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# GIVING CREDIT FOR SHAPING THE CONSTITUTION

by Karen Lugo

A Review of:  
The Lives of the Constitution: Ten Exceptional Minds That Shaped America's Supreme Law, by Joseph Tartakovsky  
<https://www.amazon.com/Lives-Constitution-Exceptional-Americas-Supreme/dp/1594039852>

## Note from the Editor:

This review discusses new book about ten people who shaped the Constitution and is both critical and complimentary.

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Joseph Tartakovsky's new book, *The Lives of the Constitution: Ten Exceptional Minds That Shaped America's Supreme Law*, promises to put flesh on the bones of some of American history's legal giants. In pursuit of that promise, *The Lives* gives readers a new, or enhanced, appreciation for the ten individuals whom Tartakovsky gives admiring color, texture, and dimension.

No two historians—professional or amateur—would compile the same list of the top ten influencers of the Constitution, and no doubt every reader will quibble with at least one or two of Tartakovsky's selections. But whether you agree or disagree with any given selection in the ten, Tartakovsky has inarguably profiled some exceptional minds and some incredible characters. The descriptions of some—like Ida B. Wells, who campaigned indefatigably for African-American criminal defense rights and women's suffrage, and Stephen Field, who was a rough-and-ready deliverer of justice to gold miners in San Francisco before appointment to the Supreme Court—bring vital elements of personal biography to the historical account.

But Tartakovsky does not always make a satisfying case for how the individuals he profiles shaped the Constitution. He does not tell his readers how he chose the ten, and he does not provide a calculus for measuring constitutional influence. And especially in the cases of James Wilson, Alexander Hamilton, and Robert Jackson, there is more to their histories that would help to explain how they influenced the Constitution. In some cases, the constitutional shaping was arguably destructive, as with Woodrow Wilson. Yet Tartakovsky dodges the questions that undoubtedly will rise in some readers' minds.

An important emphasis in the book is that, although the Constitution has been pronounced irrelevant at various intervals in American history, these are also the eras that offer crucial lessons for how to ensure its future survival. Tartakovsky concludes that the Constitution must be cherished and that, so long as it is, it "will be displaced no sooner than an ant tips over the Statue of Liberty." But he does not contemplate the eventuality of failure to cherish it. What can we expect when multiple generations of students have been taught that the Constitution and its framers—that the American project writ large—are fatally flawed? The author points to hopeful constitutional revivals, but he does not account for a time of unprecedented and sustained attack on constitutional government.

This review will proceed by commenting on Tartakovsky's treatment of eight of the ten lives; I leave out his discussions of two foreign views of the Constitution: those of Alexis de Tocqueville and James Bryce. Some of my comments summarize or elaborate on Tartakovsky's work. Others consider his profiles and interpretations more critically.

## I. JAMES WILSON

The life and work of James Wilson is given richly deserved attention in *The Lives*. This is coincident with the efforts of Professor Hadley Arkes, who founded the James Wilson Institute on Natural Rights and the American Founding to help law students, scholars, and practitioners discover the contributions of James Wilson and other leading founding jurists. Tartakovsky is himself the James Wilson Fellow in Constitutional Law at the

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## About the Author:

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Claremont Institute. He correctly credits Wilson with one of the most influential roles in founding debates and public discourse.

James Wilson was appointed to the first panel of Supreme Court Justices by George Washington; he and five other Justices were all confirmed by the Senate in two days. Although Wilson served for nine years, the court considered less than a dozen cases during his tenure. *Chisholm v. Georgia* was Justice Wilson's most notable opinion. The case required the Justices to determine whether the Constitution abrogated the common law principle of sovereign immunity, under which a sovereign—whether Crown or state—could not be sued without its consent. A majority of the Court, including Wilson, concluded that it did, although the case was later superseded by the Eleventh Amendment of the Constitution, which explicitly reinstated sovereign immunity. Nevertheless, Professor Randy Barnett says *Chisholm* was “the first great constitutional case” and that it “adopted an individual concept of popular sovereignty.”<sup>1</sup>

The author concentrates primarily on Wilson's starring role during the Philadelphia Constitutional Convention, where he was just slightly less significant than James Madison. James Wilson made the first major speech of the Convention, and his 168 substantive speeches at the ratification debates both promoted and elucidated the Constitution. Wilson worked with the Convention's Committee on Detail to define separated and checked federal powers and the jurisdiction of the federal courts. Wilson's speeches were recorded and published in an 800-page volume that is full of insights into the structure of the Constitution.

