

THE EMPORIA STATE

RESEARCH



STUDIES

THE GRADUATE PUBLICATION OF THE EMPORIA STATE UNIVERSITY

**Justice Black and
First Amendment Freedoms:
Thirty-Four Influential Years**

by Connie Mauney

*Np: 2g. 2
v. 35 no. 2*

The Emporia State Research Studies

EMPORIA STATE UNIVERSITY
EMPORIA, KANSAS

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Vol. XXXV

Fall, 1986

Number 2

THE EMPORIA STATE RESEARCH STUDIES is published quarterly by The School of Graduate and Professional Studies of the Emporia State University, 1200 Commercial St., Emporia, Kansas, 66801-5087. Entered as second-class matter September 16, 1952, at the post office at Emporia, Kansas, under the act of August 24, 1912. Postage paid at Emporia, Kansas.

"Statement required by the Act of October, 1962; Section 4369, Title 39, United States Code, showing Ownership, Management and Circulation." **The Emporia State Research Studies** is published quarterly. Editorial Office and Publication Office at 1200 Commercial Street, Emporia, Kansas (66801-5087). The **Research Studies** is edited and published by the Emporia State University, Emporia, Kansas.

A complete list of all publications of *The Emporia State Research Studies* is published in the fourth number of each volume.

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Justice Black and First Amendment Freedoms: Thirty-Four Influential Years

by
Connie Mauney*

As a memorial to Justice Hugo LaFayette Black, who was born one hundred years ago this year, it is appropriate to examine the impact of his Supreme Court opinions on First Amendment freedoms. During his thirty-four-year tenure on the Supreme Court, he promoted the ideal that the First Amendment is the "keystone" and "foundation" of free government. Between 1937 and 1971 he had opportunity to consider a wide array of cases which impinged upon speech, press, association, petition, privacy, and religion. Eventually his opinions reflected a well-defined legal philosophy that he defended with diligence. Yet much to the consternation of his admirers and to the amazement of his detractors, at times Black ignored his carefully structured norm and found reasons to support governmental actions or laws which restricted First Amendment liberties. Despite these few exceptions, Black's opinions have left a legacy which will serve as valuable precedents in the years to come.

The study presents a brief analysis of Justice Black's background followed by an overview of the Justice's judicial philosophy. After these introductory remarks, selected cases that have touched upon First Amendment freedoms will be grouped according to the following topics for closer examination: 1) Freedom of Expression and Thought: A Critique of Black's Jurisprudence and Practice; 2) Privacy and First Amendment Protections; 3) Academic Freedom, Protection of Minors, and the First Amendment; 4) The Media as Big Business and First Amendment Freedom of Expression; 5) Property, Nonconformity, and Speech Plus: Freedom and Restraint; 6) Protection of Liberties During War; 7) Religion and the First Amendment; and 8) The Record of Thirty-four Years.

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Hugo Black: A Brief Biography

As the son of a grocery store owner in Ashland, Alabama, Hugo Black was the youngest of eight children whose mother set high goals and instilled great respect for education, including the study of history and the classics.¹ Much later as jurist, Black's high regard for history became a valuable tool when he sought to underpin his legal philosophy with illustrations from history in tersely-written opinions. His favorite books included works authored by Thomas Jefferson, Tacitus, James Madison, Plutarch, Thucydides, Aristotle, Claude B. Bowers, Leon Whipple, John Stuart Mill, Adam Smith, H. G. Wells, Thomas Hart Benton, and Will and Ariel Durant. Other books included the *Harvard Classics*, *The Levellers*, and *The Federalist*. He quoted Jefferson and Madison so frequently in his opinions that he was called "a reconstructed Jeffersonian" and a "Madisonian."²

Black, however, did not easily transfer other attitudes and experiences that he acquired as a youth in Clay County. For example, despite the elevation of the value of school and much to the dismay of his family, the teenager's protest cut short his education at Ashland College, the equivalent of a high school today. He was expelled. Black, who later as justice interpreted the First Amendment's scope in cases dealing with disruptive behavior on school campuses, took direct action himself in protest of an unsatisfactory school policy described later by Fred Rodell:

[He] never so much as finished high school—or "Ashland College" as it was called. When a bullying teacher punished Black's sister by ordering her to stand in a corner on one leg, the fraternal affection plus Southern chivalry led the spindly sixteen-year-old to give his instructor a public beating and walked out of the door, never to return.³

Much later Black's court opinions, written sometimes with great emotion, showed little tolerance for protest on the school campus.

¹John P. Frank, *Mr. Justice Black: The Man and His Opinions* (New York: Alfred A. Knopf, 1949), pp. 4, 12; Daniel J. Meador, *Mr. Justice Black and His Books* (Charlottesville: University Press of Virginia, 1974), pp. 1-5, 13. Suggested reading: Tony A. Freyer, "The Justice Hugo L. Black Centennial: An Introduction," 36 *Alabama Law Review* 789 (1985); Howard Ball, "Justice Hugo L. Black: A Magnificent Product of the South," 36 *Alabama Law Review* 791 (1985); Sheldon Hackney, "The Clay County Origins of Mr. Justice Black: The Populist As Insider," 36 *Alabama Law Review* 835 (1985); David A. Shannon, "Hugo LaFayette Black as United States Senator," 36 *Alabama Law Review* 881 (1985); J. Mills Thornton III, "Hugo Black and the Golden Age," 36 *Alabama Law Review* 899 (1985); and Bertram Wyatt-Brown, "Ethical Background of Hugo Black's Career: Thoughts Prompted by the Articles of Sheldon Hackney and Paul L. Murphy," 36 *Alabama Law Review* 915 (1985).

²Meador, *op. cit.*, pp. 13-19, 43-157; Anthony Lewis, "The Authentic Voice," *New York Times*, October 5, 1970, p. 43; Stephen Parks Strickland, "Black on Balance," *Hugo Black and The Supreme Court*, ed. Stephen Parks Strickland (Indianapolis: Bobbs-Merrill Company, Inc., 1967), p. 271.

³Fred Rodell, "Justice Hugo Black," *The American Mercury* 59:137, August, 1944.

After the fiasco in Ashland College, young Hugo attended medical college one year. The career choice was not a suitable one. He next chose law school. Clifford Durr, Black's brother-in-law, once observed that he managed to "wangle" his way into the University of Alabama Law School. The school was small with only two law professors.⁴ One of those faculty members, Professor Ormand Sommerfield, said that Black, compared to the other students in his classes, made the most progress because "he had the most to learn."⁵ He was a hard worker, and his efforts paid off. He made good grades at law school.⁶

The sense of needing to "catch up" when entering law school and later new careers was engrained in Black's personality. For instance when he first arrived in Washington as a new member of the United States Senate, he piled his desk high with books. Then when he became Supreme Court Justice, he collected a wide variety of books and spent his summers trying to accumulate background knowledge needed for effective interaction with his associates on the bench.⁷ It was not an easy task. In 1944 one observer said that Black's average work week was almost eighty hours.⁸ He knew that he had a lot to learn, and he studied well into the summer months when he first came to the Court. Justice William Douglas described Black as the best read person that he had ever known.⁹

Hugo Black's involvement in politics began on a small scale in Birmingham, Alabama. After graduating from law school and establishing a law practice, he was appointed police court judge and later elected county prosecutor. He served briefly in the army during World War I and returned to Birmingham to continue his law practice. The practice was successful. He joined organizations that without doubt accommodated his career goals. One commentator said that "his batting average before juries ran close to phenomenal .800." In fact income from his law practice averaged about \$50,000 a year by the time he chose to run for the Senate. He appeared one time before the United States Supreme Court.¹⁰ His background as lawyer served him well when he entered politics.

⁴Clifford Durr, "Hugo L. Black: A Personal Appraisal," 6 *Georgia Law Review* 1, 3 (1979); Hugo L. Black, "Reminiscences," 18 *Alabama Law Review* 3, 9 (1965-1966).

⁵Frank, *op. cit.*, p. 13.

⁶Truman M. Hobbs, "Justice Black: Qualities of Greatness," 14 *Alabama Law Review* 11 (1971); John P. Frank, "Hugo L. Black," *The Justices of the United States Supreme Court 1789-1969*, Vol. III, eds. Leon Friedman and Fred L. Israel (New York: Chelsea House Publishers, 1969), pp. 2323, 2324.

⁷Frank, *Mr. Justice Black: The Man and His Opinions*, pp. 45-47; "Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Black," 405 U.S. ix, x-xi (1972); Meador, *op. cit.*, p. 3, 13; Norman Dorsen, "Mr. Justice Black and Mr. Justice Harlan," 46 *New York University Law Review* 649 (1971).

⁸Rodell, *op. cit.*, p. 143.

⁹Daniel Berman, "Hugo L. Black at 75," 10 *The American University Law Review* 43, 48 (1961).

¹⁰Rodell, *op. cit.*, p. 136; Frank, *op. cit.*; pp. 32-35, Strickland, "Introduction," *op. cit.*, p. xxiii.

As a youth Black's association with Clay County citizens influenced his political persuasion. Black was a Populist at heart. His support of laws that benefited the common man soon led his political opponents to label him a Bolshevik.¹¹ Despite his success as a jury trial lawyer and his record of public service in small offices in Birmingham, Black's entrance into the Senate race was a "big joke" to many "solid citizens" in Birmingham. Against great odds he ran for the seat of United State Senator on the Democratic ticket and won in 1926. As Senator he moved away from a narrow view of Alabama-oriented policies and became national in orientation. His popularity with the Alabama voters, however, declined during his second term in the Senate.¹²

Senator Black was a vigorous ally of President Franklin D. Roosevelt, even endorsing and supporting the ill-fated court-packing plan.¹³ Roosevelt, who had preferred Senator Joseph T. Robinson, nominated Black for the first vacancy on the Supreme Court after Robinson's unexpected death. He was confirmed by the Senate August 17, 1937, and amid a storm of unfavorable publicity Black began his first term on the Supreme Court on October 4. Extra police were on duty, and the tradition of taking a public oath was abandoned.¹⁴ After Senate confirmation, Ray Sprigle published a series of articles that appeared in the *Pittsburgh Post Gazette*, revealing that Black in earlier years had been a member of the Ku Klux Klan. The newly appointed Justice dealt with the shocking disclosure by speaking directly with the nation over the radio. His address was short, but did not fully answer a number of questions.¹⁵ The public disclosure of Klan membership lingered in the memories of observers of the court. Despite Justice Black's order¹⁶ that required the University of Mississippi to admit James Merideth, the first black student to enter that institution, and numerous supportive votes to end segregation in public schools, his reputation as a former Klan member from Alabama served to in-

¹¹Frank, *op. cit.*, pp. 10-12; Durr, *op. cit.*, p. 3.

¹²President Franklin D. Roosevelt recognized that Senator Black faced great odds in re-election. Durr, "Hugo L. Black: A Personal Appraisal," p. 3; Virginia Van der Veer Hamilton, *Hugo Black: The Alabama Years* (Baton Rouge: Louisiana State University Press, 1972), pp. 121-127, 270, 273; William F. Swindler, *Court and Constitution in the Twentieth Century* (Indianapolis: Bobbs-Merrill Company, Inc., 1970), pp. 85-87; Frank, "Hugo L. Black," *op. cit.*, pp. 2323-2333.

¹³Charlotte Williams, *Hugo L. Black: A Study in the Judicial Process* (Baltimore: The Johns Hopkins Press, 1950), pp. 12, 49.

¹⁴*New York Times*, October 4, 1937; *ibid.*, p. 1; October 5, 1937, p. 1.

¹⁵Williams, *op. cit.*, pp. 26-30. Black chose a Jew for his first law clerk. *New York Times*, October 5, 1937, p. 20.

¹⁶"Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Black," 405 U.S. ix, xiv (1972).

spire charges of racial prejudice when he on occasion voted to restrict First Amendment liberties of black demonstrators. Admittedly, Black's Klan membership between 1923 and 1925 was puzzling. During a television interview in 1967 not long before his death, Black explained the temporary membership.

The Klan in those days was not what it became later. There were a few extremists in it, but most of the people were the cream of Birmingham's middle-class. It was a fraternal organization, really. It wasn't anti-Catholic, anti-Jewish, or anti-Negro.

In fact, it was a Jew, my closest friend, Herman Beck, who asked me to join, said they needed good people in the Klan. He couldn't be in it, of course, but he wanted me to be in it to keep down the few extremists. You know, when I said on the radio that some of my best friends were Jews they told me later that was an anti-Semitic remark. Except that in my case it was true.

Anyway, the only reason I didn't join before I did was I was too busy with other organizations, Knights of Pythias, Odd Fellows, others. But before I finally agreed to join, on the night I was supposed to join, I got up first and spoke and told 'em I was against hate. I liked Negroes, I liked Jews, I liked Catholics, and that if I saw any illegality goin' on I wouldn't worry about any secrecy. I'd turn 'em into the grand jury.

Well when I finished they cheered and they said to me that's what you're obligated to do under our rules. And they were right, that's what the rules said, anything illegal, no secrecy.

Then Justice Black leaned back in the chair and said with a boyish grin:

You want to know the main reason I joined the Klan? I was trying a lot of cases against corporations, jury cases, and I found out that all the corporation lawyers were in the Klan. A lot of jurors were too, so I figured I'd better be even-up.

