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Ackerman, Bruce, "Liberating Abstraction" (1992). *Faculty Scholarship Series*. Paper 136.
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LEVELS OF GENERALITY IN CONSTITUTIONAL INTERPRETATION

Liberating Abstraction

Bruce Ackerman†

This is a great moment in world history. From Berlin to Moscow, the news is full of the restless striving of a renascent liberalism. For the first time in a long time, all of Europe resonates with the great liberal themes of freedom and equality under law. Great movements bring great dangers: a mobilized liberalism must compete with resurgent nationalisms, obscurantisms, theocracies. But the new demagogues seem less formidable than Hitler or Lenin or even Mussolini. Though we are in for lots of disappointments, I open my New York Times with something that feels like genuine hope. Will Johannesburg or Havana or Peking successfully manage the formidable challenges of liberal transformation? Maybe the answer will be "no," but this is the first time since 1848[1] when liberals could seriously ask the question.

Against this background, there is something puzzling about the path of American constitutional law. As in so many other places, American politics in the 1980s witnessed a resurgence of individualistic rhetoric. Reaganism was the most serious expression of this impulse in the half-century since the New Deal. And yet, when we look at the way the new Republicanism is translating itself into constitutional law, we find only paradox: the Supreme Court is not busily at work renewing and reviving constitutional

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† Sterling Professor of Law and Political Science, Yale University. This Article was prepared for *The Bill of Rights in the Welfare State: A Bicentennial Symposium*, held at The University of Chicago Law School on October 25-26, 1991.

[1] I say 1848, rather than 1918, since even the most passionate Wilsonian recognized that Lenin's vision would be a very formidable competitor during the decades ahead.

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commitments to individual freedom. It seems bent on glorifying the powers of the state and diminishing the constitutional protection of individual rights. Except to those fully socialized into the law-business, it must seem odd to find one of the leading legal intellectuals of the Reagan Revolution, Judge Frank Easterbrook, arguing in favor of liberating big government from an expansive interpretation of the Bill of Rights; while I come from the liberal legal academy to argue that judges like Easterbrook should be defending individual freedom. Why this odd relationship between Reaganite politics and Republican law? Why is the new Republican court leaving it to defenders of big government, like myself, to emphasize the fundamental importance of fundamental rights?

I haven't gotten to the bottom of this one. Since the question threatens to become one of the leading constitutional paradoxes of the 1990s, it will serve as my entry into the present subject. Specifically, I will argue that the statism of the new Republican court expresses itself in a fundamental asymmetry in its attitude toward legal abstraction. In interpreting the power-granting side of the Constitution, today's Court exhibits no hesitation about the liberating power of abstraction. It shows no serious inclination to question the New Deal transformation of a *federal* government with limited powers into a *national* government with plenary powers at home and abroad. Instead, the Court saves all its doubts about abstract thought for the rights-granting side of the Constitution. This asymmetry—abstract powers, but particular rights—shows the authoritarian bias in the emerging pattern of Supreme Court decisions. Time and again, the Court authorizes the activist state to assault fundamental constitutional rights in ways that evade the narrowing judicial focus.[2]

This asymmetry would be troubling enough if it were "only" a matter of legal method. It is a single Constitution we are interpreting—both when it speaks about powers and when it speaks about rights. Nobody who takes interpretation seriously should feel free to split the text in two, and approach the fragments in radically different ways—unless he is prepared to tell us why.

Take Justice Scalia for example. For all his disdain for abstraction when the subject is fundamental rights, the Justice plays a very different tune when he talks about the separation of powers.[3] He does not let the absence of a "Separation of Powers

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[2] See Charles A. Reich, *The Individual Sector*, 100 Yale L J 1409 (1991).

[3] See *Mistretta v United States*, 488 US 361, 416-27 (1989) (Scalia dissenting).

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Clause" block his interpretive path.[4] Like any other good reader of a text, he reads clauses and paragraphs together as he tries to convince us that Articles One, Two and Three express a fundamental commitment to separation—and proceeds to think about the meaning of this commitment in a highly abstract way. Like many others, I am unpersuaded by the particular abstractions Justice Scalia deploys in his interpretation of "checks and balances." My asymmetry point, however, is analytically distinct from this disagreement. I simply ask him to explain why he scoffs at Justice Douglas's celebrated search amongst the "penumbras" of the Bill of Rights in *Griswold*,[5] but invites us to conduct an analogous search amongst the penumbras of Articles One, Two, and Three in *Morrison*.[6]

Since I am not debating Justice Scalia in these pages, I will defer a serious assessment of his particular form of selective abstraction for another time.[7] It will be enough to engage Frank Easterbrook in a serious dialogue in the hope that he might reassess his very selective aversion to abstraction and generalization in constitutional law. This endeavor requires, at the outset, a search for common ground—which, happily, has not proved very difficult. When I considered Easterbrook's efforts as a judge, I found that I agreed with his most important decision touching the Bill of Rights: *American Booksellers Association v Hudnut*.[8]

The case assessed an Indianapolis ordinance that expressed a strong feminist line on the suppression of pornography. Rather than focusing on "obscene" materials without redeeming social

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[4] The absence of such a provision was by no means unintentional. Madison had originally proposed that the First Congress codify its commitment to the separation of powers in the following constitutional amendment:

> The powers delegated by this constitution are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial nor the executive exercise the power vested in the legislative or judicial, nor the judicial exercise the powers vested in the legislative or executive departments.

See Bernard Schwartz, 2 *The Bill of Rights: A Documentary History* 1028 (Chelsea House, 1971). While Madison's proposal passed the House as part of the original Bill of Rights, it failed in the Senate. Id at 1146. Since the Senate did not publish its proceedings, we do not know the reason why it failed. We do know that, in the House, opposition came from two directions: Mr. Sherman opposed the amendment as "altogether unnecessary" while Mr. Livermore thought the "clause subversive of the constitution." Id at 1117.

[5] *Griswold v Connecticut*, 381 US 479, 484 (1965).

[6] *Morrison v Olson*, 487 US 654, 697-734 (1988) (Scalia dissenting).

[7] See the useful critique of Justice Scalia's views in Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution* 97-106 (Harvard, 1991).

[8] 771 F2d 323 (7th Cir 1985), aff'd without opinion, 475 US 1001 (1985).

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value, the ordinance conceived the "pornography" problem in self-consciously political terms. It sought to suppress sexually explicit messages that "discriminated" against women by portraying them in subordinate positions.[9] So long as subordination was the theme, the work's other values would not save it from Indianapolis's ban.[10] Sexual explicitness was not "pornographic" so long as it expressed egalitarian attitudes on the gender question.[11]

This was, transparently, the kind of case that led Easterbrook to desert the academy for the bench. *American Booksellers* provided a chance to rise above statutory detail on the appellate dockets and consider a fundamental challenge fundamentally; a chance to show how a thoughtful representative of the Republican judiciary should respond to a legislative success of the academic left.[12] How to begin to write the opinion?

I join Easterbrook at this moment of judicial self-definition, and applaud his choice of a starting point. After stating the facts of the case, Easterbrook begins neither with the latest decisions of the Supreme Court, nor with the wisdom of the Founding Fathers. He begins in the middle: with Robert Jackson's great opinion in the second Flag Salute Case, *West Virginia State Board of Education v Barnette*.[13] This strikes me as an inspired choice, and one that other recent judicial appointees support as they investigate the legacy of the past half-century.[14] The debate between Jackson and Frankfurter in the Flag Salute Cases implicates far more than the meaning of the flag or even of the First Amendment. It marks a crucial turning point in the theory and practice of judicial review—one that deserves a more central role than *Carolene Product*'s famous footnote of 1938,[15] or *Palko*'s talk of "ordered liberty" in 1937.[16] The famous slogans we owe to *Carolene* and *Palko* were merely trial balloons—dicta suggesting that the New Deal Court might one day come up with a general approach to limiting the awesome powers of the modern state. *Barnette*, however, takes these promises seriously. Not only does the Court actually protect

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[9] 771 F2d at 324.

[10] Id at 325.

[11] Id.

[12] A principal drafter of the Indianapolis ordinance was Catharine MacKinnon, presently a Professor of Law at the University of Michigan.

[13] 319 US 624 (1943).

[14] See, for example, *Texas v Johnson*, 491 US 397, 420-21 (1989) (Kennedy concurring).

[15] *United States v Carolene Products Co.*, 304 US 144, 152-53 n 4 (1938) (suggesting different levels of judicial scrutiny of the constitutionality of legislation depend on its subject matter).