Wilson was a son of the Scottish Enlightenment, which provided a reasoned foundation for civic moral virtue and the principles that undergird liberty.<sup>2</sup> He was one of the Scottish emigrants who arrived with recently distilled philosophy on natural law and lessons on how it might relate to governmental structure. Although he attended university in Scotland intending to become a minister, he later switched his emphasis to law. Tartakovsky mentions the general influence of the Scottish Enlightenment during Wilson's time in university, and he writes that Wilson especially gained from Thomas Reid's teaching on “moral sense.” Wilson's close collaboration with Benjamin Rush, also from the Scottish school, in promoting the Constitution's adoption, suggests the sustained influence of this distinct worldview on America's origins. The indispensable influence of the Scottish thinkers is important to recognize, and we can reasonably speculate that John Witherspoon was another source of this influence in America. Witherspoon was a signer of the Declaration of Independence and a powerful force in the convention debates. He came to America at the behest of Benjamin Rush and extended his influence through writing and teaching at the College of New Jersey, which would later become Princeton. There is evidence that Witherspoon shared thoughts on morality and philosophy

with John Adams and James Madison. Wilson considered lawful government to be “founded on the law of nature: it must control every political maxim: it must regulate the legislature itself.”<sup>3</sup> Wilson believed that rights exist in nature, and that government exists “to acquire a new security for the possession or the recovery of those rights.”<sup>4</sup> Only this relationship could guarantee the citizen “a natural right to his property, to his character, to liberty, and to safety.”<sup>5</sup> Wilson observed that the conceptual constitutional plan was refined by the state debates, and he thought that the arguments made in the debates should also serve to provide interpretive color: “As the instrument came from [Philadelphia], it was nothing more than a draft plan.” He credited the state conventions with breathing “life and validity” into it.

Unfortunately, historians believe the bulk of Wilson's personal memoranda was destroyed. It is America's loss that so few of his personal documents survived.

## II. ALEXANDER HAMILTON

This author compares the scant institutional attention given to Hamilton—his New York home was not preserved for posterity, for example—to the great love and respect accorded Thomas Jefferson. He reveals the irony of this imbalance when he pits their arguments against each other and then concludes that Hamilton's ideas prevailed.

Hamilton was poor, orphaned, and bereft in the British West Indies when a town judge bought him the shoes he wore for his mother's funeral. Local benefactors were impressed enough with his intellectual potential that they funded his tuition at King's College in New York City. When the college closed due to British occupation of the city, Hamilton served George Washington as staff officer—and right hand man—during the Revolutionary War.

As early as the middle of the war, Hamilton worried that a weak and disunited government was more of a risk than a powerful, centralized government when it came to the potential usurpation of citizen rights. In addition to Hamilton's contributions to *The Federalist Papers*, he wrote a six-part essay series called *The Continentalist* to fortify the concept of a robust American federal government. Hamilton earned so much credit for influencing New York's decision to ratify the Constitution that some suggested that New York City be renamed “Hamiltonia.” But Hamilton was not ignorant of the pitfalls of a strong central government, and especially a strong executive; he thought that, should executive power go too far, it could devolve into tyranny. He was especially active in opposing President John Adams' 1798 Alien and Sedition Acts because of their potential for abuse.

