as an employer or contractor.<sup>283</sup> Scalia argued that patronage did not violate “any explicit text of the Constitution” and was a practice “as old as the

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275. 44 *Liquormart*, 517 U.S. at 517 (Scalia, J., concurring in part and concurring in the judgment).

276. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting).

277. *Id.* at 695 (Scalia, J., dissenting).

278. *Id.* at 693 (Scalia, J., dissenting).

279. *Id.* at 683-85 (Scalia, J., dissenting).

280. *Id.* at 694 (Scalia, J., dissenting).

281. *Block v. Meese*, 793 F.2d 1303, 1313-14 (D.C. Cir. 1986) (Scalia, J.).

282. See *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

283. *Rutan v. Republican Party*, 497 U.S. 62, 94, 95 (1990) (Scalia, J., dissenting).

Republic.”<sup>284</sup> Scalia believed that patronage practices violated neither the text of the First Amendment (because there is no “abridgement of the freedom of speech”), nor any tradition (as evidenced by their historic and widespread practice) of the American people. Furthermore, he argued, “Government favors those who agree with its political views, and disfavors those who disagree, every day—in where it builds its public works, in the kinds of taxes it imposes and collects, in its regulatory prescriptions, in the design of its grant and benefit programs”—what makes us think “patronage practices are *not only* ‘illegitimate’ in some vague moral or even precise legal sense, but *that they are unconstitutional*.”<sup>285</sup>

The expansion of the First Amendment beyond speech to activities only loosely related to speech or expression—the so-called content-neutral restrictions—is a theme that Justice Scalia has played on since he sat on the D.C. Circuit. In *Community for Creative Non-Violence v. Watt*, the question before the D.C. Circuit was whether a National Park Service rule forbidding anyone from camping in Lafayette Park across from the White House violated the First Amendment.<sup>286</sup> The badly fractured D.C. Circuit held that, where sleeping was part of the demonstrators’ protest of the plight of the homeless, the demonstrators were entitled to an injunction.<sup>287</sup> Justice Scalia asserted the tough line: he “flatly . . . den[ie]d that sleeping is or can ever be speech for First Amendment purposes.”<sup>288</sup> Scalia said that when the First Amendment “said ‘speech’ it meant speech and not all forms of expression. Otherwise, it would have been unnecessary to address ‘freedom of the press’ separately.”<sup>289</sup> He then offered a theory

284. *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 687, 688 (1996) (Scalia, J., dissenting). In *Umbehr*, The Board of County Commissioners prevented the renewal of Umbehr’s trash-hauling contract after he criticized the Board. *Id.* at 671. The same day, the Court also held unconstitutional a mayor’s action to remove a tow service from the list of city-approved services after the owner failed to contribute to the mayor’s reelection campaign. *See O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716, 726 (1996). Justices Scalia and Thomas were the only dissenters in the two cases. *See id.* at 726; *Umbehr*, 518 U.S. at 686.

285. *Umbehr*, 518 U.S. at 689, 695 (Scalia, J., dissenting); *see Johnson v. Robison*, 415 U.S. 361, 383 (1974) (holding that the government’s failure to pay veterans’ education benefits to conscientious objectors who performed alternative service did not violate the First Amendment).

286. 703 F.2d 586, 587 (D.C. Cir. 1983) (en banc), *rev’d sub nom.* *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984).

287. *See id.* at 600-22. The D.C. Circuit decided the case by a 6-5 vote, with no more than two judges joining any single opinion for the majority. *Id.* at 586-87. Judge Wilkey wrote the principal dissent.

288. *Id.* at 622 (Scalia, J., dissenting).

289. *Id.* (Scalia, J., dissenting).



of the scope of the First Amendment, a theory far more narrow than that adopted by the court's majority:

[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires. But a law proscribing conduct for a reason having nothing to do with its communicative character need only meet the ordinary minimal requirements of the equal protection clause. In other words, the only "First Amendment analysis" applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court *then* proceeds to determine whether there is substantial justification for the proscription, just as it does in free-speech cases.<sup>290</sup>

He explained that laws that impede *speech* may run afoul of the First Amendment even if they are directed at some other purpose, such as regulating noise, campaign financing, or littering.<sup>291</sup> Speech is protected against "accidental intrusion."<sup>292</sup> By contrast, "freedom of expression," as a more generalized version of the freedom of speech, cannot be violated by accidental intrusion, only by "purposeful restraint of expression."<sup>293</sup> Thus the First Amendment "would not invalidate a law generally prohibiting the extension of limbs from the windows of moving vehicles; it would invalidate a law prohibiting only the extension of clenched fists."<sup>294</sup>

The contours of Scalia's approach in *Community for Creative Non-Violence* are quite visible in two of Scalia's better-known First Amendment opinions, *R.A.V. v. City of St. Paul*<sup>295</sup> and *Barnes v. Glen Theatre, Inc.*<sup>296</sup> In *R.A.V.*, Justice Scalia wrote for the majority in a case striking down a St. Paul Bias-Motivated Crime Ordinance that punished placing symbols or objects on public or private property "which one knows or has reasonable grounds to know arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion

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290. *Id.* at 622-23 (Scalia, J., dissenting) (footnotes omitted).

291. *Id.* at 623 (Scalia, J., dissenting).

292. *Id.* (Scalia, J., dissenting).

293. *Id.* (Scalia, J., dissenting).

294. *Id.* (Scalia, J., dissenting).

295. 505 U.S. 377 (1992).

296. 501 U.S. 560, 572-81 (1991) (Scalia, J., concurring in the judgment).

or gender.”<sup>297</sup> The Minnesota Supreme Court had construed the ordinance to prohibit only “fighting words”<sup>298</sup> within the meaning of *Chaplinsky v. New Hampshire*.<sup>299</sup> In *R.A.V.*, the Supreme Court said that “[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed,”<sup>300</sup> but does not extend to certain categories of speech, including obscenity, defamation, and fighting words. The St. Paul ordinance violated the First Amendment not because it prohibited “fighting words,” but because it prohibited only fighting words when used to cause alarm or resentment in others on the basis of race, color, creed, religion or gender.<sup>301</sup> St. Paul had engaged in “content discrimination among various instances of a class of proscribable speech,” where it was as though the state had proscribed “only libel critical of the government,” “obscenity which includes offensive *political* messages,” or “only those threats against the President that mention his policy on aid to inner cities.”<sup>302</sup>

*Barnes* provides a good example of a law that was not directed at speech, but that incidentally prohibits expression.<sup>303</sup> Justice Scalia concurred in the Court’s judgment upholding Indiana’s ban on nude dancing “because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all.”<sup>304</sup> In an opinion that tracked his dissent in *Community for Creative Non-Violence*, Scalia asserted that the Court had “never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest,” but only “[w]here the government prohibits conduct

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297. *R.A.V.*, 505 U.S. at 380 (internal quotations omitted) (quoting MINN. STAT. § 292.02 (1990)).

298. *See id.* at 381.

299. 315 U.S. 568, 571-72 (1942).

300. *R.A.V.*, 505 U.S. at 382 (citations omitted).

301. *See id.* at 391-93.

302. *Id.* at 384, 388. Scalia noted that this theory would permit differential treatment of subclasses of people so long as the law did not define the subclass according to their speech. For example, the state could “permit all obscene live performances except those involving minors.” *Id.* at 389. Even “prohibiting only those obscene motion pictures with blue-eyed actresses” would create no First Amendment problem. *Id.* at 389, 390.

303. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 562-63 (1991).

304. *Id.* at 572 (Scalia, J., concurring in the judgment); *see also* *City of Erie v. Pap’s A.M.*, 120 S. Ct. 1382, 1401 (2000) (Scalia, J., concurring in the judgment) (explaining that a city’s ordinance prohibiting “going nude in public” was “a general law regulating conduct and not specifically directed at expression, [and thus] not subject to First Amendment scrutiny at all”).

*precisely because of its communicative attributes.*"<sup>305</sup> Otherwise, he noted, "all conduct-restricting regulation[s] . . . [would have to] survive an enhanced level of scrutiny."<sup>306</sup>

Scalia's general theory of the First Amendment prescribes a limited role. But within that role, the First Amendment is emperor. *Texas v. Johnson* is a good example of Scalia's approach, although he did not write an opinion.<sup>307</sup> Significantly, Scalia joined Justice Brennan's majority opinion. In *Johnson*, as in *Community for Creative Non-Violence, R.A.V.*, and *Barnes*, the question was whether a Texas statute making it a crime to "deface, damage or otherwise physically mistreat [the flag] in a way that the actor knows will seriously offend" others was *aimed* at speech.<sup>308</sup> Justice Brennan did not question that Texas might prohibit burning objects as a form of litter or pollution control; the problem was that Texas only prohibited burning when it was associated with venerated objects.<sup>309</sup> Conduct was proscribable because of the content of the speech or expression associated with the prohibited conduct.<sup>310</sup> In a sense, Texas proscribed the conduct as a means of proscribing the speech.<sup>311</sup> Justice Scalia likely thought that, had Texas prohibited open fires in downtown Dallas, Johnson's conduct would have been proscribable irrespective of the fact that he engaged in it for expressive purposes.

In Scalia's scheme, the focus of the First Amendment is the government's intent, not the putative speaker's or religionist's intent. Scalia would give little weight to the explanation or motivation for the

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305. *Barnes*, 501 U.S. at 577 (Scalia, J., concurring in the judgment); see also *id.* at 578 (Scalia, J., concurring in the judgment) (quoting his dissent in *Community for Creative Non-Violence*); *Pap's A.M.*, 120 S. Ct. at 1402 (Scalia, J., concurring in the judgment) (finding that a ban on nude dancing does not violate the First Amendment unless the "communicative character of nude . . . dancing prompted the ban").

306. *Barnes*, 501 U.S. at 578-79 (Scalia, J., concurring in the judgment); see also *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 84 (1994) (Scalia, J., dissenting) ("[A]ll of what is involved constitutes not merely pornography but fully proscribable obscenity, except to the extent it is joined with some other material (or perhaps some manner of presentation) that has artistic or other social value."); *Bd. of Trs. v. Fox*, 492 U.S. 469, 474-75 (1989) (Scalia, J.) (holding that commercial speech does not become fully protected speech because it is "intertwined" with otherwise protected speech, "no more . . . than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech").

307. 491 U.S. 397 (1989). Justice Scalia also joined Justice Brennan's opinion in *United States v. Eichman*, 496 U.S. 310 (1990) (holding the Flag Protection Act of 1989 unconstitutional).

308. *Johnson*, 491 U.S. at 400 (internal quotations omitted) (quoting TEX. PENAL CODE ANN. § 42.09(b) (1989)).

309. *Id.*

310. *Id.* at 413-14.

311. *Id.* at 411.

act so long as the state's regulation of the act had a speech or religion-neutral purpose. Scalia's view thus reduces—although it does not eliminate—the need for balancing governmental and private interests, because the law may be reviewed as an abstract proposition, or rule, and not as an inconvenience as applied.<sup>312</sup> Content-specific restrictions on speech or restrictions on religious conduct will be evident on the face of the law, while speech- and religious-neutral statutes require an equal protection-type analysis to determine if the law has singled out particular kinds of speech or religious practice. As Justice Scalia explained:

[T]he defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion; whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment.<sup>313</sup>

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312. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 988 (1992) (Scalia, J., concurring in part and dissenting in part). Scalia explained that

a law of general applicability which places only an incidental burden on a fundamental right does not infringe that right, but that principle does not establish the quite different (and quite dangerous) proposition that a law which *directly* regulates a fundamental right will not be found to violate the Constitution unless it imposes an "undue burden."

*Id.* (citations omitted); see also *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (Scalia, J.) (holding that private, religious speech expressed in a traditional public forum can be regulated only if it serves a compelling state interest).

313. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 557 (1993) (Scalia, J., concurring in part and concurring in the judgment) (citation omitted); see also *Hill v. Colorado*, 120 S. Ct. 2480, 2503 (2000) (Scalia, J., dissenting) ("Colorado's statute makes it a criminal act knowingly to approach within 8 feet of another person on the public way or sidewalk area within 100 feet of the entrance door of a health care facility for the purpose of passing a leaflet to, displaying a sign to, or engaging in oral protest, education, or counseling with such person. Whatever may be said about the restrictions on the other types of expressive activity, the regulation as it applies to oral communication is obviously and undeniably content-based."); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 785 (1994) (Scalia, J., concurring in part and dissenting in part) ("I believe that the judicial creation of a . . . zone in which only a particular group . . . cannot exercise its rights of speech, assembly, and association . . . [is] profoundly at odds with our First Amendment precedents and traditions. . . ."); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) (Scalia, J.) ("Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews."); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 n.14 (1992) (Scalia, J.) ("The equivalent of a law of general application that inhibits the practice of religion without being aimed at religion is a law that destroys the value of land without being aimed at land. . . . [A] regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions." (citation omitted)); *Planned Parenthood*, 505 U.S. at 988 (Scalia, J., dissenting) (citing, as an example of a law

### 3. Overbreadth and Standing

Perhaps no Justice has spoken in favor of standing rules as vociferously as Justice Scalia. He has insisted that "standing is a crucial and inseparable element of [separation of powers], whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the processes of self-governance."<sup>314</sup> He proposed that courts correct this tendency toward self-indulgence by requiring "that the plaintiff's alleged injury be a particularized one [that] sets him apart from the citizenry at large."<sup>315</sup> Scalia brought this proposal home in *Lujan v. Defenders of Wildlife*, stating that

a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.<sup>316</sup>

Within First Amendment jurisprudence, the rules of standing apply generally.<sup>317</sup> The Court, however, has recognized the "doctrine of substantial overbreadth [a]s an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally

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regulating protected conduct, "a state law requiring purchasers of religious books to endure a 24-hour waiting period, or to pay a nominal additional tax of 1¢"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (explaining that the First Amendment would prohibit a law that forbade "only those threats against the President that mention his policy on aid to inner cities"); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 132 (1989) (Scalia, J., concurring) (explaining the FCC's power to restrict obscene speech); *Cnty. for Creative Non-Violence v. Watt*, 703 F.2d 586, 623 (D.C. Cir. 1983) (en banc) (Scalia, J., dissenting) (the First Amendment "would not invalidate a law generally prohibiting the extension of limbs from the windows of moving vehicles; it would invalidate a law prohibiting only the extension of clenched fists").

314. Scalia, *Standing as an Essential Element*, *supra* note 29, at 881.

315. *Id.* at 881-82.

316. 504 U.S. 555, 573-74 (1992); *see* *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 120 S. Ct. 693, 713-22 (2000) (Scalia, J., dissenting); *Clinton v. City of New York*, 524 U.S. 417, 453-69 (1998) (Scalia, J., concurring in part and dissenting in part); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 29-37 (1998) (Scalia, J., dissenting); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-09 (1998); *Bennett v. Spear*, 520 U.S. 154, 161-74 (1997); *see also* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1141-60 (1993) (evaluating the impact of *Lujan* on citizen standing provisions); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 197-222 (1992) (reviewing the *Lujan* decision in light of the language and history of Article III).

317. *See, e.g.,* *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 488-90 (1982); *Laird v. Tatum*, 408 U.S. 1, 3-16 (1972).

applied to others.”<sup>318</sup> For all of his insistence on application of standing rules, Justice Scalia has been remarkably supportive of the overbreadth doctrine.<sup>319</sup> To be sure, as a circuit judge, Scalia insisted that plaintiffs allege some concrete harm apart from the “chilling” of their First Amendment rights, but once they had demonstrated the personal threat, they had standing to complain that the statute was overbroad as applied to someone else.<sup>320</sup> He explained that the overbreadth doctrine is justified as an exception to the ordinary standing rules “because to require that the harm of ‘chilling effect’ actually be suffered by the plaintiff would destroy the whole purpose of the concept, which is to enable even those who have not been chilled to vindicate the First Amendment interests of those who have.”<sup>321</sup> Thus, “[w]here an overbreadth attack is successful, the statute is obviously invalid in *all* its applications, since every person to whom it is applied can defend on the basis of the same overbreadth.”<sup>322</sup>

In other cases, Justice Scalia has, on the basis of the overbreadth doctrine, criticized the Court for failing to address First Amendment concerns. In *Massachusetts v. Oakes*, he argued that a state could not amend a statute postindictment to prevent a defendant from invoking the overbreadth doctrine.<sup>323</sup> “The overbreadth doctrine serves to protect constitutionally legitimate speech not merely *ex post*, that is, after the offending statute is enacted, but also *ex ante*, that is, when the legislature is contemplating what sort of statute to enact.”<sup>324</sup> In *Morse v. Republican Party of Virginia*, Scalia assailed the Court for declining to address “hypothetical” or “difficult” questions.<sup>325</sup> “That is a luxury our precedents do not allow. . . . In this First Amendment context, to

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318. *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989) (O'Connor, J.); see *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 120 S. Ct. 483, 488-90 (1999); *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987); *Broadrick v. Oklahoma*, 413 U.S. 601, 610-12 (1973).

319. See, e.g., *Oakes*, 491 U.S. at 586 (Scalia, J., concurring in part, dissenting in part).

320. See *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378-80 (D.C. Cir. 1984).

321. *Id.* at 1379.

322. *Bd. of Trs. v. Fox*, 492 U.S. 469, 483 (1989).

323. 491 U.S. at 586 (Scalia, J., concurring in part and dissenting in part).

324. *Id.* Although Justice O'Connor announced the judgment of the Court and delivered an opinion, Part I of Justice Scalia's separate opinion—the overbreadth section—was joined by Justices Brennan, Marshall, Blackmun, and Stevens, making it an opinion for the Court. *Id.* at 585.

325. 517 U.S. 186, 241 (1996) (Scalia, J., dissenting).

'go no further than necessary to decide the case at hand' means going far enough to assure against overbreadth."<sup>326</sup>

*B. Justice Scalia, Smith, and the Problem of Exemptions*

By the time Scalia reached the Supreme Court, the Court had made clear that both the Free Exercise Clause and the Free Speech Clause sometimes required exemption from otherwise valid laws of general applicability<sup>327</sup> (although it had also rejected such claims to exemption<sup>328</sup>). In *Wisconsin v. Yoder*, for example, the Court held that Wisconsin could not constitutionally apply its compulsory education law to the Old World Amish.<sup>329</sup> The Court balanced the "State's interest in universal education" against the "traditional interest of parents with respect to the religious upbringing of their children."<sup>330</sup> To preserve "doctrinal flexibility," the Court denied that beliefs and conduct could be "neatly confined in logic-tight compartments," but held that the Court must engage in a "balancing process" between the state's interest in universal education and parents' interest in the religious upbringing of their children.<sup>331</sup> The Court concluded that the additional two years of formal schooling were of only marginal

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326. *Id.* at 241-42 (Scalia, J., dissenting) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)); see also *City of Chicago v. Morales*, 527 U.S. 41 (1999) (Scalia, J., dissenting) (questioning the constitutionality of a Chicago ordinance that restricts citizens' rights to gather in public).

327. See, e.g., *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-98 (1982) (holding that minor parties are exempted from campaign disclosure laws); *Thomas v. Review Bd.*, 450 U.S. 707, 716-20 (1981) (holding that a state may not deny unemployment insurance to an employee who leaves a job for personal reasons if those reasons are religious); *Buckley v. Valeo*, 424 U.S. 1, 72-74 (1976) (suggesting that exemption from federal campaign laws might be required for minor parties); *Wisconsin v. Yoder*, 406 U.S. 205, 213-19 (1972) (holding that a state may not require Old World Amish to observe its compulsory education law); *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963) (holding that a state may not deny unemployment insurance to employees who leave their job for personal reasons if those reasons are religious); see also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1413 (1990) ("Free exercise litigation since *Sherbert* has consisted almost entirely of requests for exemption rather than for general invalidation of restrictive laws.").

328. See *Bowen v. Roy*, 476 U.S. 693, 699-71 (1986) (rejecting a religious-based objection to providing a social security number as a condition to receiving federal welfare benefits); *Goldman v. Weinberger*, 475 U.S. 503, 506-10 (1986) (rejecting a free exercise challenge by an Orthodox Jewish officer who wore a yarmulke in violation of a military regulation that forbade wearing headgear while indoors); *United States v. Lee*, 455 U.S. 252, 256-60 (1982) (rejecting a request by an Old World Amish member for an exemption from federal social security tax).

329. 406 U.S. 205, 213-15 (1972).

330. *Id.* at 214; see also *id.* at 237 (White, J., concurring) (referring to the "delicate balancing of important but conflicting interests").

331. *Id.* at 214, 220-21.

importance to the state but would impair the “religious development” of the Amish.<sup>332</sup> Accordingly, the Court said that Wisconsin must exempt the Amish from its compulsory education law.<sup>333</sup> The Court itself predicted that “probably few other religious groups or sects” would be able to make the Amish’s “convincing showing,”<sup>334</sup> a fact borne out in the low number of claims sustained under the authority of *Yoder*.<sup>335</sup>

Although most claims for exemption have invoked the Free Exercise Clause, the Court held, in *Brown v. Socialist Workers '74 Campaign Committee*, that under the Free Speech Clause, Ohio could not apply portions of its campaign disclosure laws to “minor parties” such as the Socialist Workers Party.<sup>336</sup> “The First Amendment prohibits a State from compelling disclosures by a minor party that will subject those persons identified to the reasonable probability of threats, harassment, or reprisals.”<sup>337</sup> The Court, however, left the law in place with respect to other political parties.<sup>338</sup>

### 1. Pre-Smith Cases

Early in his tenure on the Court, Scalia argued strongly in dicta that the First Amendment required exemption from generally applicable laws on occasion. In *Texas Monthly, Inc. v. Bullock*, the

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332. *Id.* at 218.

333. *Id.* at 231.

334. *Id.* at 235-36.

335. See Bybee, *supra* note 150, at 927-31 (“*Yoder*’s precedential value depends not on parties being able to make *claims* analogous to those made by the Amish but to mak[e] *themselves* analogous to the Amish.”).

336. 459 U.S. 87, 98 (1982).

337. *Id.* at 101; see *Buckley v. Valeo*, 424 U.S. 1, 72-74 (1976) (rejecting a “blanket exemption” from federal election campaign laws for minor parties and suggesting that an exemption may be required in individual cases); see also Geoffrey R. Stone & William P. Marshall, *Brown v. Socialist Workers: Inequality as a Command of the First Amendment*, 1983 SUP. CT. REV. 583, 619-26 (discussing exemption versus invalidation).

The exemption of the Socialist Workers Party was certainly not compelled by the Court’s prior cases such as *NAACP v. Button*, 371 U.S. 415 (1963). In *Button*, the NAACP sought to restrain the enforcement of a Virginia statute forbidding any person or organization from soliciting business for an attorney. *Id.* at 417-18. The Court made it clear that the principle it applied in *Button* was equally available to speakers representing competing views. *Id.* at 430-31.

That the [NAACP] happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse our society against the objectives of the [NAACP].

*Id.* at 444.

