

## Book Review\*

THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953. BY WILLIAM M. WIECEK. Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Volume 12. New York: Cambridge University Press, 2006. 733 pp. \$100 cloth.

*Reviewed by Brannon P. Denning\*\**

¶1 Upon hearing of Chief Justice Fred Vinson’s death in 1953, Felix Frankfurter made what must rank among the nastiest comments made by one Justice about another. It was, he told a former clerk, “the first solid piece of evidence I’ve ever had that there really is a God.”<sup>1</sup> And so it has seemed to many scholars and Supreme Court observers, who often rank the Vinson Court and its members among the worst in history. William Wiecek, the Congdon Professor of Public Law and Legislation and Professor of History at Syracuse University, has set himself a difficult task overcoming the mountains of scorn scholars have heaped upon the Vinson Court (and to a lesser extent, the Stone Court) to rehabilitate a period many regard as a disappointing *entr’acte* between the overthrow of the old regime by the Hughes Court and the brave new world of the Warren Court.<sup>2</sup>

¶2 But as Wiecek points out, “[t]he 1940s Court had the responsibility of ushering American public law into the modern era, preserving its legitimacy while redirecting judicial activism into new channels appropriate to the profoundly changed circumstances of American life in the late twentieth century.”<sup>3</sup> Given the challenge it faced, he argues that the “low repute of the Court and its Justices”—especially the Vinson Court—is “undeserved.”<sup>4</sup> Both Courts, he concludes, “stood on the threshold of the modern constitutional era. American public law crossed over from

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1. *Quoted in* WILLIAM M. WIECEK, *THE BIRTH OF THE MODERN CONSTITUTION: THE SUPREME COURT, 1941–1953*, at 410 (Oliver Wendell Holmes Devise History of the Supreme Court of the United States Vol. 12, 2006). It was not the only time Frankfurter was unkind. In a letter to Learned Hand, Frankfurter, “in one of his snide moments,” wrote of Harold Burton that “one has an easy and inviting access to [Burton’s] mind. The difficulty is what one finds when one is welcomed to enter it.” *Id.* at 408. In Wiecek’s estimation, this was “the most acid comment ever made by a Justice about a colleague.” *Id.* With respect to Professor Wiecek, I still think the remark about Chief Justice Vinson is the hands-down winner.
2. *Id.* at 402 (noting the tendency of Warren Court partisans to cast “the Stone-Vinson era to the status of a tedious and futile *entra’acte*”).
3. *Id.* at 707.
4. *Id.*

classical legal thought, with its reassuring but deceptive promise of certitude, to the creative uncertainties of judicial activism in the Warren and Burger Courts.”<sup>5</sup>

¶3 The remainder of this review will sketch the challenges of the 1940s and early 1950s, the character of the Courts that confronted those challenges, and how their response played out in a few doctrinal areas described in Wiecek’s volume. The volume is so rich that space prohibits offering more than a sampling of the topics he covers; one reading the volume cover to cover (which has not always been easy to do with the Holmes Devise) will be richly rewarded for the time spent.

### Replacing Classical Legal Thought

¶4 The Hughes Court threw off the shackles of what Wiecek calls “classical legal thought,” exemplified by *Lochner* and the early New Deal cases,<sup>6</sup> which he defines as “an integrated system of beliefs about human destiny, liberty, republican government, and the nature of law.”<sup>7</sup> By 1937, this system had been overthrown,<sup>8</sup> but the Court was left with nothing to replace it. The search for a theory the Court could employ to guide its use of judicial review was to prove the major jurisprudential challenge of the Stone and Vinson Courts, though a challenge neither was able to meet.<sup>9</sup> Their failure was not for lack of trying, however.

¶5 Several potential successors to classical legal thought emerged during the 1940s and 1950s; none, however, proved the equal of the ideology that had so dominated public law prior to the late 1930s. The first was the “preferred freedoms” approach embodied famously in *Carolene Products*’s footnote four. The second and third represented the highly personal approaches of Justices Frankfurter and Black: judicial discretion and incorporation. The final approach was the Legal Process school briefly ascendant in the legal academy in the 1950s, its flame kept thereafter by devotees of Felix Frankfurter.

¶6 The quest for a suitable replacement permeates Wiecek’s volume and informs the choices that the Justices made (or didn’t make) in a number of important doctrinal areas. Therefore, even though Wiecek’s volume tends to proceed more or less chronologically, I begin with an overview of this vexing theoretical problem and with the (ultimately) unsatisfactory responses it generated.

5. *Id.* at 712.

6. See generally WILLIAM G. ROSS, *THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES* (forthcoming 2007). On “classical legal thought,” see WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937* (1998).

7. WIECEK, *supra* note 1, at 13.

8. *Id.* at 13–32 (describing classical legal thought’s rise and fall).

9. *Id.* at 709. Wiecek notes, however, that subsequent Courts have done no better. The continued proliferation of books and articles on constitutional theory are testament to the fact that academics have been equally unsuccessful.

### ***Footnote Four and the Preferred Freedoms***

¶7 In *Carolene Products v. United States*,<sup>10</sup> a footnote appeared suggesting that, in certain circumstances, the presumption of constitutionality and deference to legislatures that marked the Court's retreat from Lochnerism would be relaxed. The presumption might not operate, the Court stated, if (1) governmental action appeared to violate a specific textual prohibition; (2) if governmental action hampered political processes through which offending laws might be repealed; (3) if the laws are directed toward "particular religious, or national, or racial minorities" or other "discrete and insular minorities" that again would "tend[] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . ."<sup>11</sup> The footnote was motivated by the dual urge "to confirm the end of the old era" but without "abandon[ing] the cause of civil liberties that had secured such notable triumphs in the 1930s. . . ."<sup>12</sup>

¶8 The problem, though, was that footnote four "provided no jurisprudential justification for the new activism it called up, nor did it hint at any awareness that such a justification might be needed."<sup>13</sup> Specifically, Wiecek points out that the Justices had no basis for enforcing some textual provisions—the First Amendment, for example—more robustly than others.<sup>14</sup> Further, by elevating process over substance, the footnote "ignored what many considered the heart of constitutional adjudication" and, ironically, *introduced* values (e.g., the value of process) without defending them.<sup>15</sup> Finally, "all elements of footnote four were ipse dixits, conclusory assertions without the necessary undergirding of rationale."<sup>16</sup> By 1948, due to the deaths of several justices to whom it was especially appealing, the onset of the Cold War (which had implications for the focus on civil liberties over majoritarian decision making), and the attacks of Felix Frankfurter, it had gone "into exile."<sup>17</sup> Nevertheless, however brief its lifespan, it "set the agenda for the Court of the 1940s."<sup>18</sup>

### ***Judicial Discretion and Justice Frankfurter***

¶9 Felix Frankfurter was an early and ardent critic of the "preferred freedoms" approach implicit in footnote four. Frankfurter saw himself as heir to the tradition of Brandeis and Holmes, whose ruthless critique of classical legal thought hastened

10. 304 U.S. 144 (1938).

11. *Id.* at 152 n.4 (citations omitted).

12. WIECEK, *supra* note 1, at 122.

13. *Id.* at 123.

14. *Id.* at 137.

15. *Id.* at 141.

16. *Id.*

17. *Id.* at 131.

18. *Id.* at 142.

the latter's demise.<sup>19</sup> But, Wiecek notes, Frankfurter's "restraint" was "paradoxical" because it would depend entirely on the capacity of individual justices and judges for self-restraint. While this was something that Frankfurter was forever crowing about having, one might question Frankfurter's degree of self-awareness, the ability to staff the judiciary with similar avatars of self-control, or both. Further, "[i]n the name of judicial restraint," Wiecek remarks, Frankfurter "commandeered sweeping interpretive powers for the federal courts, the power to pick and choose among meanings to be attributed to basic social ideas of fairness and justice."<sup>20</sup> Frankfurter eschewed sources of restraint like text and history that many latter-day advocates of judicial restraint utilize.<sup>21</sup> Nor did he "suppl[y] a thought structure within which such a solution could be worked out."<sup>22</sup> Frankfurter's prescription for judicial restraint, then, was personal, almost idiosyncratic in its reliance on the judge to know when to act and when to stay his hand.