He chuckled and said:

I haven't told that before, but that's how it was. People think it was politics, but it wasn't politics. I wanted that even chance with the juries.¹⁷

Black joined the American Bar Association, too. Of all the organizations with which he affiliated, he said the only one that he regretted joining was the American Bar Association.¹⁸ Lawyers and applicants to the bar later found that Justice Black was one hundred percent on their side whenever government or bar associations harassed them.¹⁹ He showed great contempt for the restrictions that

¹⁷*New York Times*, September 25, 1971, p. 9.

¹⁸Rodell, *op. cit.*, p. 139.

¹⁹*Konigsberg v. State Bar of California*, 353 U.S. 252 (1957); *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961); *In re Anastaplo*, 366 U.S. 82 (1961); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *In re Stolar*, 401 U.S. 23 (1971); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *In re Summers*, 325 U.S. 561 (1945); *In re Sawyer*, 360 U.S. 622 (1959); *Lathrop v. Donohue*, 367 U.S. 820 (1961); and *Cohen v. Hurley*, 366 U.S. 117 (1961).

bars placed on applicants or fellow members. Black recognized that people join associations for various reasons, sometimes not for ones that seem obvious to observers. The justice knew this from his own experience.

Young Hugo Black attended the Baptist Church in Ashland. As a member of the Birmingham church he taught a Sunday school class twenty years and became a diligent student of the Bible. After moving to Washington, he drifted away from organized religion and did not attend church. However, he kept a Gideon Bible on his desk in his Supreme Court office until he presented it as a gift to recently appointed Justice Thurgood Marshall.²⁰ In 1964 Black met with several Southern Baptist ministers in his office. One of the ministers later recalled that Justice Black expressed hope that the country would not "lose the religious conviction of our people"; for the principles of the nation out of which our constitution evolved came through religiously-oriented people.²¹ Black received heavy criticism for his opinions and votes in cases dealing with establishment of religion and free exercise of religion. In 1970 he read the thirteenth chapter of First Corinthians to the Fifth Circuit Judicial Conference to show, he said, that the Bible could still be read in this country.²²

The serene marble palace belied its appearance when Black ascended to the high bench. He was the first New Deal justice, and he dissented sixteen times during his first year.²³ When additional New Deal justices replaced the Old Guard justices, friction developed between Black and some of his colleagues. For example, Justice Harlan F. Stone, it was rumored, called him incompetent and a politician in judicial clothing.²⁴ Justice Stanley Reed and Justice Felix Frankfurter accused Black of being a politician on the bench.²⁵ Other personality clashes interfered with formal relationships of the justices. Black did not like Justice Owen J. Roberts. After being assigned the responsibility of representing the court, Black procrastinated and never wrote the customary official letter of farewell to Roberts.²⁶ Another instance of turmoil on the bench

²⁰Frank, *Mr. Justice Black: The Man and His Opinions*, p. 16; Cooper, "Mr. Justice Hugo L. Black: Footnotes to a Great Case," p. 19; see Hugo L. Black, letter to W. Howard Bramlette, April 3, 1964, Papers of Hugo LaFayette Black, Manuscript Division, Library of Congress; Hugo L. Black, letter to Robert A. Bailey, October 27, 1967, Papers of Hugo LaFayette Black, Manuscript Division, Library of Congress.

²¹Charles Maples, private interview, May 21, 1975.

²²Meador, *op. cit.*, pp. 27, 28.

²³Williams, *op. cit.*, p. 68.

²⁴Alpheus T. Mason, *Harlan Fiske Stone: Pillar of Law* (New York: Viking Press, 1956), pp. 469, 472-473; Swindler, *op. cit.*, pp. 124, 125.

²⁵See Felix Frankfurter, memo, Papers of Felix Frankfurter, Manuscript Division, Library of Congress.

²⁶Mason, *op. cit.*, pp. 765-769; Swindler, *op. cit.*, p. 134.

surfaced when Justice Robert H. Jackson felt that Black had influenced President Harry Truman's selection of a new Chief Justice, thus denying Jackson the much desired position in 1946. Although the conflict was exposed by the press, Black did not publicly reply to the charge made by Justice Jackson.²⁷

Justice Black developed a fanatical devotion to his job and never thought of leaving it. Other justices came to the bench and were overwhelmed by the workload. For example, when criticism mounted, Justice Abe Fortas left the Supreme Court. Justice Frank Murphy wanted to leave. Justices Arthur Goldberg and James Byrnes accepted other positions of governmental responsibility.²⁸ But Justice Black stayed on the bench and worked at his job. Sometimes he would rewrite an opinion a dozen times, for he knew it would remain long after his departure from the Supreme Court.²⁹

Black's years on the bench were not placid ones. Personal conflict between the justices was compounded by philosophical conflict with regard to the interpretation of the First Amendment and other constitutional provisions. It is little wonder that Black in several First Amendment cases vented strong emotions in his majority, concurring, and dissenting opinions and in his remarks from the bench. Black relentlessly tried to persuade his colleagues to accept his legal philosophy and historical interpretations. He experienced resounding defeat in some crucial votes deciding how much liberty was guaranteed by the First Amendment. In 1964 *Time* magazine, in an issue that featured Justice Black on the front cover, reported that no other justice in the past twenty-five years "has cared more, worked harder and done more to persuade his colleagues to accept his constitutional philosophy."³⁰ A former law clerk and friend observed, "His work was indeed his life, and he stayed with it literally to the end."³¹ During his long tenure, the justice could be soft-spoken or aggressive, kind or a bully. Observers found him a "tough minded thinker" and "an individualist." Hugo Black, a physically small man, who never-

²⁷Swindler, *op. cit.*, pp. 158-161; Frank, *op. cit.*, pp. 124-131; see Jerome Cooper, *Sincerely Your Friend. . . . Hugo L. Black* (University, Alabama: The University of Alabama Press, 1973), II; see Felix Frankfurter, letter to Hugo L. Black, September 30, 1950, Papers of Felix Frankfurter, Manuscript Division, Library of Congress.

²⁸Swindler, *op. cit.*, pp. 362, 364, 366; J. Woodford Howard, Jr., *Mr. Justice Murphy* (Princeton: Princeton University Press, 1968), p. 272.

²⁹Hobbs, *op. cit.*, p. 11.

³⁰"The Supreme Court: The Limits that Create Liberty and the Liberty that Creates Limits," *Time* 84: 48, October 9, 1964.

³¹Daniel J. Meador, "Mr. Justice Black: A Tribute," 57 *Virginia Law Review* 1109, 1113 (1971).

theless was hailed as a kindly giant, dominated the Supreme Court during his latter years.³²

The First Amendment: Black's Philosophy

Justice Black was an effective evangelist when he promoted his ideal that First Amendment freedoms should not be abridged by government through laws, customs, court decisions, or actions. His speeches and dissenting opinions, as well as his majority opinions, attracted attention. He was classified and evaluated according to his philosophy: legal fundamentalist; positivist; absolutist; liberal; conservative; and activist. In fact his libertarian remarks in a wide array of First Amendment cases led some observers to conclude that the justice would not tolerate any laws whatsoever affecting speech, press, religion, petition, and assembly. He constantly promoted the idea that his high standards were achievable under the constitution. In 1956 Black's friend and colleague Justice William O. Douglas wrote:

But I dare say that when the critical account is written, none will be rated higher than Justice Black for consistency in construing the laws and the Constitution so as to protect the civil rights of citizens and aliens, whatever the form of repression may be.³³

When Douglas wrote those words, he and Black had stood together seeking to keep the Court from making shambles of First Amendment protections. Justice Black was optimistic about the durability of the constitution and the Bill of Rights. One observer said that Black revered the constitution to the point that it was his legal Bible. He was called a fundamentalist, and perhaps he was.³⁴ In *Griswold v. Connecticut*,³⁵ Justice Black asserted that amendments should be the mechanism for changing the constitution; judges should not change it through interpretation.

³²Dorsen, *op. cit.*, p. 649; Louis L. Jaffe, "The Supreme Court Today," *Atlantic* 174: 76, 77, December, 1944; "Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Black," 405 U.S. ix, lii (1972); Justice Jackson's letter to the judiciary committees, Swindler, *op. cit.*, p. 160; Berman, *op. cit.*, p. 50; Clifford J. Durr, "Hugo Black, Southerner," 10 *The American University Law Review* 27, 32 (1961); "The Supreme Court: The Limits that Create Liberty and the Liberty that Creates Limits," *op. cit.*, p. 48; John P. Frank, "Hugo L. Black," *Law and Social Order* 2 (1971); Monroe E. Karmin, "Justice Black's Recent Opinions Hint a More Conservative Philosophy," *Wall Street Journal*, November 2, 1965, p. 18.

³³William O. Douglas, "Mr. Justice Black: A Foreword," 65 *Yale Law Journal* 449 (1956).

³⁴William C. Warren, "Foreword," in Hugo L. Black, *A Constitutional Faith* (New York: Alfred A. Knopf, 1969), p. ix; Earl Warren, "A Tribute to Hugo L. Black," 85 *Harvard Law Review* 1 (1971).

³⁵381 U.S. 479, 509-513 (1965).

Other labels described Black's philosophy. As a legal positivist, the Justice voted to uphold "commands of the sovereign," even ones that violated his personal opinion of what was wise policy.³⁶ As legal positivist, however, he found it easy to strike laws and actions which violated the constitution. He sought to interpret the constitution according to its language and the intent of the founding fathers. Black rejected arguments that judges should look to high moral norms and create new laws based on the due process clause. He condemned the theory that judges are social engineers who update the constitution. Judges have no power to inject their notions of what is "reasonable" and "wise." His "distinct philosophy concerning constitutional law" was perhaps one of the reasons Justice Black was called the Court's chief philosopher.³⁷

During Black's long tenure on the bench he argued vigorously against the balancing test when First Amendment freedoms were at stake. Under the balancing test justices weighed other considerations more heavily than liberties guaranteed by the First Amendment. In 1961 the justice asserted in *Wilkinson v. United States*:

Where these freedoms [First Amendment] are left to depend upon a balance to be struck by this Court in each particular case, liberty cannot survive. For under such a rule, there are no constitutional rights that cannot be "balanced" away.³⁸

Few Justices on the Supreme Court spoke in absolute terms about constitutional protections. When they did, they, including Black, were labeled absolutists. Justice Black often spoke in absolute terms, but at times he confounded students of constitutional law by applying the balancing test. Despite these rare exceptions, Black maintained that the words of the First Amendment were an absolute command. For example, he focused on the words "no law," "abridge," and "freedom of speech," and asserted that the words should be taken literally—"Congress shall make no law. . . ."³⁹ In a public interview with Edmond Cahn in 1962, he said that he did not presume to challenge the intelligence, integrity, or honesty of men who wrote the First Amendment. He advocated that the words of the amendment should be respected literally and completely. But he qualified his position:

³⁶Tinsley E. Yarbrough, "Mr. Justice Black and Legal Positivism," 57 *Virginia Law Review* 375, 379-407 (1971).

³⁷Sidney E. Zion, "Justice Black Denies Change in Basic Constitutional Philosophy," *New York Times*, March 21, 1968, p. 43; Charles A. Reich, "The Living Constitution and the Court's Role," *Hugo Black and the Supreme Court*, p. 133; Strickland, "Introduction," *op. cit.*, p. xxvii.

³⁸365 U.S. 399, 423 (1961).

³⁹Thomas I. Emerson, *Toward a General Theory of the First Amendment* (New York: Random House, 1966), pp. 56, 57, 115, 116.

Nobody has ever said the First Amendment gives people a right to go anywhere in the world they want to go or say anything in the world they want to say We have a system of property, which means that a man does not have a right to do anything he wants anywhere he wants to do it.⁴⁰

When justices seek to expand liberties protected by the constitution, they are classified as liberals, as opposed to conservative justices who find no problem with traditional governmental regulation. When compared to Justice Frank Murphy and Justice Wiley B. Rutledge, his friends and colleagues on the bench, Black was considered only moderately liberal in 1947.⁴¹

The Supreme Court had developed several theories about the First Amendment before Black came to the bench. The "clear and present danger" test was followed by the "bad tendency" test. Black's formal statements in his opinions most often rejected these two tests and the later-developed "clear and probable danger" test. In fact after struggling with the clear and present danger test, he decided in the 1960s that the doctrine "should have no place in the interpretation of the First Amendment."⁴² Yet at times in First Amendment cases, his stances and votes seemed to embrace either the clear and present danger test or even the ill-reputed bad tendency test, despite his carefully developed constitutional standard. The deviating legal posture of Black was out of line with his exhortation that the First Amendment freedoms were "preferred freedoms" on his scale of values.⁴³

Legal scholars have attempted to explain the philosophies of judges through the comparison of judges who practice judicial activism and judges who embrace judicial restraint in overturning laws passed by legislatures. Justices who are described as activists have no qualms in striking laws that collide with constitutional provisions. Justices operating under judicial restraint often give broad discretion to legislators and uphold laws which are adjudged reasonable or wise. When Justice Black's interpretation of the laws and the constitution indicated a violation of First Amendment freedoms, he showed little hesitation in striking laws which punished expression, thought, and association.