In the early 1790s, Hamilton produced three detailed reports on debt, taxes, a national bank, and manufacturing. Historian Gordon S. Wood has noted that Hamilton's goal in proposing a federal bank was to lend to large commercial enterprises and to

1 Randy E. Barnett, *The People or The State?: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729 (2007), available at [https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1008&context=fac\\_lectures](https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1008&context=fac_lectures).

2 See generally GERTRUDE HIMMELFARB, *THE ROADS TO MODERNITY: THE BRITISH, FRENCH, AND AMERICAN ENLIGHTENMENTS* (2004).

3 BENJAMIN FLETCHER WRIGHT JR., *AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT* 50 (1962).

4 HADLEY ARKES, *BEYOND THE CONSTITUTION* 65 (1990).

5 *Id.*

provide a platform for enabling international trade.<sup>6</sup> Wood has also surmised that Hamilton’s robust military ambitions at home and abroad could be considered Napoleonic.<sup>7</sup>

Tartakovsky cites historian Leonard D. White to laud Hamilton as “one of the great administrators of all time,” and he illustrates this with Hamilton’s commitment to superintending the Treasury Department’s robust growth with an eye to the mission of protecting rights and property. This duality may seem more like a contradiction in light of today’s combination of expansive government and capricious infringement of property rights. But Tartakovsky describes Hamilton’s mindset as believing the government must have enough power to be able to preserve order and, therefore, liberty.

In a book about how the various characters shaped the Constitution, it would have been useful to read more about Hamilton the lawyer. Supreme Court Justice Joseph Story described Hamilton’s legal prowess: “I have heard Samuel Dexter, John Marshall, and Chancellor [Robert R.] Livingston say that Hamilton’s reach of thought was so far beyond theirs that by his side they were schoolboys—rush tapers before the sun on noonday.”<sup>8</sup> He was considered by colleagues to be “the best trial lawyer of his generation.”<sup>9</sup> Inquiring legal minds may want to know more about Hamilton’s skill and its bearing on the shape of the Constitution.

One important feature of Hamilton’s legal work that is arguably slighted is his use of implied powers to defend the constitutionality of a national bank. Hamilton’s famous treatise, *Opinion as to the Constitutionality of the Bank of the United States*, was published in 1791 to counter Jefferson and others who argued against creating a national bank. Tartakovsky might have discussed how Hamilton’s arguments were pivotal in the later *McCulloch v. Maryland* pleadings.

The author uses the Hamilton v. Jefferson model as a stand-in for the continuing debate over executive power. He points to State of the Union addresses—with their consistent themes of ambitious projects—to demonstrate that the voice of Hamilton still prevails. But challenges to expansive executive authority are now more vigorous than ever. There has been nothing close to political resolution in favor of vast executive power.

It is interesting to read an account of Hamilton’s accomplishments told in contrast to Jefferson’s record. One wonders why Tartakovsky does not round out the discussion by making it a four-way contest, with John Adams and James Madison completing the square. Adams offered his own case for the balancing of power and institutional checks against ever-feared corruption and personal aggrandizement. Madison and Hamilton were at loggerheads on many pivotal constitutional

issues. Gordon Wood observes that Adams and Jefferson were friends, compatriots, and then embittered enemies, but that the one common interest they always shared was hatred for Alexander Hamilton’s ambitions and ideas. What was the range of constitutional issues at the heart of these life-long debates?

### III. DANIEL WEBSTER

Daniel Webster was a force of nature, as those who dared reckon with him learned. He is one of history’s greatest legal orators; indeed, Webster may have broken the mold for that class.

Webster’s rare talents were presaged by early displays of brilliance. His reported memorization of 700 lines of Virgil in one evening was notable even in a time when memorization was a common skill. Webster’s entry into the legal arena was as an actor who re-argued cases for spellbound audiences. Josiah Quincy called Webster an “electric force.” He applied his formidable talents to over 1,700 cases, 168 of them before the Supreme Court. Many qualified observers lauded his riveting powers of delivery. John Adams said of a Webster oration that it “will be read five hundred years hence with as much rapture as it was heard.” Lincoln thought that Webster’s *Second Reply* was the “very best speech that was ever delivered.” Tartakovsky compares Webster’s ability to tailor his mode of persuasion to his audience to that of Aristotle.