### *Hugo Black and Incorporation*

¶10 Hugo Black was Frankfurter's intellectual foil on the Court.<sup>23</sup> If, to use Sanford Levinson's terms, Frankfurter was "catholic" in his approach to constitutional interpretation and the judicial role, Black was staunchly protestant<sup>24</sup>—down to his insistence on unmediated access to the meaning of the Constitution (Black famously carried a pocket copy of the Constitution around with him) and his declaration to Eric Severeid that he saw no reason a nonlawyer could not serve on the Supreme Court. Black thought that "judicial restraint" as championed by Frankfurter, dependent as it was on the self-restraint of fallible human judges, repeated the sins of the *Lochner* era. Black searched for a more reliable fetter.

¶11 Black thought he found that in the doctrine of incorporation. It solved three problems for Black (and at least one for the Court as a whole). First, it seemed to resolve questions about the role of the Court in the post-classical legal thought era. The Court appeared to be positioning itself as protector of civil liberties in the late 1930s and early 1940s, but, as noted earlier, the *Carolene Products*/preferred-freedoms approach had problems the Court was not able successfully to address.

19. *Id.* at 90–91.

20. *Id.* at 519.

21. *See id.* (writing that, for Frankfurter, "the touchstone of meaning was judges' views, not the framers"). The same goes for those most closely associated with Frankfurter, like Alexander Bickel. *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

22. WIECEK, *supra* note 1, at 532.

23. William Douglas was Frankfurter's nemesis; the two apparently hated one another. Black and Frankfurter, toward the end of Frankfurter's career, achieved a mutual respect, which is really testament to Black's capacity for charity, given how shabbily Frankfurter sometimes treated him and how thoroughly he disparaged Black in many letters.

24. *See* SANFORD LEVINSON, *CONSTITUTIONAL FAITH passim* (1988) (describing "catholic" and "protestant" approaches to constitutional interpretation).

Incorporation, on the other hand, provided the sort of textual referent that the former theory did not: under it, the *whole* Bill of Rights—not some of it or part of it—could be enforced against state infringement of civil liberties. Finally, incorporation solved the accompanying problem of federalism. History, Black would argue until his death, demonstrated that the framers of the Fourteenth Amendment *intended* the federal government to play this role and *intended* that the entire Bill of Rights be absorbed by the Amendment and available for enforcement against the states.

¶12 Incorporation was not a new theory in the late 1940s. In fact, the Court had begun to hold, *ipse dixit*, that certain provisions of the Bill of Rights were enforceable against the states as early as 1897.<sup>25</sup> Thereafter, the Court declared that “fundamental” rights essential to “ordered liberty” would be enforced against states through the Fourteenth Amendment.<sup>26</sup> By the late 1930s, “as Black and Frankfurter were coming onto the bench, the Court had built up both a momentum and yet a confusion about [incorporation], which the two men and their colleagues would have to resolve.”<sup>27</sup>

¶13 Given Frankfurter’s predilections, he was entirely comfortable leaving incorporation as a question to be decided on a case-by-case, right-by-right basis—especially since the “ordered liberty” formulation, famously articulated by Cardozo, had such an impeccable pedigree. To Black, of course, such vague generalities were anathema; they were the gateway to unchecked judicial discretion.<sup>28</sup> If *Carolene Products* was the prism through which to view the Stone Court, incorporation served the same role for the Vinson Court.<sup>29</sup> As Wiecek puts it, “incorporation was a vehicle for divergent views of the judicial function. Expounded by Frankfurter and Black in the next decade, those views bid to replace classical legal thought at least as an explanation for the role of judges, and to identify objective restraints on their discretion.”<sup>30</sup>

¶14 Together they might have forged a common approach that could command a solid majority of the Court. But it was not to be. As illustrated by the Black-Frankfurter duel in *Adamson v. California*,<sup>31</sup> the distance between the two men in temperament, intellectual orientation, and vision of the judicial role was too great. In *Adamson*, Black poured a summer’s worth of research into a dissenting opinion that was a “set-piece assault on freestanding due process, the community-standards enterprise, and Felix Frankfurter’s judicial outlook.”<sup>32</sup> The Fourteenth Amendment, Black argued, incorporated every jot-and-tittle of the Bill of Rights.

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25. WIECEK, *supra* note 1, at 468.

26. *Id.* at 469.

27. *Id.* at 471.

28. For examples of early cases in which Black and Frankfurter clashed, see *id.* at 492–97.

29. *Id.* at 498.

30. *Id.* at 497.

31. 332 U.S. 46 (1947).

32. WIECEK, *supra* note 1, at 514.

¶15 Though Black meant the *whole* Fourteenth Amendment, he knew he couldn't rely on the most promising part, the Privileges or Immunities Clause,<sup>33</sup> which had been strangled in its crib by the *Slaughterhouse Cases*.<sup>34</sup> This forced Black to rely on the Due Process Clause of the Fourteenth Amendment, which left Frankfurter an opening he exploited. Wasn't leaning on due *process* to do *substantive* work the very sin of classical legal thought?<sup>35</sup> Moreover, as Wiecek deftly notes, "Black's literalism was deceptive and as judicially unconfining as Frankfurter's expansive due process."<sup>36</sup> Adverting to a particular piece of constitutional text (particularly a vague portion, like the Due Process Clause) meant only pushing "the whim back by one remove."<sup>37</sup>

¶16 In a sense, Frankfurter "won," because the Court never bought Black's "total incorporation" argument. Academic opinion at the time sided with Frankfurter, with Stanford's Charles Fairman writing a much-read article arguing that Black got his history all wrong.<sup>38</sup> Black and Frankfurter continued to do battle in the pages of the *United States Reports*, but, as Wiecek notes, "the academic dispute over incorporation . . . outlived the judicial contest."<sup>39</sup> Nevertheless, in an important sense, the debate between Black and Frankfurter could hardly have mattered less: with a few exceptions, the Bill of Rights applies to the states in the same way that it applies to the federal government.

### *The Legal Process*

¶17 For a brief moment, it looked as if the academy might provide a replacement for classical legal thought.<sup>40</sup> What became known as the "Legal Process" school began as an attempt to incorporate the lessons of legal realism, while avoiding the positivism ("the law is what the judges do, in fact")<sup>41</sup> that post-war scholars like Lon Fuller thought gave legal sanction to Nazism.<sup>42</sup> Groping for a kind of "secular natural law," Fuller began to think "that an understanding of law's processes could lead to discovery of the natural law of the social order."<sup>43</sup>

33. U.S. CONST. amend. XIV, § 1.

34. 83 U.S. 36 (1873); WIECEK, *supra* note 1, at 515.

35. WIECEK, *supra* note 1, at 515.

36. *Id.* at 516.

37. *Id.*

38. *Id.* at 519; *see generally* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

39. WIECEK, *supra* note 1, at 521. And it continues. Black's view, incidentally, has been largely rehabilitated and Fairman's discarded by contemporary scholars. *See generally* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

40. WIECEK, *supra* note 1, at 440–41.

41. *Cf.* KARL N. LEWELLYN, *THE BRAMBLE BUSH* 3 (Oceana Publishing 1996) (1930) ("What . . . officials do about disputes is, to my mind, the law itself:").

42. WIECEK, *supra* note 1, at 442–43, 448.

43. *Id.* at 450. On Fuller's quest for secular natural law, *see id.* at 446–50.