⁴⁰Edmond Cahn, "Justice Black and First Amendment 'Absolutes:' A Public Interview," 37 *New York University Law Review* 549, 551, 553, 558, 559 (1962).

⁴¹C. Herman Prichett, *The Roosevelt Court* (New York: Octagon Books, Inc., 1963), pp. 89-131.

⁴²*Brandenburg v. Ohio*, 395 U.S. 444 (1969); see Hugo L. Black, "Justice Black and the First Amendment Absolutes," *One Man's Stand for Freedom*, ed. Irving Dilliard (New York: Alfred A. Knopf, 1963), p. 479. In 1971 Justice Black concurred in Justice Harry Blackman's dissenting opinion that discussed "clear and present danger." *Cohen v. California*, 403 U.S. 15 (1971).

⁴³Fred P. Graham, "At 80 Hugo Black Looks Ahead," *New York Times*, February 27, 1966, IV, p. 7; Cahn, "Justice Black and First Amendment 'Absolutes:' A Public Interview," *op. cit.*, p. 564.

Black arrived on the bench in 1937 seemingly unprepared for his new assignment. In fact, he was uncertain about what the role of the court should be in our system of government. He said to a gathering of friends at the Jewish Country Club in Birmingham in 1968:

When I first came to the Court I had grave doubts about judicial review. Grave doubts. But I am now convinced that if we are to have the form of free government and free society which the Constitution intends, the Court must function as it has. . . .⁴⁴

Black participated vigorously in judicial review. Despite his few conservative votes in First Amendment cases, his evangelical pleas for adherence to the specific words of that amendment and to the intent of founding fathers broadened the meaning of those freedoms and encouraged the Court to develop an expansive interpretation. Throughout his tenure on the bench he was praised and condemned for his opinions and for his votes. Yet he tenaciously communicated the ideals that American society must be based on toleration of expression, religion, and association and that the constitution was paramount.

Freedom of Expression and Thought: A Critique of Black's Jurisprudence and Practice

Examination of cases which dealt with speech, press, or thought and which did not involve action provides an opportunity to evaluate the application of Justice Black's legal theory. Justice Black's jurisprudential postures in light of First Amendment cases decided over a third of a century have long been subjects of analyses by legal scholars and other observers of the Supreme Court. Black's opinions provided a wealth of data, and Black himself responded to criticisms in speeches, interviews, and publications. A closer examination of his jurisprudence indicates that his legal philosophy was interpreted variously by the justice himself in key cases and also by observers who soundly scored his stances and sought to explain his role in the development of constitutional law.

Justice Black always contended that he interpreted the First Amendment by looking at the literal words—such as “no law”—and studying history in order to find the intent of the foun-

⁴⁴Cooper, “Mr. Justice Hugo L. Black: Footnotes to a Great Case,” *op. cit.*, p. 5.

ding fathers and to instruct others on dangers if the amendment were jeopardized. He espoused the view that if the laws and ordinances did not violate specific words of the constitution, either by the way they were written or by the way they were applied, he as judge had to uphold them regardless of his own ideas about their wisdom. He acknowledged that he left "some room for judicial discretion."⁴⁵ Black said that "interpretation obviously may sometimes result in a contraction or extension of the original purpose of a constitutional provision, thereby affecting policy."⁴⁶ As a New Deal justice, his methodology developed in response to the "Old Deal" court's substantive due process approach. He tried to carry this technique over into cases dealing with civil rights and liberties, and he was soundly criticized for his literal constitutional approach, for example, by opponents as well as supporters of the labor movement.⁴⁷ It depended upon how his vote was cast. The literal words in the First Amendment were not all that clear to Justice Frankfurter and the majority of the justices during Black's tenure. But Justice Black felt that the commands were easily understood and absolute in nature. In addition to his incorporation theory, his absolutist doctrine perhaps attracted as much attention of legal scholars as any of his pronouncements on the bench or off.⁴⁸ Black said in 1960:

It is my belief that there *are* "absolutes" in our Bill of Rights, and that they were put there on purpose by men who knew what the words meant, and meant their prohibitions to be "absolutes." The whole history and background of the Constitution and Bill of Rights, as I understand it, belies the assumption or conclusion that our ultimate constitutional freedoms are no more than our English ancestors had when they came to this new land to get new freedoms.⁴⁹

Just as a religious fundamentalist approaches his study of the Bible, Black "was interested in the original text and context, not later interpretations."⁵⁰ Because the Supreme Court in such cases as *Feiner v. New York*,⁵¹ *Beauharnais v. Illinois*,⁵² *Roth v. United*

⁴⁵Roger W. Haigh, "Mr. Justice Black and the Written Constitution," 24 *Alabama Law Review* 15, 43 (1971).

⁴⁶Hugo L. Black, *A Constitutional Faith*, pp. 35-36; see *Adamson v. California*, 332 U.S. 46, 90-91 (1947).

⁴⁷Hobbs, *op. cit.*, p. 12; Louis L. Jaffe, "The Supreme Court Today," *Atlantic* 76: 78-79, December, 1944.

⁴⁸Charles L. Black, Jr., "Mr. Justice Black, the Supreme Court and the Bill of Rights," *Harper's* 222: 63, February 1, 1961.

⁴⁹Hugo L. Black, "The Bill of Rights," *One Man's Stand for Freedom*, ed. Irving Dilliard (New York: Alfred A. Knopf, 1963), p. 33.

⁵⁰Daniel M. Berman, "Freedom and Mr. Justice Black: The Record after Twenty Years," 25 *Missouri Law Review* 155, 159 (1960).

⁵¹340 U.S. 315 (1951).

⁵²343 U.S. 250 (1952).

States,⁵³ and others had not given absolute protection of First Amendment rights in the past, Black's remarks in his New York University lecture caused quite a "stir within the professional legal community."⁵⁴ Several articles in law journals followed. One legal scholar and friend, Daniel J. Meador, felt that Black's idea that democratic society under law was protected by the absolute could be described as the most prominent feature in "his constitutional landscape." Stephen Parks Strickland said that Justice Black was a modified absolutist. Black was attacked, according to Strickland, not for his absolutist position. Critics of Black were dissatisfied with his great boldness when he interpreted the First Amendment during the 1950s, when hysteria swept the country, with United States Senator Joseph McCarthy a significant contributor.⁵⁵

The other technique which Black rejected when he felt cases should be resolved based on the absolute nature of the amendment was the balancing technique. Yet Black balanced outright in several important cases that he felt required it. Charles L. Black, Jr., tried to define the absolutist theory as a working concept. Since Justice Black had, on occasions, applied some limitations to those freedoms that he viewed as absolutes, Professor Black stated that Justice Black balanced at the stage when the right was defined and then enforced the defined right as an absolute. The value of this method, the analyst pointed out, was that justices who used it would have a positive attitude of protector of constitutional rights and would firmly enforce these rights. Laurent B. Frantz reached a similar conclusion. After weighing pros and cons during the defining stage, Frantz noted, the justice decided the scope of a particular constitutional freedom and a line was drawn. Utilizing this technique, the justice showed consistency in legal reasoning and votes when dealing with issues that were adjudged within the defined scope of the constitutional provisions. Raymond G. Decker attempted to explain Black's theory and found that Black balanced on the jurisprudential level in three major areas: the individual versus the state; monolithic society versus a pluralistic society; and rule of law versus rule of man. Even Decker agreed that Justice Black modified his own jurisprudential results in a few instances; but on the whole record, the justice was "one of the most searching jurists in American legal history."⁵⁶

⁵³354 U.S. 476 (1957).

⁵⁴Charles L. Black, Jr., *op. cit.*, p. 63.

⁵⁵Meador, "Mr. Justice Black: A Tribute," *op. cit.*, p. 1109; Stephen Parks Strickland, "Mr. Justice Black: A Reappraisal," 25 *Federal Bar Journal* 365, 368-376 (1965).

⁵⁶Charles L. Black, Jr., *op. cit.*, p. 63-68; Laurent B. Frantz, "The First Amendment in Balance," 71 *Yale Law Review* 1424, 1434-1435 (1962); Raymond G. Decker, "Justice Hugo L. Black: The Balancer of Absolutes," 59 *California Law Review* 1335, 1354 (1971).

Black's philosophy with regard to the constitution, according to Tinsley E. Yarbrough, led him to reject natural law-due process sociological jurisprudence. Yarbrough described the philosophy as one grounded in legal positivism. A legal positivist applies the constitution and the laws without trying to change the meaning and content according to his own notions of right and wrong and without judicially keeping the constitution up-to-date.⁵⁷ Using Yarbrough's thesis that Black was a legal positivist, several, but not all,⁵⁸ controversial and seemingly contradictory votes by Black can best be explained. Black's legal positivism was the reason he could vote one time as a liberal, another time as a conservative.

While Thomas I. Emerson admitted that Black's absolutist theory made a significant contribution, there were shadowy areas of action-expression distinction, while in other areas the theory was applied in an overly rigid way.⁵⁹ It is true that Black consistently dismissed arguments to balance in favor of an individual being libeled; in favor of the government when it sought to protect social welfare by regulating obscenity publications and sales; or in favor of the government when it argued for the necessity to protect national security. In a group libel case (*Beauharnais v. Illinois*),⁶⁰ he interpreted the First Amendment's "no law" to be just what the amendment said without any "ifs," "buts," or "whereases." He abhorred balancing by judges when these issues of communication came before the bench. Yet Black balanced in several cases, even admitting it. In other words there were a few "ifs," "buts," and "whereases" in the area of expression. Without at this time going into the more complicated cases where conduct was associated with expression, we can find several instances where speech and written words alone were the central issues, and Black said he would uphold regulation under these circumstances. "Fighting words"; "hollering" fire when there was no fire; shouting down the judge by a defendant in a robbery case, using threats and trying to talk so his trial could not proceed; wearing in the courthouse halls an obscene message printed on a jacket; communicating

⁵⁷Yarbrough, *op. cit.*, p. 407.

⁵⁸For example, Black's conservative stance with regard to expression through symbols, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); voting to penalize a quiet sit-in with forecasts of anarchy, *Brown v. Louisiana*, 383 U.S. 131 (1966); disregard of his standard for "fighting words" expounded in his *Beauharnais* dissenting opinion in *Cohen v. California*, 403 U.S. 15 (1971); his puzzling support of Blackmun's dissenting opinion discussing "clear and present danger" in that case; Justice Black's vote that supported the requirement of an oath with regard to political beliefs in order to be placed on a ballot, *Gerende v. Board of Supervisors of Elections of Baltimore City*, 341 U.S. 56 (1951); and his vote to uphold closed shop agreements authorized by an amendment to the Railway Labor Act, *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956).

⁵⁹Thomas I. Emerson, *The System of Freedom of Expression* (New York: Random House, Inc., 1970), p. 719.

⁶⁰343 U.S. 250, 275 (1952).

through use of symbols; discussion of topics outside the scope of the approved curriculum in the realm of politics, economics, or religion, in the classroom; taking a loyalty oath to get on a state ballot; coercive speech and overstatements by an employer; and speech closely connected with planning anarchist activities and teaching construction of molotov cocktails—in these cases, Black wittingly or unwittingly balanced.⁶¹

After studying the "balancing war" between the Black and Frankfurter camps, one observer thought the whole thing was a "fruitless one, generating on the one hand an unnecessary philosophic debate and obscuring on the other, by its large rhetoric, a hard technical free speech issue. Some of the responsibility for the 'war' rests with Justice Black."⁶² The real stake, another scholar pointed out, was *attitude*. Perhaps here resided the value of Black's espoused high goal of absolute protection of the First Amendment. In several cases he found it necessary to balance—sometimes one constitutional protection against another; at other times his sense of justice and orderliness controlled. Yet his attitude that there were absolutes prohibited him from voting in a remarkably large number of cases where intellect or bias may have tempted him to dilute the content of the First Amendment. His attitude was bent toward absolutism, but his record indicated a "modified absolutist."⁶³

Justice Black was rather proud of his historical knowledge. The library in his home in Alexandria, Virginia, was filled with history books; other books that he did not own came from the Library of Congress.⁶⁴ He sprinkled his opinions rather liberally with quotes and notations from his study of English, American, and French history. When he read one history book with conclusions that disagreed with his own, he was quick to point out that his inference from the same historical data differed from the author's. Black dashed off a letter to his friend Edmond Cahn in 1960 congratulating his friend for his review of Leonard Levy's *Legacy of Suppression*.⁶⁵

⁶¹*Chaplinsky v. New Hampshire*, 315 U.S. 658 (1942); Cahn, *op. cit.*, 549, 558; *Illinois v. Allen*, 397, 346-347 (1970); *Cohen v. California*, 403 U.S. 15 (1971); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Gerende v. Board of Supervisors of Elections of Baltimore City*, 341 U.S. 56 (1951); *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Epton v. New York*, 390 U.S. 29 (1968).

⁶²Harry Kalven, Jr., "Upon Rereading Mr. Justice Black on the First Amendment," 14 *U.C.L.A. Law Review* 428, 444 (1967).

⁶³Charles L. Black, Jr., *op. cit.*, p. 66; Stephen Parks Strickland, "Black on Balance," *Hugo Black and the Supreme Court*, ed. Stephen Parks Strickland (Indianapolis: Bobbs-Merrill Company, Inc., 1967), p. 263.