[16] *Palko v Connecticut*, 302 US 319, 324-25 (1937).

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individual rights, but it does so only after Felix Frankfurter forces the Justices to struggle self-consciously with the asymmetry problem with which I began: how abstractly should judges read the Bill of Rights, given that they accept the New Deal decision to read the Constitution's "Bill of Powers" at the highest levels of abstraction?

Within the context of the New Deal in general, and Frankfurter's opinions in particular, Jackson's decision in *Barnette* marks a very fundamental turn indeed—toward a powerful statement of a distinctive problem confronting the modern judiciary. I call this the problem of intergenerational synthesis and explore why it led Jackson to reaffirm the power of abstraction in interpreting the Bill of Rights. I conclude by asking why Easterbrook, though he turns to Jackson at his moment of professional self-definition in *American Booksellers*, seems to be a very selective abstractionist.

My test case will be *Bowers v Hardwick*.[17] I suggest that a consistent embrace of the Jacksonian position should lead Easterbrook to the dissenters' position in *Bowers*. I do not hope to convince him to sign any of the dissents written in the case. As before, my aim is to talk to him in a language that he understands, the language of property and contract, and to convince him that he should be urging his colleagues to overrule *Bowers*. This effort to engage Easterbrook in serious dialogue will, I hope, illustrate the paradox with which I began: Why is the Republican Court so intent upon aggrandizing the authority of activist government against the claims of individual freedom?

I. The Bill of Powers

Nowadays, even Robert Bork and Richard Epstein accept—after appropriate grumbling[18]—the New Deal reading of the Bill of Powers contained in Article One, Section Eight of the Constitution. For Robert Jackson, things stood differently. In 1942, the proper interpretation of the Bill of Powers was very much a live issue. During the same Term he wrote *Barnette*, he also handed down *Wickard v Filburn*[19] for a unanimous court.

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[17] 478 US 186 (1986) (holding state anti-sodomy law constitutional).

[18] See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 158 (Free Press, 1990); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va L Rev 1387, 1454-55 (1987).

[19] 317 US 111 (1942).

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A. Jackson, Abstraction, and the Commerce Power

Wickard examined the effort of the national government to regulate a farmer who was growing a trivial quantity of wheat for on-farm use.[20] Even though the crop would never leave the farm, Justice Jackson empowered national bureaucratic regulation by reading the Commerce Clause at a breathtaking level of abstraction: "[i]f we assume that [the wheat] is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce."[21] This highly abstract equation of opportunity cost with commerce allowed the national government to place all significant human activity within its constitutional grasp.[22] By unanimously embracing this abstractionist reading, the New Deal Court rang the death-knell for traditional notions of limited national government expressed in leading cases of the Republican era like *Hammer v Dagenhart*.[23]

When the New Deal Court unanimously overruled the caselaw of the Republican era, it repudiated the old idea of limited government with all of the decisiveness of a formal constitutional amendment.[24] Lawyers would quickly treat cases like *Hammer* with the kind of disdain they reserve for decisions, like *Dred Scott*,[25] that have been reversed through mobilized constitutional politics. How, they would soon ask themselves, could the Old Court of the 1930s have ever thought it worthwhile to fight desperate battles in defense of "mechanical" distinctions between "direct" and "indirect" effects on interstate commerce?

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[20] Id at 114.

[21] Id at 128.

[22] This implication became even more emphatic when the Warren Court relied on the New Deal's expansion of the Commerce Cláuse to legitimate the Civil Rights Act of 1964 in *Heart of Atlanta Motel v United States*, 379 US 241, 253-62 (1964). The abstract reading of the Commerce Clause thus served to codify the two great successes of constitutional politics in the modern era: the New Deal and the Civil Rights Movement.

[23] 247 US 251 (1918), overruled by *United States v Darby*, 312 US 100, 116 (1941).

[24] Unanimity in *Wickard* was important. If a single Republican justice remained on the bench to contest the New Deal vision, he would keep the old "direct-indirect" distinctions alive on the pages of the United States Reports. Savvy lawyers would be obliged to keep abreast of these dissents, since they could never know when the new judicial majority would split, leaving the Republican vote to play a decisive role. See Bruce Ackerman, *We The People: Transformations* ch 9 (forthcoming).

[25] *Scott v Sandford*, 60 US (19 Howard) 393 (1856).

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B. Founding Father?

As we approach the flag salute cases, however, it is important to recall the remarkable way that Jackson's abstractionist reading uprooted the modern Constitution from one of its deepest historical roots. To reawaken this sense of rupture and discontinuity, allow me to tell a story from the life of our greatest constitutionalist, James Madison.

The date is March 3, 1817, the day before President Madison leaves the White House. As his last official service to the nation, he leaves a revealing state paper. It is his final veto—the sixth of his presidency and the eighth in the history of the Republic (Washington contributed the other two).[26] As these numbers suggest, vetoes were taken seriously in those days. They were not normal instruments of presidential government. They were reserved for especially weighty anxieties.[27]

In the President's case, these were occasioned by the passage of a bill to establish a fund "for constructing roads and canals."[28] Madison had no problem with the intrinsic merits of the proposal. He placed his veto entirely on high constitutional ground: " 'The power to regulate commerce among the several States' cannot include a power to construct roads and canals," the veto advises, "without a latitude of construction departing from the ordinary import of the terms . . . ."[29] The entire veto is well worth reading,[30]

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[26] See Benjamin Perley Poore, ed, *Veto Messages of the Presidents of the United States, With the Action of Congress Thereon* 16-18 (GPO 1886), published as Senate Mis Doc No 53, 49th Cong, 2d Sess (1887).

[27] See Bruce Ackerman, *We the People: Foundations* 68-69 (Belknap, 1991). This view of the veto power arose from a very different understanding of the presidential office, usefully explicated by James W. Ceaser, *Presidential Selection: Theory and Development* ch 1 (Princeton, 1979), and Ralph Ketcham, *Presidents Above Party: The First American Presidency, 1789-1829* chs 5-7 (North Carolina, 1984).

[28] Poore, *Veto Messages* at 16 (cited in note 26).

[29] Id at 17. The text of this veto is perhaps most easily found in Jefferson Powell, *Languages of Power: A Source Book of Early American Constitutional History* 313-14 (Carolina Academics, 1991). We owe a debt of gratitude to Professor Powell, who has recently made materials readily available to modern readers interested in the controversy that provoked Madison's veto. See id at 311-25.

[30] Especially its remarkable explanation of why the road-building program is not authorized by the grant of power to Congress to "provide for the common defense":

> To refer the power in question to the clause "to provide for the common defense and general welfare," would be contrary to the established and consistent rules of interpretation, as rendering the special and careful enumeration of powers, which follow the clause, nugatory and improper. Such a view of the Constitution would have the effect of giving to Congress a general power of legislation, instead of the defined and limited one hitherto understood to belong to them, the terms "common defense and general welfare" embracing every object and act within the purview of a legislative trust.

but this punchline is mind-boggling enough. Here is *the* Founding Father reserving his last official words to warn us against the dangerous abstraction needed to suppose that federal support for roads and canals was a necessary and proper way "to regulate Commerce . . . among the several States." And yet the New Deal Court simply erased these Madisonian anxieties from legal consciousness—to the point where "conservatives" like Frank Easterbrook deny the very existence of the problem.[31]

I do not wish to urge reconsideration of Robert Jackson's wrenching break with the constitutional past. We should see the truth for what it is: the New Deal Democrats gained the mobilized consent of a majority of the American people to a fundamental constitutional transformation—a reorganization no less profound than the one successfully achieved by the Reconstruction Republicans. If the Court had stood by its Madisonian views of the national government, Congress was prepared to amend the Constitution formally.[32] By making its "switch in time," the New Deal Court made this drastic action seem unnecessary.[33] With Jackson's abstractifying opinion in *Wickard*, the new judicial majority ful-

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Poore, *Veto Messages* at 17 (cited in note 26).

I have placed a copy of this passage in the glove compartment of my car. It serves as marvelous therapy whenever I am threatened by drowsiness while driving on the interstate. I simply stop at the next roadside rest, retrieve this bit of Madisonian wisdom from the glove compartment, and am jolted into another hour of reasonably alert confrontion with the perplexities of life on the National System of Interstate Defense Highways.