Tartakovsky establishes Webster as a shaper of the Constitution through cases that are staples in most constitutional law casebooks: *Charles River Bridge*, *Ogden v. Saunders*, and *Dartmouth College*. Webster and William Pinckney masterfully applied Alexander Hamilton’s treatise on the doctrine of implied powers (discussed above) to prevail in *McCulloch v. Maryland*, the case that affirmed federal authority to establish a national bank.

Daniel Webster served as a Senator and as Secretary of State under President William Henry Harrison. He also ran for president, but, Tartakovsky explains, he was “fitted to oppose and not to direct,” and he was unsuccessful. A useful memorandum from Daniel Webster to the 21st century may be his known aversion to ad hominem attacks, as expressed in his instruction to his son: “I war with principles, and not with men.”

### IV. IDA B. WELLS-BARNETTE

Born into the Reconstruction Era, this African-American woman was a profile in resilience and tenacity. As an indefatigable civil rights activist and investigative journalist, she was a forceful agent for reform. She fought for criminal defense protections for black defendants and, often to her own peril, exposed lynching practices. She was a stalwart suffragette, and she even nursed her baby while on speaking circuit. Her pursuit of justice—for women and for blacks who were not experiencing promised civil rights protections—would not be denied. This section will be a revelation to many, and *The Lives* promotes Wells to her rightful historical rank.

### V. WOODROW WILSON

There are many conservative and originalist critics of Woodrow Wilson. Tartakovsky is not one of them. He seeks to rehabilitate—or at least suggest that readers reconsider—Wilson’s reputation. He refers to Wilson’s constitutional scholarship from his years as an academic and his professed reverence

6 Gordon S. Wood, *The Birth of American Finance*, THE NEW REPUBLIC (Dec. 7, 2012), <https://newrepublic.com/article/110824/the-birth-american-finance>.

7 Jason Willick, *Polarization Is an Old American Story*, WALL ST. J. (Feb. 2, 2018), <https://www.wsj.com/articles/polarization-is-an-old-american-story-1517613751> (interview with Prof. Wood).

8 RON CHERNOW, ALEXANDER HAMILTON 189 (2004).

9 Wood, *supra* note 5.

for America's founders as assurances that Wilson intended to uphold constitutional foundations. Tartakovsky admits Wilson's dismissal of those who "want to consult their grandfathers about everything" and his aversion to going "back to the annals of those sessions of Congress to find out what to do," but he argues that Wilson's stated and observable activism were motivated by his regard for Edmund Burke's teachings. The author believes that when Wilson called Burke the "authentic voice of the best political thought of the English race," he was indicating a mentorship that comprehensively influenced his actions. But he accepts Wilson's professions of admiration for Burkean philosophy too readily, rather than probing his life and words for evidence that he meant what he said or that he properly understood his supposed mentor's teaching.

Woodrow Wilson's tenure as President evinced overarching fidelity to the evolutionary spirit of Progressivism, a political philosophy that challenged political structures on the basis of social prerogatives. Tartakovsky points out that virtually everyone in federal politics at the time ran on Progressive themes; Theodore Roosevelt had so popularized strains of the movement that no politician could avoid its appeal. And to Tartakovsky, this widespread embrace of Progressivism did not represent a departure from constitutional traditions; rather, he sees the Progressives as bent on recovering the Constitution through updated interpretation.