338. See *Brown*, 459 U.S. at 88-98.



Court held unconstitutional under the Establishment Clause a Texas statute exempting magazines and books published by religious faiths from sales tax if the magazines promoted the faith and the books consisted wholly of sacred writings.<sup>339</sup> Justice Brennan's plurality opinion faulted the Texas exemption for "lack[ing] sufficient breadth to pass scrutiny under the Establishment Clause."<sup>340</sup> According to Brennan, Texas's scheme failed to afford tax exemptions for nonreligious groups.<sup>341</sup> In the plurality's view, past cases approving tax exemptions for religious activities had involved exemptions for a broader range of activities, and religious activities simply fell within the range.<sup>342</sup> Justice Brennan admitted that *Texas Monthly* was "in tension" with *Murdock v. Pennsylvania*<sup>343</sup> and *Follett v. Town of McCormick*,<sup>344</sup> both cases in which the Court struck general taxing schemes as applied to Jehovah's Witnesses (and both cases in which Justice Jackson dissented). "[B]ased on the evolution in our thinking about the Religion Clauses over the last 45 years," Justice Brennan "disavow[ed]" language in those opinions inconsistent with *Texas Monthly*.<sup>345</sup>

Justice Scalia dissented, joined by Chief Justice Rehnquist and Justice Kennedy.<sup>346</sup> Justice Scalia could not find support for the majority's decision in the "text of the Constitution, the decisions of this Court, or the traditions of our people."<sup>347</sup> The Justice's dissent, however, made no pretense of parsing the text of the Constitution independent of what the Court in prior cases had said the First

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339. 489 U.S. 1, 21 (1989) (Brennan, J., plurality opinion). Justice Scalia also voted with the majority in *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989), and *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987). In both cases the Court held that states must pay unemployment compensation to workers who left their jobs for religious reasons. *Frazee*, 489 U.S. at 832-35; *Hobbie*, 480 U.S. at 139-46.

340. *Tex. Monthly*, 489 U.S. at 15 (Brennan, J., plurality opinion).

341. *See id.* at 14-15 (Brennan, J., plurality opinion).

342. *Id.* at 14 & n.4, 15-17 (Brennan, J., plurality opinion). Justice White wrote a brief opinion concurring in the judgment on the basis of the Press Clause. *Id.* at 25-26 (White, J., concurring in the judgment). Justice Blackmun, joined by Justice O'Connor, also concurred in the judgment. *Id.* at 26. Justice Blackmun believed that Justice Brennan's opinion subordinated the Free Exercise Clause to the Establishment Clause, while Justice Scalia's opinion subordinated the Establishment Clause "value" to the Free Exercise "value." *Id.* at 27 (Blackmun, J., concurring in the judgment). Blackmun thought that the case should be decided narrowly on the question of "whether a tax exemption limited to the sale of religious literature by religious organizations violates the Establishment Clause." *Id.* at 28 (Blackmun, J., concurring in the judgment).

343. 319 U.S. 105 (1943); *see supra* text accompanying notes 108-126.

344. 321 U.S. 573 (1944); *see supra* text accompanying note 224.

345. *Tex. Monthly*, 489 U.S. at 21, 24 & n.11 (Brennan, J., plurality opinion).

346. *Id.* at 29 (Scalia, J., dissenting).

347. *Id.* at 33 (Scalia, J., dissenting).

Amendment meant; in truth, Scalia's opinion drew no distinction between the text of the Constitution and the decisions of the Court. Justice Scalia attacked the Court's decision for creating "the antinomy that accommodation of religion may be required but not permitted."<sup>348</sup> Scalia devoted much of his opinion to discussing prior cases in which the Court had approved of efforts to accommodate religion.<sup>349</sup> Scalia adamantly maintained that, in these cases, the Court "recognized that 'the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.'"<sup>350</sup> In support of this proposition, Scalia cited *Sherbert v. Verner*,<sup>351</sup> *Wisconsin v. Yoder*,<sup>352</sup> *Thomas v. Review Board*,<sup>353</sup> and *Hobbie v. Unemployment Appeals Commission*.<sup>354</sup> According to Scalia, "It is not always easy to determine when accommodation slides over into promotion . . . but [this is] not even a close case."<sup>355</sup> The only "close question . . . is not whether the exemption is permitted, but whether it is constitutionally compelled" by decisions such as *Murdock* and *Follett*.<sup>356</sup> Scalia drew from these cases the principle that "[i]f the exemption comes so close to being a constitutionally required accommodation, there is no doubt that it is at least a permissible one."<sup>357</sup>

As Justice Scalia correctly pointed out, the majority opinion in *Texas Monthly* was vulnerable to attack on the basis of *Murdock* and *Follett*. When these cases are read in context, there can be no question that the Court had created an exemption for the religious activities of the Jehovah's Witnesses. The difference between the issue presented in *Texas Monthly* and that in *Murdock* was not the activity or religious qualifications of the party claiming exemption, but that the Jehovah's Witnesses in *Murdock* claimed exemption from a general statutory scheme under the Free Exercise Clause,<sup>358</sup> while in *Texas Monthly*,

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348. *Id.* at 29 (Scalia, J., dissenting).

349. *See id.* at 29-45 (Scalia, J., dissenting).

350. *Id.* at 38 (Scalia, J., dissenting) (quoting *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987)).

351. 374 U.S. 398 (1963).

352. 406 U.S. 205 (1972).

353. 450 U.S. 707 (1981).

354. 480 U.S. 136 (1987).

355. *Tex. Monthly*, 489 U.S. at 40 (Scalia, J., dissenting).

356. *Id.* at 41 (Scalia, J., dissenting).

357. *Id.* at 42 (Scalia, J., dissenting); *see also id.* at 45 ("Just as the Constitution sometimes *requires* accommodation of religious expression despite not only the Establishment Clause but also the Speech and Press Clauses, so also it sometimes *permits* accommodation despite all those Clauses.").

358. *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943).

Texas's statutory exemption was attacked as a violation of the Establishment Clause.<sup>359</sup> *Texas Monthly* and *Murdock* leave us with contradictory premises—that the state must exempt certain religiously motivated activities from taxation under the Free Exercise Clause, but a state making this constitutional exemption scheme statutory would violate the Establishment Clause. Nonetheless, at least in *Texas Monthly*, it appeared that Justice Scalia thought the Free Exercise Clause both permitted and required exemption from generally applicable laws.<sup>360</sup>

## 2. *Smith*

If Justice Scalia thought that the majority's decision in *Texas Monthly* proved an embarrassment to the Court's prior jurisprudence, his own opinion in *Texas Monthly* was surely an embarrassment to his startling opinion the following term in *Employment Division v. Smith*.<sup>361</sup> In *Smith*, Oregon had denied unemployment benefits to Alfred Smith and Galen Black, who had been fired as drug rehabilitation counselors.<sup>362</sup> Smith and Black were members of the Native American Church, which prescribed the sacramental use of peyote, a controlled substance.<sup>363</sup> The Court considered whether the Free Exercise Clause compelled Oregon to pay unemployment benefits to persons dismissed from their employment because of their religiously motivated use of peyote.<sup>364</sup> Other than the fact that the religiously motivated activity (use of peyote) was prohibited by Oregon's criminal laws, *Smith* looked very much like the Court's other unemployment compensation cases—*Sherbert*, *Thomas*, and *Hobbie*—all cases Justice Scalia had cited favorably in his *Texas Monthly* dissent.<sup>365</sup>

### a. The Failure of Text and History

Scalia began by reciting the text of the First Amendment and stating the noncontroversial proposition—derived from *Reynolds v. United States*<sup>366</sup>—that the Free Exercise Clause absolutely prohibits

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359. *Tex. Monthly*, 489 U.S. at 5 (Brennan, J., plurality opinion).

360. *See Tex. Monthly*, 489 U.S. at 44.

361. 494 U.S. 872 (1990). For interesting background on the case, see Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L.J. 953 (1998).

362. *Smith*, 494 U.S. at 874.

363. *Id.*

364. *Id.*

365. *Tex. Monthly*, 489 U.S. at 38 (Scalia, J., dissenting).

366. 98 U.S. 145 (1878).

government regulation of religious belief.<sup>367</sup> Observing that the exercise of religion includes actions as well as profession of beliefs, Justice Scalia returned to a theme that he had espoused in his prior Free Speech opinions. The Justice explained that a state would clearly violate the Free Exercise Clause if it prohibited acts “only when they are engaged in for religious reasons, or only because of the religious belief that they display.”<sup>368</sup> As in his opinions in *Community for Creative Non-Violence, R.A.V.*, and *Barnes*, Scalia’s inquiry turned on whether the law singled out expression or religion, or whether it incidentally prohibited expression or religion in the course of regulating conduct.<sup>369</sup>

This brought Scalia to the first question at hand: Is religion to be treated differently from speech? If the law neither regulates religious belief, nor regulates conduct because it is religious, does the Free Exercise Clause nevertheless excuse the religiously scrupled from observing a law that “requires (or forbids) the performance of an act that his religious belief forbids (or requires)”?<sup>370</sup> The Court disagreed, “as a textual matter,” with this proposition:

It is no more necessary to regard the collection of a general tax, for example, as “prohibiting the free exercise [of religion]” by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as “abridging the freedom . . . of the press” of those publishing companies that must pay the tax as a condition of staying in business.<sup>371</sup>

Scalia’s opinion could muster no more powerful textual argument than that such interpretation was not “necessary,” and that the contrary view was “a permissible reading of the text.”<sup>372</sup> Moreover, Scalia’s choice of a tax example was more than ironic and surely not coincidental. While Scalia mustered a weak citation to a case applying the antitrust laws to the press,<sup>373</sup> conspicuously absent from his discussion was any mention of *Murdock*, or *Follett*,<sup>374</sup> or his own year-

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367. See *Smith*, 494 U.S. at 877.

368. *Id.* Scalia further explained that “[i]t would doubtless be unconstitutional, for example, to ban the casting of ‘statutes that are to be used for worship purposes,’ or to prohibit bowing down before a golden calf.” *Id.* at 877-78; see also *supra* note 314 (citing examples of religious exemption cases).

369. *Smith*, 494 U.S. at 878.

370. *Id.*

371. *Id.* (alterations in original).

372. *Id.*; see McConnell, *supra* note 7, at 1115.

373. See *Smith*, 494 U.S. at 878 (citing *Citizen Publ’g Co. v. United States*, 394 U.S. 131 (1969)).

374. Scalia’s omission of *Murdock* and *Follett* could be justified by the Court’s previous “disavow[al]” of any inconsistencies between *Texas Monthly* and *Murdock*. See

old dissent in *Texas Monthly*, in which he favorably cited those opinions with the warning that the “close question [was] not whether [religious] exemption is permitted, but whether it is constitutionally compelled.”<sup>375</sup>

If Justice Scalia invited criticism for his omissions, he nearly deflected attention from it entirely with his explosive assertion—backed by quotation of Justice Frankfurter’s opinion in *Gobitis*—that “[w]e have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”<sup>376</sup> The proposition that the Court had *never* thought that free exercise claims excused compliance was so outlandish that it diminished the credibility with which the Court announced its new position.<sup>377</sup> If the Court had so misread its prior cases as to believe seriously that it had never thought the Free Exercise Clause compelled exemption, then maybe the Court was equally wrong on the proper construction of the Free Exercise Clause itself.

I will not defend *Smith* on this proposition. As I have explained elsewhere, there is some merit to Scalia’s claim that the cases in which the Court appeared to excuse the religiously motivated involved other First Amendment rights—speech, press, parental rights—but Scalia’s explanation fell far short of the mark.<sup>378</sup> Indeed, even having staked the absolute position that the Court had “never” so honored the Free

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Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 21 (1989). Scalia did refer to *Murdock* and *Follett* later in his *Smith* opinion, but only then as examples of decisions in which the Court had “bar[red] application of a neutral, generally applicable law to religiously motivated action” in conjunction with other constitutional protections. *Smith*, 494 U.S. at 881. His characterization of *Murdock* and *Follette* is nonsensical, because, in *Smith*, the right “conjoined” with the Free Exercise claim would have been free speech. That puts Scalia in the position of approving exemptions from generally applicable laws only so long as a free exercise claim is joined with a free speech claim.

375. *Tex. Monthly*, 489 U.S. at 41 (Scalia, J., dissenting). Scalia’s opinions in *Texas Monthly* and *Smith* can be reconciled, but not on the rationale offered by Scalia in the two cases. In *Texas Monthly*, Scalia did not have to conclude that the Free Exercise Clause *compelled* the exemption (although it was rhetorically powerful for him to be able to suggest that exemption might be compelled); instead, all that Scalia had to conclude was that the Establishment Clause did not *prohibit* Texas’s religious materials exemption. Statutory exemptions, in Scalia’s post-*Smith* view, are permissible, even if not constitutionally required: “[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.” *Smith*, 494 U.S. at 890. Indeed, Scalia invited Oregon to statutorily exempt sacramental peyote use. *See id.*

376. *Smith*, 494 U.S. at 878-79.