⁶⁴Meador, *Mr. Justice Black and His Books*, p. 272.

⁶⁵Leonard Williams Levy, *Legacy of Suppression* (Cambridge: Belknap Press, 1960).

This book, I think will give aid and comfort to every person in the country who desires to leave Congress and the States free to punish people under the old English seditious libel label. It was because of the existence of such governmental power that men like John Udall, John Lilburne, John Bunyan and numerous other martyrs to the cause of civil and religious liberty spend a large part of their lives in jail. If seditious libel is permitted in this country, as Dean Levy indicates the First Amendment intended it should be, I see no obstacle to imprisoning and punishing people here exactly as they punished in England and in the Colonies before the First Amendment was adopted. I spent a large part of my summer studying Dean Levy's book and his references. I am perfectly willing to admit that Alexander Hamilton, numerous Federalists, and others, probably thought and hoped that the First Amendment could be utilized in such a way as to prosecute people for seditious libel. It seems to me, however, that the facts upon which Dean Levy relies to draw such inferences point precisely in the other direction. I do not have time nor could I in a letter document what I am saying in detail. I have marked my copy of his book at many places where he drew inferences that seem to me to be completely without proper foundation. I was particularly impressed with the many conclusions that Dean Levy drew from negative premises, that is, from statements of this nature: "While this man talked or wrote in broad, rhetorical language about liberty of speech, press and religion, it must be noticed that he never did specifically and unequivocally express a desire wholly to bar prosecutions for seditious libel." From the many instances cited by Dean Levy of prosecution of people for seditious libel in this country and in England, I draw the inference, quite contrary to that of Dean Levy, that the First Amendment was adopted to bar such prosecutions then and thereafter.

Since you state that Dean Levy is a great libertarian, I accept your appraisal of him. I sincerely regret, however, that he has seen fit to take this completely reactionary view of the First Amendment's purposes. Again I say, it is too bad that he did not submit his book to you for careful scrutiny and criticism before it was published. I do hope, however, that someone in this country will study his book carefully and give it the kind of criticism that I think it should receive. My own basic disagreement with Dean Levy is that I think the First Amendment was intended to give us a "Legacy of Liberty" and not, as he says, "Legacy of Suppression."⁶⁶

While Black criticized Levy's conclusions, the justice himself received a blistering attack on his defamation position from W. Eugene Rutledge, who scored his history and findings. He pointed out that thirteen of the fourteen states to ratify the constitution by 1792 had laws which authorized prosecution for libel. Rutledge thought this fact significant.⁶⁷ Alfred Kelly was reminded of Mark DeWolfe Howe's comment that judges use history selectively,

⁶⁶Hugo L. Black, letter to Edmond Cahn, October 24, 1960, Papers of Hugo LaFayette Black, Manuscript Division, Library of Congress.

⁶⁷W. Eugene Rutledge, "The Law of Defamation: Recent Developments," 32 *Alabama Lawyer* 365, 409 (1971); *Engel v. Vitale*, 370 U.S. 421 (1962).

simplistically, and rather naively. Based on Howe's remarks and observations made by Paul Murphy, who felt Black's *Engel* opinion contained "stale and inadequate" history citations, Kelly concluded that Justices Black, Douglas, and Rutledge relied on history in order to support libertarian activism. Although Kelly stated that Black's *Adamson* history proved too much, he found that Black's critic, Charles Fairman, ignored important evidence. Kelly concluded, "In short, Mr. Justice Black may not be able to win his *Adamson* argument hands down, but, in my opinion, his history is far better than that which has characterized most of the libertarian-inspired law-office in the past few years."⁶⁸ A. E. Dick Howard chided Kelly for restricting his research to Black's opinions that urged judicial activism in conjunction with history. A more balanced appraisal of Black's historical citations should have included opinions where he used history to urge judicial restraint, such as in his *Bell v. Maryland* dissenting opinion.⁶⁹

"I haven't changed a jot or tittle," Justice Black asserted in a 1967 private interview.⁷⁰ At that time he had served thirty years on the Supreme Court, and during the sixties, court observers had accused Black of going over to the conservative bloc or becoming senile without ability to continue his justiceship. His votes in the sit-in cases, the Connecticut birth control law case, and the poll tax case, as well as his position with regard to eavesdropping by electronic devices, shocked his admirers and gave comfort to former critics. Actually, Black had changed a few jots and tittles during his long tenure. The changes were illustrated in cases that had some impact on his most valued section of the constitution—the First Amendment. Selected cases in this article, although not exhaustive, also show that he set high standards for himself and was able to abide by them a remarkable number of times. His critics who focused mostly on his votes instead of his legal reasoning presented in court opinions were not always correct in assessing his supposed changes. Justice Black had invited unfavorable commentaries by court observers because as orator and persuader he had presented exceedingly high constitutional goals, higher ideals than he sometimes was willing to impose upon himself on rare occasions.

⁶⁸*Adamson v. California*, 332 U.S. 46 (1947); Alfred H. Kelly, "Clio and the Court: An Illicit Love Affair," *The Supreme Court Review*, ed. Philip B. Kurland (Chicago: University of Chicago Press, 1965), pp. 119, 134.

⁶⁹A.E. Dick Howard, "Mr. Justice Black: The Negro Protest Movement and the Rule of Law," 53 *Virginia Law Review* 1030, 1069 (1967); 278 U.S. 226 (1964).

⁷⁰*New York Times*, September 25, 1971, p. 9.

Justice Black was an idealist.⁷¹ In earlier years his absolutist position was especially convincing in an address at New York University.⁷² He had talked of First Amendment absolutes earlier in 1955, in his address at the Einstein Memorial meeting.⁷³ Yet when he voted to restrict symbolic expression, and when in the civil rights demonstration cases he found other criteria, as he earlier had found in religious marching and industrial picketing cases—observers were aghast that absolutist Black could ignore his own evangelical pleas for First Amendment freedoms. Although in later years his emphasis changed in several important cases where expression was closely connected with some type of action (*Amalgamated Food Employees Union Local 590 et al. v. Logan Valley Plaza*, *Brown v. Louisiana*, *Cox v. Louisiana*, *Adderley v. Florida*, *Hamm v. City of Rock Hill*, *Bell v. Maryland*, *Bouie v. Columbia*, and *Barr v. Columbia*),⁷⁴ his most conservative legal posture could be found in cases where he was unwilling to interpret the First Amendment so that it protected symbolic speech and in cases where his votes were inconsistent when determining the scope of academic freedom. The protection of privacy gave Black many problems; his adamant statements in the *Griswold* case⁷⁵ did not mirror the role privacy had played with regard to his posture in other cases touching upon the First Amendment. Black constantly strived for the simple approach, and he sincerely wanted clarity in his opinions, but even in areas where he was able to retain extraordinary consistency—particularly in cases⁷⁶ dealing with libel, contempt of court, obscenity, and subversion—his positions sometimes posed paradoxes when compared to postures he had assumed in other First Amendment cases.

During the time when people developed great fear of communism, and legislators pressed for measures which would thwart communist infiltration, federal and state legislatures and govern-

⁷¹Wallace Mendelson, *Justice Black and Frankfurter: Conflict in the Court* (Chicago: University of Chicago Press, 1966), p. 47.

⁷²Hugo L. Black, "The Bill of Rights," *op. cit.*, p. 33.

⁷³Hugo L. Black, address at Einstein Memorial Meeting, Town Hall, May 15, 1955, Papers of Hugo LaFayette Black, Manuscript Division, Library of Congress.

⁷⁴391 U.S. 308 (1968); 383 U.S. 131 (1966); 379 U.S. 536 (1965); 385 U.S. 39 (1966); 379 U.S. 306 (1964); 378 U.S. 226 (1964); 378 U.S. 347 (1964); and 378 U.S. 146 (1964).

⁷⁵*Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁷⁶Libel cases: *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Barr v. Matteo*, 360 U.S. 564 (1959); *Howard v. Lyons*, 360 U.S. 593 (1959); *Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966); *Time, Inc., v. Hill*, 385 U.S. 374 (1967); *Curtis Publishing Company v. Butts*, *Associated Press v. Walker*, 388 U.S. 130 (1967); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Aston v. Kentucky* 384 U.S. 195 (1966);

mental agencies contributed to the emotional climate by raising issues about memberships in questionable organizations. Private citizens and associations were at times the object of harassment and punishment. During this time Black voted steadfastly against governmental invasion of thought, opinions, expression, and association.⁷⁷ He abided by his absolutist norm in these controversial cases.

Throughout his thirty-four years he diligently participated in striking down laws that punished First Amendment freedoms, regardless of his early quandary. He was labeled an activist, but he did not regard himself as an activist. He drew the puzzling conclusion that the Frankfurter approach illustrated true activism as the justice "toyed" with words, talked of reasonableness of legislation, and deferred to legislators.⁷⁸ Black's record in First Amend-

Monitor Patriot Co. v. Roy, Executrix, 401 U.S. 265 (1971); *Ocala Star-Banner Co. v. Dameron*, 401 U.S. 295 (1971); *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969). Contempt of court cases: *Bridges v. California, Times-Mirror Co. v. Superior Court*, 314 U.S. 252 (1941) *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947); *Wood v. Georgia*, 370 U.S. 375 (1962). Obscenity cases: *Roth v. U.S.*, 354 U.S. 476 (1957); *Smith v. California*, 361 U.S. 147 (1959); *Freedman v. State of Maryland*, 380 U.S. 51 (1965); *United States v. Alpers*, 338 U.S. 680 (1950); *Kingsley International Pictures v. Regents*, 360 U.S. 684 (1959); *Mishkin v. New York*, 383 U.S. 502 (1966); *Ginzberg v. U.S.*, 385 U.S. 463 (1966); *Ginsberg v. New York*, 390 U.S. 629 (1968); *United States v. Reidel*, 402 U.S. 351 (1971); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971). Cases dealing with subversion: Justice Black, in case dealing with litigants charged with advocacy of violent overthrow of government or with defendants whose problems stemmed from membership in organizations suspected of being communist or closely connected with subversive activities, decided in favor of the litigants, with the exception of *Gerende v. Board of Supervisors of Election of Baltimore City*, 341 U.S. 56 (1959); for example, *Scales v. United States*, 367 U.S. 203 (1961); *Braden v. United States*, 365 U.S. 431 (1961); *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961); *Wilkinson v. United States*, 365 U.S. 399 (1961). Other cases included *Dennis v. United States*, 341 U.S. 494 (1951); *Adler v. Board of Education of City of New York*, 342 U.S. 485 (1952); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Beilan v. Board of Education*, 357 U.S. 399 (1958); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Cramp v. Board of Public Instruction of Orange County*, 368 U.S. 278 (1961); *Nostrand v. Little et al.* 368 U.S. 436 (1962); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Elfrandt v. Russell*, 384 U.S. 11 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); and *Whitehill v. Elkins*, 389 U.S. 54 (1967). Other cases that dealt with penalties due to anti-communist sentiments included *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957); *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961); *In re Anastaplo*, 366 U.S. 82 (1961); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *In re Stolar*, 401 U.S. 23 (1971); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Speiser v. Randall*, 357 U.S. 513 (1958); *Carlson v. Landon*, 342 U.S. 524 (1952); *Flemming v. Nestor*, 363 U.S. 603 (1960); *Galvan v. Press*, 347 U.S. 522 (1954); *Lerner v. Casey*, 357 U.S. 468 (1958); *American Communications Associations v. Douds*, 339 U.S. 382 (1950); *United States v. Brown*, 381 U.S. 437 (1965); *Watkins v. United States*, 354 U.S. 178 (1957); *Black v. Cutter Laboratories*, 351 U.S. 292 (1956); *United States v. Robel*, 389 U.S. 258 (1967); *Garner v. Board of Public Works*, 341 U.S. 716 (1951); *Cole v. Young*, 351 U.S. 536 (1956); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Schneider v. Smith*, 390 U.S. 17 (1968); *Peters v. Hobby*, 349 U.S. 331 (1955); *Barsky v. Board of Regents*, 347 U.S. 442 (1954); *Nelson v. Los Angeles*, 362 U.S. 1 (1960); *United States v. Zucca*, 351 U.S. 91 (1956); *Deutch v. United States*, 367 U.S. 456 (1961); *Uphaus v. Wyman*, 364 U.S. 388 (1960); *Law Students Civil Rights Research Council, Inc., et al. v. Wadmond*, 401 U.S. 154 (1971).

⁷⁷Justice Black voted to protect rights of other organized groups: See *NAACP v. Alabama*, 357 U.S. 449 (1958); *Flemming v. Nestor*, 363 U.S. 603 (1960); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Louisiana v. NAACP*, 366 U.S. 293 (1961); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *W.E.B. Dubois Clubs of America v. Clark*, 389 U.S. 309 (1967); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *Veterans of Abraham Lincoln Brigade v. Subversive Activities Control Board*, 380 U.S. 513 (1965); *American Committee for Protection of Foreign Born v. Subversive Activities Control Board*, 380 U.S. 503 (1965).