Wilson argued that the founders' "Newtonian" vision of government—ruled by unalterable orbits and gravitation based on checks, balances, and branches—was outdated and needed to be replaced by a political construction that was "Darwinian in structure and practice."<sup>10</sup> His desire for such a shift reveals his foundational orientation as untethered from founding principles. Yet Tartakovsky says that this and other similar expressions did not necessarily mean that Wilson wanted a pliable Constitution because Darwin's theories had not yet been popularized and Wilson must have been thinking in terms of a Burkean approach to adjusting government by slow modification. This Burkean interpretation cannot explain Wilson's clear derision for vital American precepts. He maintained that "a lot of nonsense has been talked about the inalienable rights of the individual, and a great deal that was mere vague sentiment and pleasing speculation has been put forward as fundamental principle."<sup>11</sup> When Tartakovsky dismisses critics by surmising that they may give Wilson too much credit—apparently by ascribing to Wilson too much responsibility for constitutional departures he did not intend—he fails to square this with Wilson's long record of dismissing the very principles that undergird both the Declaration of Independence and the Constitution.

Tartakovsky points to the major institutions that Wilson installed—and that have only increased in power and scope—and argues that the lack of significant pushback against the Wilsonian legacy somehow legitimates it. Wilson indeed had a lasting impact

on the country, the law, the world, and history. This impact goes far beyond his establishment of the Clayton Antitrust Act, the Federal Trade Commission, and the Federal Reserve Act. And it is impossible to ignore Wilson's core faith in central planning, which was manifest in his idealistic pursuits including the Treaty of Versailles, the Fourteen Points, and the League of Nations. But a better explanation for the lack of systemic challenge to Wilson's policies is that any would-be opponent of these initiatives and institutions knows that attempts to reform them have proven futile.

Wilson showed little regard for one of our most cherished constitutional rights: the First Amendment's right to freedom of speech. For example, he wholeheartedly embraced the Espionage Act of 1917. The measure, occasioned by WWI-era German espionage, made it a crime "to willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States," or to "willfully obstruct the recruiting or enlistment service of the United States."<sup>12</sup> Subsequently, Wilson supported the Sedition Act, which forbade spoken or printed criticism of the U.S. government, the Constitution, or the flag. Hundreds were jailed during the closing months of World War I for expressing thoughts that officials claimed could aid the Central Powers. Wilson's administration also blocked some 75 socialist and other periodicals from delivery by mail. Libraries could not offer German-language books, and German-language newspapers were silenced. Eugene Debs, a socialist leader and five-time presidential candidate, spoke disapprovingly of government prosecutions under the Espionage Act and was one of many incarcerated. Debs' sentence was commuted in 1921 after the repeal of the Sedition Act in 1920.

Wilson most infamously reinstated segregation in government agencies during his presidency. Wilson reportedly told black activist William Monroe Trotter that "[s]egregation is not a humiliation but a benefit, and ought to be so regarded by you gentlemen."<sup>13</sup> Another shameful episode in his political career was when Wilson, as governor of New Jersey, signed a law providing for forced sterilization of "undesirables."

Finally, Tartakovsky does not elaborate on Wilson's controversial appointment of Supreme Court Justice Louis Brandeis, beyond broadly ascribing to Brandeis a judicial philosophy of antitrust and separation of business and government. Brandeis, an early social justice activist, was certainly a Constitution-shaping force.

## VI. STEPHEN FIELD

Tartakovsky does his best work when he provides texture to a life while showing how events and actions in that life shaped the Constitution. That is exactly what he does—to delightful effect—in his vivid account of the life of Justice Stephen Field.

Field grew up in Connecticut and Massachusetts, where his father was a Puritan preacher. While his upbringing did not

10 WOODROW WILSON: THE ESSENTIAL POLITICAL WRITINGS 121 (Ronald Pestritto ed., 2005).

11 WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 16 (1908).

12 The Espionage Act of 1917, available at [http://www.digitalhistory.uh.edu/disp\\_textbook.cfm?smtid=3&psid=3904](http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtid=3&psid=3904).

13 See *The Trotter-Wilson Meeting*, William Monroe Trotter Timeline, Trotter Multicultural Center, available at <https://trotter.umich.edu/content/trotter-wilson-meeting>.

foreshadow his adult life, it may have been the source for his belief that all possible influence for good should be brought to bear upon the destiny of a state.

