‘Suicide Pact’?
Or
‘Unrestricted Constitutional Right’?

*Robert Jackson and the struggle in balancing the liberties of the First Amendment*

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ABSTRACT

As a journalism major, the First Amendment is of the utmost importance to me and I believe it is the foremost section of the Bill of Rights in separating the ideologies of our nation from other nations. Its relevance today is also an important thing to note.

As someone who grew up in the community that former Associate Justice of the U.S. Supreme Court and Chief U.S. Prosecutor at the Nuremberg War Crimes Trial, Robert Jackson, hails from, the preservation of his legacy, through his words and actions, has also always been important to me.

Thus, in combining those two backstories, I came up with the following questions of which I hope this research project comes to answer:

1. What do Jackson’s opinions from *Terminiello v. Chicago* (1949) and *American Communications Association v. Douds* (1950) tell us about Jackson’s beliefs on the First Amendment?
2. Considering these cases both take place after the Nuremberg War Crimes Trial, are his beliefs different from those before Nuremberg?

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INTRODUCTION

I N T R O D U C T I O N

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

While the framers of the United States Constitution might not have realized the subsequent 226 years worth of dispute the above forty-four words would cause, what remained foremost in their minds in authoring one of the most important documents in world history was a belief that oppression would have no place in the new nation that they had envisioned. The First Amendment and its continued protection of our expression serves as the foremost basis against government oppression. By preserving this right, power naturally can enable an everyday citizen to make decisions and rise to the highest of heights.

During Robert Jackson’s time as a Supreme Court Justice, many cases argued before the Court dealt chiefly with elements of the First Amendment. As a nation engulfed in war, concerns rose over actions that may be perceived as being unpatriotic. Among the most famous of Jackson’s decisions regarding such a case continues to be West Virginia State Board of Education v. Barnette (1943) which ruled that the Free Speech Clause of the First Amendment protected students from being required to pledge allegiance to the United States flag. However, while Barnette has been cited as one Jackson’s most cited decisions from his eleven years on the Court and remains timeless in its magnitude, few realize that two of his other First Amendment opinions, American Communications Association v. Douds (1950) and Terminiello v. Chicago (1949), come to form a more nuanced approach to freedom of speech.

Though both influential in their own way, Douds and Terminiello represent the views of an almost changed Jackson --- one who had seen the lengths of oppression during the Nuremberg Trials. Jackson, as Chief U.S. Prosecutor for the inaugural International Military Tribunal, not only was in charge of researching the brutality of the Third Reich during its 12 year reign, but he bore witness to the additional brutality of just working with Soviet leaders in coordinating the trials. As Francine Hirsch mentions in “The

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1 The Constitution of the United States, Amendment 1.

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Soviets at Nuremberg,” communist participation was considered as “regrettable, but unavoidable, a Faustian bargain that the U.S. and Britain made in order to bring closure to the war and bring the Nazi’s to justice.” As such, Jackson was able to witness the danger in allowing citizens to engage in hateful speech from both sides of the ideological spectrum that results in the undermining of authority. Thus, after the trials, Jackson’s opinions are more complex and less absolute as compared to his opinion in Barnette, where he is often remembered for crafting the following belief on 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. If there are any circumstances which permit an exception, they do not now occur to us.*

However, seven years later, Jackson’s poetic tone regarding the First Amendment changes as suddenly through his opinions, readers can almost gather his fear of the events that excessive and hate-filled speech could create.

**American Communications Association v. Douds (1950)**

Following World War II and the first and only use of an atomic bomb on enemy territory, it was no secret that, while the United States’ war against the Japanese had ended, a war against the Soviet Union was ready to begin. For the next forty years, the fear of any type of nuclear attack was closely associated and partnered with a national fear of communism.

Amidst this fear was hostility toward socialistic organizations, such as labor unions. While the Wagner Act of 1935 had legally justified the organization of unions, the Taft-Hartley Act of 1947 made serious substantive provisions to this. While Section 7 did remain, an adjustment was made to add language that employees had the right to refrain from participating in a union. Additionally, further provisions included an

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3 “The right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” - “Interfering with Employee Rights (Section 7&8(a)(1))” *National Labor Relations Board.*
ability by the President to appoint a board of inquiry to investigate labor disputes when said dispute could endanger national health or safety and obtain an 80-day injunction to stop the continuation of a strike, as well as the forbidding of unions to contribute to political campaigns. However, the provision that became the most notable was the requirement of union leaders to take an oath stating they were not communists.