[31] See Frank H. Easterbrook, *Abstraction and Authority*, 59 U Chi L Rev 349, 369 (1992): "[I] do not locate the advance of federal power in the New Deal. It occurred in *McCulloch v Maryland*. . . . Everything after that was a matter of details." In fact, Marshall's opinion in *McCulloch* is far more cautious than Easterbrook supposes in its affirmation of national powers. Note, for example, Marshall's warning that the Court would intervene if Congress, "under the pretext of executing its power, pass[ed] laws for the accomplishment of objects not entrusted to the government." *McCulloch v Maryland*, 17 US (4 Wheat) 316, 423 (1819). For a critique of the present mythification of Marshall's nationalism, see Ackerman, *We the People: Foundations* chs 2-3 (cited in note 27).

[32] I shall discuss the congressional debate over the need for constitutional amendment and its relationship to Roosevelt's Court-packing plan, in the next volume of Ackerman, *We the People: Transformations* (cited in note 24).

[33] In Jackson's words:

> What we demanded for our generation was the right consciously to influence the evolutionary process of constitutional law, as other generations had done. And my generation has won its fight to make its own impression on the Court's constitutional doctrine. It has done it by marshalling the force of public opinion against the old Court through the court fight, by trying to influence the choice of forward-looking personnel, and most of all, by persuasion of the Court itself.

Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics* xiv (Knopf, 1941).

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filled a term of the constitutional bargain that permitted the Court to survive the 1937 crisis with its powers untouched.[34]

Rather than questioning *Wickard*, I want simply to emphasize how it sets the stage for Jackson's confrontation with the modern asymmetry problem in *Barnette*: *given* the historical victory of an abstract understanding of constitutional powers, how should modern lawyers read the Constitution's rights-granting provisions? Should we approach the Constitution asymmetrically, reading the Bill of Rights (and other fundamental texts) in the same particularistic way in which Madison had read the original Bill of Powers?[35]

II. THE BILL OF RIGHTS: THE FLAG SALUTE CASES

Even if Jackson had not authored *Wickard*, he could hardly avoid these questions in deciding *Barnette*. Felix Frankfurter had placed them at the very center of the Court's first response to the flag salute problem.[36] Frankfurter's opinion for the Court in *Gobitis* is well known and widely excoriated amongst civil libertarians. How, they ask, could this New Dealer turn his back so quickly on

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[34] See Ackerman, *We the People: Foundations* chs 2, 4, 5 (cited in note 27).

[35] A cautionary note: Since *Barnette* involved a suit against West Virginia, not the United States, it raises additional fundamental questions. Even if it is assumed that Jackson was right to read the Bill of Rights at a very high level of abstraction, we must also ask ourselves about his approach to the "incorporation" problem. Was he right to impose his abstract interpretation of the Bill of Rights on the states as well as the federal government, or should he have watered down the guarantees of the Bill when applying it to the exercise of state power?

Unfortunately, Judge Easterbrook confuses these two questions when he objects to my argument on the ground that "[m]ost contemporary debates about abstraction do not concern federal power. They have to do with state power." Easterbrook, 59 U Chi L Rev at 369 (cited in note 31). Insofar as this is true, Easterbrook is making a serious mistake in suggesting that federalist concerns are relevant to the abstraction problem. If federalist values trouble Easterbrook, he should reserve them for a critique of Jackson's decision, followed by a host of more recent judges, to incorporate most of the Bill of Rights through the Fourteenth Amendment. As the second Justice Harlan famously emphasized, it would be a fatal error to allow federalist concerns to water down the guarantees of the Bill of Rights since this would liberate the federal government, as well as the states, from these constitutional limitations. See *Duncan v Louisiana*, 391 US 145, 183 n 21 (1968) (Harlan dissenting); *Ker v California*, 374 US 23, 45-46 (1963) (Harlan concurring in the result). Better by far to rethink incorporation than to dilute the Bill of Rights.

This is not the place to do justice to the problems raised by the incorporation debate. See Ackerman, *We the People: Foundations* 86-99 (cited in note 27). My point is simply that if Judge Easterbrook wants to enter this debate in defense of Harlanesque views on incorporation, he sbould try to do so in a way that avoids the mistakes that Harlan condemns.

[36] *Minersville School District v Gobitis*, 310 US 586 (1940), overruled by *Barnette*, 319 US at 642.

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his liberal past and uphold compulsory flag-saluting in his first major opinion?

A. Frankfurter's Asymmetry

This question is best treated as a rhetorical one because it proceeds on a false premise. Frankfurter is not going against the grain of the New Deal in deciding the case against the Jehovah's Witnesses. Instead, *Gobitis* should be read as an especially pure example of the New Deal approach to the Bill of Rights, which builds upon the New Deal revolution in the theory of government power.[37]

Frankfurter's opinion organizes post-*Lochner*ian rights-talk around two New Deal ideas. The first is democracy:

> Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained—so long as the remedial channels of the democratic process remain open and unobstructed—when it is ingrained in a people's habits and not enforced against popular policy by the coercion of adjudicated law.[38]

The second is expertise:

> The influences which help toward a common feeling for the common country are manifold. Some may seem harsh and others no doubt are foolish. Surely, however, the end is legiti-

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[37] This explanation is more plausible than one that views Frankfurter as acting out of some deep psychological deficiency. See Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 Stan L Rev 675 (1984). See also Robert A. Burt, *Two Jewish Justices: Outcasts in the Promised Land* 42-43 (California, 1988). Though Danzig recognizes that "Justice Frankfurter was strongly influenced by the ideas inherent in the opinions . . . that rejected the notion of close judicial oversight of New Deal legislation," Danzig, 36 Stan L Rev at 720 n 132, he does not criticize these ideas: "I [do not] detect any decisive error of logic in Felix Frankfurter's flag salute opinions." Id at 722. Instead, he "explains" Frankfurter's opinion by rooting it in a remarkably unsympathetic psychological portrait of the Justice as a rootless cosmopolitan. Id at 690-718.

My emphasis is different. Frankfurter and Jackson do differ on a crucial issue of legal "logic": should we draw our powerful legal abstractions only from the New Deal or from the Founding and Reconstruction as well? Cosmopolitan Jews are not fated to answer this question in Frankfurter's manner, nor are small-town Protestants predisposed toward Jackson's answer. As lawyers and judges, we owe our fellow citizens more than the reflex reenactment of our particular ethnic and religious heritages. We can and should use constitutional law to carve out a common public space in which we may affirm our identity as American citizens, fated by a common past to determine a common future—and to recognize that, for all their transparent differences, both Frankfurter and Jackson still have something to say to us as we continue their conversation about our public identity.

[38] *Gobitis*, 310 US at 599.

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> mate. And the effective means for its attainment are still so uncertain and so unauthenticated by science as to preclude us from putting the widely prevalent belief in flag-saluting beyond the legislative power.[39]

Frankfurter is using the very same abstractions—democracy and expertise—that Robert Jackson employed one year later to liberate New Deal Democracy from a limiting construction of the enumerated powers. Just as Jackson in *Wickard* allowed an "expert" Agricultural Adjustment Act administrator to restrict a farmer's consumption of homegrown wheat in order to implement a democratic judgment about the interstate economy, Frankfurter in *Gobitis* allowed an "expert" board of education to implement a democratic judgment about national solidarity. One may question the expert judgment of either agency. In both cases, though, the New Deal answer should be the same: in the absence of a "clear mistake" in means-end rationality, fight it out in democratic politics, not in the courts.

Since Jackson had not yet come to the Court when the first Flag Salute Case was decided, we don't know whether he would have been persuaded by Frankfurter's arguments for minimizing the scope of the Bill of Rights. We do know that every New Dealer then on the bench—Black, Reed, Douglas, and Murphy—did go along, as did every non-Roosevelt appointee except Stone. Moreover, when Frankfurter's colleagues deserted him in *Barnette* in 1943, his New Deal elegance consoled him in his famous dissent.[40] After opening with a passionate peroration, the dissent begins its technical-legal analysis by quoting a New Deal dissent in *United States v Butler*, one of the Old Court's last desperate struggles on behalf of a Madisonian understanding of limited national powers.[41] Frankfurter then denies that there is any fundamental difference between the New Court's defense of liberty in the public school

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[39] Id at 598. Frankfurter's opinion contributes another characteristic New Deal invocation of legislative expertise:

> To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence.

Id at 597-98.

[40] *Barnette*, 319 US at 646-71 (Frankfurter dissenting).

[41] Id at 647-48 (quoting *United States v Butler*, 297 US 1, 79 (1936) (Stone dissenting)).