When he arrived in San Francisco in 1945, Field observed that a functioning government was needed for the urgent purpose of recording deeds. Field would be part of the solution as the only lawyer northwest of the Yuba River. His first case was based in the law of Mexico. Another arose from claim jumper disputes, and the trial was located in a saloon, which—not unpredictably—resulted in a mass drawing of revolvers. He judged thieves more harshly than murderers in an early expression of something like Rudy Giuliani’s “broken windows” theory, where lesser crimes are corrected in pursuit of order; Field believed that the whole system could fall if horses or purses could vanish without “prompt justice.” Field had a reputation for combining English common law with practical frontier policy. This merging of principle and pragmatism helped to counteract the “might makes right” impulse so common on the frontier, which made settlers fear that the rules of plunder would prevail if legal order was not maintained.

Field rose to sit on the California Supreme Court until President Abraham Lincoln appointed him as the first westerner, and the first Democrat, to the United States Supreme Court in 1863. Tartakovsky marshals a compendium of cases to show Field’s fierce defense of railroads and corporations. He wrote the opinions in *Cummings v. Missouri* and *Ex Parte Garland*, using the Declaration of Independence’s phrase “pursuit of happiness” to strike down legislation that restricted property rights. Field believed that “protection of property and persons cannot be separated.”

Field’s famous dissent in *The Slaughterhouse Cases*, which gutted the Privileges or Immunities Clause, was based in what he called the “right to labor.” He later channeled Adam Smith to compose his clarion defense of economic freedom in the *Butchers Union* case, which he said stood for “the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties.”

Tartakovsky likens Field’s jurisprudence in his collected dissents to that of Justice Clarence Thomas. Both jurists set up markers and lay cornerstones with “missionary zeal”—despite being a dissenting minority—so that future jurists may build upon their ideas.

Field earned a reputation as “protector of the Chinese” during his California tenure, but Tartakovsky is very critical of Field’s lack of interest in defending the rights of freed black slaves. This criticism is fair, but the close scrutiny applied to Justice Field is surprising when Tartakovsky attempts to contextualize President Wilson’s overt racism.

## VII. ROBERT H. JACKSON

Justice Robert H. Jackson was called the “greatest lawyer of the greatest generation,” but he never earned a law degree, and he never achieved his cherished pinnacle: appointment as Chief Justice of the Supreme Court.

As a member of President Franklin Roosevelt’s administration, Jackson was an early cheerleader for the president’s economic experimentation. He vigorously advocated for the constitutionality

of New Deal initiatives as Solicitor General and Attorney General. As Attorney General, Jackson defended wartime price controls and internal surveillance as implemented by an energetic wartime executive. And, ironically in light of his later take on this issue in the Steel Seizure Case, Jackson presented a compelling national security brief arguing that the president’s duty to prevent plane construction from being paralyzed overcame the rights of workers to strike at a production facility. When FDR responded to what he saw as the Supreme Court’s intransigence by threatening to pack it with his own nominees, Jackson—still Attorney General—wrote the definitive defense of court-packing in his book, *A Struggle for Judicial Supremacy*. But the Court realigned on its own when Justice Owen Roberts pivoted to support New Deal legislation before the threatened court-packing happened.

Justice Jackson was appointed to the Supreme Court six months before Pearl Harbor was attacked. Amid reports of Japanese sabotage, the shelling of oil fields near Santa Barbara by a Japanese submarine, and western states refusing admission to Japanese migrants, the Supreme Court voted 9-0 to uphold a Japanese curfew in the *Hirabayashi* case. But the next term, Jackson dissented in *Korematsu*, the infamous Japanese internment case. He argued that, although the Court was not in a position to evaluate claims of military necessity, it was nevertheless unconstitutional for the government to hold persons of Japanese origin in camps. He famously wrote:

But once a judicial opinion rationalizes . . . the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.<sup>14</sup>

In his most famous Supreme Court opinion, his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case), Jackson dismissed President Harry Truman’s claim of emergency to justify seizing steel mills to avoid a worker strike during the Korean War. This came as a surprise to many because the government had based its arguments on Jackson’s own brief that argued for executive prerogatives in a similar case involving airplane production during World War II. Jackson’s concurrence outlined a three-level test of presidential authority based on congressional action which has figured prominently in pivotal federal appellate cases most years since 1952.