The constitutionality of this “test oath,” as it was famously referred as, found its way onto the desk of the Supreme Court in October of 1949 during one of the most unusual periods in the Court’s history. Limited to six justices for this particular case, three of the Court’s most liberal jurists refrained from or were unable to take part in the case. Justices Frank Murphy and Wiley Blount Rutledge had passed away in June and September, respectively, and Justice William Douglas had been injured in a horse riding accident, causing him to be hospitalized during the arguments. Further, Murphy and Rutledge’s successors, Justices Tom Clark and Sherman Minton, respectively, disqualified themselves from the case; Minton, because he was not sworn onto the Court until the day after oral arguments had concluded and Clark, because he had served as the Attorney General responsible for the government’s side of the case. Thus, the Court was left with six justices, the statutory minimum.

Legal scholar Glendon Schubert, in his synthesis of Jackson’s judicial opinions, believes the Court could have decided to reargue the case in the spring or fall of 1950 with Minton and Clark able to participate. However, he claims that fear overrode an opportunity for jurisprudence.

The unseemly haste in which the decision was announced doubtless reflects that these were the days when Senator McCarthy’s goose hung high, so the collective national security interest in purging American labor of Commies and their fellow travelers overrode such lesser interests as constitutional rights to freedom of speech and of belief.

Thus, in a 5-1 decision, the Court ruled the “anti-communist test oath” did not violate the First Amendment. While Chief Justice Fred Vinson delivers the opinion of the Court, and Justices Harold Burton, Stanley Reed, Felix Frankfurter, and Jackson, join him, Frankfurter and Jackson each concurred and dissented in part.

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6 Justice Hugo Black was the lone dissenter.
What *Douds* Tells Us About Jackson’s First Amendment Beliefs

*The Concurrence*

As mentioned, Jackson publicly acknowledges his own moral and legal bind by issuing a concurrence and a dissent. Through this, readers are given almost exclusive access to the inner conscientious workings of the Justice.

In opening, Jackson ponders, quite openly, why the Communist Party is not held in the same constitutional light as the already established idealogues:

*If the statute before us required labor union officers to forswear membership in the Republican Party, the Democratic Party or the Socialist Party, I suppose all agree that it would be unconstitutional. But why, if it is valid as to the Communist Party?*

But, almost immediately, Jackson describes the difference, stating that the Communist Party is “something different, in fact from any other substantial party we have known.” He further explains that, because of the unique Democracy threatening situation, the Communist Party, “constitutionally, may be treated as something different in law.” This presents an interesting precedent as suddenly there is acknowledgment that the U.S. Constitution may be open to the greatest interpretation that there are proper dealings for unique circumstances. He continues by acknowledging five reasons why:

1. *The goal of the Communist Party is to seize powers of government by and for a minority, rather than to acquire power through the vote of a free electorate.*

2. *The Communist Party, alone among American parties past or present, is dominated and controlled by a foreign government.*

3. *Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party’s goal.*

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7 *American Communications Association v. Douds*, 339 U.S. 422 (1950) (6-1 decision) (Jackson, J., concurring and dissenting in part)

8 *American Communications Association v. Douds*, 339 U.S. 425 (1950)

9 *American Communications Association v. Douds* 339 U.S. 427 (1950)

10 *American Communications Association v. Douds* 339 U.S. 429 (1950)
4. The Communist Party has sought to gain this leverage and hold on the American population by acquiring control of the labor movement.11

5. Every member of the Communist Party is an agent to execute the Communist program.12

Even though Jackson admits that the time period warrants his concurrence, it his additional dissent that may give scholars and readers a more in depth look into what he may have believed to be absolute principles of the First Amendment. The dissent features language very similar to that of Barnette, but still remains much different due to the era.

**The Dissent**

First and foremost, Jackson begins his dissent by discussing the idea that an attempt at thought control is unconstitutional. He describes the notion to attempt such a matter as “an additional disclaimer which, in my view, does encounter serious constitutional objections.” He acknowledges serious concerns in a nation where Congress has the power to control thoughts that have “not manifested itself in an overt act.” Thus, it is made clear that Jackson believes in absolute constitutional protection of thought. On this he states:

*The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored.*13

Jackson, further, from that statement is making the notion that power still lies in the hands of the people and that the First Amendment protects the right of the people to keep the government in line and in check.