¶18 Fellow Harvard professors Henry Hart and Albert Sacks became the apostles of this new school of thought, which had at its center the notion of “institutional competence.” Each branch of government should do only that to which it was best suited.<sup>44</sup> Hart and Sacks would produce a famous (if never finalized) collection of materials driving this point home.<sup>45</sup> Wiecek summarizes the core of Legal Process nicely:

The men who expounded Legal Process ideas saw the legal system as being both a collection of substantive rules and “a structure of decision-making processes.” Substantive rules, such as those that impose liability for actions in tort or contract, rest ultimately on conflicting values best reconciled by the political branches, not the courts. The *processes* of law, on the other hand, are the lawyer’s domain, where legal expertise is both most needed and most readily justified. A focus on process rather than substance would enable lawyers to do their work without having to choose among the conflicting values of a heterogeneous society.<sup>46</sup>

¶19 The Legal Process school appealed to Frankfurter because of its incorporation of his views about judicial restraint,<sup>47</sup> and its cause was taken up by his former clerks who went into the academy, like Alexander Bickel, Harry Wellington, and Philip Kurland, each of whom criticized (often with Frankfurter’s encouragement) what they saw as shoddy craft in Supreme Court opinions.<sup>48</sup>

¶20 But like the other pretenders to classical legal thought’s vacant throne, Legal Process, too, “withered” toward the end of the 1950s.<sup>49</sup> In Wiecek’s assessment, Legal Process was undone by its inability to come to terms with cases like *Brown* and with the civil rights movement.<sup>50</sup> Its insistence on judicial restraint was, like Felix Frankfurter himself, out of step with the nascent activism of the Warren Court.<sup>51</sup> More important, however, its faith in processes and institutions “could work only if all governmental institutions were authentically democratic, responsive and responsible, representative, and legitimate.”<sup>52</sup> This was not the case in the pre-Civil Rights Act South, nor was it the case for pre-*Baker v. Carr* state legislatures that were often grossly malapportioned to the disadvantage of all urban citizens, white and black.<sup>53</sup> Worse, Legal Process was “incapable of choosing

44. *Id.* at 454.

45. See HENRY HART & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William M. Eskridge & Philip Frickey eds., 1994).

46. WIECEK, *supra* note 1, at 452 (footnote omitted).

47. *Id.* at 455.

48. *Id.* at 456.

49. *Id.* at 455. It would continue to dominate in the law schools, however, as graduates of Harvard who entered the academy would use the Hart and Sacks materials in legal process classes all over the country.

50. *Id.* at 463.

51. *Id.* at 459.

52. *Id.* at 460.

53. *Id.*; see also *id.* at 461 (Legal Process “could work only in a society that was homogeneous and that was already just.”).

among substantive values, or even of identifying them, when it had to do so.”<sup>54</sup> In a poignant illustration of this point, Wiecek retells the story of Henry Hart confessing, on the third night of his 1963 Holmes Lectures at the Harvard Law School, that Legal Process had no answer to the question he had spent the two previous lectures posing, and simply sitting down.<sup>55</sup>

¶21 The lack of a successor to Classical Legal Thought meant that the Stone-Vinson Court opinions have a fractured quality that scholars have contrasted unfavorably with what they perceive as the unifying egalitarianism of the later Warren Court. As shown earlier, however, the Stone-Vinson years were rich ones intellectually; as will be seen later, the products of those years were foundational and still serve as important doctrinal starting points. The variety of constitutional outlooks during those years also suggests that the then-serving Justices were equally as interesting, and varied, as their views on the role of the Court.

### The Justices of the Stone and Vinson Courts

¶22 If any group of Justices was going to construct a post-classical legal order to replace the one many of the same Justices dismantled during the New Deal era, it would have been those Justices who served from the late 1930s to the mid-1950s. Wiecek provides deft thumbnail sketches and short biographies of all the Justices who served on both Courts. In doing so—especially with the description of Vinson Court personnel—he challenges a good deal of the conventional wisdom. The portraits are evenhanded; even with Justices whom he admires, Wiecek never blinds himself to a particular Justice’s faults. The reverse is true, too: he is fair to Justices, like Frankfurter, whom the reader senses he dislikes, writing frankly of his intellect, skill, and integrity.

¶23 Chief Justice Stone was an academic reformer who was less successful than his predecessor, Charles Evans Hughes, in running the Court, not only because of the strong personalities on the Court, but also because he tended to preside with a lighter touch.<sup>56</sup> Stone had to ride herd on a number of strong personalities. Frankfurter, for example, was himself a former professor, civil libertarian, and an advisor to Roosevelt. He was undeniably brilliant, but patience and charity were virtues that Frankfurter did not possess in abundance. He would subject new

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54. *Id.* at 461.

55. *Id.* at 461–62. The question posed by Hart was, assuming that the Constitution entitles everyone to equal opportunity to develop and exercise his capacities, how does government ensure “that the overriding purpose of all actions taken by the authority of society as a whole through the processes of government and law is to make that opportunity as meaningful as possible”? *Id.* at 461 (quoting Hart in PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 56–57 (1982)).

56. *Id.* at 61.

members of the Court to his smothering influence, then insult them in catty letters to friends like Learned Hand when they resisted his “mentoring.”<sup>57</sup>

¶24 Hugo Black had the autodidact’s certitude and served as the intellectual counterweight to Frankfurter.<sup>58</sup> Joining them, for a time, was a holdover from the “Nine Old Men,” Owen Roberts, a Philadelphia lawyer responsible (or not) for the famous “switch in time that saved nine” following the Court packing plan.<sup>59</sup> Also on the Court was William O. Douglas, brilliant academic and legal realist par excellence, whose opinions, Wiecek notes, “now read like period pieces from an era long past.”<sup>60</sup>

¶25 There was Frank Murphy, former Detroit mayor, Michigan governor, governor-general of the Philippines, and attorney general for Roosevelt. Murphy’s single-minded penchant for advancing the cause of civil liberties earned scorn from Frankfurter, who mocked him as “St. Francis” and “Dear God” in his letters.<sup>61</sup> For his part, Murphy was “sensitive, vain, and insecure,”<sup>62</sup> going so far as reenlisting in the Army in 1942 and appearing at the Court in his uniform.

¶26 Robert Jackson, too, would prove prickly and quick to quarrel, as he showed later in his feud with Hugo Black when the two men vied for the center chair following Stone’s death. But if Jackson “was not animated by a coherent judicial philosophy,”<sup>63</sup> he was one of the most eloquent writers on the Court, and a number of his opinions (his *Youngstown* concurrence,<sup>64</sup> for example) are seminal.

¶27 Wiley B. Rutledge, who replaced James Byrnes after the latter departed a short time after taking his seat to run the wartime economy, was another former law school dean with a keen interest in seeing the Court assume the guardianship of civil liberties. Though an ally of Frank Murphy, Rutledge was a hard worker, personable, and apparently got along with his colleagues on the Court. Even Stanley Reed, a Kentuckian who left “little discernable mark on [the Court’s] work”<sup>65</sup> when he retired in 1957, rose to the occasion when, in 1954, he swallowed his doubts and ensured Chief Justice Warren a unanimous decision in *Brown*.

¶28 Most critics would have regarded Reed as a giant among men as compared with some of his Vinson Court colleagues. “Scholarly and professional opinion,”

57. *Id.* at 83–92 (providing a sketch of Frankfurter). For an example of Wiecek’s perceptive comments, see his comments about the Frankfurter-Hand exchanges. He notes that they are full of “pompous and often stilted language” that “often serv[e] as a marker for a negative synergy exchange” between the two. *Id.* at 457 (commenting on Hand’s famous Holmes Lectures, later published as *The Bill of Rights*).

58. *See id.* at 75, 79, 81.

59. *Id.* at 67–70 (describing the controversy).

60. *Id.* at 93.

61. *Id.* at 104.

62. *Id.*

63. *Id.* at 109.

64. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

65. WIECEK, *supra* note 1, at 83.

Wiecek notes, “dismisses the Justices appointed by Truman as a clutch of mediocrities raised by political happenstance to a station beyond their abilities.”<sup>66</sup> Wiecek nicely balances the almost wholly negative assessment of the Vinson Court personnel which he attributes in part to “a tradition of liberal historiography that has explained and legitimated the achievement of the Warren Court by contrasting it with its predecessors.”<sup>67</sup>

¶29 To be sure, some of the negative assessment is accurate. Truman’s nominees (Harold Burton, Fred Vinson, Tom Clark, and Sherman Minton) “evinced an ideological blandness shading off to moderate conservatism, reinforced by a commitment . . . to judicial self-restraint.”<sup>68</sup> Wiecek hilariously remarks that “[t]he Constitution would not have been noticeably affected if Sherman Minton’s chair had been occupied by a stuffed teddy bear from 1949 to 1953.”<sup>69</sup> Tom Clark, who replaced Frank Murphy in 1949 and whose reputation has fared somewhat better, had similar political experience, but made no notable contribution to the Court, according to Wiecek, until after 1954.<sup>70</sup>

¶30 But if the new justices were not the equal of Felix Frankfurter (and he most assuredly thought they were not), neither were they rude rustics or collectively the personification of Truman’s affinity for appointing personal friends to high positions and damn their qualifications. Burton was a Harvard law school graduate. Minton had an LL.M. from Yale and did post-graduate work in law at the Sorbonne following service in World War I.<sup>71</sup> All had a wealth of political and judicial experience. Burton was a senator, as was Minton, who also served on the Seventh Circuit; Vinson served in the House and later on the Court of Appeals for the D.C. Circuit, the wartime Emergency Court of Appeals, and as secretary of the treasury. Clark, too, served in the Department of Justice under FDR and as Truman’s attorney general where he pursued communists and sought civil rights for blacks.<sup>72</sup>

¶31 Even the much-maligned Vinson, regarded by those who attempt to rank such things as a “failure” as a Justice, gets a fair shake from Wiecek. He was selected in part because his reputation was of an “honest broker” during his service in the House, the executive branch, and on the Court of Appeals, all of which makes his selection less idiosyncratic than it appears at first blush.<sup>73</sup> While he was

66. *Id.* at 400. For examples, see *id.* at 400–01.

67. *Id.* at 402. One wonders, too, whether Felix Frankfurter’s low opinion of his Vinson Court colleagues was accepted and then repeated as gospel by his academic allies.

68. *Id.* at 438.

69. *Id.* at 403.

70. *Id.* at 429–30.

71. *Id.* at 434–35.

72. *See id.* at 430–31.

73. *Id.* at 422–24.

certainly unable to draw the poison out of the Court's personality conflicts,<sup>74</sup> few probably could have, given the personalities involved. And if the rest of his picks were not "Brandises, Cardozos, and Frankfurters," as Senator Hruska would put it years later,<sup>75</sup> well, that said as much about the president nominating them as it did about the Justices. As Wiecek states, "Truman, ever the pragmatist and not one given to theorizing, had no time for jurisprudential speculation. . . ."<sup>76</sup>

¶32 Whatever the brilliance of the individual members of the Stone Court, none was able to persuade his colleagues to adopt a systemized approach for deciding cases that approximated the coherence of Classical Legal Thought. By contrast, despite the scorn heaped on the individual members of the Vinson Court, much of the rest of Wiecek's work demonstrates the debt contemporary constitutional law owes to it and to them.

[The Vinson Court's] handling of First Amendment issues in the Cold War was, on the whole, disappointing from a libertarian point of view, and many of its precedents in that areas were shunted aside within the decade. But it blazed ahead in civil rights cases, beginning with the exploration of the Equal Protection Clause that provided the necessary prelude to *Brown v. Board of Education*. The Vinson Court created the basic Establishment Clause precedent, as its predecessor had done for the Free Exercise Clause, and in doing so it laid the foundations of modern strict-separation doctrine. It rebuked the president for overreaching his authority in the steel seizure matter. It made rich and significant contributions to the emergent field of constitutional procedure. The Vinson years are worth our attention in their own right, as well for being the threshold of the modern constitutional era.<sup>77</sup>

### **The Stone and Vinson Courts and Constitutional Law**

¶33 As the foregoing quotation suggests, Wiecek's real thesis is that without the Stone-Vinson Courts, the Warren Court's legacy would look quite different to us. Given that constitutional law—and the common law system—grows through accumulation and expansion of precedent, this may seem like an obvious, even banal, point. Wiecek's point is not merely that the Warren Court would have appeared different to us without the contrast of the earlier courts, but that the Stone-Vinson

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74. Much of the rancor on the Court was due to Hugo Black and Robert Jackson (and their partisans) jockeying for selection as the new Chief Justice following Stone's death. There was also an incident in which Jackson thought Black should have recused himself, the latter did not, and Jackson unwisely decided to make the incident public while serving as the chief prosecutor in Nuremburg. The origins and progress of the feud are described in *id.* at 413–20. Jackson, whose extra-curricular service had created problems for the Court, garnered little sympathy from his colleagues and his reputation suffered more than Black's as a result.

75. HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS PROCESS FROM WASHINGTON TO CLINTON* 11 (rev. ed. 1999).

76. *Id.* at 406.

77. *Id.* at 404.

Courts supplied some indispensable doctrinal frameworks that, in a sense, *made* the Warren Court. This is especially true, he argues, in First Amendment and civil rights cases.

### *The First Amendment*

#### *Freedom of Speech*

¶34 Wiecek argues that the Stone and Vinson Courts bequeathed to us the basic doctrinal structure of free speech that we today take for granted.<sup>78</sup> A glance at a constitutional law casebook confirms this. After covering the early speech cases (usually focusing on the dissents of Brandeis and Holmes), casebooks move quickly to cases like *Chaplinsky*,<sup>79</sup> *Feiner*,<sup>80</sup> *Terminiello*,<sup>81</sup> and *Beauharnais*.<sup>82</sup> Cold War chestnuts like *Dennis*<sup>83</sup> are also usually included. All are Stone-Vinson Court cases.

¶35 For Wiecek, one could hardly overstate the importance of Frank Murphy's dicta in *Chaplinsky*, famous for excluding "fighting words" from First Amendment protection. But Murphy excluded more than simply fighting words, identifying regulation of the "lewd and obscene, the profane, [and] the libelous," as well as "the insulting or 'fighting' words."<sup>84</sup> "This passage," writes Wiecek, "provided a First Amendment technique, categorization, so influential that it continues to rival the clear-and-present-danger test today."<sup>85</sup> For Wiecek, it involved a subtle shift; instead of the government being tasked with the burden of justifying speech regulation, the speaker first had to demonstrate that his or her speech was of the sort deserving of First Amendment protection. In other words, "the speaker's right becomes contingent on being tied to a rationale for protecting speech."<sup>86</sup> The open-ended nature of Murphy's dictum, moreover, invites expansion, and the "categories tend not only to multiply but to bifurcate, as well."<sup>87</sup>

¶36 The Stone Court also had to reconcile a judicial interest in protection of speech with private property rights. The point of contact for these rights often occurred when striking employees sought to picket their employers on their employers' premises. Wiecek deftly uses the picketing cases as a microcosm of the Stone Court, especially to the extent that the Court's engagement with the issue emphasized "divisions among the Justices after 1941 over fundamental jurispru-

78. *Id.* at 143.

79. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

80. *Feiner v. New York*, 340 U.S. 315 (1951).

81. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

82. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

83. *Dennis v. United States*, 341 U.S. 494 (1951).

84. *Chaplinsky*, 315 U.S. at 517.

85. WIECEK, *supra* note 1, at 160.

86. *Id.* at 162.

87. *Id.* at 166.

dential approaches and the policy choices they served, and the temporary reversal of libertarian trends in the late 1940s.”<sup>88</sup> Specifically, these cases widened the split between Black’s absolutism and Frankfurter’s championing of judicial discretion and case-by-case balancing.<sup>89</sup> This difference in approach to the First Amendment augured other differences that would, in time, only deepen between the two men.