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and the Old Court's defense of property.[42] He urges his colleagues to remember 1937,[43] and to keep faith with the bargain that left them their powers of judicial review.

This New Deal mix of democracy and expertise—call it the ideal of "democratic managerialism"—retains a strong hold on the modern legal mind.[44] It remains an important source of the modern propensity toward an asymmetric reading of the Constitution, in which the Bill of Rights is constrained by an understanding of the democratic managerial imperatives underlying the Bill of Powers. It is all the more important, then, to see how Jackson responds to the challenge.

B. Jackson's Reply: Intergenerational Synthesis

A key Jacksonian text is worth reciting:

> True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened government controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our judgment. But we act in these matters not by authority of our competence but by force of our commissions.[45]

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[42] Id at 648.

[43] Id at 652.

[44] The most important statement of this ideal is found in John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard, 1980). Other scholars' works are also profoundly marked by democratic managerialism. Robert Bork's well-known book, *The Tempting of America*, for example, is more heavily influenced by this New Deal ideal than by any constitutional principle articulated by the Founding Federalists during the 1780s. See Bork, *Tempting* (cited in note 18).

[45] *Barnette*, 319 US at 639-40.

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Begin by considering how much common ground this text reveals. Jackson, no less than Frankfurter, bears witness to the great constitutional revolution in which they both had been eager participants: "the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs." Hence he is happy to memorialize the transformation in opinions like *Wickard* that empower the activist regulatory state to pursue the general welfare.[46]

But he is not willing to go further—from powers to rights. While the New Deal shattered the old foundations, Jackson denies that his generation intended to completely remove the old constitutional philosophy from the modern constitutional understanding. Instead, he calls on the Court to make sense of the Constitution as the work of different generations, each contributing different ideas and ideals into an evolving whole. In a phrase, the task is one of "intergenerational synthesis." The aim is to "translat[e]" the "majestic generalities" of "the eighteenth century" into "concrete restraints on officials dealing with the problems of the twentieth century." The challenge is to "transplant" the "principle of non-interference" into a constitutional order in which "social advancements are increasingly sought through closer integration of society and through expanded and strengthened government controls."

Frankfurter, in contrast, treats the constitutional transformation of the 1930s as if it had worked a total revolution in our constitutional law. He insists that the New Deal model of democratic managerialism should be the measure of all things, and that judges should rewrite previous constitutional history so as to emphasize only those features that are consistent with the reigning ideas of the Roosevelt Revolution.[47] Frankfurter's approach allows for clarity in doctrinal derivation because all legal ideas can be related to a single generation's cluster of organizing concepts. The trouble is that his approach distorts the character of the modern Constitution, which is the cumulative product of the constitutional politics of many generations, not the exclusive handiwork of any one of them.

Or so Jackson persuaded himself—and, more importantly, the other triumphant New Dealers who sat with him on the bench in 1943. From where these men sat, Frankfurter seemed the model

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[46] See text accompanying notes 19-25.

[47] His treatment of the Founding in *Barnette*, id at 652-54, provides an instructive example of this Whiggish technique, which I elsewhere analyze as a "myth of rediscovery." See Ackerman, *We the People: Foundations* chs 2-3 (cited in note 27); and Ackerman, *We the People: Transformations*, chs 8-11 (cited in note 24).

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legal ideologue who insists upon totalizing the transforming character of the particular intellectual movement to which he has committed his life. After thinking over Frankfurter's proposal, however, most New Dealers in 1943 were content to read their generation as supporting only a revolutionary reform, not a total revolution. For them, the questions were how to identify the shattered fragments of the constitutional order that had survived the New Deal transformation, and how to integrate these fragments into the brave new world of "closer integration of society . . . and strengthened government controls" that Americans had built for themselves in the 1930s.

C. Earlier Challenges in Intergenerational Synthesis

This was not the first time the Supreme Court had faced such a problem. The Civil War, no less than the Great Depression, had led Americans to give their sustained support to a constitutional politics of revolutionary reform—reform which was expressed in the three Reconstruction Amendments. As the movement in support of Reconstruction crested, a newly reconstituted Republican Court confronted the same questions as the New Deal Court: How comprehensive was the revolutionary reform after all? How much of the old order had been repudiated? How much old law could or should be integrated into the new regime? The Reconstruction Court's response was similar to that of the New Deal Court.

In its first encounter with the challenge of synthesis, the Republican Court expressed the very same sense of anxiety and responsibility later voiced by Jackson for the newly reconstituted Democratic Court. Justice Miller set up the problem of intergenerational synthesis he confronted in the *Slaughter-House Cases* of 1873:

> We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences . . . have been before this court during the official life of any of its present members.
>
> . . . Twelve articles of amendment were added to the Federal Constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original; and the twelfth, adopted in eighteen hundred and three, was so nearly so as to have become, like all the

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> others, historical and of another age. But within the last eight years three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument.[48]

Miller, like Jackson, finds himself on the other side of a yawning break in constitutional time. He must somehow synthesize a recent constitutional transformation of "vast importance" into a very different constitutional order built in "another age." Of course, the ideals that inspired nineteenth-century Americans in the aftermath of the Civil War were very different from those that gained decisive popular support in response to the Great Depression. The Reconstruction Republicans had won a decisive victory for previously controversial ideas of nationhood, liberty, and equality. The New Deal Democrats gained much larger popular majorities for their vision of activist regulation by expert bureaucracies, superintended by democratic politicians responsive to an "open and unobstructed" electoral process.

Despite crucial substantive differences, the two Courts both emphasized the distinctive interpretive problem facing them: how to do justice to the most recent transformation in constitutional principles, while integrating the achievements of earlier generations of Americans into a meaningful whole.

D. A Closer Look at Intergenerational Synthesis

Jackson's answer: We should refuse to look upon New Deal ideals of democratic managerialism as if they were the only powerful abstractions guiding modern constitutional law. Instead, we should view them as part of a larger whole, in which the contributions of earlier generations justify robust abstractions that should constrain the operation of these New Deal ideals.

Since I will offer Jackson's performance in *Barnette* as a model for constitutional adjudication[49] in general, it is best to begin by sketching the broad outlines of this project in intergenerational synthesis. After all, neither the First Amendment nor the entire Bill of Rights is the only fragment from the Founding and Reconstruction that has survived the constitutional politics of the twentieth century. Before exploring *Barnette* more closely, it would be wise to view the entire range of problems to which Jackson's methods might serve as a guide.

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[48] *Slaughter-House Cases*, 83 US 36, 67 (1873).

[49] See Section II.E.

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For this purpose, think of the modern Constitution as a series of ideals constructed through the successful constitutional politics of different generations. From the Founding, at least four ideals have survived the transformations of two centuries: first, *higher lawmaking*—the people can give new marching orders to the normal politicians who govern in their name; second, *separation of powers*—no elected politician may normally monopolize authority, but must convince many other representatives of the people to go along before a new law can be validated; third, *federalism*—states, no less than the federal government, exercise power delegated by the people; and fourth, *fundamental rights*, including those expressly reserved by the people in the original Constitution and the Bill of Rights.

Following in the footsteps of Miller and Jackson, however, modern judges interpret the meaning of these constitutional themes in the light of other ideals validated during the great mobilizations of the nineteenth and twentieth centuries. Since Reconstruction, for example, judges have sought to reconcile the Founding federalism with the new sense of nationhood affirmed in the aftermath of the Civil War, and the new affirmations of universal liberty and equality that became the birthright of all Americans. Since the New Deal, judges have tried to preserve these Reconstruction ideals within the framework of a powerful activist state authorized to intervene in many areas of social life whenever elected politicians find that bureaucratic management will serve the general welfare.[50]

Nobody really expects the Justices to integrate all of the constitutional ideals of the Founding, Reconstruction, and New Deal in a single Moment of Grand Synthesis. Such a Herculean effort would outstrip the limits of the human mind. Such an expectation would also be hubristic in its implication that a single judge, or even an entire interpretive community, could wholly escape the limits of its own time and place. Despite our best efforts at synthe-

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[50] In singling out the great transformations achieved during Reconstruction and the New Deal, I do not deny the contributions of other generations in the construction of the modern constitutional order. From the triumphs of Jeffersonian and Jacksonian Democracy before the Civil War, through the victories of the Progressives and the Women's Movement during the middle republic, through the Civil Rights Revolution of the modern era, each generation has made its mark. My simplified triangular schema is complicated enough to make my point that the synthetic mission marked out in *Barnette* is a formidable one, requiring judges to reflect deeply upon the complex web of affirmations made at different times and places by the American people. See Ackerman, *We the People: Foundations* chs 3-6 (cited in note 27).