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11 American Communications Association v. Douds 339 U.S. 430 (1950)
12 American Communications Association v. Douds 339 U.S. 431 (1950)
13 American Communications Association v. Douds 339 U.S. 442-443 (1950)
This belief then begs the question as to how Jackson, he of such an idealistic viewpoint in regards to this freedom, would respond to the current backlash against media organizations by current U.S. President Donald Trump’s administration. There has always been a belief that free and independent media, under the measures of the First Amendment, is what separates totalitarianism from democracy. George Washington once said “If the freedom of speech is taken away then dumb and silent we may be led, like sheep to the slaughter” or the opportunity for people to be overtaken increases. Jackson would agree, for he states in *Douds* that, “The idea that a Constitution should protect individual nonconformity is essentially American, and is the last thing in the world that Communists will tolerate.” He continues by noting that “some profession of belief or nonbelief” is precisely what a Communist regime would enact, thus giving in to a philosophy of minimizing “man as an individual and ... increase the power of man acting in the mass.”

However, while Jackson’s dissent would give hope to First Amendment absolutists, his concern over the protections of the First Amendment and the correlating rise of Communist dogma would not go away, for even a year before *Douds*, Jackson had made it clear that the Bill of Rights should have some limitations in *Terminiello v. Chicago*.

**Terminiello v. Chicago (1949)**

20 months prior to the first oral arguments of *American Communications Association v. Douds*, the Supreme Court encountered, what Schubert refers to as “one of the last important civil liberties decisions dominated by the Libertarian four.”¹⁴ A fascist, Roman Catholic Priest, Father Arthur W. Terminiello was arrested for disorderly conduct for inciting among his supporters, a brawl that would silence any fascist critics. Chicago Police fined Terminiello, who was suspended by the local diocese, for disrupting a “breach of peace ordinance.” Terminiello appealed on the grounds that “his speech was protected by the First Amendment.”¹⁵ However, the conviction was upheld by three different Illinois courts and found its way to the Supreme Court among justices who were split almost in half.

Justices Douglas, Murphy, Rutledge, and Black favored the reversal of the conviction, while Vinson, Frankfurter, Burton, and Jackson were favorable to an affirmance. Justice

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¹⁴ “The Libertarian Four” refers to Justices Owen Douglas, Frank Murphy, Wiley Blount Rutledge, and Hugo Black.
Reed was the “odd man out,” so to speak, and looked at the case in a more minimal way, eventually siding with the former.

While Jackson was one of the dissenters, Schubert suggests that the *Terminiello* decision still remains one of the “most aborted deliveries of the Supreme Court.” Further, we come to discover more about Jackson’s true opinions on the lengths of the First Amendment as the former Chief U.S. Prosecutor of the Nuremberg Trials in charge of researching the brutality of the Holocaust. Schubert explains on page 89:

> Jackson was much too close to the lesson of the downfall of the Weimar Republic --- he was still at Nuremburg only three years prior the announcement of this decision --- not to interpret from the perspective of the German experience was in reality (as we can observe with the benefit of hindsight) a relatively small-scale local disturbance that Chicago was quite competent to handle. In the light of Jackson’s unique socialization and consequent sensitization to this dimension of the issue raised by *Terminiello*, it is quite understandable that the record of Nazi aggression that Jackson had worked so diligently to document, was uppermost in his mind.

**What *Terminiello* Tells Us About Jackson’s First Amendment Beliefs**

**The Dissent**

As only he could, the then-57 year old Justice Jackson exhibits his meticulous research in regards to the *Terminiello* case by issuing a 24-page dissent in response to the 4-page opinion given by Justice Douglas. The dissent maps out the testimonies given by Father Terminiello himself and the issues Jackson finds in reversing his conviction not just because of the period during which this situation takes place, but the repercussions it could have in the future.

After summarizing the entirety of the case, Jackson outlines a criticism of the Court and insists that liberty should not be favored over order or vice versa --- there should be a balance:

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16 Aborted in the sense that it has not stood the test of time in a favorable light.
When the light of the evidence not recited by the Court is thrown upon the Court’s opinion, it discloses that underneath a little issue of Terminiello and his hundred-dollar fine lurk some of the most far-reaching constitutional questions that can confront a people who value both liberty and order. This Court seems to regard these as enemies of each other, and to be of the view that we must forego order to achieve liberty. So it fixes its eyes on a conception of freedom of speech so rigid as to tolerate no concession to society’s need for public order.\textsuperscript{17}

The liberty of the First Amendment does not exist without the organization of public order. While this has been and will always be an argument in regards to the regulations of the First Amendment, in this particular case, Jackson feels the Court, in issuing this victory for Terminiello, is in danger of walking “into a well from looking at stars,” using a Aesopic fable to allude to the mistake in trying to preserve the lofty goal of liberty.\textsuperscript{18}

Jackson notes that by eliminating the order that must go in hand in hand with liberty, the threat of extremism increases, for citizens being to lose faith in those who are delegated to protect them.