¶37 In all, Wiecek pronounces the Stone Court’s legacy to the First Amendment a “mixed” one. While it continued the libertarian trends started by the Hughes Court, even “pushing the reach of the amendment into new areas,” there were ominous signs of conflict, like the divergence of Frankfurter and Black.<sup>90</sup> Further, “[a]s the Court foreclosed states’ power to inhibit speech by tightening clear-and-present danger, it opened new avenues for state intrusion on the First Amendment by adopting categorization as an analytical technique.”<sup>91</sup>

¶38 The speech-suppressing potential of *Chaplinsky* was realized by the Vinson Court. While many regard the Vinson Era as the nadir of modern First Amendment jurisprudence (*Dennis*, the second Red Scare, McCarthyism, etc.), Wiecek argues that the effects of Cold War cases like *Dennis* were transitory, “while Vinson-era precedents involving such issues as obscenity and group libel have enjoyed great staying power.”<sup>92</sup> Further, the Vinson Court struggled to adapt First Amendment doctrine to emerging technologies, which it did by conceiving of the seminal contemporary distinction between content-based and content-neutral regulations, exemplified by so-called “time-place-manner” laws.<sup>93</sup>

¶39 The “heckler’s veto” cases were another problem area for both Courts. The Court in *Terminiello v. Chicago*<sup>94</sup> reversed the conviction of a speaker convicted of disorderly conduct because he refused to cease speaking in the face of an angry mob.<sup>95</sup> The Court divided 5-4, however, and the majority included Justices Murphy and Rutledge, who died and were replaced by two Justices less inclined to require local officials to protect the speaker *against* a mob, as opposed to placating the mob by silencing the speaker. The result, three years later, was *Feiner v. New York*,<sup>96</sup> in which, on similar facts, the speaker’s conviction was upheld. If Chief Justice Vinson had difficulty distinguishing *Terminiello*, one can take comfort in the fact that the latter “has displayed the greater staying power, while *Feiner* has been eclipsed.”<sup>97</sup>

88. *Id.* at 168.

89. *Id.* at 177.

90. *Id.* at 182.

91. *Id.*

92. *Id.* at 183.

93. *Id.*

94. 337 U.S. 1 (1949).

95. WIECEK, *supra* note 1, at 184–85.

96. 340 U.S. 315 (1951).

97. WIECEK, *supra* note 1, at 188.

¶40 Categorization's potential was further on display in *Beauharnais v. Illinois*,<sup>98</sup> which, if not for contemporary debate over the constitutionality of "hate speech" regulation, would probably be an historical curiosity. Because of its relevance to that debate, "*Beauharnais* retains its interest, if not its vitality," Wiecek writes, "because it presents a dilemma for liberal values, the choice between civil rights and civil liberties."<sup>99</sup> It posed no such dilemma for Felix Frankfurter, who "simply (and simplistically) subsumed group libel into the general law of libel,"<sup>100</sup> from which Murphy's *Chaplinsky* dicta had withdrawn all First Amendment protection. Freed from the strictures of the clear-and-present-danger test, government need only prove "merely a 'rational basis' for its actions."<sup>101</sup>

¶41 The Vinson Court also had to confront the First Amendment implications of the regulation of new (or fairly recent) technologies. The first was sound trucks, which became the object of numerous local ordinances.<sup>102</sup> These cases "raised momentous First Amendment issues that the Court largely sidestepped."<sup>103</sup> While the Court upheld many of these ordinances, members of the majority were struggling to make the distinction between regulations designed to protect people from unwarranted invasions of their privacy and those designed to protect people from unwarranted ideas or messages. The Court did somewhat better on the issue of movie censorship, as it began to strike down state and local laws imbuing government officials with unbridled discretion to censor movies deemed unfit for public exhibition.<sup>104</sup>

¶42 Any discussion of the Vinson Court's First Amendment cases has to take account of *Dennis v. United States*<sup>105</sup> and sundry, lesser-known cases involving federal and state prosecution of communists in the late 1940s and early 1950s. Wiecek devotes two separate chapters to the Cold War in general and *Dennis* in particular. Here Wiecek is as critical of the Vinson Court as he is of the Stone Court's record on the internment of the Japanese. The Court, he says flatly, "gave its blessing to the second Red Scare."<sup>106</sup>

¶43 *Dennis* concerned the prosecution of members of the Communist Party of the U.S. under the Smith Act,<sup>107</sup> which prohibited membership in an organization that advocated the violent overthrow of the government, advocacy of the govern-

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98. 343 U.S. 250 (1952).

99. WIECEK, *supra* note 1, at 191 (footnote omitted).

100. *Id.* at 189.

101. *Id.* at 190.

102. *Id.* at 194–97.

103. *Id.* at 197.

104. *Id.* at 197–200.

105. 341 U.S. 494 (1951).

106. *Id.* at 535.

107. Act of June 28, 1940, ch. 439, 54 Stat. 670.

ment's violent overthrow, and conspiracy to do any of those things.<sup>108</sup> Wiecek terms the trial of the CPUSA members a "political" trial and a "state trial,"<sup>109</sup> and the antics of judge and counsel certainly recall the histrionics of some of the Moscow show trials of the 1930s.<sup>110</sup> By the time the case reached the Supreme Court, the Justices had very little problem upholding the convictions. Chief Justice Vinson managed to shift the focus from the activities of the defendants themselves to those of "World Communism," with the result that they were made to seem such a threat as to justify abrogating the clear-and-present-danger test.<sup>111</sup> As a result, *Dennis* permitted the criminalization of merely being a Communist.<sup>112</sup>

¶44 While not excusing the Court, Wiecek is careful to place *Dennis* in its proper historical perspective. Judges, no less than ordinary citizens, succumbed to an ideological world view of communism that drove the Court's decisions here.<sup>113</sup> Communism was seen as such a grave threat to the American way of life that it warranted a suspension of constitutional rights ordinarily available to all. Communists were a breed apart according to the prevailing wisdom of the 1950s, which viewed them as "subversive automatons controlled by Moscow, dedicated to subverting American freedom."<sup>114</sup>

¶45 In the short term, *Dennis* not only legitimized anti-communism's zealous pursuit of subversives, it "arrested the momentum of First Amendment development."<sup>115</sup> But only in the short term. In the long term, *Dennis* stimulated an "extraordinary reactive critique"<sup>116</sup> that resulted in the Court adopting a libertarian approach to free speech that makes the United States nearly unique even among Western democracies.<sup>117</sup> At the same time, "*Dennis* reminds us that the Court can be buffeted by popular passions" and, as it has never been repudiated, "remain[s] [a] potential source[] of governmental power."<sup>118</sup>

¶46 Of course, *Dennis* was only one of numerous Cold War era cases involving the federal loyalty program, the Attorney General's list of subversive organizations, immigration and naturalization, legislative investigating committees, and state antisubversive legislation.<sup>119</sup> Wiecek dutifully covers these cases in a

108. WIECEK, *supra* note 1, at 543. As Wiecek makes clear, the Smith Act was merely one of a handful of acts aimed at the activities of communists. *See id.* at 542–43.

109. *Id.* at 553.

110. *Id.* at 552–53 (recounting errors of defendants' trial counsel).

111. *Id.* at 567.

112. *Id.* at 568.

113. *Id.* at 538.

114. *Id.* at 537.

115. *Id.* at 573.

116. *Id.* at 574.

117. *See generally* RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE* (2006) (discussing Canada, Germany, and the United Kingdom).

118. WIECEK, *supra* note 1, at 573.

119. *Id.* at 579–618.

separate chapter, ruefully concluding that “in all but two of [them] the Court did support governmental regulatory power when it intruded on First Amendment freedoms.”<sup>120</sup>

¶47 Though not really a First Amendment case, Wiecek singles out the Court’s treatment of Julius and Ethel Rosenberg for particular condemnation.<sup>121</sup> In Wiecek’s opinion, never in history had the Court “so bungled a series of appeals and done such violence to elementary standards of fairness and deliberate judgment” as in the Rosenbergs’ case.<sup>122</sup> Interestingly, in this case Felix Frankfurter was the Rosenbergs’ consistent advocate with his colleagues, while William O. Douglas’s vacillations showed that even he was not immune to the prevailing views on communism and communists.

¶48 While generally fair, Wiecek’s chapters on *Dennis* and the Cold War cases are suffused with a palpable anti-anticommunism. He seems dismissive of the contemporary view that communism—whether foreign or homegrown—posed a grave national security threat. He does not question that the CPUSA was in fact controlled by Moscow or that the Soviets ran an extensive espionage ring during the 1930s and 1940s in the United States, but he seems to think that much of the federal and state response to these truths was overreaction. Interestingly, the quiescence of the Vinson Court, many of whose members had extensive executive and legislative branch experience, might give pause to those who call for nominees with “political experience” to be named to the Court to temper its juristocratic tendencies.