377. *See* Gordon, *supra* note 7, at 97 (referring to the Court’s statement as “almost Orwellian” and “a manifestly false statement of history”); McConnell, *supra* note 7, at 1120 (“[T]he Court’s use of precedent is troubling, bordering on the shocking.”).

378. *See* Bybee, *supra* note 150, at 923-26.

Exercise Clause, Scalia himself conceded that the unemployment insurance cases were an embarrassment to his characterization.<sup>379</sup>

Whatever credibility Justice Scalia might have garnered for his revisionist history was likely squandered at the outset by his quoting Justice Frankfurter's opinion in *Gobitis*.<sup>380</sup> Scalia's reference to *Gobitis* squarely supported his proposition, but it appeared disingenuous because Scalia failed to mention that the decision was overruled in *Barnette*.<sup>381</sup> To be sure, Scalia subsequently cited *Barnette*—quite correctly—as a case “decided exclusively upon free speech grounds . . . [that] also involved freedom of religion,”<sup>382</sup> but,

379. *Smith*, 494 U.S. at 882-85. Scalia admitted that

we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. We have never invalidated any government action on the basis of the *Sherbert* test except the denial of unemployment compensation. . . . In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all.

*Id.* at 883 (citations omitted).

The Justice rationalized *Sherbert* and the unemployment cases as schemes that granted broad discretion to the government and required individual assessments and, which, consequently, were subject to abuse. See *Smith*, 494 U.S. at 884; Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 115-19 (2000).

The better explanation may be that Scalia simply disagreed with *Sherbert* and the subsequent unemployment insurance cases, but did not have the votes to overrule them. See *Smith*, 494 U.S. at 884 (“Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.”). Even post-*Smith*, Justice Scalia continues to assert that the First Amendment may require accommodation of religion, and he has cited the unemployment compensation cases. See, e.g., *Bd. of Educ. v. Grumet*, 512 U.S. 687, 743-44 (1994) (Scalia, J., dissenting).

380. See *Smith*, 494 U.S. at 879. Justice Scalia took a second run at history in his concurring opinion in *Boerne*, but this time he focused on the original meaning of the Free Exercise Clause. See *City of Boerne v. Flores*, 521 U.S. 507, 535-46 (1997) (Scalia, J., concurring). Justice Scalia joined all of Justice Kennedy's majority opinion except for Part III.A.1, which considered the history of Section 5 of the Fourteenth Amendment. *Id.* at 509. He reviewed this history himself in his concurrence. *Id.* at 535-46. For the leading historical studies of exemptions outside case law, see McConnell, *supra* note 327, at 1511-13 (concluding that exemptions are supported by history), and Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

381. See *Smith*, 494 U.S. at 879; FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE* 149 n.83 (1995) (calling the omission “[i]nexplicabl[e]”); McConnell, *supra* note 7, at 1124 (“Relying on *Gobitis* without mentioning *Barnette* is like relying on *Plessy v. Ferguson* without mentioning *Brown v. Board of Education*.”); David A. Strauss, *Tradition, Precedent and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1699-1700 (1991) (citing *Gobitis* “is, to draw the obvious comparison, a little like citing *Plessy v. Ferguson* without mentioning subsequent developments in the law concerning racial segregation” (footnote omitted)).

382. *Smith*, 494 U.S. at 882 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

although he had properly cited both cases and fairly represented their holdings, he utterly failed to place the two opinions in context. In his citation of *Gobitis*, Scalia *appeared* disingenuous, but was not dissembling.

b. The Rise of Theory

*Smith*, as a discourse on the text of the Free Exercise Clause and its history, is a mess, and unnecessarily so. *Smith* had at its core an approach to the First Amendment that Scalia had been working on for a long time. Critical to Scalia's approach was the fact that Oregon had the right to prohibit the use of peyote.

"[I]f Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon," [and] "the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation."<sup>383</sup>

Under a first reading, this statement appears "tautological [because] there is no constitutional right to engage in conduct that a state can constitutionally prohibit."<sup>384</sup> The statement is not tautological at all, however. The claim to religious exemption is a claim that the law—whatever its applicability to everyone else—cannot lawfully be applied to an individual or group of individuals. The claim to exemption goes to the question of the state's power in a particular case, but not to the question of its power generally. For example, had *Smith* and *Black* prevailed on some variation of the *Sherbert* balancing test, Oregon would have had a constitutional power to prohibit peyote use among those who would not use it for religious reasons, but not the power to prohibit its use among adherents to the Native American Church. Oregon's *power* to prohibit peyote use would be of limited, not general, applicability. In one sense, we might say that Oregon lacked power over some group, but the better terminology would be that *Smith* and *Black* (and others like them) were immune from prosecution. What Scalia meant was that Oregon had the general power to prohibit the use of peyote despite the fact that peyote is predominantly used for religious purposes.

The Oregon statute dealt with the general use of peyote and did not make distinctions based on the purposes for its use.<sup>385</sup> Because the

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383. *Id.* at 876 (quoting *Employment Div. v. Smith*, 485 U.S. 660, 672 (1988)).

384. Gordon, *supra* note 7, at 94.

385. *Smith*, 494 U.S. at 874.

statute prohibited the use of peyote generally, it necessarily prohibited the *religious* use of peyote. By contrast, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, decided three years after *Smith*, Justice Scalia joined the Court in striking down a city ordinance barring the ritual slaughter of animals.<sup>386</sup> In *Lukumi*, the statute dealt with ritual slaughter, not slaughter for other purposes (such as consumption).<sup>387</sup> Thus, in *Lukumi*, ritual use was an element of the crime, while in *Smith*, religious use was irrelevant.<sup>388</sup> In *Smith*, but not in *Lukumi*, the burden to religious worship was “not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision.”<sup>389</sup>

For Scalia, the essence of good government is clear rules, generally applied. Governments risk illegitimacy when they adopt rules that single out particular groups in society for benefits or burdens. Thus, when government deliberately draws distinctions on the basis of race or political views, then, according to Scalia, the Court must find a compelling governmental interest to ensure the “constitutional norms” of “equality of treatment and an unrestricted flow of contending speech.”<sup>390</sup> The Court employs the compelling governmental interest test (as described in *Sherbert* and *Yoder*) in such cases to ensure fair treatment when the government itself would draw distinctions.<sup>391</sup> Scalia argued that the *Sherbert* test, applied in *Smith*, would have forced the Court to treat groups differently when the state was inclined to treat them the same.<sup>392</sup> Thus, for Scalia, the *Sherbert* test would make every law “*presumptively invalid*, as applied to the religious objector,”<sup>393</sup> which is a strange reversal of the way the Court ordinarily approaches laws of general applicability.

Although Justice Scalia did not suggest it, there is another way to apply the *Sherbert* compelling state interest test in *Smith* and still honor the “constitutional norm[]” of “equality of treatment.”<sup>394</sup> The

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386. 508 U.S. 520, 523-24 (1993). Justice Scalia authored a brief concurring opinion to explain why he joined most of the majority opinion. *Id.* at 557 (Scalia, J., concurring in part and concurring in the judgment). For an insightful discussion of Scalia’s *Lukumi* concurrence, see Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519, 571-75 (1994).

387. *Lukumi*, 508 U.S. at 524-27.

388. *Id.* at 526-28; *Smith*, 494 U.S. at 882-90.

389. *Smith*, 494 U.S. at 878.

390. *Id.* at 886; see also Gedicks, *supra* note 379, at 78-121 (discussing the Court’s claim).

391. *Smith*, 494 U.S. at 884.

392. *Id.* at 882-84, 888.

393. *Id.* at 888.

394. *Id.* at 886.



Court could afford all persons the benefit of whatever exemption the religious adherent obtains. In other words, if Oregon's peyote law burdened Smith and Black's free exercise and Oregon could not offer a compelling governmental interest, then the peyote law would not only be unconstitutional as applied to Smith and Black, but it would be unconstitutional as applied to everyone else as well. As a matter of equality, the remedy is perfectly sound, and it is consistent with both Justice Scalia and Justice Jackson's views of the importance of general rules. What is missing from Justice Scalia's analysis is any sense of the what the constitutional text permits or demands. As I discuss in the next Part, a careful reading of the Constitution vindicates Scalia and Jackson's overall approach to the place of the First Amendment.

#### IV. COMMON GROUND: A POWER THEORY OF THE FIRST AMENDMENT

Perhaps no Justice of this generation has worked as hard at the text and text-based theories of the Constitution as Justice Scalia. Although his opinions in the First Amendment area show a determined search for rules and a willingness to read precedent and history closely, Justice Scalia has made no effort to deal directly with the text of the First Amendment or to locate it within the larger structure of the Constitution. In fine, Scalia has not done for the First Amendment what he has done for separation of powers, federalism, or statutory construction.

Like Justice Scalia, Justice Jackson worked very hard at constitutional theory, though he never demonstrated Justice Scalia's preoccupation with the text. And while there is a pattern to Jackson's First Amendment cases through which a theory emerges, even Jackson never attempted to offer a broad vision of the First Amendment in the same way that he did for separation of powers or federalism.

Despite this dearth of textual exposition and theory from two of this century's most driven Justices, there is a theory of the First Amendment, based on a close reading of the text of the Amendment and its place in the larger structure of the Constitution, that brings together the First Amendment approaches of both Justice Jackson and Justice Scalia. But in order to find this common ground between Jackson and Scalia, we must approach the First Amendment on its own terms.

The First Amendment appears as part of a larger document whose principal focus at the time it was written was the distribution of power within a new federal government, the relationship between the

new federal government and existing state governments, and the withdrawal of power from federal and state governments. The Constitution employs two different forms when it withdraws government power. On one hand, it creates personal immunities against certain kinds of governmental action, such as unreasonable searches and seizures, coercion of self-incriminatory statements, and taking private property for public use without just compensation.<sup>395</sup> On the other hand, the Constitution also disables government from enacting certain categories of laws, such as those making past actions a crime or punishing named individuals.<sup>396</sup> Viewed in its larger context, the First Amendment is of the latter form. It disables the government from exacting a class of laws; the government violates the imperatives of the First Amendment when it has “made” a law within the prohibited class.<sup>397</sup> As I explain in this Part, the First Amendment is an immunity of general applicability, which means that when the government has violated anyone’s First Amendment rights, the law (as applied to everyone) is unconstitutional. That is, the First Amendment “withdraw[s] . . . from the vicissitudes of political controversy . . . all official control” of certain subjects.<sup>398</sup> It leaves the government with no power to make laws prohibiting the free exercise of religion or abridging the freedom of speech or press.

#### A. *The Constitution and the Allocation of Power*

The Founders did not conceive of the United States Constitution as the ultimate means of guaranteeing the political and personal autonomy of individuals.<sup>399</sup> That function was served by other charters and documents—most importantly state constitutions—almost all of which contained some kind of bill of rights.<sup>400</sup> Instead, the Constitution protected individuals through the careful structuring of the federal government.<sup>401</sup> The Constitution recognized two distinct levels of government, although it only conferred power to one of those levels of government; in so doing, the Framers confronted two separate problems of divided government. They first created and then separated the powers of a national government and, second, they

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395. See, e.g., U.S. CONST. amend. IV; *id.* amend. V.

396. See, e.g., *id.* art. I, § 9, cl.3.

397. See *id.* amend. I.

398. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 642 (1943).

399. See Thomas B. McAfee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 18 (1998).

400. See *id.*

401. See *id.*

defined a relationship between the new national government and existing state governments.<sup>402</sup> Separation of powers describes three entities exercising the power of a single government, while federalism describes the relationship between two distinct governments.