\textit{The fascist and communist groups, on the contrary, resort to these terror tactics to confuse, bully and discredit those freely chosen governments. Violent and noisy shows of strength discourage participation of moderates in discussions so fraught with violence, and real discussion dries up and disappears. And people lose faith in the democratic process when they see public authority flouted and impotent, and begin to think the time has come when they must choose sides in a false and terrible dilemma such as was posed as being at hand by the call for the Terminiello meeting: “Christian Nationalism or World Communism -- Which?”}

\textit{This drive by totalitarian groups to undermine the prestige and effectiveness of local democratic governments is advanced whenever either of them can win from this Court a ruling which paralyzes the}

\textsuperscript{17} Terminiello v. Chicago 337 U.S. 13 (1949) (5-4 decision) (Jackson, J., dissenting)
\textsuperscript{18} The fable that Jackson is alluding to is the story of Thales, the astronomer, from the time of Aesop. According to Perry’s Online Index to Aesopica (mythfolklore.net), the fable reads: “When Thales the astronomer was gazing up at the sky, he fell into a pit. A Thracian slave woman, who was both wise and witty, is said to have made fun of him for being eager to know what was happening over his head while failing to notice what was right there at his feet.”
power of these officials. This is such a case. The group of which Terminiello is a part claims that his behavior, because it involved a speech, is above the reach of local authorities.¹⁹

Totalitarian groups long for chaos to occur within a society, Jackson implies, and through the undermining of authorities, the risk for it to occur only increases, especially through declaring the “Breach of Peace” ordinance, unconstitutional.

However, Jackson admits that the Constitution is not explicit in its limits on the freedom of speech:

This absence from the Constitution of any expressed power to deal with abuse of freedom of speech has enabled the Court to soar aloof from any consideration of the abuses which create problems for the states and to indulge in denials of local authority, some of which seem to me improvident in the light of functions which local governments must be relied on to perform for our free society. Quite apart from any other merits or defects, recent decisions have almost completely immunized this battle for the streets from any form of control.²⁰

But, Jackson notes that in the state Constitution of Illinois, the interpretation exists that any formal display of speech through written or oral terms on all subjects is allowed with the condition that the person who partakes in the activity is “responsible for the abuse of that liberty.”²¹ Jackson acknowledges that he has come to form a belief that this is what is meant by “that cryptic phrase ‘freedom of speech,’ as he notes almost immediately after this acknowledgment of Article II, Section 4 in most state constitutions.

Most of all, however, it is obvious that Jackson was not a believer in the installation of outrageous restrictions on speech. Toward the end of the dissent, he notes that the United States cannot “meet this dilemma by suppression of free, open and public speaking on the part of any group or ideology,” as “Suppression has never been successful permanent policy.” Jackson simply believes that it may be the most

un-American ideal to attempt to silence anyone who disagrees with the government, for he states:

*My confidence in American institutions and in the sound sense of the American people is such that if, with a stroke of the pen, I could silence every fascist and communist speaker, I would not do it.*

Jackson, to further explain this thought quotes Woodrow Wilson’s “That Quick Comradeship of Letters” address at the Institute of France, Paris in 1919:

*I have always been among those who believed that the greatest freedom of speech was the greatest safety, because if a man is a fool, the best thing to do is to encourage him to advertise the fact by speaking. It cannot be so easily discovered if you allow him to remain silent and look wise, but if you let him speak, the secret is out, and the world knows that he is a fool. So it is by the exposure of folly that it is defeated, not by the seclusion of folly, and, in this free air of free speech, men get into that sort of communication with one another which constitutes the basis of all common achievement.*

But, of the utmost importance to Jackson is his belief that individual liberties, though important, simply do not exist if there is no country for them to exist within. Thus, his final sentence of the dissent, may be the most telling about his overall belief, not only of the First Amendment, but that of the Bill of Rights, itself:

*There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.*

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25 “The Suicide Pact” analogy has been widely used since Jackson first coined the term in 1949. The term, actually, was used in Chief Justice Fred Vinson’s opinion in *American Communications Association v. Douds* (1950) in the same sense: to warn against the length of civil liberties. Linda Greenhouse of *The New York Times* stated in a Sept. 2002 column entitled “The Nation; Suicide Pact,” “Where his colleagues saw, free speech, Jackson, after serving as [Chief U.S. Prosecutor] at the Nuremburg war crimes trial, saw the dangers of the mob” and utilized the term in order to present this in a more understandable way. Greenhouse insists, though, that Justice Arthur J. Goldberg utilized the term best in the majority opinion of *Kennedy v. Mendoza-Martinez* (1963), which held that the government cannot could not automatically strip the citizens of those who left the country in order to avoid the draft. “The powers of
Conclusion

After examining these two post-Nuremberg decisions, the question then arises: what exactly was Jackson’s approach in formulating an opinion on a “freedom of speech” issue? There are two different possible answers:

1. Jackson either believed that there is an underlying principle or principles in discerning a decision on the First Amendment, or;
2. Jackson was of the belief that every case is different and consistency should not be the first aim in a decision.

Based on the information presented and after great extensive research the latter may simply be the case. Jackson’s decisions, on just about any issue are difficult to gauge direction on and that is exemplified best through his First Amendment opinions. But, among the many quotations that may best exemplify this notion, two words may come to suggest it the best: Practical wisdom. Jackson’s approach to dealing with a decision regarding the First Amendment may just be as simple as that.

The end of the Terminiello decision may reveal the most about Jackson. By pushing the Court to “temper its doctrinaire logic,” through the use of “practical wisdom,” he is concluding that there is simply no absolute formula, calculation, or methodology in examining a decision regarding the First Amendment simply because it is so complicated from the surface. Additionally, as already mentioned, Jackson is explicit that the Constitution provides no precedent or legal basis as far as the restriction of free speech goes in balancing this liberty as well as maintaining order in the wake of it.

Thus, Jackson is almost committing to a Aristotelian approach --- meaning that he sees all of these questions as a balancing act between liberty and order and thus the task is to discern what the proper place along that continuum is. Further, this speaks to the idea that each case must be examined separately and on its own merits and that there is no legal rule to be applied in all situations.

This, then, ultimately proves that there is a change in Jackson after the Nuremberg Trials. The man who once ruled in Barnette that nothing should ever restrict one’s...
ability to speak freely seems changed. After compiling the evidence and proof against the Nazi War Criminals and having to temper a Soviet call for immediate execution without trial, it is no wonder that this is the case.

Finally, this blueprint on Jackson’s belief in a case-by-case basis poses an interesting thought: if there is no underlying principle and each First Amendment case should be measured on its own merit, the concept of a legal precedent does not exist. Further, considering Douds took place after Terminiello could ultimately explain why Jackson issues a concurrence and dissent in regards to the test oath. It could be inferred that this is the prime example that there is not necessarily an overarching right or wrong, but simply different situations at different times. And, additionally, another one of Jackson’s most notable opinions, Mcgrath v. Kristensen (1950), also occurs following Terminiello. In this case, Jackson, perhaps vindicated upon the realization following Terminiello that his opus of opinions do not have to all align, is famous for reversing his position on an issue he had advocated for as Attorney General, and for saying, rather in a tongue-in-cheek manner, “If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all.”

This also speaks to Jackson’s perception overall by legal minds in general, with Paul A. Weidner stating in “Justice Jackson and the Judicial Function” in a Michigan Law Review article from 1955:

> The most striking feature of Justice Jackson’s judicial philosophy is that it can only with great difficulty be made to conform to any of the neat and currently-popular classifications of Supreme Court justices ... Jackson, for one, cannot be so readily pigeonholed.

All of the preceding information suggests that maybe there is a case for scholars to examine Jackson after Terminiello instead of Jackson after Nuremberg.

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26 According to Schubert on pg. 312 and 313 of Dispassionate Justice, the McGrath case dealt with a “statutory interpretation: whether a temporary visitor to the United States, whose stay had been unavoidable prolonged by the outbreak of World War II, was a ‘resident’ of the United States liable to induction under the Selective Service Act. The majority decided that such a person was not barred from naturalization (and was therefore eligible for suspension of deportation), since the alien’s status as an involuntary resident in fact did not constitute residence in law within the meaning of the statute of the the prevailing regulations.”

27 Continuing from Schubert on pg. 313: “As Attorney General before he joined the Court, however, Jackson had given contrary advice to Secretary of War Stimson; and the present Attorney General had relied upon Jackson’s earlier opinion in arguing the instant case.”


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