⁷⁸*New York Times*, September 25, 1971, p. 9.

ment cases that came early in his career shows that his votes without opinions were a mixture of support for free expression and assembly and support for regulation of these rights. His focus at first seemed to be on economic issues, but generally speaking, he upheld the right to distribute religious literature, to assemble and speak about controversial subjects, to participate in industrial picketing, and to evangelize. It should be noted that in these early years Black voted to uphold governmental regulation of conduct on the streets in the Cox religious marching case.⁷⁹ He rejected First Amendment protections of "fighting words" that surprisingly were spoken by a supposedly religious zealot named Chaplinsky,⁸⁰ and he never backed away from that stance.

Privacy and First Amendment Protections

Perhaps the most telling insight into Black's basic philosophy about property protection and privacy was disclosed by J. Woodford Howard, Jr. In *Martin v. Struthers*, Justice Black at first favored governmental regulation to protect homeowners from having religious workers ring doorbells. He even projected the possibility that Jehovah's Witnesses would disrupt Catholic worship services with their evangelizing tactics, but fellow justices persuaded him to give some thought to the protection of First Amendment freedoms. After mulling over the discussions, he switched sides and wrote the majority opinion that struck down the doorbell ban, but suggested that each homeowner could rely upon trespass laws to keep away unwelcome people. Howard explained the process of how "judges of all ideological persuasion pondered, bargained, and argued in the course of reaching their decisions, and they compromised their ideologies too." Black's first position in *Struthers* was similar to the mid-1960s stance where again property and trespass laws figured in sit-in and demonstration marches. Howard maintained that Black exhibited a constancy of ideology in the early cases later in his career.⁸¹

In 1965 Justice Black rejected elevation of the term "privacy" to the status of constitutional law in *Griswold v. Connecticut*,⁸² but in *Struthers* he showed concern for privacy of the homeowner. Black's support of governmental regulation of commercial leaflet distribution (*Valentine v. Chrestensen*)⁸³ and banning news and political

⁷⁹Cox v. New Hampshire, 312 U.S. 569 (1941).

⁸⁰Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

⁸¹Martin v. Struthers, 319 U.S. 141 (1943).

⁸²J. Woodford Howard, Jr., "On the Fluidity of Judicial Choice," 62 *American Political Science Review* 43: 48-56, March, 1968.

⁸³Griswold v. Connecticut, 381 U.S. 479 (1965).

speeches from city bus radios piped to a captive audience (*Public Utilities Commission of District of Columbia et al. v. Pollak*)⁸⁴ showed judicial support of laws to protect the privacy of people who were recipients of broadcasts and leaflet distribution. The most ardent campaign he launched for privacy—utmost privacy—was for people and organizations suspected of subversion. Thought and beliefs should not be proved, according to Black. People should not be forced to reveal past memberships. Organizations should not be required to give membership lists or names of financial contributors.⁸⁵ He also fought for the right of an organization suspected of skirting lobbying regulations to refrain from submitting lists of people who ordered books and pamphlets (*United States v. Rumely*).⁸⁶

Black revered privacy of his home, especially, and more than once said that the constitution gave no one the right to march around his home or other specified areas that he would restrict from unwanted marchers and demonstrators.⁸⁷ Based on this kind of reasoning throughout the years, students of the Court expected a different attitude about the constitutional right of privacy in the *Griswold* case. But Black was not a champion of the right of privacy in other situations. As Senator Black investigating lobbying practices, he had uncovered massive fraud by holding companies which used names out of telephone books in a letter and telegram campaign. Invasion of privacy was one of his senate investigatory techniques.⁸⁸

In the libel cases Justice Black supported freedom of press over the pleas of invasion of privacy.⁸⁹ Other cases dealing with press showed a justice more inclined to protection of the press than privacy. For example, Billie Sol Estes's trial was complicated by an array of television cameras capturing significant portions for public consumption without regard for stress placed on the televised participants.⁹⁰ In this case Black voted to support press activities. Thus Black's concern for privacy lacked continuity and predictability in several important cases that were considered by the Supreme Court. Sometimes privacy was a significant factor as he read background data; sometimes it was not.

⁸⁴316 U.S. 52 (1942).

⁸⁵343 U.S. 451 (1952).

⁸⁶345 U.S. 41 (1953); see *NAACP v. Alabama*, 357 U.S. 449 (1958).

⁸⁷Hugo L. Black, television, CBS Special, December 3, 1968. See *Gregory v. Chicago*, 394 U.S. 111 (1969).

⁸⁸Berman, *op. cit.*, p. 50; Rodell, *op. cit.*, p. 140.

⁸⁹See Note 76.

⁹⁰*Estes v. Texas*, 381 U.S. 532 (1965).

Academic Freedom, Protection of Minors, and the First Amendment

In addition to formal instruction, students in public schools often acquire understanding and tolerance by observing practices and hearing views expressed by other students. Local authorities have at times made school policies which penalized students whose religious and political views were unpopular in the community-at-large. In addition to enforcing rigid student behavior in the classroom, school authorities sometimes mandated that teachers conform to norms supported by the majority in the community and state. Thus school regulations thwarted academic freedom in individual classrooms, and diversity of views was penalized. The Supreme Court during Black's tenure on the bench had opportunity to examine a number of school policies which strangled liberties of students and teachers. Other cases dealt with attempts of local and state authorities to protect minors on the street. Sale of pornography to minors was a troublesome issue for many communities. Other communities took action to prohibit children from selling religious literature. All of these issues touched upon First Amendment liberties, and Black's legal posture was a study of contradiction.

Justice Black's uneven record with regard to academic freedom is perhaps the major blight on his distinguished career in protecting First Amendment principles. In the early forties Black was among the majority of justices who upheld educational policies that allowed administrators to interrupt the education of students who, as believers in the minority sect of the Jehovah's Witnesses, would not stand to salute the flag. These school policies were implemented in response to a tremendous wave of patriotism before and during World War II. A few students were faced with the choice of obeying God's command—as they interpreted the scriptures—to refrain from worship of idols (in this case the flag) with subsequent expulsion or of obeying school officials and violating their consciences. Black's vote in *Minersville School District v. Gobitis*⁹¹ favored school regulation which punished students' free exercise of religious principles in the schoolroom. The repressive academic environment was condoned by the Supreme Court, Justice Black included. However, he quickly decided that he had erred in giving support to the harrassment of an unpopular religious sect. One scholar said that Black noticed the frequency of litigation and the types of statutes applied to the Jehovah's

⁹¹310 U.S. 586 (1940).

Witnesses and began to "doubt the good faith of the local authorities." He relied on the application of the "clear and present danger" test in which "religious scruples might be overridden only when their observance would create a clear and present danger of some sort of serious harm to the community."⁹² In 1942 in *Jones v. Opelika*,⁹³ Black indicated that the Court had incorrectly decided the *Minersville* flag salute case. One year later the issue was again before the bench, and this time Black joined Chief Justice Stone and Justices Douglas, Jackson, and Byrnes when the Court overturned its earlier decision in *West Virginia State Board of Education v. Barnette*.⁹⁴

Perhaps the most restrictive remarks Justice Black ever made concerning speech were made in the twilight of his career in *Tinker v. Des Moines Independent Community School District*⁹⁵ and *Epperson v. Arkansas*.⁹⁶ Black wrote in his *Epperson* opinion:

I am also not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed. . . . I question whether it is absolutely certain, as the court's opinion indicates, that "academic freedom" permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities who hired him.⁹⁷

In the *Tinker* case, Black displayed no tolerance whatsoever for teacher-pupil discussion about any important topic that school authorities did not condone. Once the teacher and student entered the school classroom, they lost their First Amendment rights. No dissent should be tolerated—even in the mild form of quietly wearing black armbands during the Vietnam War, as the *Tinker* children did. His stance was reminiscent of his early stance in the *Minersville School District* case where a restrictive policy was upheld by the Supreme Court in 1940. In the sixties campus disruptions and penalties were issues that came before the court. Black was appalled by the activities associated with protests. Although the *Tinker* case dealt with a few children quietly wearing black armbands, symbolic speech was not protected by the First Amend-

⁹²David R. Manwaring, *Render Unto Caesar: The Flag Salute Controversy* (Chicago: University of Chicago Press, 1962), pp. 207, 252.

⁹³*Jones v. Opelika*, 316 U.S. 584 (1942).

⁹⁴*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁹⁵*Epperson v. Arkansas*, 393 U.S. 97, 113-114 (1968).

⁹⁶*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

⁹⁷*Epperson v. Arkansas*, 393 U.S. 97 (1968).

⁹⁷393 U.S. at 113-114.

ment according to his interpretation. The case did not deal with demonstrations, but an irate Black considerably expanded the discussion in his 1969 *Tinker* dissenting opinion:

[G]roups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. Many of these student groups, as is all too familiar to all who read the newspapers and watch the television news programs, have already engaged in rioting, property seizures and destruction. They have picketed schools to force students not to cross their picket lines and have too often violently attacked earnest but frightened students who wanted an education that the picketers did not want them to get.⁹⁸

During another time of tension when the nation was caught in a grip of fear of communist subversion, in 1952, Black wholeheartedly supported academic freedom for teachers in the classroom. Unlike in *Tinker* and *Epperson*, he spoke in expansive terms. In *Adler v. Board of Education of City of New York*⁹⁹ Black carefully justified why the First Amendment protected the liberties of teachers on school campuses. When teachers have liberty to present ideas, students have opportunity to hear a variety of views. Black wrote:

This is another of those rapidly multiplying legislative enactments which make it dangerous—this time for school teachers—to think or say anything except what a transient majority happen to approve at the moment. Basically these laws rest on the belief that government should supervise and limit the flow of ideas into the minds of men. The tendency of such government policy is to mould people into a common intellectual pattern. Quite a different governmental policy rests on the belief that government should leave the mind and spirit of man absolutely free. Such a governmental policy encourages varied intellectual outlooks in their belief that the best views will prevail. This policy of freedom is in my judgment embodied in the First Amendment and made applicable to the states by the Fourteenth. Because of this policy public officials cannot be constitutionally vested with powers to select the ideas people can think about, censor the public views they can express, or choose the persons or groups people can associate with. Public officials with such powers are not public servants; they are public masters.¹⁰⁰

⁹⁸393 U.S. at 525. Between 1967 and 1969 major protests occurred on college campuses; for example, "292 major protests on 232 campuses during the first six months of 1969" were reported. Joseph Herman, "Injunctive Control of Disruptive Students Demonstrations," 56 *Virginia Law Review* 215 (1970).

⁹⁹*Adler v. Board of Education of City of New York*, 342 U.S. 485 (1952).

¹⁰⁰342 U.S. at 496-497.

Black for the most part limited First Amendment liberties of minors; but there were exceptions. For example, in *Ginsberg v. New York*¹⁰¹ and *Rabeck v. New York*,¹⁰² Black voted to strike down all regulations that prohibited the sale of obscene literature to minors. Yet earlier in *Prince v. Massachusetts*¹⁰³ he voted to uphold regulations governing children who sold religious literature on the streets. Protection of child welfare was his justification. According to Black's voting record, theoretically a child, who under certain conditions was restricted from selling religious literature to a magazine and book salesman, could legally buy hard core pornography from that salesman. The hypothetical case which illustrates Black's interpretation of the First Amendment raises another problem with regard to minors. According to Black in *Interstate Circuit, Inc. v. City of Dallas*¹⁰⁴ the hard core pornography salesman has freedom to transmit messages by literature and movies to children for profit, but the teacher in the classroom under *Tinker* and *Epperson* could be restricted from discussing with students such topics as economics, politics, sociology, and religion when school policies prohibit those topics. If the justice had voted total freedom for minors to distribute religious literature, for teachers and students to discuss pertinent topics and transmit serious messages through symbols, and for salesmen to sell literature and movie tickets to any age of customer, his First Amendment interpretation would have remained consistent with his absolutist philosophy. But as his votes in these cases show, he waived and at times fell short of his carefully developed norm.

The Media as Big Business and First Amendment Freedom of Expression

In 1929 Senator Black wrote: "Control of the source of public information, is, therefore the most powerful factor, in shaping public opinion, and in directing public action. No one class, or group should be given this tremendous power."¹⁰⁵ He actively supported the Radio Act of 1927, which denied permits for operation or owning of radio stations by public utility corporations. To gather support for his views Black wrote the following statement in the *Public Utilities Fortnightly*:

¹⁰¹390 U.S. 629 (1968).

¹⁰²391 U.S. 462 (1968).

¹⁰³321 U.S. 158 (1944).

¹⁰⁴390 U.S. 676 (1968).

¹⁰⁵Hugo L. Black, "No Broadcasting by Public Utilities," *Public Utilities Fortnightly*, Vol. III: 686, June 13, 1929.

If it be true that "fifteen or twenty big stations could practically monopolize the air in this country," it is certainly time for us to "stop, look and listen," unless we believe such a situation desirable. As for myself, I believe a monopoly on supplying public information the most dangerous that can be imagined.¹⁰⁶

Later, when he was on the Supreme Court, congressional statutes rather than the First Amendment figured prominently for the majority of justices in cases dealing with media businesses and organizations. Black, however, considered other risks. For example, in *Associated Press v. United States*¹⁰⁷ in 1945 Justice Black sternly rebuked the Associated Press when under its by-laws it excluded some of the applicants for membership in the private organization:

The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. . . . Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.¹⁰⁸

In 1951 Black with the Court condemned the practice of the *Lorain Journal*, which refused to accept advertisements whenever a business advertised on local radio stations.¹⁰⁹ Besides monopolistic practices of media businesses and efforts to limit diversity of thought, Black feared laws which suppressed criticism of government. In *Wieman v. Updegraff* Black explained First Amendment protections:

Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended. We must have freedom of speech for all or we will in the long run have it for none but the cringing and craven. And I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually be wholly lost.