The Constitution confers power—the “Powers herein granted”<sup>403</sup>—on a national government, but it does not confer power on state governments, which derive their power from their own state constitutions. As we approach questions of governmental power, we begin from different propositions depending on whether the issue is one of state or federal power. Separation of powers questions begin from the premise that the national government, as a whole, possesses the power at issue; the question is: To which department has the power been assigned? Federalism questions begin from the quite different premise that states have the general power of a sovereign, and the national government is a government of limited powers. As a government of enumerated powers, the federal government must affirmatively prove the source of its powers. By contrast, we invert that assumption with respect to state governments: We presume that the states possess governmental power (that the states have “reserved” their power) unless it can be shown that they do not.<sup>404</sup> Finally, the Framers declared certain matters, including ex post facto laws, bills of attainder, and titles of nobility, beyond the competence of any governmental action, whether state or national.<sup>405</sup>

In order to describe succinctly this complex array of powers allocated to different branches of the national government, reserved to the states, or denied to any government, the Framers employed a familiar mechanism: the language of the common law.<sup>406</sup> Such a choice may seem obvious to us, but it was not as obvious then. The common law largely regulated relationships between individuals, rather than relationships between governments or between individuals and governments.<sup>407</sup> Furthermore, the common law grew out of a

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402. THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961) (“In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments.”).

403. See U.S. CONST. art. I, § 1.

404. See *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (“[E]xcept as restrained and limited by [the Constitution, the states] possess and exercise the authority of independent States.”).

405. See U.S. CONST. art. I, § 9, cls. 3, 8; *id.* § 10, cl. 1.

406. See MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* 17 (1965); see also Pritchard & Zywicki, *supra* note 270, at 466-67 (discussing the influence of the common law on the Constitution).

407. See Pritchard & Zywicki, *supra* note 270, at 460-68.

tradition of incremental change through judge-discovered law.<sup>408</sup> The Constitution suggested a different approach, one that shared as much with the civil law traditions of a written code as with the unwritten common law traditions.<sup>409</sup>

The common law laid out a binary scheme that treated all legal relationships as relationships between persons.<sup>410</sup> As Oliver Wendell Holmes described it: "All proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected."<sup>411</sup> The Constitution mediated a triangular relationship between the federal government, the states, and the people. In some instances, the Constitution describes relationships between governments and all the people (what might be called an in rem relationship), while in other instances it describes relationships between governments and individuals (what might be called an in personam relationship).

One of the insights of the common law's binary scheme is that it is irrelevant to speak of a "right" without speaking of its respective correlative, a "duty." It makes no legal sense (although it would have meaning in common discourse) to say, for example, "John has a right to \$10," without knowing who owes John the money. It is even incomplete to state that "John has a right to \$10" and "Mary owes \$10," unless we know that John and Mary have a legal relationship and "Mary owes John \$10." Once we have described a legal

408. See *id.* at 467.

409. Although Chief Justice Marshall wrote that the Constitution incorporated "only [the] great outlines" of the law, lest it "partake of the prolixity of a legal code," the Constitution was, nevertheless a codification that shared in the European experience with civil codes. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). Justice Scalia recognized this connection in his provocative essay "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws." See Scalia, *Common-Law Courts*, *supra* note 29.

410. See Bybee, *supra* note 151, at 1546-52 (consciously employing the terminology of Wesley Hohfeld); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld, *Fundamental Legal Conceptions II*]; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter Hohfeld, *Fundamental Legal Conceptions I*].

411. *Tyler v. Judges of the Court of Registration*, 55 N.E. 812, 814 (1900). As Hohfeld described these common law relationships or "fundamental legal conceptions," "paucital rights" referred to rights held by an individual or a discrete group of individuals (rights held in personam), while "multital rights" referred to rights held by or against the population at large—property rights being but one example of such rights. See Hohfeld, *Fundamental Legal Conceptions II*, *supra* note 410, at 718-20. Hohfeld employed four sets of terms which, he believed, described all common law relationships: rights/duties, privileges/no rights, power/liability, and immunity/disability. See *id.* at 710; Hohfeld, *Fundamental Legal Conceptions I*, *supra* note 410, at 30-32.

relationship, it can be described from the perspective of either party; it can be described as either a right or a duty. Thus, "Mary has a duty to pay \$10 to John" is equivalent to "John has a right to \$10 from Mary."

For my purposes, the most important of the binary relationships are the correlatives "immunity/disability." Following my previous example, if Mary is legally immune from some action by John, then John is legally disabled with respect to Mary. To state that John is legally disabled, is to imply, necessarily, that there exists some party, Mary, who is possessed of an immunity. In this binary scheme, we may accurately describe the relationship from the perspective of either party.

The legal relationships described by the Constitution among the branches of the federal government, between the federal government and state governments, and between federal and state governments and the people, fit well within this binary scheme. The critical sections for defining Congress's powers are Sections 8, 9, and 10 in Article I. Section 8 contains the bulk of the affirmative grants of power to Congress.<sup>412</sup> A grant of power to Congress necessarily implies that some person or group of persons is subject to a liability, or stated differently, someone must exist who is subject to the powers of Congress defined in Section 8. Article I, Section 9 describes disabilities, or things that the federal government cannot do.<sup>413</sup> Article I, Section 10 contains corresponding disabilities for the states, which the Court in *Fletcher v. Peck* described as a "shield [for the people of the United States] and their property" and thus a "bill of rights for the people of each state."<sup>414</sup> Since some of the prohibitions found in Section 10 are repeated in Section 9 (e.g., bills of attainder, ex post facto laws, titles of nobility), we could easily describe Section 9 as a bill of rights for the people of the United States. Section 10, however, does not only grant immunities to people. When Section 10 disables the states from entering into treaties, granting letters of Marque and Reprisal, and coining money<sup>415</sup> it guarantees to Congress or the President that their respective powers over treaties,<sup>416</sup> letters of Marque and Reprisal,<sup>417</sup> and coining money<sup>418</sup> are exclusive. The disabilities in

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412. See U.S. CONST. art. I, § 8.

413. See *id.* art. I, § 9.

414. 10 U.S. (6 Cranch) 87, 138 (1810); see U.S. CONST. art. I, § 10; see also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 343 (1816) (referring to Article I, Section 10 as "a long list of disabilities and prohibitions imposed upon the states").

415. See U.S. CONST. art. I, § 10, cl. 1.

416. See *id.* art. II, § 2, cl. 2.

417. See *id.* art. I, § 8, cl. 11.

418. See *id.* art. I, § 8, cl. 5.

Section 10 have become guarantees of state noninterference with the exercise of corresponding national powers.

Although Sections 9 and 10 contain many of the same *substantive* provisions, the Founders drafted Sections 9 and 10 differently in *form*, and with good reason. The most striking difference is that Section 9 is written in passive voice: “The Privilege of the Writ of Habeas Corpus shall not be suspended;” “No Tax or Duty shall be laid;” “No Preference shall be given.”<sup>419</sup> By contrast, the three clauses in Section 10 are written in active voice; each begins, “No State shall.”<sup>420</sup> Certainly Section 9 *could* have been written in active voice to parallel Section 10: “Congress shall pass no Bill of Attainder or ex post facto Law.” I said “could,” but there is a caveat. A careful examination of the Framers’ stylistic choices suggests these were deliberate and significant. The Framers drafted Section 9 in passive voice because Congress is not the only federal branch of government disabled by Section 9. The disabilities in Section 9, except where the Constitution provides otherwise, apply to all of the departments of the United States, not just to Congress. As Chief Justice John Marshall pointed out, “[s]ome [Section 9 disabilities] use language applicable only to [C]ongress: others are expressed in general terms.”<sup>421</sup> For example, the Habeas Clause provides that the Great Writ “shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>422</sup> Who determines when “public Safety” requires suspension of Habeas Corpus?: Congress? the Supreme Court? the President? President Lincoln argued that the decision may be made by the President since “the Constitution itself, is silent as to which, or who is to exercise the power.”<sup>423</sup> Chief Justice Taney argued that the suspension power belonged exclusively to Congress because it was found in “the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department.”<sup>424</sup> Although the matter is not free from

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419. *Id.* art. I, § 9, cls. 2, 5, 6.

420. *See id.* art. I, § 10.

421. *Barron v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 248 (1833); *see* Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 5-6 (1998) (noting that Section 9 “proclaim[s] that ‘x shall not be done’ without specifying *who* may not do x”).

422. U.S. CONST. art. I, § 9, cl. 2.

423. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), reprinted in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953).

424. *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487). Lincoln made his argument in direct response to Taney’s opinion two months earlier in *Merryman*.

doubt, Lincoln's argument finds greater support in the structure I have described.<sup>425</sup> My argument is strengthened by the fact that, in two instances, Section 9 makes clear that the disability applies uniquely to Congress. The Migration Clause provides that "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress . . . ."<sup>426</sup> In contrast, the Bill of Attainder and Ex Post Facto Clause emphasizes that "[n]o [such] Law shall be passed."<sup>427</sup>

By disabling one or more of the departments of the federal government, Section 9 creates an immunity in someone. But in a Constitution tasked with expressing complex relationships between and among branches of a national government, states, and people, identifying the party possessing the immunities described in Section 9 is not always as easy as it seems. We would naturally characterize the Habeas Clause as creating an immunity in the people, whose right to the Great Writ may not be suspended, except when public safety demands it in case of rebellion or invasion.<sup>428</sup> But the Habeas Clause has a federalism component.<sup>429</sup> The states are also beneficiaries of

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Rather than openly defy the Court, however, Lincoln responded to Taney on the merits. See Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 95 (1993). Interestingly, Lincoln responded to Taney in the passive voice, which, Professor Paulsen notes, "provide[d] a sense of detachment and objectivity and perhaps [allowed Lincoln] to remove, diffuse, or depersonalize blame." *Id.* at 94 n.45.

Passive voice usefully disguises the actor ("my keys got lost" instead of "I lost my keys"), which, in Lincoln's case, allowed him to disagree with the Chief Justice without provoking a constitutional crisis by challenging the Chief Justice directly. In the case of Article I, Section 9, passive voice usefully disguises the federal branches to which each provision applies.

425. As an example, the Appropriations Clause, U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."), binds all three departments, but it is the President, not Congress or the Judiciary, that has the greatest opportunity and temptation to violate it.

426. U.S. CONST. art. I, § 9, cl. 1.

427. *Id.* art. I, § 9, cl. 3. The Treason Clause is also stated in passive voice. See *id.* at art. III, § 3, cl. 1 ("No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."). Because of its location in Article III, we naturally assume that the Clause is "addressed especially to the courts." See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803). But as Chief Justice Marshall recognized, by stating the privilege as a personal privilege belonging to the "Person" accused of treason, the Constitution effectively disabled both the courts and Congress, which might be tempted to "change that rule." See *id.*; U.S. CONST. art. III, § 3, cl. 2 (granting Congress the "Power to declare the Punishment of Treason").

428. See U.S. CONST. art. I, § 9, cl. 2.

429. See Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 865, 871-72 & n.42 (1994) ("[T]here is some reason to believe that the Framers designed the

Congress's disability, because Congress may not suspend the states' privilege of granting or denying habeas.<sup>430</sup> The Habeas Clause (found in Section 9, but not in Section 10) is a guarantee to federal prisoners and a promise of noninterference to the states; both can lay legitimate claim to the immunity created through the disability in Section 9. Similarly, the Bill of Attainder and Ex Post Facto Clauses in Section 9 benefit individuals, but John Hart Ely has added that "[t]he Ex Post Facto and Bill of Attainder Clauses prove on analysis to be separation of powers provisions, enjoining the legislature to act prospectively and by general rule (just as the judiciary is implicitly enjoined by Article III to act retrospectively and by specific decree)."<sup>431</sup> The clauses thus serve as a guarantee to the federal judiciary that Congress will not usurp judicial functions.<sup>432</sup> It is easy to identify individuals as the beneficiaries of these congressional disabilities, but it would be a mistake to identify only individuals without considering—in a scheme in which separation of powers and federalism matter—who else may lay claim to the immunity.