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sis, future generations of judges will, by virtue of their different historical perspectives on our nation's formative events, win insights that elude us today.

Modern judges have sought synthetic insight in a more realistic way: by using the case method as the engine for an ongoing process of collective deliberation. Each judicial effort at intergenerational synthesis is partial in at least two senses. First, even the greatest cases undertake a fundamental re-examination of only a few of the constitutive themes of constitutional law. *Barnette*, for example, focuses on the relationship between the New Deal ideal of democratic managerialism and the Founders' Bill of Rights, leaving other synthetic issues to other cases.

This first kind of incompleteness leads to another. Over time, as the Court explores different lines of partial synthesis, it will gain a new perspective on the synthetic exercises of the past, which will allow it to revisit older syntheses with new insights. No partial synthesis is good for all time. Each opinion, no matter how important, is but a sentence in an ongoing legal conversation. Judges, driven by the pragmatic imperative to decide a never-ending stream of cases, are required by individual litigants to revisit the tensions generated by the different ideals affirmed by different generations of the American people as they confronted different challenges to their constitutional identities. Because different sides will win if they can convince the Court to extend the leading ideals of different periods of constitutional politics to the case at hand, opposing lawyers regularly pit Founding federalism against Reconstruction equality, New Deal managerialism against the ideals of liberty expressed at the Founding and Reconstruction, and so forth.

The result is an ongoing contest between advocates of the Founding, Reconstruction, and New Deal for primacy in the field of legal contestation. No advocate ousts the others from the conversation, but each seeks to persuade the Justices (and the rest of us) to give greater weight to the themes and concerns most vividly expressed during one or another of these great jurisgenerative periods. This agon, I should emphasize, is motivated by each party's self-interest. The reason that one side emphasizes the Founding, and the other emphasizes the New Deal, has everything to do with their efforts to win the case. The larger test of success is whether, over many cases, lawyers and judges can elaborate convincing lines

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of synthesis which integrate intergenerational tensions into meaningful doctrinal wholes.[51]

The process of legal abstraction plays a crucial role within the ongoing effort at synthesis. It provides a vital medium through which the continuous struggle among the partisans of the Founding, Reconstruction, and the New Deal is conducted. In the courtroom, each lawyer tries to win her case by abstracting those aspects of these crucial jurisgenerative eras which suggest that the emerging lines of synthesis should be drawn in her favor. The judicial patterns of response to particular abstractions provide an index of the power of each past generation to make its constitutional ideals an enduring part of modern law.

E. Jackson's Contribution

Within this framework I return to the Flag Salute Cases. As we have seen, Justice Frankfurter's opinions represent a remarkably pure case of New Deal hegemony.[52] He seeks to express his own generation's contribution by elaborating the powers of the democratic managerial state at a high level of abstraction, while trivializing all previous contributions that cannot be understood within New Deal terms. Thus, he is entirely willing to recognize the meaning of the Bill of Rights insofar as it might be instrumental in keeping "the remedial channels of the democratic process . . . open and unobstructed."[53] Similarly, he is willing to tolerate intervention when democratic managers make "clear mistakes" in means-end rationality. But Frankfurter is unwilling to accept the thought that New Deal themes should be constrained by abstractions drawn from the constitutional politics of *previous* genera-

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[51] Of course, this dynamic effort at ongoing synthesis is but an interpretive possibility. Time may lead instead to judicial arbitrariness and interpretive confusion: in one case, New Deal ideas of democratic managerialism may triumph over Founding ideals of the Bill of Rights; and in the next, apparently similar, case, the reverse is true. Rather than trying to reconcile conflicting "lines of cases," the Court acts in the way legal realists say is both inevitable and desirable—rejecting the synthetic imperative and glorying in the judicial freedom wrought by doctrinal indeterminacy.

It is important to determine whether American judges have, by and large, followed the path of the law described in the text or in this footnote. Moreover, there is only one way to find out: we should take the interpretive hypothesis seriously and read the Justices' work with charity. Can one see them elaborating large synthetic patterns over time? If not, then the realist/crit hypothesis wins. If so, the argument proceeds to a second stage more favorable to the interpretivist: why does the realist/crit insist on ignoring the patterns of juridical meaning that intelligent reading reveal?

[52] See Section II.A.

[53] *Gobitis*, 310 US at 599.

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tions—generations whose enthusiasm for the activist welfare state was modest, to say the least.[54]

This is the premise that Jackson is at pains to deny:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[55]

Note the exercise in holistic reading that has, since the time of Marshall, signalled the introduction of powerful constitutional abstractions. Jackson refuses to cut up the Bill of Rights into little bits and pieces. He urges us to study the Bill, taken as a whole, and use it to re-present the Founding contribution to the new world of constitutional meaning inaugurated by the New Deal. As he approaches his particular problem, his claims for the Bill's enduring relevance are no less emphatic. For him, the First Amendment is to be understood as a norm of compelling generality and abstraction.

As always, Frankfurter provides a useful foil in considering generality. His dissent in *Barnette* points out that parents who deeply object to flag-saluting have the option of sending their children to private schools that dispense with this requirement.[56] For him, this private-sector option helps make it constitutionally permissible for the state to require ritual professions of loyalty.[57]

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[54] A fuller treatment of Frankfurter's particular effort at synthesis would move far beyond his Flag Salute opinions. On the one hand, his treatment of reapportionment as a "political question," see *Colegrove v Green*, 328 US 549, 552-56 (1946), sits awkwardly with his recognition in *Gobitis* of the importance of keeping the "channels of the democratic process . . . open and unobstructed." 310 US at 599. On the other hand, his willingness to use the Due Process Clause as a source of substantive norms, see *Rochin v California*, 342 US 165, 169-74 (1952), is in tension with the hard line he took in *Barnette* a decade earlier. Since my focus here is on Jackson, not Frankfurter, I will have to save a fuller treatment of these Frankfurterian themes for another time. See Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 NY L Sch L Rev (forthcoming 1992).

[55] *Barnette*, 319 US at 638. Jackson's final line is, I think, an exaggeration. Since the Bill of Rights can be amended, its continuing vitality could well "be submitted to vote"—as, for example, President Bush's effort to repeal the First Amendment with regard to flag-burning suggests. I elaborate on this theme in *We the People: Foundations* chs 1, 11 (cited in note 27).

[56] *Barnette*, 319 US at 656-57.

[57] Id at 657-58.

Jackson rejects this gambit. He thinks that the Bill of Rights should not be treated as a weighty constraint only when the activist state intervenes in the private sector; its powerful abstractions should also constrain state action within the expanding *public* sector.[58] As in other great synthetic cases of the early modern period—most notably *Brown v Board of Education*[59]—the constitutional limits on the public sector are developed in a case involving the schools. But the theme invites yet further generalization: democratic management of public institutions, no less than intervention in the private sector, must contend with competing principles drawn from the Founding and Reconstruction.

Within this framework, Jackson defines the mission of the First Amendment:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[60]

Notice the "if." As the New Deal transformation has swept away so much of the old order, it is not at all clear whether any fixed stars remain in our constitutional constellation. *If*, however, it remains plausible to use the Founding as a check on the New Deal, Jackson's celestial imagery suggests that we must appreciate the great distance separating us from the eighteenth century. His gesture toward a distant but "fixed" star recalls Justice Miller's recognition that the Founders' Constitution is "of another age."[61] Neither Miller nor Jackson imagines that Madison, or anybody from the eighteenth century, could help him out on his particular problem. Madison lived in a world where states still established religions, where public schooling was hardly known, where we had not fought the Civil War and had not won the Reconstruction Amendments. The only way *credibly* to re-present the Founding contribution in the twentieth century is through "majestic general-

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[58] See his opinion in *Barnette*, 319 US at 635-36 (answering in the negative the question whether "a ceremony [flag saluting] so touching matters of public opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution.").

[59] 347 US 483 (1954). For a discussion, see Ackerman, *We the People: Foundations* ch 6 (cited in note 27). See also *Everson v Board of Education*, 330 US 1 (1947) (relationship of Establishment Clause to state funding for parochial education).

[60] *Barnette*, 319 US at 642.

[61] *Slaughter-House Cases*, 83 US at 67.

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ities," which challenge us to make them meaningful premises in our effort to do justice to the concrete problems of activist government.