### *Free Exercise*

¶49 At the start of the 1940s, the “scant body” of precedent interpreting the Free Exercise Clause was not particularly “solicitous of religious freedom.”<sup>123</sup> Owing to the aggressive proselytizing of Jehovah’s Witnesses and the equally aggressive reactions to them by state and local governments, it would fall to the Stone Court to make law where little had existed before, save for cases like *Cantwell v. Connecticut*,<sup>124</sup> in which the Court incorporated the Free Exercise Clause through the Fourteenth Amendment, applied it to the states, and reversed the convictions of two Witnesses charged with disorderly conduct for playing anti-Catholic records to consenting passersby in New Haven, Connecticut.<sup>125</sup> *Cantwell* was important for two other reasons. First, it expanded the Free Exercise Clause to cover laws that did not absolutely prohibit religious practices, but merely burdened them. Second, it articulated a balancing approach whereby the Court decided whether state action

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120. *Id.* at 579.

121. *Id.* at 602–18.

122. *Id.* at 603.

123. *Id.* at 204.

124. 310 U.S. 296 (1940).

125. WIECEK, *supra* note 1, at 218.

burdened a particular practice or not.<sup>126</sup> By doing so, the Court “arrogated to itself the power to determine what is religious practice” and, as is true of all balancing approaches, in doing so “reduced[d] right[] to interests . . . vulnerable to trade-offs and passing popular panics.”<sup>127</sup>

¶50 The most dramatic conflict between governmental authority and free exercise came in the Flag Salute cases, *Minersville School District v. Gobitis*,<sup>128</sup> and *West Virginia Board of Education v. Barnette*,<sup>129</sup> which reversed *Gobitis* three years later. Witness children, who had religious objections, were threatened with discipline if they did not salute the flag each morning. In *Gobitis*, Justice Frankfurter employed the balancing test of *Cantwell* to uphold the flag salute law. Only Justice Stone dissented, despite Frankfurter’s best efforts to dissuade him.<sup>130</sup> Their disagreement, Wiecek writes,

was one of the earliest harbingers of the profound division that split the Court in the 1940s and 1950s. Already characteristics appeared that would dominate Frankfurter’s later thought: his (entirely sincere) refusal as a judge to assume a policy-making role; his excessive confidence in the legislative process; and his formalistic blindness to the workings of his opinions in the real world. Stone, on the other hand, presaged the unbending concern for the plight of minorities that was to shape so many opinions, both for the majority and in dissent, in the next two decades.<sup>131</sup>

¶51 Reaction to *Gobitis* was negative, and in short order Hugo Black, William Douglas, and Frank Murphy, who joined the *Gobitis* majority, began to have second thoughts.<sup>132</sup> In 1942, the three signaled their inclination to vote the other way should another case come to the Court.<sup>133</sup> The result was *Barnette*, in which Robert Jackson wrote for a majority in overruling *Gobitis* and rejecting West Virginia’s flag salute statute.<sup>134</sup> “*Barnette* was a crushing humiliation for Frankfurter, which accounts for the personal and vitriolic tone of his dissent.”<sup>135</sup>

¶52 Dramatic though it was, Wiecek argues that a series of less-known cases involving door-to-door distribution of literature by the Witnesses actually “signaled the demise of *Gobitis*, adopted the preferred-position doctrine, enhanced

126. *Id.* at 220.

127. *Id.* at 220, 223.

128. 310 U.S. 586 (1940).

129. 319 U.S. 624 (1943).

130. WIECEK, *supra* note 1, at 225.

131. *Id.* at 226.

132. *Id.* at 226–27.

133. *Id.* at 227.

134. *Id.* at 230 (“Jackson’s opinion was a sharp, almost personal, attack on the values Frankfurter had extolled in *Gobitis*.”).

135. *Id.* at 233.

free-exercise rights, and subordinated the exceptions/exemptions doctrine.”<sup>136</sup> After a series of cases came before the Court in 1943,

[s]tates could not ban proselytizing or distribution of religious handbills on streets, or burden such activity by a flat licensing tax, or require a permit for such activity from an official who had uncontrolled discretion to grant or deny it. Nor could a state prohibit door-to-door religious soliciting, though it could enforce prohibitions by individual homeowners to whom such missionary activity was unwelcome. The Court in recent times has reaffirmed the heritage of [these cases], citing them as barring “laws that foreclose an entire medium of expression,” even if free of the taint of content or viewpoint discrimination.<sup>137</sup>

¶53 Taken as a whole, these Witness cases replaced the balancing approach of *Cantwell* and *Gobitis* with “a different doctrinal approach” requiring, upon showing of a sincere religious belief and governmental action that burdened that belief, that the government “demonstrate that its policy served a compelling and secular purpose, and that the means chose to realize that end were not unnecessarily restrictive of religious belief.”<sup>138</sup> While it would take two decades more for this doctrine to take shape fully, Wiecek convincingly locates its origins with the Stone Court.

#### *Establishment of Religion*

¶54 In an interesting sort of doctrinal symmetry, while the Stone Court laid the foundations for modern free exercise doctrine, the Vinson Court did the same for the Establishment Clause, for which no law existed prior to 1945.<sup>139</sup> Moreover, the contending positions regarding establishment have changed very little from those adopted by the majority and the dissent in *Everson v. Board of Education*,<sup>140</sup> each of which claimed fidelity to the intention of the Framers.

¶55 At one end of the spectrum is the strict-separationist position articulated by Justice Black (though he ultimately rejected the position that subsidizing transportation to school for all students, even parochial school students, violated the Establishment Clause). From that time forward, strict separationism would attract “those Justices left of wherever the ideological median of the Court happens to be at the time,” while the opposing positions, accommodation and nonpreferentialism, “reflects preference rightward of that shifting median.”<sup>141</sup>

¶56 For all of the rhetoric, from *Everson* onwards, about fidelity to history, Wiecek argues that neither side offers more than the maligned “law office” history so irritating to professional historians.<sup>142</sup> “The mythic struggles conjured up

136. *Id.* at 240.

137. *Id.* at 242 (quoting *Ladue v. Gilleo*, 512 U.S. 43, 55 (1994)).

138. *Id.* at 248–49.

139. *Id.* at 250.

140. 330 U.S. 1 (1947).

141. WIECEK, *supra* note 1, at 252–53.

142. *Id.* at 264.

by Justice Hugo Black . . . simply did not agitate the founding generation, and the Court's circa 1947 understanding of early American history, which it projected onto the First Amendment, had little basis in reality."<sup>143</sup> On the other hand, the non-preferential aid position does similar violence to whatever definite intent does exist because the "Framers considered just such a clause repeatedly and rejected it each time."<sup>144</sup> Lacking definite answers, the Court "conjured up a synthetic past,"<sup>145</sup> exemplified by Justice Black's seizing on the "wall of separation" metaphor used by Jefferson in a letter to the Danbury Baptists.<sup>146</sup> The metaphor, however, had (and has) a powerful hold on popular and judicial imaginations. The strict separation of *Everson* would "dominate church-state cases into the 1970s"; not until the Burger Court would "nonpreferentialists succeed in dislodging it and making room for alternative outcomes."<sup>147</sup>

¶57 The release-time cases would sharpen the cleavages on the Court evident in *Everson*. The issue was the constitutionality of "releasing students" from public school classes to receive religious instruction. In *McCollum v. Board of Education*,<sup>148</sup> the Court rejected a plan permitting release for instruction on the school grounds.<sup>149</sup> Three years later, however, in *Zorach v. Clauson*,<sup>150</sup> the Court ruled the other way when the students were transported *off* school grounds for instruction.<sup>151</sup> Wiecek characterizes *Zorach* not as a "strategic retreat" from *Everson* and *McCollum*, but rather as a reaffirmation of "the divisions among the Justices that had been there all along."<sup>152</sup> These three cases, he concludes, "span most of the conceptual doctrinal spectrum of establishment," and, as such, are still taught together.<sup>153</sup> They represent, Wiecek writes, "the ambivalent legacy of the Vinson Court to religion-clause law."<sup>154</sup> Both the sharp cleavages and the uncertainties of the cases are still with us; one need only read the recent Court opinions about the display of the Ten Commandments for confirmation.