¹⁰⁶*Ibid.*, pp. 688-689.

¹⁰⁷*Associated Press v. United States*, 326 U.S. 1, 20 (1945).

¹⁰⁸326 U.S. at 108.

¹⁰⁹*Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

It seems self-evident that all speech criticizing government rules and challenging current beliefs may be dangerous to the status quo. With full knowledge of this danger the Framers rested our First Amendment on the premise that the slightest suppression of thought, speech, press, or public assembly is still more dangerous. This means that individuals are guaranteed an undiluted and unequivocal right to express themselves on questions of current public interest. It means that Americans discuss such questions as of right and not on sufferance of legislatures, courts or any other governmental agencies. . . . It means that courts are without power to appraise and penalize utterances upon their notion that these utterances are dangerous. In my view this uncompromising interpretation of the Bill of Rights is the one that must prevail if its freedoms are to be saved. Tyrannical totalitarian governments cannot safely allow their people to speak with complete freedom. I believe with the Framers that our free Government can.¹¹⁰

On the whole, Black's interpretation of the First Amendment accommodated the interests of the media industry. Controversial disclosures and sharply worded editorials sell papers and magazines and improve the ratings. Sometimes national security is broken; sometimes defendants in court are tried by press or accused falsely. Sometimes human dignity is violated through pornographic publications, and the press thrives. The following cases serve as examples of the media industry on the defensive in courts of law with Justice Black asserting constitutional freedom of publication.

Government tried to prevent publication of secret documents that encouraged questions about governmental credibility in formulation of Vietnam war policies. Black upheld the right of publication. His opinion in the *New York Times Company* case¹¹¹ was the last one he wrote. He wrote with vigor and clarity, remaining constant to his high ideals. Comparing his remarks about freedom of press with ones he made much earlier in his career, no one could be fair to Black and credit his 1971 Pentagon Papers opinion to senility or growing conservatism. He asserted:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free unrestrained press can effectively expose deception in governments. And paramount among the responsibilities of a free press is the duty to prevent any part of

¹¹⁰344 U.S. 183, 193-194 (1952).

¹¹¹*New York Times Co. v. United States*, 403 U.S. 713 (1971).

the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of the government that led to the Vietnam War, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.¹¹²

Black's broad interpretation of the First Amendment in 1971 despite pleas of national security confirmed his 1969 *Brandenburg*¹¹³ rejection of the "clear and present danger" test.¹¹⁴ He also supported the press over objections of judges quite early—in 1941.¹¹⁵ Not even the cry of interference with justice and fair trial by publication of a threatening telegram from a union leader and by editorials and cartoons directed toward a trial outcome led Black to deny the press First Amendment rights. He saw no clear and present danger. Government, including the judicial branch, could not thwart and penalize the media industry.

His aversion to censorship and control of the press through private or government monopoly led him naturally to reject every plea that public officials or private persons had been libeled or had had their privacy invaded by the press. The newspaper, television, and radio attacks could be false, malicious, true, or slanted; it made no difference to Black. He said the First Amendment gave total freedom to the publishers.¹¹⁶ Such a position, of course, led to criticism. One of his most severe critics was W. Eugene Rutledge. He said that Black in the libel cases looked at the problem from the point of view of the publisher. "Is the press too fragile to face the public in the form of a jury?" Rutledge asked. "Every other business organization in the United States, and the press is precisely that, must 'guess' at the way a jury will assess its conduct of its business." Jury trials, he maintained, are a cornerstone of liberty, and Black had ignored the Seventh Amendment. "It is common," Rutledge insisted, "to find that the same corporation owns a radio and television station and a newspaper in the same town." This critic felt that by ignoring the individual citizen, Black assumed a posture that was "a tragic event in the career of a great civil liber-

¹¹²403 U.S. at 717.

¹¹³*Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹¹⁴In 1971 Black concurred in Justice Harry Blackmun's dissenting opinion that discussed "clear and present danger." *Cohen v. California*, 403 U.S. 15 (1971).

¹¹⁵*Bridges v. California*, 314 U.S. 252 (1941).

¹¹⁶*New York Times v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

tarian."¹¹⁷ The late Harry Kalven, Jr., also saw problems with Black's absolutist position. He saw an invasion into the rights of the individual and a distrust of the legal system, but he softened his criticism of Black and Douglas by remarking, "Nevertheless there is a point to their thesis. One might develop a free-speech theory on the premise that we must over protect speech in order to protect the speech that matters."¹¹⁸

Community regulations could have serious impact on the businesses which publish obscene literature and produce pornographic movies, as well as on the distributors. Black would have no part of the approval of censorship ordinances and laws. In order to fulfill the functions of a censorship board, the Supreme Court had to make value judgments. Black maintained that "judges possess no special expertise providing exceptional competency to set standards and to supervise the private morals of the Nation." A Supreme Board of Censors would have to determine in each case what was good or bad according to their own standards of what was immoral. In Black's judgment "this Court should not permit itself to get into the very center of such policy controversies, which have so little in common with lawsuits." Censorship in obscenity cases was a deadly enemy of freedom and progress.¹¹⁹ Under Black's interpretation of the First Amendment, businesses transmitting messages that offended the morals of a segment of the community would have no threat of community or court-approved censorship regulations.

In summary, Black on the one hand welcomed governmental regulation of the media to prevent monopolistic practices of media enterprises which reduced robust debate. On the other hand management in the media whose businesses were subject to libel and slander lawsuits or subject to censorship regulations when subject matter dealt with obscenity welcomed the interpretation of the First Amendment by Justice Black. Had Black's interpretation prevailed, public figures and public officials who were libeled or slandered would have had no legal recourse. Communities could not restrict sale and distribution of pornography. The majority of Supreme Court justices, however, never agreed with his absolutist theory applied to the First Amendment in cases dealing with libel

¹¹⁷Rutledge, *op. cit.*, pp. 416, 417, 423.

¹¹⁸Harry Kalven, Jr., "The Reasonable Man and the First Amendment: Hill, Butts, and Walker," *The Supreme Court Review*, ed. Philip B. Kurland (Chicago: The University of Chicago Press, 1967), p. 294.

¹¹⁹*Kingsley International Pictures v. Regents*, 360 U.S. 684, 690-690 (1959). By 1966, however, Black apparently tried to find a compromise when he reluctantly suggested that if censorship were to continue, he thought a governmental institution other than the courts should shoulder the tedious responsibility of deciding what was obscene. *Mishkin v. New York*, 383 U.S. 502, 517 (1966).

and obscenity. In his last opinion Black dealt handily with freedom of press for publication of governmental secret documents, and his opinion prevailed.

Property, Nonconformity, and Speech Plus: Freedom and Restraint

Cases dealing with union strikes and picketing to protest management policies presented thorny issues long before Justice Black took his place on the bench. The marches and strikes were not pure speech protected by the First Amendment, and yet they were efforts to communicate dissatisfaction on employers' property and on the streets when other avenues of communication closed. Thus in 1940 the Supreme Court finally defined these forms of communication connected with action as "speech plus," but gave only limited constitutional protection.¹²⁰ Black soon found himself in the fray of deciding which union activities were protected by the First Amendment. These cases laid a foundation in the development of constitutional law which would guide the court when civil rights demonstrations and protests against the Vietnam War became commonplace. In these later cases speech also was involved, but it was closely connected to action; speech plus was again the subject of constitutional interpretation.

When property rights took precedence over First Amendment rights in some but not all cases during the latter part of Black's tenure, both his admirers and his critics were amazed. In 1968 Black wrote (*Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*) that "whether this Court likes it or not, the Constitution recognizes and supports the concept of private ownership of property. The Fifth Amendment provides that '[n]o person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.'"¹²¹ During that same year, in a nationally televised interview, he said, "I've never said that freedom of speech gives people the right to tramp up and down the streets by the thousands, either saying things that threaten others, with real literal language, or that threaten them because of the circumstances under which they do it . . ." Black asserted that the First Amendment did not have anything in it to "protect a man's right to walk . . . around and around and around my house, if he wants to; to fasten my people—my family—up into the house, make them afraid to go out

¹²⁰*Thornhill v. Alabama*, 310 U.S. 88 (1940).

¹²¹391 U.S. 308, 330 (1968).

of doors, afraid that something will happen."¹²² The premise he developed narrowed the appropriate places people could assemble and petition. He based his standards upon the idea that certain private and public places were designated for certain uses, and protesting groups could legitimately be restricted from these areas.

Much earlier in his career, as pointed out in this study more than once, Justice Black recognized the value of protection of property owners against unwanted solicitation and religious literature (*Martin v. Struthers*). Black agreed with the necessity of regulation of religious marching and industrial patrolling (*Cox v. New Hampshire* and *Giboney v. Empire Storage and Ice Company*).¹²³ Both kinds of marchers had violated legitimate laws. He abhorred the total ban on sound trucks, but agreed that their volume and presence on the streets could be governed by laws (*Kovacs v. Cooper*).¹²⁴ Critics cited Black's dicta in the *Marsh v. Alabama* opinion¹²⁵ dealing with a distributor of religious literature and a privately owned town that had ousted her completely from its "private property." In *Marsh* Black said that the more an owner opens his property to the public, the more circumscribed his rights become by statutory and constitutional rights of others who use it.¹²⁶ A former law clerk felt that Black in that case was talking only in terms of a town—"a town is a town no matter who own it."¹²⁷

Looking back at the earliest cases, Justice Owen J. Roberts wrote in expansive terms about use of the streets. In 1939 in *Hague v. Committee for Industrial Organization* he wrote:

Wherever the title of street and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.¹²⁸

Yet Roberts added that regulation for comfort, convenience, and order was legitimate. In 1943 (the same year of the *Struthers* trespass case), Justice Black was less expansive than Roberts. He wrote in a leaflet case, "But one who is rightfully on a street" can

¹²²Hugo L. Black, television interview, CBS, December 3, 1968; *New York Times*, September 25, 1971.

¹²³*Martin v. Struthers*, 319 U.S. 141 (1942); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Giboney v. Empire Storage and Ice Company*, 336 U.S. 490 (1949).

¹²⁴336 U.S. 77 (1949).

¹²⁵326 U.S. 501 (1946).

¹²⁶326 U.S. 506.

¹²⁷Howard, *op. cit.*, p. 1072.

¹²⁸307 U.S. 496, 515 (1939).

express his views. He discussed the role of government in the *Jamison v. Texas* case:

Of course, states may provide for control of travel on their streets in order to insure the safety and convenience of the traveling public. They may punish conduct on the street which is in violation of a valid law.¹²⁹

Two years earlier Black outlined governmental regulation. He gave more weight to the idea that states control their streets in industrial picketing than critics in later years gave him credit. He said in his 1941 *Meadowmoor* dissenting opinion:

. . . I deem it essential to our federal system that the states should be left wholly free to govern within the ambit of their powers. Their deliberate governmental actions should not lightly be declared beyond their powers. For us to shear them of power not denied to them by the Federal Constitution would amount to judicial usurpation.¹³⁰

He went on to assert that states could not "wholly remove or partially whittle away First Amendment freedoms." Although he voted to uphold the rights of picketers in this case, he abided by the above-cited standard for state regulation of picketing when he felt unions had violated valid laws. The states had power, he asserted in 1941, to prevent or punish disorders, traffic interference, or "threat to public safety, peace or order . . . because the preservation of peace and order is one of the first duties of government."¹³¹

Thus Justice Black put limitations on the use of streets early in his career; but he felt that the Supreme Court should further define these limitations and said so in 1965 in *Cameron v. Johnson*:

There are many earnest, honest, good people in this Nation who are entitled to know exactly how far they have a constitutional right to go in using the public streets to advocate causes they consider just. . . . The issues are of such great importance that I am of the opinion that before this Court relegates the States to the position of mere on-lookers in the struggles over their streets and the access to their public buildings, this Court should at least write an opinion making clear to the States and interested people boundaries between what they can do in this field and what they cannot.¹³²

In his personal library was a 1960 edition of a book authored by Paul Freund. Black marked several passages and wrote in the

¹²⁹318 U.S. 413, 416 (1943).

¹³⁰*Milk Wagon Drivers Union of Chicago, Local 753 et al. v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 302 (1941).

¹³¹312 U.S. at 317.

¹³²381 U.S. 741, 742-743 (1965).

margins of the pages. For example, he underlined a section of Freund's sentence in the following manner: ". . . the culmination of a persistent search by Mr. Justice Black for a textual basis on which to predicate the *maximum protection of civil liberties with a modicum of protection for interest of property.*" In the margin he wrote, "No! Not truth!"¹³³ Black was upset apparently because Freund had ignored cases where Black had voted to protect private property interests.