In contrast to Section 9, Section 10 prohibits actions by the "state," without presupposing the structure of state governments. It was sufficient for the Constitution to prohibit action by the state, whatever its governmental organization. This is not so in Article I, Section 9. In a document concerned with allocating power between state and federal governments and, within the federal government, among three branches, it mattered for separation of powers purposes whether the prohibition applied to the federal government as a whole, or to one or more branches specifically. The use of the passive voice in Section 9 was a simple way of placing, in parallel form, a series of disabilities, most of which applied to all departments and some of which applied to only one department. Since no such distinction was required to disable the states, the Framers wrote the Section 10 disabilities in parallel form and active voice. This choice of stylistic

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Suspension Clause principally to promote federalism—to ensure that Congress would not interfere with the power of *state* courts to afford habeas relief to federal prisoners.”).

430. *See id.*; *see also* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 113-14 (1825) (explaining that the privilege of the writ of Habeas Corpus should be applied against both the federal government and the states).

431. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 90 (1980); *see also* *United States v. Brown*, 381 U.S. 437, 442 (1965) (“[T]he Bill of Attainder Clause was intended . . . as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function.”); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1205 (1991) (“[The bill of attainder and ex post facto clauses] obviously have structural overtones sounding in separation of powers.”).

432. *See* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (holding that a congressional attempt to reopen a judgment violates separation of powers).



forms allowed the Framers to express complex relationships implicating federalism and separation of powers concepts succinctly and efficiently.

*B. The Structure of the Bill of Rights*

1. The Second Through Eighth Amendments: Privileges and Immunities as Rights Held In Personam

A similar stylistic structure awaits us in the Bill of Rights. First, we should observe that the Bill of Rights is not a bill of *rights* in any sense that people have claims enforceable against the government.<sup>433</sup> Amendments II through VIII are written as privileges and immunities, while the First Amendment is a disability.<sup>434</sup> In contrast to Section 9 of Article I, which consists of disabilities on the government and alternatively, protects people, states, or other branches of government, Amendments II through VIII grant privileges or immunities specifically to identified individuals or groups; these can be described as “paucital” rights or rights *in personam*.<sup>435</sup> The various guarantees protect “people” (Amendments II, IV), “person” (Amendment V), “owner” (Amendment III), and “accused” (Amendment VI).

Let us take the Fourth Amendment as an example. It provides in part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”<sup>436</sup> The right belongs to “the people,” who are immune from certain kinds of actions involving their persons, houses, papers, and effects. But against whom is the immunity secured? Who bears the correlative disability? The question is perhaps not as obvious as it might first appear. We suspect from what we know about the purposes and structure of the original Constitution, that the guarantee is good at least against the federal government, but nothing in the plain language of the Fourth Amendment restricts it to the federal government. In the amendment’s indistinct format, it might just as easily apply to the states, or even to private persons.<sup>437</sup> One of the

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433. Professor Howe points to two possible exceptions to this rule: the right of the accused to a speedy and public trial, and the right to jury trial in common law suits exceeding twenty dollars in value. See HOWE, *supra* note 406, at 16-17; U.S. CONST. amends. VI-VII.

434. See U.S. CONST. amends. II-VIII.

435. See *supra* note 417.

436. U.S. CONST. amend. IV.

437. If so, then the Fourth Amendment constitutionalized the common law crimes of trespass and burglary. See David M. Skover, *The Washington Constitutional “State Action” Doctrine: A Fundamental Right to State Action*, 8 U. PUGET SOUND L. REV. 221, 244-45 (1985) (arguing that provisions in the state constitution phrased in passive voice apply to private persons as well as public entities).

earliest commentators, William Rawle, contended that most of the Bill of Rights applied to the states.<sup>438</sup> Furthermore, a modern scholar, William Crosskey, noting the differences in linguistic style within the Bill of Rights, argued that “the only reasonable explanation for the variance in form thus existing between the First Amendment and all the others of the first eight is that the others were *intentionally* drawn in general terms, in order to apply both to the nation and to the states.”<sup>439</sup> Chief Justice Marshall, examining the structure of Article I, Sections 9 and 10, disagreed.<sup>440</sup> He explained that the Framers used very specific language when they wished to disable the states and concluded that the Bill of Rights did not apply to the states.<sup>441</sup> Marshall recalled that the states adopted the amendments as protection against federal encroachment, and he observed that at the time of ratification the states had their own constitutional guarantees.<sup>442</sup> “Had [C]ongress engaged in the extraordinary occupation of improving the constitutions of the several States . . . they would have declared this purpose in plain and intelligible language.”<sup>443</sup> Marshall undoubtedly reached the right conclusion, but he failed to explain the use of the passive voice in the Bill of Rights.

So why did the Framers not state the immunities in the Bill of Rights as disabilities and write them in active voice? The Framers could just have easily stated, “Congress shall not violate the right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures . . .” There is a perfectly sound explanation for why the Framers did not adopt such language. First, the Framers wrote the amendments in passive voice to ensure that they applied to the executive and judicial departments as well.<sup>444</sup> In fact, especially with respect to the Fourth Amendment, citizens had more to fear from collusion between the executive and judicial departments than from Congress. The Framers intended that the

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438. RAWLE, *supra* note 430, at 124 (noting that the Fourth Amendment is stated in “general terms which prohibit *all* violations of these personal rights, and of course extend both to the state and the United States”); *see also id.* at 120-21 (explaining that “some of the [Bill of Rights] are to be . . . generally construed, and considered as applying to the state legislatures as well as that of the Union”).

439. 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1058 (1953). If this was not the First Congress’s intention, Crosskey claims, “its draftsmanship of these amendments was bungling, in an extreme degree.” *Id.*

440. *See* *Barron v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 247 (1833).

441. *Id.* at 247-49.

442. *Id.* at 249-50.

443. *Id.* at 250.

444. *See supra* notes 417-424 and accompanying text.

amendments secure rights of people, persons, and owners against all of the departments of the federal government, and the simplest way to accomplish that was to draft the amendments in the passive voice.<sup>445</sup>

Moreover, not only is this explanation consistent with the structure of the rights secured in Article I, Section 9, but it is consistent with the way in which James Madison proposed his amendments to the Constitution in the First Congress. Madison recommended that his proposed amendments be included in the various articles of the Constitution to which they naturally belonged.<sup>446</sup> Most of what became the Bill of Rights under Madison's proposal would have been added to Section 9 and not left free-standing at the end of the Constitution.<sup>447</sup> Had they done so, the Framers would have made it indisputable that the people held these immunities against the federal government alone. Madison had drafted his proposed amendments in the same form as Section 9, to which they would belong.<sup>448</sup>

## 2. The First Amendment: Disabilities as Rights Held In Rem

That brings us back to the First Amendment, which is unique not only among the Bill of Rights, but among any of the disabilities found in the body of the Constitution. Amendments III through VIII address boundaries between the federal government and individuals that demand some kind of rule.<sup>449</sup> Quartering soldiers, searching homes,

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445. There is an additional reason why the Framers might have chosen to avoid the active voice when referring to all three branches of the federal government: It served to downplay the creation of a powerful central government. The term "federal government" does not appear in the Constitution. In fact the only term used that includes all three branches is "United States," which was of sufficient ambiguity that the term was generally rendered plural until after the Civil War. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 846 n.1 (1995) (Thomas, J. dissenting) ("In the Constitution, after all, 'the United States' is consistently a plural noun."); John Randolph Prince, *Forgetting the Lyrics and Changing the Tune: The Eleventh Amendment and Textual Infidelity*, 104 DICK. L. REV. 1, 16 n.65 (1999).

446. *See* Edward Hartnett, *A "Uniform and Entire" Constitution; or, What If Madison Had Won?*, 15 CONST. COMMENT. 251, 252 (1998).

447. Professor Hartnett concludes that the First, Second, Third, Fourth, Eighth, and Ninth Amendments, plus portions of the Fifth and Sixth Amendments, would have been inserted into Article I, Section 9. *See id.* at 252. The Seventh Amendment and portions of the Fifth and Sixth Amendments would have been inserted into Article III. *See id.* at 259. The Tenth Amendment would have become Article VII and Article VII would have been renumbered as Article VIII. *See id.* at 258-64; *see also* EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 33-38 (1957) (discussing Madison's proposed amendments).

448. *See* Hartnett, *supra* note 446, at 252-53.

449. I will set to one side the Second Amendment. It is not critical for my purposes that I resolve whether that Amendment protects states or individuals. *See* 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 894-903 (3d ed. 2000); Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157 (1999). I should at least observe here that the

holding persons for crimes, and conducting criminal and civil trials all concern sovereign powers granted the new government. The Founders did not expect the government to govern without holding at least some ordinary police powers; thus, a declaration of the rights of citizens with respect to the inherent powers of the government was both necessary and inevitable.<sup>450</sup> The new government, pursuant to its war powers, might quarter soldiers in peace, but it could not do so without the consent of the owner.<sup>451</sup> It might conduct searches and seizures, but only if they were reasonable and only after the proper issuing of a warrant.<sup>452</sup> In the conduct of criminal trials, it must afford due process, an impartial jury, the opportunity to confront witnesses, and the assistance of counsel to the accused.<sup>453</sup> These privileges and immunities are a kind of procedural constraint—they do not restrain the government from acting at all in a particular area, but restrain the way the government conducts its legitimate functions.<sup>454</sup> The rights found in Amendments III through VIII are personal privileges or immunities; they are rights in personam against the government, and may be waived.<sup>455</sup>

The relationship between government and people regarding religion, speech, press, and petition, however, involves a different kind of boundary, and the Framers dealt with it differently. Instead of simply qualifying the conduct of government affairs, the First Amendment puts a category of laws beyond the competence of Congress. The disability is so complete that Congress is expressly forbidden to enact laws respecting the establishment of religion or laws abridging the free exercise of religion, freedom of speech, freedom of the press, or the right to petition the government.<sup>456</sup> By

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Amendment is drafted in the passive voice, thereby disabling Congress and the President, both of which might have the opportunity to disarm state militias or individuals. See U.S. CONST. art. I, § 8, cls. 15-16 (granting Congress the power to “call[] forth the Militia” and to provide for “organizing, arming, and disciplining, the Militia”); *id.* art. II, § 2, cl. 1 (making the President the “Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States”).

450. See Bybee, *supra* note 151, at 1555.

451. U.S. CONST. amend. III.

452. *Id.* amend. IV.

453. *Id.* amends. V-VI.

454. See Bybee, *supra* note 151, at 1555-56; Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1091 (1998); Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2351-57 (1997).

455. See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848-49 (1986).

456. See *Printz v. United States*, 521 U.S. 898, 937 (1997) (Thomas, J., concurring) (referring to the First Amendment as an example of how the Constitution “places whole areas outside the reach of Congress’ regulatory authority”); *id.* at 941 (Stevens, J., dissenting)

contrast, the rights secured in the remaining amendments do not forbid the passage of laws to define the rights conferred and, indeed, the Third Amendment contemplates that the quartering of soldiers in time of war be done "in a manner to be prescribed by law."<sup>457</sup> Congress has, from time to time, adopted rules defining or enforcing rights protected by these powers of the Bill of Rights.<sup>458</sup>

In contrast to Amendments II through VIII, the First Amendment applies, by its terms, to Congress and not to the President or the courts. The First Amendment makes this quite clear by emphasizing that Congress "shall *make* no law," where the making of laws is a duty peculiarly entrusted to Congress.<sup>459</sup> The Necessary and Proper Clause grants Congress the power "[t]o *make* all Laws which shall be necessary and proper for carrying into Execution [Congress's] foregoing Powers."<sup>460</sup> As Akhil Amar pointed out, the text of the First Amendment is an inverted Necessary and Proper Clause, suggesting that it would never be necessary or proper for Congress enact laws in violation of the First Amendment.<sup>461</sup> The fact that the First Amendment applies to Congress has some interesting implications. It may suggest nothing more than that the Framers did not fear the power of the President or the federal courts. Or, it may suggest that the Framers' principal concern was legislative prior restraints.<sup>462</sup> Because the peculiar focus of the First Amendment's disability is *Congress*, the Amendment forbids the making of laws, not just the imposing of administrative burdens. To empower Congress, however, is to empower it to enact rules of general applicability. Thus, to disable Congress is to disempower it generally or to render it incapable of enacting certain rules of general applicability. The First Amendment has become a "no-power," a disability, "a rule about rules."<sup>463</sup> As such, it is a structural right that may not be waived.<sup>464</sup>

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("[T]he First Amendment . . . prohibits the enactment of a category of laws that would otherwise be authorized by Article I . . .").