Chief Justice William Rehnquist, who clerked for Justice Jackson during the *Youngstown* proceedings, provides clarifying historical context. In his book, *The Supreme Court*, he wrote that Truman avoided congressional war authorization for the Korean conflict by calling the engagement a police action based in UN prerogatives. Rehnquist also wrote of the weak enthusiasm for the Korean engagement, as it arose less than five years after WWII hostilities concluded. He posited that this was important background for Supreme Court’s new reticence on war powers at the time of *Youngstown*.

<sup>14</sup> *Korematsu v. United States*, 323 U.S. 214, 246 (1944).

Jackson wrote the majority opinion in *West Virginia Board of Education v. Barnette*, upholding Jehovah's Witness students' right to not participate in the flag salute. Jackson came to the Court after the *Gobitis* decision that allowed school administrators to make flag salutes mandatory even for religious dissenters, and he was one of two new Justices needed to overrule that case. Jackson famously wrote for the six-justice majority "that no official can prescribe what shall be orthodoxy in politics, nationalism, religion, or other matters of opinion . . . ."<sup>15</sup>

Justice Jackson took leave from the Court for a year to assume the role of chief prosecutor of the Nuremberg trials. There were controversies over ex post facto lawmaking and how to define war crimes that attended Jackson's role in the trials. Tartakovsky writes of Jackson's even temper and political finesse, and he credits Jackson with achieving agreement between the four key Allied nations to merge their different systems of law. He reports that Jackson worked by candlelight behind closed shades at night for concern over snipers. Jackson's opening and closing statements were said to have ranked with the great state papers of American history.

While Tartakovsky provides fascinating detail about Jackson as a person and judge, he does not discuss one of Jackson's most constitutionally influential and controversial opinions: *Wickard v. Filburn*. That case drastically expanded Congress' power under the Commerce Clause. One would expect a mention of this case in a discussion of how the Constitution was shaped.

#### VIII. ANTONIN SCALIA

Tartakovsky calls Justice Antonin Scalia a "button pusher" and presents as Exhibit A his first dissent as a judge on the D.C. Circuit Court of Appeals, in which he upbraided senior members of the court for being "perverse" and for promulgating reasoning that was "harmful to the national interest." Scalia's efforts on the Supreme Court yielded great constitutional dividends. He was "on a mission" to warn Americans that the Supreme Court was slowly expropriating democratic powers, and the author lists an array of social and cultural issues where Scalia saw judicial usurpations of the legislative process. *The Lives* showcases Scalia's provocative and erudite opinions, books, and public statements to demonstrate the profound impact that the Justice had in his long battle against the "Living Constitution."

#### IX. THE FINALE

Tartakovsky concludes his book on the same hopeful note that echoes throughout his narrative. He suggests that the salutary role of culture will rescue the Constitution when it most needs resuscitation. He points to the social movement that paved the way for legalization of gay marriage as a seminal example of how a trending cause can advance from cultural movement to protected constitutional right. Tartakovsky disregards the legion of legal scholars, some appealed to in the pages of his book, who would argue that this dignity-based license is not even implicitly found in the Constitution.

Furthermore, Tartakovsky fails to reckon with the reality that the Supreme Court's rulings in cases like *Obergefell* remove

controversial issues from the voters and their representatives; the very usurpation of democracy he decries when praising constitutional thinkers like Justice Scalia. Constitutional revolutions are certainly significant, but many would argue that such creative applications of the Constitution chip away at its legitimacy rather than restore it.

15 319 U.S. 624 (1943).