Jackson's opinion cautions us against any mechanical understanding of this process. He refuses to categorize *Barnette* as a "free exercise" case and thus protect the Witnesses' rights on the basis of a formulaic reading of a single clause. While this much is evident from the text,[62] Jackson's next step requires more careful attention. For it is equally mistaken to understand him as "applying" a mechanistic understanding of the clause protecting "free speech." There is not a single day in the life of school children when they are not forced to speak and write in ways that meet with their teachers' approval. And if they don't say and do the "right things" in oral drill and written examination, school authorities can punish them very severely without violating their constitutional rights. Indeed, if any compendious label will serve to mark Jackson's fixed star, I think "privacy" serves at least as well as "free speech." While the activist state may coercively shape the behavioral and intellectual repertoire of each young American through long years of "public education,"[63] each child has the fundamental right to turn his back on the symbols of national identity so eagerly impressed upon him by his teachers. He has the right to tell his classmates, and his fellow citizens more generally, that he insists upon standing apart from the common rituals of citizenship they find so deeply meaningful—that the Constitution protects his right "to be let alone," and to search for fundamental meaning in fora far removed from the common civic culture.

It is better yet to beware all labels, and focus instead on Jackson's fundamental interpretive proposal. We must continue to read the Bill of Rights, and other great texts of the eighteenth and nineteenth centuries, as a source of liberating abstractions that might serve as a counterweight to the claims of democratic managerialism. "We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increas-

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[62] *Barnette*, 319 US at 635-36.

[63] Moreover, even if parents choose to withdraw their children from the public schools they can hardly insulate "private" education from pervasive state control. While a certain degree of curricular freedom is constitutionally required, see, for example, *Meyer v Nebraska*, 262 US 390, 402-03 (1923), the extent to which "private" schools may exempt themselves from onerous state minima remains an open question.

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ingly sought through closer integration of society and through expanded and strengthened government controls."[64]

III. EASTERBROOK'S CONTRIBUTION?

A. The Paradox Revisited

This is, at least, Frank Easterbrook's view of the matter as he confronts his moment of judicial truth in *American Booksellers*.[65] In seeking to explain why Indianapolis's sweeping prohibition of pornography was unconstitutional, Easterbrook can find no better place to start than a word-for-word recitation of Jackson's gesture toward a "fixed star."[66] What follows is a compelling effort to follow in Jackson's footsteps by insisting on the right of all Americans to pursue a private life of the spirit even though a majority may find that life degrading.[67]

I am puzzled, then, that Judge Easterbrook returns to academia in these pages to profess anxiety about the role of abstraction in constitutional law. He is much too wise to spend his time challenging the decisive New Deal victory for an abstract reading of the Bill of Powers. Surely he is not willing to stumble where even Robert Bork and Richard Epstein fear to tread.[68] Does he propose, then, to renounce his opinion in *American Booksellers* and embrace the ideal of managerial democracy with the New Deal fervor of a Felix Frankfurter? Equally unlikely. Easterbrook's reliance on Jackson was no makeweight. It reflects an interpretive imperative that both of us share. We both aim to put the New Deal Revolution in its place—neither making too much of it nor too little. Thus, we both accept Jackson's opinion in *Wickard* as putting the quietus on sharp Madisonian limits on the powers of the ac-

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[64] *Barnette*, 319 US at 640.

[65] *American Booksellers Ass'n, Inc. v Hudnut*, 771 F2d 323 (7th Cir 1985). See text accompanying notes 8-16.

[66] 771 F2d at 327.

[67] While I find much to praise in Easterbrook's opinion, I do have a serious problem with it. It lies in his monocular concentration on a single one of the "fixed stars" that seems relevant to his problem. An even better opinion would have thoughtfully confronted—as Easterbrook did not—Catharine MacKinnon's effort to guide doctrinal development in this area by reference to a very different "fixed star": the principle of equality affirmed two generations after the Founding at Reconstruction.

MacKinnon, however, suffers from an equal and opposite deficiency in her exercises in constitutional navigation: she peripheralizes the libertarian aspect of the Founding with the same spectacular intensity that Easterbrook uses to blot out the potential significance of Reconstruction. I am still searching for a deeper sense of synthetic understanding than either Easterbrook or MacKinnon attempts or provides.

[68] See note 18 and accompanying text.

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tivist welfare state. At the same time, we follow Jackson in seeking to place the revolutionary reforms codified by *Wickard* into a larger constitutional context within which the enduring principles of Reconstruction and the Founding play a fundamental role. Only if judges continue to thematize these earlier affirmations with the vigor that Easterbrook displays in *American Booksellers* will the ideals of the Bill of Rights continue to compete on relatively equal terms with New Deal ideals of democratic managerialism.

I now return to the paradox with which I began. If Easterbrook and I basically don't disagree about the role of abstraction in constitutional law, surely we *do* disagree about something. What might that something be? My bewildered reply: at least so far as constitutional law is concerned, Frank Easterbrook is a bigger New Dealer than I am, and so is more reluctant to use the Bill of Rights as a source of powerful abstractions constraining the claims of democratic managerialism. This may seem paradoxical because I would also be prepared to use the (more limited) powers of activist government more aggressively on a whole range of legislative matters than Easterbrook would tolerate.

B. The *Lochner* Myth

Right now I am more interested in elaborating the paradox than in resolving it. A systematic approach would invite Judge Easterbrook to read the entire Bill of Rights in the same spirit of robust abstractionism with which he reads the First Amendment. It will be enough here to concentrate on one obvious place where Easterbrook lets his anxieties about abstraction get the better of him—in his acceptance of the familiar New Deal myth about *Lochner v New York*.[69] On this view, the *Lochner* Court was simply imposing its own hard-nosed capitalist values upon a populace who, even in 1905, was already yearning for New Deal leadership. Justice Peckham and company were not engaged in the business of constitutional interpretation; they were pulling decisions out of thin air. In the words of Justice Black, they were engaged in some obscurantist project in "natural law."[70] To borrow from Justice White, perhaps the most emphatic New Dealer now on the bench:[71]

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[69] 198 US 45 (1905).

[70] *Griswold*, 381 US at 514-15 (Black dissenting).

[71] See *INS v Chadha*, 462 US 919, 967-1003 (1983) (White dissenting).

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> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses . . . .[72]

Substantive due process: the oxymoron itself suggests the phantasmic quality of the *Lochner* era on the New Deal rendering. If Easterbrook holds this view of *Lochner*, I'm not surprised that he worries about the "right" level of abstraction appropriate in constitutional cases. If the judicial protection of "liberty" involves "constitutional law having little or no cognizable roots in the language or design of the Constitution," perhaps the "right" level of abstraction in *these* cases should be "zero." If anything, Justice White is fainthearted in describing the lessons of the New Deal-Old Court struggle: why should the Courts safeguard *any* rights unrooted in the larger "text or design"?[73]

But this familiar line of reasoning is based on a false historical premise. The *Lochner* Court was not making it up: the Contract and Property Clauses are no more, but no less, a part of the Constitution than are the Free Speech and Establishment Clauses. Peckham's decision in *Lochner*, no less than Jackson's decision in *Barnette*, has deep intellectual roots in our most successful movements of constitutional politics. Freedom of contract is deeply entrenched in the Free Labor and Abolitionist sources of the Reconstruction Amendments, with roots that run as deep as the Enlightenment and Commonwealth ideas that provide the interpretive context for the Founding Bill of Rights.[74] When *Lochner*

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[72] *Bowers v Hardwick*, 478 US 186, 194-95 (1986).

[73] See Frank H. Easterbrook, *Substance and Due Process*, 1982 S Ct Rev 85, 125.

[74] A fuller treatment would consider the Founders' understanding of the Property and Contract Clauses before the constitutional politics of the nineteenth century transformed the original Constitution. See Ackerman, *We the People: Foundations* at 63-67, 101-04 (cited in note 27). *Lochner* was unthinkable as a constitutional interpretation until Reconstruction made it seem a plausible synthetic response to the task of reconciling the Founding concerns with federalism and Republican commitments to Free Labor and Abolitionist principles. See id at 86-103. The most sensitive recent discussion of these matters is William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 Wis L Rev 767, 772-800. As Forbath emphasizes, *Lochner*ism was by no means the only plausible interpretation of the historical experience culminating in the Reconstruction Amendments. For example, if the Populists had won the crucial Presidential election of 1896, their judicial appointees would have interpreted the tradition in ways far more conge-

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was decided in 1905, moreover, Americans had decisively repudiated the Populist effort to transform the emerging laissez-faire economy.[75] Indeed, Teddy Roosevelt had a very hard time gaining support for very modest efforts to control big time capitalism.[76] It is simply anachronistic to suppose that the courts of the *Lochner* era were engaging in an utterly undemocratic and noninterpretive form of value imposition.[77]

Rather than spending more time criticizing the New Deal myth about *Lochner*, I want to invite Easterbrook to join me in taking a more sympathetic view of the interpretive enterprise that the justices of the middle republic attempted during their long march from Reconstruction to the New Deal. After all, if liberal Democrats like myself can face up to the anachronistic character of this New Deal myth, why should conservative Republicans resist intellectual rapprochement with the *Lochner* Court?