Whether or not critics agreed with Black's reasoning in the trespass sit-in and demonstration cases or his ideas that owners retained some control over their property if state action did not enforce segregation, many of his opinions appeared rationally structured, with Black adhering to selected principles rather consistently. He voted to strike down convictions as well as uphold convictions. In the controversial *Cox v. Louisiana* case,¹³⁴ the majority said that the Louisiana law prohibiting demonstrations at the courthouse was a valid one. The difference between their votes and Black's stance was that those justices winked at the fact that an official gave permission to violate valid law and allowed the group to gather at the combination jail-courthouse building.¹³⁵

One of the most perplexing opinions and votes with regard to speech plus occurred in the 1966 *Brown v. Louisiana*.¹³⁶ Justice Black wrote a fierce dissenting opinion displaying emotional pleas and forecasts. When the facts in the case are examined, Black's intense response is somewhat surprising and perplexing. In contrast to the *Cox* case cited above, where a throng of two thousand people stood near a courthouse trying to influence a judge to release twenty-three prisoners, the *Brown* case involved five quiet people in a small regional public library. The confrontation of the five CORE members with local officials was so mild that Black's dissent appeared to be based merely on the justice's sense of frustration that the Court by overturning *Brown's* conviction had given a judicial stamp of approval to this type of activity in a public building. The background facts indicated that five black people were received graciously by a librarian. One book was requested, and Mrs. Reeves suggested that she could order it for them since it was not on the regional library shelves. After the conversation ended, the "sit-in" began with one person sitting in the only chair

¹³³Paul A. Freund, *The Supreme Court of the United States* (Cleveland: World Publishing Co., 1961), p. 46.

¹³⁴379 U.S. 536 (1965).

¹³⁵Harry Kalven, Jr., "The Concept of the Public Forum: *Cox v. Louisiana*," *The Supreme Court Review*, ed. Philip B. Kurland (Chicago: University of Chicago Press, 1965), p. 9.

¹³⁶*Brown v. Louisiana*, 383 U.S. 131 (1966).

available and the other four standing nearby. After several requests to leave by two librarians and the sheriff, the five demonstrators continued to stay quietly where they were until the arrest. Their arrest was based on a state statute which made it a crime to *intend* to breach the peace by congregating in public buildings and refusing to leave when requested to do so. Black thought this part of the statute was sufficiently narrow to be constitutionally valid and was unlike the vague portion dealing with breach of peace struck down by the Court in the *Cox* case. His dissent qualified First Amendment protections in speech plus cases:

The First Amendment, I think, protects speech, writings, and expression of views in any manner in which they can be legitimately and validly communicated. But I have never believed that it gives any person or group of persons the constitutional right to go wherever they want, whenever they please, without regard to the rights of private or public property or to state law. Indeed a majority of the Court said as much in *Cox v. Louisiana*. Though the First Amendment guarantees the right of assembly and the right of petition along with the rights of speech, press and religion, it does not guarantee to any person the right to use someone else's property, even that owned by the government and dedicated to other purposes as a stage to express dissident ideas.¹³⁷

Black could be very emotional about controversies that came before the Court and his proposed solutions. Several opinions indicated this trait. Charlotte Williams in a book published in 1950 commented on Black's emotionalism.¹³⁸ The *Brown* and the *Tinker* opinions seemed to exceed all others in emotionalism. On opinion day when the *Brown v. Louisiana* decision was announced and Black spoke in the Court, a *Washington Post* reporter thought his dissent was "one of the most bitter and heated" that he could recall in recent years. He shook his finger at the audience and made a "30 minute verbal assault that made his strongly worded written dissent seem pale by comparison."¹³⁹

In the direct action sit-in and demonstration cases, observers who tried to understand Black's posture said his main concern was that lawlessness and violence would replace "the rule of law" and the utilization of government to solve social discrimination. In other words, he feared that direct action would replace traditional processes of settling disputes and controversies. This philosophy

¹³⁷383 U.S. at 166.

¹³⁸Charlotte Williams, *Hugo L. Black: A Study in the Judicial Process* (Baltimore: Johns Hopkins Press, 1950), p. 50.

¹³⁹*Washington Post*, February 24, 1966, cited in Howard, *op. cit.*, p. 1045.

was also illustrated in his 1949 *Giboney* opinion dealing with industrial picketing.¹⁴⁰ Other critics were less benevolent about Black's posture. Black had indeed condoned other practices on the streets as a form of a "poor man's printing press."¹⁴¹ He felt that when management and labor disputed practices and policies, they could go in the streets and air their views; many times (but not always), he voted to uphold industrial picketing. Emerson was dismayed with the *Adderley v. Florida* decision;¹⁴² it "raises serious questions," he wrote, "concerning the legal foundations of the rights, embodied in the First Amendment, to assemble peaceably and to petition for a redress of grievances. More particularly, the decision casts disturbing doubt upon the right of the citizen to use public open places for purpose of assembly."¹⁴³

Harry Kalven, Jr., went to the other extreme and said that all speech is "speech plus," but Howard thought he was trying to prove too much.¹⁴⁴ Perhaps much discussion about Black's philosophy with regard to First Amendment absolutes and conduct could be reduced if we focused on whether Black at the jurisprudential level defined the words in the First Amendment properly. About the right of a union to hire lawyers to assist its members, Black wrote in *United Mine Workers of America District 12 v. Illinois State Bar Association*:

We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. . . . We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.¹⁴⁵

Black time and again maintained that certain types of assembling and petitions were conduct that lay outside the protection of the First Amendment. The actions of assembly and petitioning, however, are forms of conduct; people gathering together in a locale and transmitting messages to government can be nothing more than conduct intermingled with expression. Black evidently

¹⁴⁰*Giboney v. Empire Storage and Ice Company*, 336 U.S. 490 (1949).

¹⁴¹Howard, *op. cit.*, p. 1071; Kalven, "Upon Rereading Mr. Justice Black on the First Amendment," *op. cit.*, p. 449.

¹⁴²385 U.S. 39 (1966).

¹⁴³Thomas I. Emerson, "The Court v. the Demonstrators," *Nation* 203: 704, December 26, 1966.

¹⁴⁴Kalven, "The Concept of the Public Forum: *Cox v. Louisiana*," *op. cit.*, p. 6; Howard, *op. cit.*, p. 1078.

¹⁴⁵389 U.S. 217, 222 (1967).

had to assume that assembly and petition were not conduct, but using Black's own premise quoted above, conduct in the form of assembly and petition is protected by the First Amendment. Lack of recognition of the assumption, or unwillingness to recognize it, produced difficulties for him throughout his judicial career. He also convinced people that First Amendment freedoms were preferred and the keystone; thus when he introduced another constitutional protection—that of property protection—and raised it above First Amendment protections in several cases, his followers felt he had abandoned them. They seemed to forget many cases, even civil rights demonstration cases, where he voted to uphold the rights of demonstrators. A serious deviation occurred, however, in his 1966 *Brown* dissenting opinion. Justice Black projected complete chaos and anarchy from this quiet behavior by five dissatisfied black people. He was not feigning fear; he really was afraid. He wanted to see demonstrations of this nature stopped, because judicial approval would encourage minority groups to increase their assembling and petitioning in streets and public buildings. Black unwittingly voted to penalize the CORE members in the tradition of the ill-reputed 1925 bad tendency test.¹⁴⁶ He detected risk; punishment should be upheld because of that risk. His *Tinker* dissenting opinion had a similar thrust.

Three years after Black's perplexing dissenting opinion in *Brown v. Louisiana*, the *Gregory* case was decided.¹⁴⁷ Those who clicked their tongues and said things about his advancing age had to find other reasons to explain his vote seeking to protect Gregory, whose activities caused far more stir than the CORE members in the library and whose activities took place in a residential area of privately owned homes. Black, true to his old form of striking down vague breach of peace statutes, had to violate his own standard that marches should not go around and around private homes. If *Gregory* proved anything, it illustrated the difficulty Black had when he tried to chart an even course and valued principles clashed.

Protection of Liberties During War

Black had some difficulties in interpreting the constitution when threats to the governmental system existed. World War II produced cases where he voted against Nazi propagandists (*Viereck*

¹⁴⁶*Gitlow v. New York*, 268 U.S. 652 [1925].

¹⁴⁷*Gregory v. Chicago*, 394 U.S. 111 [1969].

v. United States)¹⁴⁸ and a Nazi organizer (*Knauer v. United States*).¹⁴⁹ The most shocking incidence occurred when he wrote the majority opinion in the Japanese-American removal case. After he assumed his expansive posture in subversion cases during the cold war, there may have been the temptation to speculate that he regretted his *Korematsu* decision.¹⁵⁰ Actually he never regretted his opinion and said so in 1967:

I would do precisely the same thing today, in any part of the country. I would probably issue the same order were I President. We had a situation where we were at war. People were rightly fearful of the Japanese in Los Angeles, many loyal to the United States, many undoubtedly not, having dual citizenship—lots of them.

They all look alike to a person not a Jap. Had they [the Japanese] attacked our shores you'd have a large number fighting with the Japanese troops. And a lot of innocent Japanese-Americans would have been shot in the panic. Under these circumstances I saw nothing wrong in moving them away from the danger area.¹⁵¹

Justice Black remained calm and detached in the years of the Cold War and Korean war. He was not swayed by justices who felt national security demanded judicial support of penalties imposed on people and organizations suspected of subversive advocacy. His emotions were directed toward the restrictive laws and penalties—not toward the individuals and the threats they posed. His detachment from hysteria gave way when people during the years of the Vietnam war introduced symbolic speech and went into the streets and public buildings to protest foreign policies. His record during World War II and the Vietnam war was a mixture of support and negation of individual liberties. Writing and speaking remained firmly protected during these years, but burning flags, draft cards, wearing "fighting words" on jackets, and wearing armbands (*Street v. New York*, *United States v. O'Brien*, *Cohen v. California*, and *Tinker v. School District*)¹⁵² were outside the protections, as far as Black was concerned. As in the civil rights demonstrations cases, sometimes litigants who disdained national policies found a supportive vote, but not always. Actor Schacht, the New York

¹⁴⁸318 U.S. 236 (1943).

¹⁴⁹328 U.S. 654 (1946).

¹⁵⁰*Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁵¹*New York Times*, September 25, 1971, p. 9.

¹⁵²394 U.S. 576 (1969); 391 U.S. 367 (1968); 403 U.S. 15 (1971); 393 U.S. 503 (1969).

Times Company, young Watts, and Representative Bond retained their right of expression with Justice Black's approval.¹⁵³

Religion and the First Amendment

The brevity of the First Amendment posed problems of interpretation for the Supreme Court. The place of religion with regard to governmental regulation was not resolved by 1971, when Justice Black retired. The justice was on the bench when the free exercise and establishment clauses were made applicable to state and local governments. A great deal of care and thought went into his *Everson* opinion, where the establishment clause was given meaning and content.¹⁵⁴ Black read into the constitutional prohibitions Jefferson's wall of separation of church and state. Then he breached the wall by allowing indirect subsidy from governmental funds for transportation costs of students to parochial schools and by talking in terms of child benefit. Lynford A. Lardner described how the *Everson* case and *Illinois ex rel McCollum v. Board of Education*,¹⁵⁵ where Black wrote the majority opinions, "touched off a flood of controversy." Lardner commented that seven opinions in two cases exhibited a "wide divergence of views" about the meaning of the establishment clause, a clause that had gone "virtually unnoticed" for a century and a half. In *Everson* Black helped provide attendance to religious schools; and conversely in *McCollum*, the argument that government should not participate in providing attendance was used to strike down a released time program. This critic in 1951 predicted that public welfare arguments in *Everson* could be presented later to support expanded aid.¹⁵⁶ That prediction came true. Black dissented in cases approving released time out of the school building and financial aid in the form of textbooks and building construction (*Zorach v. Clauson*, *Board of Education of Central School District 1 v. Allen*, and *Tilton v. Richardson*).¹⁵⁷ According to Walter G. Katz, Roger Williams's fear that government would "taint" churches, rather than Jefferson's fear that government would aid churches, reflected the attitude of the people when the amendment was written.¹⁵⁸

¹⁵³*Schacht v. United States* 398 U.S. 58 (1970); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Watts v. United States*, 394 U.S. 705 (1969); *Bond v. Floyd*, 385 U.S. 116 (1966).

¹⁵⁴*Everson v. Board of Education*, 330 U.S. 1 (1947).

¹⁵⁵*Illinois ex rel McCollum v. Board of Education*, 338 U.S. 203 (1948).

¹⁵⁶Lynford A. Lardner, "How Far Does the Constitution Separate Church and State?" 45 *American Political Science Review* 110, 130, March 1951.

¹⁵⁷343 U.S. 317 (1952); 393 U.S. 236 (1968); 403 U.S. 672 (1971).

¹⁵⁸Walter G. Katz, "Radiations from Church Tax Exemptions," *The Supreme Court Review*, ed. Philip B. Kurland (Chicago: University of Chicago Press, 1970), pp. 94-95.