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143. *Id.* at 254.

144. *Id.* at 256.

145. *Id.* at 264.

146. *Id.* at 267.

147. *Id.* at 273.

148. 333 U.S. 203 (1948).

149. WIECEK, *supra* note 1, at 274.

150. 343 U.S. 306 (1952).

151. WIECEK, *supra* note 1, at 277–78.

152. *Id.* at 279.

153. *Id.* at 279–80.

154. *Id.* at 280.

### *Civil Rights*

¶58 Building on the tentative efforts of the Stone Court,<sup>155</sup> the Vinson Court continued constructing judicial tools with which future courts could redeem the Reconstruction Amendments' promises of equality for African Americans. The Court did so slowly: first, it rehabilitated the Equal Protection Clause, rescuing it from Holmes's disdainful characterization as the "usual last resort of constitutional arguments."<sup>156</sup> Second, borrowing from *Carolene Products*' footnote four, it created a higher standard of review for differential treatment based on characteristics like race and began striking down state laws on this basis. Finally, the Court's efforts were aided by Truman's strong stand in favor of civil rights,<sup>157</sup> and by the NAACP's deliberate strategy to focus its litigation on higher education as a prelude to eliminating "separate but equal" in all schools, and in society at large. Wiecek's masterful chapters on civil rights in the Vinson Court alone would be worth the purchase of the book.

#### *Rediscovering the Equal Protection Clause*

¶59 The emergence of equal protection as a viable constitutional claim in the Vinson Court was aided in large part by two developments during the Stone Court. First, in a series of cases, the Court "established a broad interpretation of state action in civil rights matters that provided a platform, however shaky, for subsequent federal civil rights enforcement in the South."<sup>158</sup> Second, in *Skinner v. Oklahoma*,<sup>159</sup> William O. Douglas "originated the fundamental-rights strand" of the Equal Protection Clause when he held invalid an Oklahoma statute that mandated sterilization for repeat commission of certain crimes (like chicken stealing) but not others (like embezzlement).<sup>160</sup> Cold comfort though it was to the Japanese-American plaintiffs, even in *Korematsu* the Court gave assurances that legislative classifications based on race were subject to strictest scrutiny.<sup>161</sup>

¶60 It was fitting, then, that the first beneficiaries of a rejuvenated Equal Protection Clause were Japanese—many of whom had been prevented from

155. The Stone Court, in cases like *Smith v. Allright*, 321 U.S. 649 (1944), eradicated the "white primary" as a means of discriminating against black voters. Of course, in most southern states the constant threat of violence tended to discourage most blacks from even attempting to register. Moreover, Wiecek notes, "[u]ndoing disenfranchisement entirely was beyond the capacity of the Stone Court." WIECEK, *supra* note 1, at 634–35, and the Vinson Court, too, for that matter. See *Colegrove v. Green*, 328 U.S. 549 (1946) (declining to enter reapportionment's "political thicket"); *but see Baker v. Carr*, 369 U.S. 186 (1962) (entering it).

156. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

157. On the importance of Truman's position, see WIECEK, *supra* note 1, at 658–60.

158. *Id.* at 657.

159. 316 U.S. 535 (1942).

160. WIECEK, *supra* note 1, at 648–49. *Skinner* did not, however, ground this notion of "fundamental rights" in any particular bit of constitutional text. *Id.* at 649.

161. *Korematsu v. United States*, 323 U.S. 214, 215 (1944) ("all legal restrictions which curtail the civil rights of a single racial group are immediately suspect").

becoming citizens by restrictive immigration laws—denied the ability to own land by restrictive laws in states like California. For example, in *Oyama v. California*,<sup>162</sup> the Court struck down, as violation of equal protection, a legislative attempt to prevent indirect alien ownership of land by prohibiting transfer of title to persons or entities not barred by law from owning land.<sup>163</sup>

¶61 Then, in 1949, an article<sup>164</sup> on the Fourteenth Amendment appeared in the *California Law Review* that “located the origins and meanings of section 1 of the Fourteenth Amendment, and particularly its Equal Protection Clause, in the constitutional thought of antebellum abolitionists.”<sup>165</sup> This article “gave the clause a powerful impetus toward dismantling segregation and protecting the rights of African Americans to full and genuine equality before the law.”<sup>166</sup>

### *The Road to Brown*

¶62 But “full and genuine equality” still required political will. Truman had shown it in desegregating the armed forces and placing the moral weight of the executive branch behind equal treatment for African Americans. The Vinson Court managed to muster it, too. “Whatever the moral ambiguities or failures of some individual Justices,” Wiecek writes, “the Court as a whole after World War II moved decisively to end segregation.”<sup>167</sup>

¶63 The Vinson Court moved against racially restrictive covenants, despite the difficulties circumventing the Fourteenth Amendment’s state action doctrine.<sup>168</sup> While *Shelley v. Kraemer* has its critics,<sup>169</sup> Wiecek argues that the critics (then and now) “undervalue[] the merits of Vinson’s opinion,”<sup>170</sup> and shows the consequences of another outcome.<sup>171</sup> Ultimately, however, *Shelley*—like the Court’s invalidation of racially discriminatory zoning in *Buchanan v. Warley*<sup>172</sup> before it—was a “noble failure,” in Wiecek’s estimation, because of the persistence of discrimination and segregation in housing patterns, it was a start.<sup>173</sup>

¶64 At the same time, the NAACP Legal Defense Fund was accelerating its own legal campaign against segregation in education, deciding, after World War II

162. 332 U.S. 633 (1948).

163. WIECEK, *supra* note 1, at 663.

164. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

165. WIECEK, *supra* note 1, at 660.

166. *Id.* at 660–61 (footnote omitted).

167. *Id.* at 671.

168. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

169. WIECEK, *supra* note 1, at 677–78.

170. *Id.* at 678.

171. *Id.* at 678–79.

172. 245 U.S. 60 (1917).

173. WIECEK, *supra* note 1, at 680.

to make more direct challenges to segregation, as opposed to bringing “equality” suits designed to make maintenance of *Plessy* too costly for states.<sup>174</sup> As their legal attack continued, and as their victories in the courts mounted, the NAACP was leaving the Court less and less room to maneuver. In *McLaurin v. Oklahoma*,<sup>175</sup> that state’s humiliating efforts to admit a black student to its graduate school while forcing him to sit and eat apart from white students gave Thurgood Marshall the opportunity he had been looking for to mount a frontal assault on *Plessy*.<sup>176</sup> *McLaurin* was decided on the same day as a case invalidating mandated dining car segregation on trains<sup>177</sup> and *Sweatt v. Painter*,<sup>178</sup> which required the University of Texas School of Law to admit Heman Sweatt because the blacks-only law school was not the former’s equal. This trio of cases “drained the force from *Plessy*.”<sup>179</sup>

¶65 *Sweatt* was particularly important because the Court accepted the plaintiff’s argument that intangibles, like reputation, had to be considered when judging whether or not equality existed between educational institutions.<sup>180</sup> That signaled that the Court was going to require *actual* equality, not just nominal equality; by doing so, *Plessy* was doomed.<sup>181</sup> Nearly two years to the day after deciding *Sweatt*, the Court announced probable jurisdiction in *Brown v. Board of Education*.

¶66 While the story of *Brown* and *Brown II* are left for the forthcoming volume on the Warren Court, Wiecek does describe how *Brown* was argued, then set for reargument in the 1953 Term. Though many of the decisions regarding desegregation of higher education were unanimous, the Court’s unanimity disappeared when it came to desegregating primary and secondary schools.<sup>182</sup> Many Justices were sure they wanted to end segregation there too, but were unsure how to do it.

¶67 In the end, the Court played for time. First, Frankfurter sought to delay any decision until after the 1952 elections. When the conference was first held, in December 1952, there was agreement not to take a vote. Frankfurter then called for reargument to be scheduled for October 1953 and drafted questions for the

174. *Id.* at 682–83.