C. Easterbrook's Options

The task for a judge like Easterbrook, of course, is to define the implications for practical decisionmaking were he to undertake this interpretive turn. So far as I can see, Judge Easterbrook has two basic choices: he can follow Richard Epstein or he can follow me.[78]

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nial to the rights of organized labor. See id at 800-17. But this point only establisbes that *Lochner* wasn't inevitable, not that it was radically noninterpretive.

Just as modern constitutionalists minimize the nineteenth-century foundations of a property-contract understanding of constitutional liberty, so too we tend to exaggerate the continuity between the modern understanding of free speech and its eighteenth-century roots. See Leonard W. Levy, *Emergence of a Free Press* (Oxford, 2d rev ed 1985). To forestall predictable misunderstanding, I hardly wish to suggest that there is *no* continuity between the eighteenth and twentieth centuries. To the contrary, it is precisely Jackson's aim to convince us that, by approaching the Bill of Rights at an appropriately abstract level, we may grasp the sense in which twentieth-century case law carries on, under vastly different circumstances, the motivating concerns of the eighteenth-century Framers. My point is simply to suggest that my proposed application of the Contract and Property Clauses in *Bowers v Hardwick*, see Section II.D., is no more, but no less, grounded in the constitutional affirmation of the past as Easterbrook's application of the First Amendment in *American Booksellers*.

[75] See James L. Sundquist, *Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States* 134-69 (Brookings, rev ed 1983).

[76] See John Morton Blum, *The Republican Roosevelt* 73-87 (Atheneum, 3d ed 1974).

[77] Or so I bave argued, at tedious length, elsewhere. Ackerman, *We the People: Foundations* ch 4 (cited in note 27). For an analysis of *Lochner* that goes quite far in questioning the New Deal myth, see Laurence H. Tribe, *American Constitutional Law* 584-86, 769-72 (Foundation, 2d ed 1988); Tribe and Dorf, *On Reading the Constitution* at 65-66 (cited in note 7).

[78] When faced with such grim alternatives, perhaps he will find his own "third way"?

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First, for Richard Epstein: If *Lochner* was good law when it was decided, it remains good law today. So let's get on with the great task of our generation—the destruction of the constitutional legacy of the New Deal. Forward to yesterday.[79]

Second, for me: The reason you are a judge, and other Reagan nominees aren't, is that you recognize that Epstein is calling for a constitutional revolution that has not gained the mobilized support of the American people.[80] Whatever the Reagan Revolution accomplished, it failed to win a popular mandate that would justify an effort by its judicial appointees to repudiate the Roosevelt Revolution. Robert Jackson should remain Easterbrook's "fixed star"—both the Jackson of *Wickard* and the Jackson of *Barnette*.

Nonetheless, this is the 1990s, not the 1940s. Perhaps Judge Easterbrook can take advantage of his historical perspective to recognize some things that enthusiastic New Dealers like Jackson did not emphasize in the heat of their constitutional struggle. In particular, the Old Court's emphasis on private property and freedom of contract was not nearly so aberrant as the New Deal Court proclaimed. Granted, New Deal Democracy suceeded in repudiating property and contract talk as a way of constraining governmental regulation of the marketplace. Nonetheless, the ideas of property and contract have a far broader range of application than merely to the marketplace. Perhaps, following Jackson in *Barnette*, Easterbrook should be able to "transplant these rights [of property and contract] to a soil in which the *laissez-faire* concept or principle of non-interference has [not] withered"?[81]

D. The Test Case: *Bowers v Hardwick*

Consider *Bowers v Hardwick*.[82] Two adults want to arrange their affairs to their mutual advantage. They seek to exclude others who wish to invade their private spaces for the purpose of disrupting their consensual arrangements—to make the couple worse off, not better off, as they themselves understand "better" and "worse." This is stuff the Old Court described in the language of property and contract, only they talked this way mostly in cases

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[79] See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 281-82 (Harvard, 1985).

[80] Bernard Siegan, for example, owes the failure of his nomination to the Court of Appeals to his Epsteinian views on the Takings Clause. See, for example, Editorial, *An Injudicious Choice for Judge*, NY Times 26 (Mar 5, 1988) ("[t]he courts are the wrong place for such extreme views").

[81] 319 US at 640.

[82] 478 US 186 (1986).

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involving the marketplace.[83] *Lochner* protected the right of workers, not lovers, to move their bodies around ovens, not bedrooms, for as many hours a week as they and their employers believed mutually advantageous.

But any reasonably competent lawyer can see that the same basic legal ideas are at play in *Lochner* and *Bowers*: property, conceived as the right to exclude others, and contract, conceived as the right to arrange mutually advantageous terms for association. The parallel should be especially obvious to a lawyer-economist like Frank Easterbrook, whose entire academic career has been devoted to the property-contract paradigm. Easterbrook's particular specialty has been corporation law, where he has been quite creative in analyzing the modern firm as if it were little more than an especially dense "nexus of contracts."[84] If Easterbrook has the imagination to view "General Motors" as just another name for a "nexus of contract," it should be child's play for him to see how a homosexual couple can use the language of property and contract to express their legal interests.[85] Quite true, most lawyers call *Bowers* a case involving "privacy" and "freedom of intimate association," not "property" and "contract." But these conventional labels shouldn't stop Easterbrook from applying the property-contract paradigm to *Bowers* any more than it stopped him in the case of "corporations" like General Motors.

Indeed, it doesn't require fancy law and economics to grasp the point. In their great essay of 1890 introducing "privacy" into the legal lexicon, Warren and Brandeis were perfectly aware that

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[83] However, the Court did not reserve this language *exclusively* for cases involving the marketplace. See, for example, *Meyer v Nebraska*, 262 US 390, 400 (1923) (invalidating statute forbidding teaching of foreign languages and placing an instructor's and parents' rights to contract for instruction "within the liberty of the [Fourteenth] Amendment"); *Pierce v Society of Sisters*, 268 US 510, 535 (1925) (invalidating statute mandating public school attendance and recognizing private schools' property rights in maintaining the patronage of students).

[84] See Frank H. Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* 12 (Harvard, 1991).

[85] The standard framework for defining property relationships within the field of law and economics does not discriminate between traditional economic relationships and those typically described by the language of "privacy." So far as lawyer-economists are concerned, a rights-holder has a *property* interest if the law requires others to gain his consent before invading the right in question. See Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv L Rev 1089, 1092 (1972). Plainly, the petitioners in *Bowers* were claiming a property right in this sense. Moreover, other members of the Chicago School of Law and Economics have spent a great deal of time analyzing family relationships in contractualist terms. See Gary S. Becker, *A Treatise on the Family* ch 2 (Harvard, 1991).

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they could have achieved their objectives by dispensing with their neologism.[86] They explicitly note that their point would prevail if the profession would begin to speak not of privacy, but of "[t]he right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolable personality."[87] Rather than taking this conceptual route, however, Warren and Brandeis chose to split "the right of property in its widest sense" into two components: they kept the name of "property" to mark the market-based conception that nineteenth-century lawyers used at common law and equity, and they applied the new label "privacy" to mark the legitimate exclusion of outsiders in non-market contexts.

Warren's and Brandeis's proposal to split "property in its widest sense" into two legalistic boxes—"market property" and "privacy"—has had many fateful consequences in twentieth-century law. Most importantly, the two-box approach made it easier for the legal mind to accommodate itself to increasing regulation of market property. However intensive public regulation in this area might be, lawyers could explain to themselves that they might continue to protect more intimate relationships through the new doctrine of "privacy." Similarly, lawyers could endorse the intensive regulation of "contracts" in the marketplace, while protecting more intimate contractual relationships under the heading "freedom of intimate association."[88] Perhaps the pragmatic advantages engendered by this systematic doubling of doctrinal categories have proven substantial; perhaps not. But surely, there is no gain in forgetting the more abstract ideas—"property and contract in their

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[86] Samuel D. Warren and Louis Brandeis, *The Right to Privacy*, 4 Harv L Rev 193 (1890).