457. U.S. CONST. amend. III.

458. See, e.g., 18 U.S.C. § 3105 (1994) (defining who can serve a warrant during federal searches and seizures); *id.* § 3501 (regulating the admissibility of confessions).

459. See U.S. CONST. amend. I (emphasis added).

460. *Id.* art. I, § 8, cl. 18 (emphasis added).

461. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 37-39 (1998) [hereinafter AMAR, *THE BILL OF RIGHTS*]; Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 814 (1999) [hereinafter Amar, *Intratextualism*] ("Thus, the textual interlock between the First Amendment and the Necessary and Proper Clause was no coincidence but part of a deep design.").

462. See Bybee, *supra* note 151, at 1560-62; Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1162-1201 (1986).

463. See Harrison, *supra* note 36, at 170-71; William T. Mayton, "Buying-Up Speech": *Active Government and the Terms of the First and Fourteenth Amendments*, 3 WM.

Who, then, are the beneficiaries of the First Amendment, who necessarily possess an immunity against Congress? Does it protect those who practice religion, speak, and publish? The First Amendment protects all of these and more. As we might have anticipated, it has a separation of powers and a federalism component.<sup>465</sup> Trying to identify the beneficiaries of the First Amendment is largely irrelevant. The First Amendment creates “multital” rights, or rights in rem, and in rem rights are rights held by (or against) the world.<sup>466</sup> Once Congress is disabled from doing something, it is immaterial who the intended beneficiaries of the clause were; the disability is absolute and works to the benefit of everyone. Congress does not have the right to prohibit free exercise or free speech in some cases but not in others, nor is Congress permitted to apply a law to some persons but not to those who can demonstrate that their free exercise of religion has been prohibited or their free speech abridged. Congress is barred from “making” the law in the first place.

Although the First Amendment applies, by its terms, to Congress alone, the Court’s jot-for-jot incorporation has brought the First Amendment to the states on precisely the same terms. The First Amendment, applied to the states through the Due Process Clause of the Fourteenth Amendment, has become a subject matter disability to the states as well. Incorporation has blurred both the federalism and separation of powers aspects of the original First Amendment. The argument I have made for a power theory may lose some effect when we enforce First Amendment norms through the Due Process Clause

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& MARY BILL RTS. J. 373, 376 & n.17, 377, 390 n.71 (1994) (employing Hohfeld’s terminology and referring to the First Amendment as a “no-power”). As Professor Mayton described it, the First Amendment “primarily establish[es] speech as a common good rather than a personal right.” *Id.* at 405.

464. See *New York v. United States*, 505 U.S. 144, 181-82 (1992); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850-51 (1986); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 3 (1998).

465. The amendment binds Congress alone to prevent legislative (but not judicial) prior restraints. It also binds Congress so as not to interfere with state establishments of religion. See Bybee, *supra* note 151, at 1555-66 (discussing these points and supplying historical evidence); see also AMAR, *THE BILL OF RIGHTS*, *supra* note 461, at 33-34 (discussing federalism); Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J.L. & RELIGION 355, 371-76 (1994-95) (discussing separation of powers); Lash, *supra* note 454, at 1093-1110 (discussing federalism).

466. My deliberate choice of property terms to characterize the First Amendment may not be a purely rhetorical or analytical device. James Madison understood the “freedom of speech as a type of property right inhering in individuals.” John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 64-65 (1996).

of the Fourteenth Amendment.<sup>467</sup> Since the Due Process Clause of the Fourteenth Amendment benefits “persons,” we might argue that First Amendment rights held against the states should be personal rights and of a different content or tenor than the First Amendment rights as applied to the federal government. Such an argument finds support in the earliest Due Process cases under the First Amendment, but the Court has long since rejected the notion that different standards apply to federal and state actions.<sup>468</sup> If the Court remains serious about its jot-for-jot incorporation, then whatever content of First Amendment rights is applied to Congress should bind the states, as if a similar provision (“No state shall make a law . . .”) had been written originally into Article I, Section 10.

Under the “power theory” of the First Amendment, any law enacted by Congress (or the states) that violates the First Amendment is beyond the power of Congress (irrespective of the enumerated powers) and the states (irrespective of any powers reserved). That is, any government that has made a law respecting the establishment of religion, prohibiting its free exercise, or abridging the freedom of speech, press, or petition, has acted beyond its powers, and the law is void.

### C. *Justice Jackson, Justice Scalia, and the Power Theory*

#### 1. The Power Theory and Exemptions

The power theory that I have described in the preceding subpart explains the First Amendment views of both Robert Jackson and Antonin Scalia. It is common ground to both Jackson and Scalia that

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467. See Amar, *Intratextualism*, *supra* note 461, at 821 (“[T]he best argument for religious exemptions lies . . . in the Reconstruction, and not in the Founding.”).

468. See *supra* text accompanying notes 148-153. The Supreme Court has denied that there is any difference between the First Amendment applied to the federal government and the First Amendment applied to the states through the Fourteenth Amendment. See Amar, *Intratextualism*, *supra* note 461, at 788-95. The Court largely ignored the views of Justices Jackson and Harlan that the Fourteenth Amendment imposed *less* strict requirements on the states than the First Amendment did on the federal government. See *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney Gen.*, 383 U.S. 413, 456 (1966) (Harlan, J., dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 288-91 (1952) (Jackson, J., dissenting); see also *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting) (noting the difference between the First Amendment as applied to Congress and as applied to the states through the Fourteenth Amendment); AMAR, *THE BILL OF RIGHTS*, *supra* note 461, at 233-34 (discussing whether the First and Fourteenth Amendments are in any way linked). The Court also thought “it would be incongruous to interpret [the Fourteenth Amendment] as imposing *more* stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government.” *Marsh v. Chambers*, 463 U.S. 783, 790-91 (1983) (emphasis added).

the First Amendment protects religious exercise from regulation as a religious exercise, speech from regulation as speech, and press from regulation as press, but that the First Amendment does not grant special privileges to persons exercising such freedoms. The First Amendment does not reach incidental regulation of matters affecting religious exercise, speech, or press so long as the regulation affects everyone equally. The First Amendment standards or rules are clear on at least this point: Whatever rule applies to one, applies to all.

Although I have not discussed in depth these Justices' views of the Establishment Clause, their power theory approach to the rest of the First Amendment is consistent with their approach to that clause as well. At least for Justice Scalia, the Establishment Clause supplies a rule against formalized religion, but does not bar churches or religiously motivated individuals from participating in public programs on an equal basis.<sup>469</sup> Just as the religiously motivated are not entitled to exemption from government requirements, they are also not specially excluded from government programs or largesse. There is a certain parallelism between the two. Although the Establishment Clause was not as well developed when Jackson was on the Court, he drew a neutral line, one that frowned upon even legislative exemptions.<sup>470</sup>

The power theory is quite consistent with Justice Jackson's approach in *Barnette*, and with his other First Amendment decisions. Consider again his striking rhetoric in *Barnette* (and again I have italicized the word "power"):

[The] validity of the asserted *power* to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of *power* that must be considered independently of any idea we may have as to the utility of the ceremony in question. . . .

. . . It is not necessary to inquire whether non-conformist beliefs will [be] exempt from the duty to salute unless we first find *power* to make the salute a legal duty.

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469. See *Agostini v. Felton*, 521 U.S. 203, 208-40 (1997); *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 822-46 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3-14 (1993); *Bowen v. Kendrick*, 487 U.S. 589, 593-622 (1988).

470. See, e.g., *Zorach v. Clauson*, 343 U.S. 306, 323-25 (1952) (Jackson, J., dissenting). Justice Jackson, dissenting in *Everson*, noted his previous disagreement with the Court over free exercise and free speech matters, and argued that "we cannot have it both ways. Religious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all." *Everson v. Bd. of Educ.*, 330 U.S. 1, 27 (1947) (Jackson, J., dissenting).



... We examine rather than assume existence of this *power* . . . .<sup>471</sup>

Jackson's conclusion that the state lacked the power to compel an "American citizen" to profess beliefs could not be further removed from the argument that West Virginia had to exempt Jehovah's Witnesses from reciting the Pledge of Allegiance. After *Barnette*, every American citizen was exempt from reciting the Pledge, without inquiry into motive.<sup>472</sup> *Barnette* contrasts with *Gobitis*, in which the Court "*assumed* . . . that power exists in the State to impose the flag salute discipline upon school children in general."<sup>473</sup> It was that assumption that Jackson believed *Barnette* overruled, not the question of whether Jehovah's Witness children alone deserved exemption from the law.

Justice Scalia's conclusion in *Smith* tracks this same logic and makes sense of Scalia's favorable citation to *Gobitis*.<sup>474</sup> When Scalia pointed out that peyote laws, applied generally, are within the proper public powers of the state, he had negated the very premise on which the First Amendment was based—that the government *lacks* the power in question.<sup>475</sup> By making this finding, the question for Scalia—are the religiously motivated exempt from laws properly enacted under the police power—was easily answered: "[A]n individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."<sup>476</sup> *Lukumi* becomes an easy case as well. It is clearly beyond the state's police power to single out religious conduct (but not similar secular conduct). The remedy, as in *Barnette*, is clear: The law is unconstitutional in its entirety, and not just as applied to the *Lukumi*.<sup>477</sup>

## 2. The Power Theory and the Core of the First Amendment

So far in my discussion of the power theory, I have avoided the difficult question of the core meaning of the freedoms of religion, speech, and press. The power theory describes an overall approach to the First Amendment and the conflict between laws of general applicability and a claim to exemption, but it does not supply a

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471. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634-36 (1943) (emphasis added).

472. *Id.* at 641-42.

473. *Id.* at 635.

474. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

475. *Id.* at 878-79.

476. *Id.*

477. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993).

substantive rule for determining when a law infringes the free exercise of religion or the freedom of speech or press. Neither Jackson nor Scalia, of course, could end their First Amendment analysis with recital of a power theory, and yet both arrived at roughly the same point on questions of substance. In cases involving content regulation, both worked generally within the Holmes-Brandeis formulation, as modified by subsequent cases.<sup>478</sup> In cases involving content-neutral restrictions on religion, speech, or press, they asked (at least rhetorically), What does the challenged law concern? Is it about religion, or is it about speech or press? For Jackson, requiring the pledge of allegiance concerned speech, whereas prohibiting doorbell ringing did not. For Scalia, regulating hate speech was about speech, whereas regulating sleeping in the park and nude dancing were not. Forbidding the ritual killing of animals was a law prohibiting the free exercise of religion; regulating the use of peyote was not.

I do not believe the power theory I have outlined compels us to accept Jackson and Scalia's views on the core of the First Amendment. Indeed, the power theory is more of a theory about *who* is forbidden to interfere with religion, speech, and press than a theory of *what* is forbidden.<sup>479</sup> It is nevertheless true that the Court must answer the "*what* is forbidden" question. Regrettably, the First Amendment provides virtually no guidance on this question, a fact amply demonstrated by Jackson and Scalia's own textless theorizing about the "core" of the First Amendment.