175. 339 U.S. 637 (1950).

176. WIECEK, *supra* note 1, at 685–87 (discussing Oklahoma’s “inane combination of pettiness and dishonor”).

177. *Henderson v. United States*, 339 U.S. 816 (1950). In an interesting aside, early efforts by the Court to roll back some segregation saw it rely not on the Equal Protection Clause, but rather on the dormant Commerce Clause doctrine to strike down requirements that modes of interstate transportation segregate passengers. *See, e.g.*, *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948); *Morgan v. Virginia*, 328 U.S. 373 (1946). These cases and *Henderson*, which was really a statutory case, are discussed in WIECEK, *supra* note 1, at 666–71.

178. 339 U.S. 629 (1950).

179. WIECEK, *supra* note 1, at 687.

180. *Id.* at 692.

181. *Id.* at 693.

182. *Id.*

litigants to address that focused on the intent of the Fourteenth Amendment's framers and on the problem of remedy.<sup>183</sup> His colleagues agreed and reargument was set for October 12, 1953. In the meantime, fate intervened, and the task of forging unanimity out of a fractious and uncertain Court fell to Earl Warren, not Fred Vinson.

### *Other Issues*

¶68 Of course, the Stone and Vinson Courts did more than address First Amendment and civil rights issues. The Vinson Court had to contend with questions spawned by the Cold War, while the Stone Court was forced to function in the context of a global war.<sup>184</sup> Excepting the internment of the Japanese (a large exception), Wiecek concludes that the Court did well handling issues involving conscientious objectors, enemy propagandists, and denaturalization proceedings.<sup>185</sup> The Stone Court gets much lower marks "when it was called upon to inhibit military authority during the crisis of war."<sup>186</sup> When FDR made it clear that Nazi saboteurs were going to be tried by military commission and executed, none of the Justices "had any stomach to challenge the president and the army."<sup>187</sup> On the other hand, the Court "hedged treason prosecutions . . . with strict evidentiary requirements,"<sup>188</sup> and moved decisively against the military's refusal to relinquish control of Hawaii well after the need for martial law had receded.<sup>189</sup>

¶69 The biggest failure was the Court's unwillingness to halt the internment of the Japanese. Wiecek chronicles the history of racial animosity that, after Pearl Harbor, blinded otherwise reasonable people to the manifest injustice of the roundup and transportation of thousands of American citizens to desolate camps solely because of their race.<sup>190</sup> He also details the split in the Roosevelt administration on the constitutionality of internment and, sadly, the efforts of some in the government to mislead the Court about the military necessity.<sup>191</sup> Ultimately, the Court stood aside, allowing *Korematsu* to take its place alongside *Dred Scott* and *Plessy* as paradigms of Court wrongheadedness. Yale Law School Dean Eugene Rostow delivered the verdict even before the end of the war. The internment cases, he said simply, were a "disaster."<sup>192</sup>

183. All of this is recounted in *id.* at 693–97.

184. *See id.* at ch. 8.

185. *Id.* at 305.

186. *Id.*

187. *Id.* at 314.

188. *Id.* at 321.

189. *See* *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), *discussed in* WIECEK, *supra* note 1, at 333–37.

190. WIECEK, *supra* note 1, at ch. 10.

191. *Id.* at 353–54.

192. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 *YALE L.J.* 489 (1945).

¶70 Wiecek devotes one chapter to the scope of national authority during and after World War II.<sup>193</sup> Not surprisingly, federal power—and executive power—expanded in wartime; unlike after World War I, this expansion did not “immediately subside[.]”<sup>194</sup> Particularly when it came to the power of the federal government to wage war and conduct foreign policy, “America’s experience with global total war . . . realized the appalling potential suggested by George Sutherland’s loose dicta” in the *Curtiss-Wright* case.<sup>195</sup> The only exception was the Supreme Court’s somewhat surprising rebuke to Harry Truman when he attempted to seize the steel mills in the *Youngstown* case.<sup>196</sup>

¶71 As for the relationship between the federal government and the states, Wiecek writes that, with one exception, “the Vinson Court had little to say about the issues of federalism that have so engaged the passions of the modern Court.”<sup>197</sup> The exception was the Court’s activity in limiting the ability of states to discriminate against or otherwise impermissibly burden interstate commerce—the so-called dormant Commerce Clause doctrine.<sup>198</sup> Under Stone and Vinson, the doctrine—and the related doctrine of preemption—tended to expand federal power (either judicial or legislative) at the expense of the states.

## Conclusion

¶72 Wiecek makes a convincing case that we owe much to the Stone and Vinson Courts. His brief on behalf of the Vinson Court is particularly persuasive. The Warren Court’s legacy would not have been so celebrated among a generation of lawyers and scholars had the Vinson Court not wrestled with some hard questions with little or nothing in place to guide it. As with any book of its size and scope, a reviewer can quibble with omissions or interpretations. I was surprised to find so little mention of cases involving congressional regulation of the economy under the Commerce Clause. *Wickard v. Filburn* garners only a paragraph,<sup>199</sup> perhaps reflecting the opinion that *Wickard* just made explicit what had been apparent since 1937—that judicially enforceable limits on the Commerce Clause no longer existed.<sup>200</sup>

¶73 For the most part, Wiecek covers what needs to be covered and does so with fairness, charity, and an eye toward placing events and cases in their proper

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193. WIECEK, *supra* note 1, at ch. 11.

194. *Id.* at 364.

195. *Id.* at 365.

196. *Id.* at 387–95.

197. *Id.* at 382.

198. *Id.* at 375–82.

199. 317 U.S. 111 (1942), *discussed in* WIECEK, *supra* note 1, at 36–37.

200. For such a suggestion, see WIECEK, *supra* note 1, at 36 n.81.

historical perspective. His writing is clear, his organization logical, and he includes extremely helpful summaries where needed to properly situate discussions of doctrine. The only other quibble I had was with the fact that the manuscript was apparently submitted in 2003, with the result that he made little use of scholarship appearing after that date. Even with a manuscript of this size, three years seems quite a long time to prepare for publication. Further, much of the material dealing with the war powers of the executive cries out for comparisons or contrasts with those issues as they arise today.

¶74 Wiecek followed the practice of the latest entries in the Holmes Devise series by forsaking the encyclopedic for the readable. As a result, unlike most of the works predating G. Edward White's two volumes on the Marshall Court,<sup>201</sup> Wiecek's contribution can be read cover-to-cover. It is nice to see the series back on track after more than a decade-long hiatus between Wiecek's volume and the publication of Owen Fiss's volume in 1993.<sup>202</sup> One hopes that we won't have to wait another decade to read Robert Post's review of the Taft Court, Mark Tushnet's examination of the Hughes Court, or Morton Horwitz's treatment of the Warren Court. Cambridge University Press, which has replaced Macmillan as the publisher, has seen fit to continue the trade dress of the earlier volumes and has even reprinted Owen Fiss's volume. The hope, I'm told, is eventually to have all volumes in the series—which are out of print, difficult to find used, and expensive when found—reprinted.

¶75 As for the Holmes Devise project itself, Frankfurter was the impetus behind it, and the early volumes written by his hand-picked authors bear his indelible imprint. It is probably a good thing that the job tended to overwhelm many of the initial choices and that the task fell to authors beyond Frankfurter's influence. The result is probably less "institutional," more critical—that is, better—history. Even with my quibbles, I believe that Wiecek's volume on the Stone and Vinson Courts (along with Melvin Urofsky's volume<sup>203</sup> for the parallel history edited by Herbert Johnson) will for the foreseeable future be the standard works, indispensable to specialists yet engaging for those with a more general interest in constitutional and Supreme Court history.

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201. G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE*, 1815–35 (Oliver Wendell Holmes Devise History of the Supreme Court of the United States Vols. 3–4, 1988).

202. OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910* (Oliver Wendell Holmes Devise History of the Supreme Court of the United States Vol. 8, 1993).

203. MELVIN I. UROFSKY, *DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941–1953* (1997).