[87] Id at 211. See also: "We must therefore conclude that . . . the principle which has been applied to protect these rights [of privacy] is in reality not the principle of private property, *unless that word be used in an extended and unusual sense.*" Id at 213 (emphasis supplied). Of course, if the authors had convinced their audience to expand property-talk, rather than speak in terms of "privacy," the "extended" conception of property would have long since lost its "unusual" character.

[88] Kenneth Karst recognizes that "[w]e pay a price" for refusing to recognize the relationship between the modern language of "intimate association" and *Lochner*ian talk of "freedom of contract." See his characteristically sensitive essay, Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L J 624, 664-65 (1980). Nonetheless, even he does not explore this relationship with the energy he displays in other parts of his important essay.

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widest sense"—when we go about construing the meaning of the Constitution.[89]

New Dealers like Justices Black and White are wrong, then, to treat "privacy" and "intimate association" as concepts that have "little or no cognizable roots in the language . . . of the Constitution."[90] And essays, like Richard Posner's in this issue, continue this error by treating *Bowers* as if it involved the question of "unenumerated rights."[91] To the contrary, the special place of contract and property is *explicitly* enumerated in our Constitution. The challenge is simply to grasp the way in which "privacy" and "freedom of intimate association" express these constitutional commitments to "property" and "contract" after the New Deal transformation has stripped *market*-property and *market*-contract of their constitutionally privileged position. While I am an admirer of Justice Douglas's opinion in *Griswold v Connecticut*,[92] he unnecessarily weakens his argument by treating "privacy" as if it were only a "penumbra" of other explicit guarantees of the Bill of Rights.[93] Though a holistic reading of the Bill of Rights does indeed support Douglas's claim, it should serve as a preliminary for the main point: "privacy" is simply a word that modern lawyers have used to describe a vital aspect of "property in its widest sense"—and hence is appropriately at the *center* of the modern Takings Clause.[94] Similarly, Justice Brennan missed an opportunity to use the Contract Clause in *Eisenstadt v Baird*, when he led the Court to protect the fundamental right of each American to arrange the terms of his sexual engagements to mutual advantage.[95] No less than Douglas, Brennan was too traumatized by the

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[89] A powerful essay by Margaret Jane Radin, *Property and Personhood*, 34 Stan L Rev 957 (1982), serves as the best modern introduction to this use of the Takings Clause. See also Bruce Ackerman, *Private Property and the Constitution* chs 2, 4 (Yale, 1977).

[90] *Bowers*, 478 US at 194.

[91] Richard A. Posner, *Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U Chi L Rev 433 (1992).

[92] 381 US 479 (1965). See Ackerman, *We the People: Foundations* at ch 6 (cited in note 27).

[93] 381 US at 484.

[94] See Radin, 34 Stan L Rev 957 (cited in note 89), and Ackerman, *Private Property* at chs 2, 4 (cited in note 89).

[95] 405 US 438 (1972). On the surface at least, Brennan relied on a construction of the Equal Protection Clause, holding that there were insufficient grounds for a statute denying unmarried individuals access to contraceptives which married couples could claim by right under *Griswold*. To make this argument credible, however, he found himself speaking in a language with contractualist overtones.

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of

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Court Crisis of the 1930s to allow himself to admit the extent to which he was engaged in the Jacksonian project of "transplant[ing] . . . rights"—rights of property and contract—"to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs."[96]

But, as Easterbrook's presence on the bench attests, a new judicial generation is rising to prominence. In contrast to Black or Douglas, White or Brennan, the New Deal Revolution is not a central part of this generation's lived experience. It is simply an important, but not all-important, historical reality. While perfectly prepared to live with the activist regulatory state, the Easterbrooks of the world are not prepared to love it. They are, moreover, equipped with intellectual tools that allow them to understand non-market institutions in terms of property and contract. Their challenge is synthesis: to use their conceptual tools to express a renewed appreciation of the fundamental place of liberty in the American constitutional tradition without destroying the constitutional foundations of the modern state.

E. Final Thoughts: Pollution/Commerce, Privacy/Property

Perhaps a final analogy will help smooth the way. This one returns to my first point—the need for symmetry in the treatment of rights and powers. From this vantage, my proposal for *Bowers* invites courts to use the very same level of abstraction in dealing with "privacy" that they already use in legitimating novel uses of federal power. Consider, for example, the untroubled way in which courts have authorized the national government to embark on a multifaceted assault on the pollution problem. In dealing with the Clean Air Act,[97] nobody worries about the lack of an explicit grant of power to "regulate pollution" in the Constitution. In the post-New Deal era, it is enough to point to the power to regulate "commerce," and pass on to more interesting constitutional questions.

But more thoughtful consideration suggests that the relationship of "pollution" to "commerce" is, as a matter of legal method,

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its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Eisenstadt, 405 US at 453. Because Brennan understood the case in equal protection, rather than contractualist, terms, he did not expand on this line of thought.

[96] *Barnette*, 319 US at 640.

[97] Clean Air Act, 42 USC §§ 7401 et seq (1989).

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remarkably analogous to the relationship of "privacy" to "property." First, treating "pollution" as if it involves "commerce" requires a more abstract understanding of the term than even *Wickard* involved. It was at least *possible* for the farmer in *Wickard* to sell his home-grown wheat in the marketplace, and thus participate in interstate commerce. The only problem was that the farmer didn't want to enter the marketplace. In contrast, there is no marketplace for pollution at all. If "commerce" covers this exercise of power, the idea must be stripped of all its usual connotations of "buying" and "selling." The only sense in which "pollution" involves "commerce" is that it is often, but not always, the outcome of market production, and its federal regulation will alter competitive relationships that would otherwise exist. Yet this very extended sense of "opportunity cost" suffices to place "pollution" comfortably within the category of "commerce" as the modern legal mind understands the term. If this is so, why does it seem so hard to define "property" at a sufficient level of abstraction so as to embrace Hardwick's "privacy" right? If anything, the relationship between these two ideas is closer than anything that binds "commerce" and "pollution." The core of both "privacy" and "property" involves the same abstract right: the right to exclude unwanted interference by third parties. The only real difference between the two concepts is the kind of relationship that is protected from interference—"property" principally protects market relationships while "privacy" protects more spiritual ones. Yet surely this fact should not prevent recognition of "privacy" as a dimension of constitutional "property in its widest sense."

We can push the analogy further. In both the case of "commerce" and the case of "property," the explicit text, if particularistically interpreted, only covers cases involving relatively straightforward market relationships. In treating these two concepts abstractly so as to include "pollution" and "privacy," modern constitutional law has permitted modern government to reinterpret its fundamental purposes in ways that undoubtedly would have surprised the Founding generation. Though founded in the Commerce Clause, the federal concern with "pollution" is by no means exhausted by economic concerns, however abstractly understood. There is a different concern at work—a concern for ecological integrity which is quite alien to any of the central aims of the Founders. Whatever was motivating the generations who fought the Revolution and the Civil War, it definitely wasn't the protection of the wilderness.

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Once again, the relationship between "property" and "privacy" is less strained. While "privacy," like "pollution," directs our attention to non-market values, at least the particular value it protects—individual freedom—isn't absent from the writings of the Federalist Founders and Reconstruction Republicans. If lawyers find it so easy to read "commerce" to embrace ecology, it seems very odd that they should suddenly have "originalist" worries when reading "property" to embrace privacy. The question remains: *Why* this asymmetry between powers and rights?

CONCLUSION

At the end of his great dissent in *Bowers v Hardwick*, Justice Blackmun searches the past for signs of a better future. Remarkably enough, he repairs to the same fixed star that inspires Judge Easterbrook:

> It took but three years for the Court to see the error in its analysis in [*Gobitis*]. . . . I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do.[98]

It is not too late for Judge Easterbrook to hear this warning. The tides of political fortune, and his own intellectual gifts have granted him a position of judicial leadership. Will he lend his formidable talents to a deeper accommodation of the Bill of Rights to New Deal claims of managerial democracy? Or will his gesture toward Jackson's "fixed star" seem increasingly empty with the passage of time—as he leads the rising generation of judges to embrace a statist reading of the Bill of Rights that Jackson thought he had buried at the moment of the welfare state's greatest promise?

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[98] 478 US at 213-14 (Blackmun dissenting).

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