The power theory is not irrelevant, however, to the choice of substantive standards. The power theory will clearly influence the substantive standard chosen. Indeed, it may recommend Jackson and Scalia's views, because violation of the First Amendment means the entire law is beyond the government's legitimate powers. Accordingly, we may choose to narrow the scope of the First Amendment, because the consequences for finding a violation are so

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478. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992); *Kunz v. New York*, 340 U.S. 290, 298 (1951) (Jackson, J., dissenting); *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 443-44 (1950) (Jackson, J., concurring in part and dissenting in part); *Terminiello v. Chicago*, 337 U.S. 1, 25-28 (1949) (Jackson, J., dissenting); Scalia *supra* note 30, at 12-19.

479. See STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 21, 26 (1995) (finding that "it is futile to try to extrapolate or reconstruct a principle or theory of religious liberty from the original meaning of the religion clauses . . . [because they] were calculated merely to assign jurisdiction over matters of religion to the states"); see also Steven D. Smith, *The Religion Clauses in Constitutional Scholarship*, 74 NOTRE DAME L. REV. 1033 (1999) (responding to a critique of Smith's book found in David E. Steinberg, *Gardening at Night: Religion and Choice*, 74 NOTRE DAME L. REV. 987 (1999) (book review)).

profound.<sup>480</sup> For example, most First Amendment theories, and particularly those that address incidental (or content-neutral) burdens on free expression, involve some kind of balancing of competing interests.<sup>481</sup> In *Yoder*, the Court weighed the interests of the state in two additional years of formal schooling against the religious interests of the Amish.<sup>482</sup> When the Court determined that Amish interests outweighed the interests of the state, the Court exempted the Amish from Wisconsin's compulsory education laws.<sup>483</sup> Under a power theory, the Court may choose to balance competing interests, but the consequences of the weighing those interests are far more severe. In *Yoder*, a conclusion that Wisconsin has prohibited the free exercise of the Amish would mean that the *law* is beyond Wisconsin's legitimate powers, not just with respect to the Amish, but with respect to all of Wisconsin's children. This the Court was plainly not prepared to do.<sup>484</sup> That consequence will surely affect the weight the Court will be willing to give to the state's interest.

The power theory will not relieve us of hard questions, but it will redirect our focus. *Yoder* becomes a very different case if every eighth-grader in Wisconsin will be affected by a decision that Wisconsin's compulsory education requirement prohibits the free exercise by the Amish. The power theory has the virtue of focusing on the right questions: What counts as religion? What is speech? When is free exercise prohibited? The Court's exemption approach relieved us of these difficult questions because the consequences of overinclusion by the Court are minimal: Exempting the Amish has little affect on Wisconsin's schools; requiring South Carolina to pay unemployment to Adele Sherbert would not bankrupt the system; exempting the Socialist Workers Party from Ohio's campaign disclosure requirements does not affect the Democratic and Republican parties, about which the majority of people really care.

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480. See William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 394-95 (1989-90).

481. See, e.g., *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 740-41 (1996); *Gentile v. State Bar*, 501 U.S. 1030, 1074-75 (1991); *McDaniel v. Paty*, 435 U.S. 618, 628 n.8 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

482. *Yoder*, 406 U.S. at 214-15.

483. *Id.* at 215-19.

484. *Id.* at 213, 236 ("There is no doubt as to the *power* of a State . . . to impose reasonable regulations for the control and duration of basic education. . . . Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the *power* of the State to promulgate reasonable standards." (emphasis added)).

Adoption of the power theory would likely promote a fundamental change in the balancing formula, from an ad hoc balancing to a form of categorical balancing. It may force us to rethink our position on what counts as an incidental burden on speech and religion.<sup>485</sup> Categorical balancing—a term which I will employ here somewhat differently from the way in which it may have been previously used in First Amendment context<sup>486</sup>—is familiar in other areas of the law where the government's responsibility is clear, irrespective of the motivation of the citizens so regulated. Take one familiar example. The Freedom of Information Act (FOIA) provides that "any person" may obtain certain government files so long as the person reasonably identifies the records, and the records are not exempt from disclosure.<sup>487</sup> The phrase "any person" means what it says. If the file may be obtained by someone whose name appears in the file, it is equally available to the *New York Times*, Microsoft, Larry Flynt, or even Moammar Quadaffi. Although FOIA exempts certain records from disclosure,<sup>488</sup> when the Court considers the application of the exemption, it does not take into account the identity or motivation of the person requesting the documents.<sup>489</sup> FOIA "give[s] any member of the public as much right to disclosure as one with a special interest [in a document]."<sup>490</sup> In FOIA cases, the Court will balance the kind of information found and decide—once and for all, for everyone—whether the information should be made available under FOIA.<sup>491</sup> The only question is whether the requested material falls within one of the enumerated exceptions in FOIA; if it does not, it is available on an equal basis to everyone without any showing reason for inquiry.<sup>492</sup>

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485. See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1176, 1200-19 (1996).

486. "'Categorical' or 'definitional' balancing is the phrase ordinarily used to define the Court's content-based jurisprudence. Under this approach, the Court strictly scrutinizes all content-based restrictions except for those directed at carefully defined categories of low-value speech." Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 n.3 (1987); see also Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 939-41 (1968) (evaluating problems with "ad hoc balancing" of competing interests under the First Amendment).

487. See 5 U.S.C. § 552(a)(3) (1994).

488. See *id.* § 552(b)(1)-(9).

489. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 147 (1975).

490. *Id.* at 149; see, e.g., *EPA v. Mink*, 410 U.S. 73, 86 (1973).

491. See *United States Dep't of Justice v. Julian*, 486 U.S. 1, 17-21 (1988) (Scalia, J., dissenting).

492. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 777 (1989).

This kind of “categorical balancing” is not incompatible with the Court’s approaches in *Barnette* and *Smith*. Justice O’Connor, concurring in the judgment in *Smith*, argued that Oregon’s law should be “subject to a balancing, rather than a categorical, approach” because the “courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests.”<sup>493</sup> Justice O’Connor, like the dissenters in *Smith*, was willing to consider a “case-by-case determination” or “selective exemption in this case.”<sup>494</sup> Categorical balancing demanded by a power theory would recommend a shift in Justice O’Connor’s approach and make it more difficult for courts to engage in such ad hoc judgments.

In sum, the power theory may inform, but it will not resolve, the ongoing dispute between Justice Scalia and Justice O’Connor over whether “neutral laws of general application may be invalid if they burden religiously motivated conduct.”<sup>495</sup> The theory does not contradict Justice O’Connor’s view that the “[Free Exercise] Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law,”<sup>496</sup> but Justice O’Connor may alter her balancing calculus when she considers that any law violating the Free Exercise Clause is beyond the power of government to enact. By raising the cost of finding laws unconstitutional, the power theory may induce the Court to find fewer violations of the First Amendment.

What are the consequences of the Court finding laws unconstitutional and striking them in their entirety? One likely consequence is that legislatures will reduce the opportunity for conflict between law and religious practices by including more religious

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493. *Employment Div. v. Smith*, 494 U.S. 872, 902 (1990) (O’Connor, J., concurring in the judgment). Here, Justice O’Connor has used the term “categorical” in its more familiar, First Amendment sense of categories of speech, rather than in the sense that I have referred to as “categorical balancing.”

494. *Id.* at 899, 906 (O’Connor, J., concurring in the judgment).

495. *City of Boerne v. Flores*, 521 U.S. 507, 538 (1997) (Scalia, J., concurring); *see id.* at 546 (O’Connor, J., dissenting).

496. *Id.* at 546 (O’Connor, J., dissenting).

exemptions. The Court has generally approved such exemptions,<sup>497</sup> and Justice Scalia, in *Smith*, invited just such a result.<sup>498</sup>

### 3. The Power Theory, Overbreadth, and Standing

The power theory is also able to explain one of the seeming anomalies in Justice Scalia's First Amendment jurisprudence: the overbreadth doctrine. Because the power theory does not admit case-by-case exemptions, and goes to the heart of government power, the theory makes sense of Justice Scalia's rigorous application of overbreadth. As the Justice explained, "Where an overbreadth attack is successful, the statute is obviously invalid in *all* its applications, since every person to whom it is applied can defend on the basis of the same overbreadth."<sup>499</sup> Indeed, the power theory helps us understand why the Court has struggled with standing in the First Amendment cases generally.<sup>500</sup>

The First Amendment disables the government without specifying who is possessed of the correlative immunity.<sup>501</sup> To return to Hohfeld's usage, the First Amendment describes a multital right (or right in rem), and the standing to sue on such a right may be multital as well.<sup>502</sup> The overbreadth doctrine, which Justice Scalia characterizes as a doctrine "born as an expansion of the law of standing,"<sup>503</sup> is

497. See *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-40 (1987) (approving a statutory exemption from Title VII); see also *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 504-07 (1979) (construing a statute to avoid NLRB jurisdiction over religious schools). But see *Tex. Monthly Inc. v. Bullock*, 489 U.S. 1, 8-17 (1989) (striking a Texas statute exempting religious publications from taxation).

498. *Smith*, 494 U.S. at 890; see also *Tex. Monthly*, 489 U.S. at 41-42 (Scalia, J., dissenting) (explaining that a tax exemption on religious books is close to being a constitutionally required accommodation, and that it is certainly allowed).

499. *Bd. of Trs. v. Fox*, 492 U.S. 469, 483 (1989).

500. Compare *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 476-82 (1982) (holding that an organization lacked standing to challenge a donation of government surplus property to a religious school as a violation of the Establishment Clause), with *Flast v. Cohen*, 392 U.S. 83, 103-06 (1968) (holding that taxpayers had standing to challenge disbursements of federal funds to religious schools as a violation of the Establishment Clause); see William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 268 (1988) ("[I]t should be clear that either *Flast* or *Valley Forge* is wrongly decided."); see also Esbeck, *supra* note 464, at 33-40 (discussing the Court's struggle with the standing to raise Establishment Clause challenges by non-Hohfeldian plaintiffs).

501. "The Establishment Clause was only a prohibition of congressional power. . . . [T]here is no explicit right holder in the Establishment Clause . . . ." Robert C. Palmer, *Akhil Amar: Elitist Populist and Anti-textual Textualist*, 16 S. ILL. U. L.J. 397, 400 (1992).

502. See Fletcher, *supra* note 500, at 224 ("If a duty is constitutional, the constitutional clause should be seen not only as the source of the duty, but also as the primary description of those entitled to enforce it.").

503. *Bd. of Trs.*, 492 U.S. at 484.

simply, as Justice Frankfurter wrote, recognition of “the class for whose sake [a] constitutional protection is given.”<sup>504</sup> Where the government lacks *power* to enact a class of laws, any person who might be subject to these laws has standing; this is likely to be everyone. Accordingly, a power theory suggests that the class of First Amendment stakeholders is much broader than the class of stakeholders in other rights protected by the Bill of Rights, a principle recognized in the overbreadth doctrine.

## V. CONCLUSION

Professor Edwin Corwin once related that “Professor [Thomas Reed] Powell of Harvard carefully warns his class in Constitutional Law each year against reading the Constitution, holding that to do so would be apt to ‘confuse their minds.’”<sup>505</sup> That is, of course, the burden of a written Constitution. It not only confuses our predisposed minds, but enlightens as well, and sometimes surprises us with the consistency and coherence of its structure. That such formal consistency and coherence would attend a careful reading of the First Amendment has eluded, but should not surprise, Justices Jackson and Scalia.

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504. *Jones v. United States*, 362 U.S. 257, 261 (1960) (internal quotations omitted) (quoting *Hatch v. Reardon*, 204 U.S. 152, 160 (1907)). The First Amendment is, in this regard, unlike the Fourth Amendment, which identifies the immune party (“people . . . secure in their persons, houses, papers, and effects”) but not the government entity disabled. The Fourth Amendment creates paucital rights and, accordingly, creates standing in only a very limited group. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 111 (1983) (holding that there is no case or controversy where there is no real and immediate threat of future injury from the police); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (holding that there is no case or controversy where there is no reasonable expectation that the party will suffer illegal police conduct again); *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) (holding that past exposure to illegal police conduct is insufficient to establish a present case or controversy).

505. EDWIN S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* 13 (1941).