Paul G. Kauper scathingly attacked Black's *Engel v. Vitale* majority opinion.¹⁵⁹ He said that the decision and the opinion made no relevant contribution. Justice Black made no attempt to square the ban on state-composed non-sectarian prayers and the *Zorach* released time program of religious instruction.¹⁶⁰ He was faulted for failing to cite precedents to support the decision and failing to take note of the long tradition of school exercises.¹⁶¹ Black grounded his decision on the establishment clause. His history citations included how people felt the need to leave England because of Parliament's power over the Church of England and the selection of prayers for the Common Prayer Book. He traced colonial restrictions on religion up to the Virginia Bill of Religious Liberty. He felt that fear of government's intrusion into the kinds of prayers people could pray helped bring about the First Amendment. Black included in his thesis the idea that where there was a state-established church, persecutions resulted; government was destroyed; and religion, degraded. Justice Black relayed Madison's warning in *Engel v. Vitale*:

Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?¹⁶²

For all of his efforts in his *Engel v. Vitale* opinion, Black received bad press coverage, and an outcry against the "godless" Court followed.¹⁶³ Congress participated in this politically and emotionally charged protest. Fifty-three Representatives and twenty-two Senators introduced amendments to override the *Engel* decisions.¹⁶⁴ The United States Government Printing Office received requests for 13,500 copies of the *Engel* case.¹⁶⁵ After the *Schempp* and *Murray* decisions,¹⁶⁶ with regard to Bible reading and the Lord's

¹⁵⁹*Engel v. Vitale*, 370 U.S. 421 (1962).

¹⁶⁰*Zorach v. Clauson*, 343 U.S. 317 (1952).

¹⁶¹Paul G. Kauper, "Prayer, Public Schools and the Supreme Court," *The Supreme Court and Constitutional Rights*, ed. Martin Shapiro (Atlanta: Scott, Foresman and Company, 1967), pp. 59-60.

¹⁶²370 U.S. at 436.

¹⁶³Leo Katcher, *Earl Warren: A Political Biography* (New York: McGraw-Hill Book Company, 1967), p. 422.

¹⁶⁴William M. Beaney and Edward N. Beiser, "Prayer and Politics: The Impact of *Engel* and *Schempp* on the Political Process," *The Impact of Supreme Court Decisions*, ed. Theodore L. Becker (New York: Oxford University Press, 1969), pp. 20-27.

¹⁶⁵Stephen L. Wasby, *The Impact of the United States Supreme Court* (Homewood, Illinois: Dorsey Press, 1970), p. 88.

¹⁶⁶*School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963); *Murray v. Curlett*, 374 U.S. 203 (1963).

Prayer, public dissatisfaction decreased, but congressional activity increased. One hundred-thirteen Representatives and twenty-seven Senators introduced amendments.¹⁶⁷ Communities and states complied with varying degree to the school prayer decisions. A community in central Illinois, Robert M. Johnson found, complied with *Schempp* and *Murray* without personal acceptance of the decision. In other words, if the Supreme Court handed down a decision, they felt it necessary to comply regardless of personal attitudes.¹⁶⁸ Robert H. Birkby in his impact study found that while policy procedures in Tennessee changed, the practice of Bible reading continued for a while in the classroom.¹⁶⁹ The result was similar to the evasion practices after the *McCullum* and *Zorach* decisions.¹⁷⁰

Justice Black lost support of justices in the Court, too. Most likely he felt chagrined when Justice Douglas modified the establishment doctrine by writing the *Zorach v. Clauston* opinion, nullifying the stance in *McCullum*, adding the dictum, "We are a religious people. . . ."¹⁷¹ Then in *Engel* Douglas wrote that *Everson* was decided wrongly.¹⁷² Black and Douglas finally joined forces in the succeeding cases dealing with aid in the form of the textbooks, salary supplements for teachers in parochial schools, and construction of buildings on parochial campuses, but divided on tax exemptions for church property (*Board of Education of Central School District 1 v. Allen*, *Lemon v. Kurtzman*, *Tilton v. Richardson*, and *Walz v. Tax Commission*).¹⁷³

Omitting the early leaflet cases involving the Jehovah's Witnesses, Black's leadership in First Amendment religion cases blossomed from 1947 to 1962 in the *Everson*, *McCullum*, and *Engel* cases and in *Torcaso v. Watkins*.¹⁷⁴ Justice Clark's assignment to write *Schempp*, his reliance on neutrality of the state rather than separation of church and state, and the vocal support of leaders of religious sects for the Court's new doctrine cooled public resentment. To Black's dismay the Supreme Court continued to press forward, expanding intermingling of government and church in financial matters. Black seemed to lack interest in probing history and

¹⁶⁷Beaney and Beiser, *op. cit.*, pp. 20-27.

¹⁶⁸Robert M. Johnson, "Compliance and Supreme Court Decision-Making," *The Impact of Supreme Court Decisions*, ed. Theodore L. Becker (New York: Oxford University Press, 1969), p. 118.

¹⁶⁹Robert H. Birkby, "The Supreme Court and the Bible Belt: Tennessee Reaction to the 'Schempp' Decisions," *The Impact of Supreme Court Decisions*, p. 106.

¹⁷⁰Frank J. Sorauf, "The Impact of a Supreme Court Decision," *Law, Politics, and the Federal Courts*, ed. Herbert Jacob (Boston: Little, Brown and Company, 1967), p. 185.

¹⁷¹343 U.S. 306, 313 (1952).

¹⁷²*Engel v. Vitale*, 370 U.S. 421, 443 (1962).

¹⁷³392 U.S. 236 (1968); 403 U.S. 602 (1971); 403 U.S. 672 (1971); 397 U.S. 664 (1970).

¹⁷⁴*Torcaso v. Watkins*, 367 U.S. 488 (1961).

confirming with detailed opinions his ideas about the free exercise clause in the Sunday closing cases (*Braunfeld v. Brown*, *Gallagher v. Crown Kosher Super Market*, *Two Guys v. McGinley*, and *McGowan v. Maryland*)¹⁷⁵ and the Seventh Day Adventist's plight of being denied unemployment compensation because she refused to work on her religious worship day (*Sherbert v. Verner*).¹⁷⁶ Rather he relied on Chief Justice Earl Warren's history.

Virginia Van der Veer Hamilton and John P. Frank mentioned Black's participation in the Baptist Church before he moved to Washington to serve in the Senate.¹⁷⁷ We do not know the impact that Black's early religious training in his home and membership in the church had on his later life. His first law clerk and friend revealed in 1971 that neither he nor other clerks could remember Black's attending church during his Court tenure, except when he returned to Birmingham. Jerome A. Cooper called him a "reverent agnostic." A Unitarian minister who had been a close friend spoke at Justice Black's funeral.¹⁷⁸ When a case dealing with religion came before the Court, Black, like the other justices, tried to find the most appropriate solutions. How much his personal religious experience influenced his interpretation is hard to evaluate. Black maintained he was compelled by the language of the constitution, with historical facts supplementing and giving depth to its meaning. "No law" meant precisely that to Justice Black, except for Jehovah's Witnesses marchers; child leaflet distribution; trespass laws utilized by individual property owners' choice; tax money channeled for transportation of parochial students; and Sunday closing laws. For absolutist Black, that is quite a list.¹⁷⁹

The Record of Thirty-four Years

The urge to tabulate votes in certain categories and to label Black, for example as a doctrinaire liberal, led to an informative practice, but one that needed supplemental information.¹⁸⁰ On the other hand, Wallace Mendelson, a scholar who rejected tabulation of votes and confined his research to the content of opinions, was

¹⁷⁵366 U.S. 599 (1961); 366 U.S. 617 (1961); 366 U.S. 582 (1961); 366 U.S. 420 (1961).

¹⁷⁶374 U.S. 393 (1963).

¹⁷⁷Hamilton, *op. cit.*, pp. 77-79; Frank, *Mr. Justice Black: The Man and His Opinions*, p. 16.

¹⁷⁸Jerome A. Cooper, "Mr. Justice Hugo L. Black: Footnotes to a Great Case," *op. cit.*, p. 9.

¹⁷⁹*Cox v. New Hampshire*, 313 U.S. 569 (1941); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Martin v. Struthers*, 319 U.S. 141 (1943); *Everson v. Board of Education*, 330 U.S. 1 (1947); see note 165; see Constance Mauney, "Religion and First Amendment Prosecutions: Analysis of Justice Black's Constitutional Interpretation," 10 *Pepperdine Law Review* 377 (1983).

¹⁸⁰S. Sidney Ulmer, "The Longitudinal Behavior of Hugo Lafayette Black: Parabolic Support for Civil Liberties, 1937-1967," unpublished paper; see Yarbrough, *op. cit.*, p. 394.

surprised by several stances Black took during the latter part of his career. He suggested, for instance, that Black's *Griswold* dissent showed that he had "changed his mind about the role of courts in a democracy." The critic thought that Black perhaps had accepted "the 'old fashioned' Holmes-Hand-Frankfurter view that keeping law abreast of life is primarily a legislative, not a judicial, function." He wondered if the justice may have "always been an anti-activist, adhering to the plain mandates of the written law."¹⁸¹

Toward the end of Justice Black's years on the bench more than one observer pointed out that Black's votes were not as liberal as they had been earlier. He joined the conservative bloc more frequently, they were quick to point out. Unfortunately these observations left the impression that when it came to civil liberties, Justice Black had always been a strong liberal. C. Herman Pritchett by simple tabulation of non-unanimous cases found that in cases dealing with civil liberties (1939-1969 terms), Justice Murphy's score was 97 percent while Black's score was 68 percent, or moderately above average. Ninety-two percent of his votes in his early years, on the other hand, favored economic regulation.¹⁸² His expertise and interest were in this area. If the justice's early record in civil liberties indicated a "moderately above average" justice, then why the grave shock when several votes in later years upheld a few trespass convictions; favored in a few cases regulation of groups gathering on the streets; and deemed academic expression outside the realm of First Amendment? Black reached his zenith in protecting First Amendment freedoms in the 1950s, but when the issues changed, he found it difficult to abide by his high ideals. He had failed to come to grips with the meaning of assembly and petition on the jurisprudential level. Other constitutional protections were upheld, such as concern for fair trials and pressure on judges by crowds outside the courthouse and the protection of certain categories of properties.

The number of cases dealing with subversion, obscenity, libel, religious leaflet distribution, religious evangelizing, expression and contempt of court, and fiery speeches on corners, in auditoriums, and parks far outnumbered the cases where Black's votes were against individual liberties. In 1969 he implied there was a marginal scope of the First Amendment; it was in this marginal scope that he had received the most criticism by the more liberal

¹⁸¹Mendelson, *op. cit.*, pp. 132-134.

¹⁸²Pritchett, *op. cit.*, pp. 89, 131.

critics.¹⁸³ It was in the marginal scope that he let stand laws—even ones that he thought unwise—if he could see no violation of the constitution. Alfred Karmin felt that after Frankfurter left the bench, Black felt the necessity of raising a cautionary hand against the more progressively minded justices.¹⁸⁴ Black may have been influenced by Frankfurter's appeals for moderation in the demonstration cases, but the justice continued to debate the incorporation theory into 1965.¹⁸⁵ Meanwhile the Supreme Court on a selective case-by-case basis incorporated most of the amendments in the Bill of Rights and made them applicable to states through the Fourteenth Amendment. No cautionary hand was demonstrated here. Yet in *Griswold v. Connecticut*, Black raised both hands in exasperation when the Court made a new constitutional term (privacy) by devising a penumbral theory. Similarly he saw his establishment clause definition, over which he labored in the 1947 *Everson* opinion, ignored. He put a nick in the wall of separation of church and state in the bus fare case, and the nick grew significantly by ever-increasing authorizations of tax expenditures for private and parochial schools. He voted in many cases to give equal protection to minority races, but exceptions were distinguished based on public and private property, for example.¹⁸⁶ While frequently voting to strike down most of the breach of peace convictions and sometimes trespass convictions, he warned protesters that they should get off the street and get back into the courthouse as litigants. His record in these cases was uneven, just as it was in industrial picketing.¹⁸⁷

¹⁸³Hugo L. Black, *A Constitutional Faith*, pp. 53-63.

¹⁸⁴Karmin, *op. cit.*, p. 18.

¹⁸⁵Felix Frankfurter, "Memorandum on 'Incorporation' of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment," 78 *Harvard Law Review* 746 (1965).

¹⁸⁶For example, Black voted to support constitutional claims of black litigants in *Edwards v. South Carolina*, 372 U.S. 229 (1963) and *Gregory v. Chicago*, 394 U.S. 111 (1969). Black at times did not support constitutional claims of black litigants. See his discussion in *Cox v. Louisiana*, 379 U.S. 536 (1965) and *Adderley v. Florida*, 385 U.S. 39 (1966).

¹⁸⁷Black often voted to protect the right to picket. See *Thornhill v. Alabama*, 310 U.S. 88 (1940); *American Federation of Labor v. Swing*, 312 U.S. 321 (1941); *Milkwagon Drivers Union of Chicago, Local 753 et al. v. Meadowmoor Dairies, Incorporated*, 312 U.S. 287 (1941); *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union Local 309 v. Hanke*, 339 U.S. 470 (1950); *International Brotherhood of Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957); *Local Union #10, United Association of Journeymen Plumbers and Steamfitters of United States and Canada of American Federation Labor et al. v. Graham*, 345 U.S. 192 (1953); *Carpenters and Joiners Union of America; Local #213 et al. v. Ritters Cafe et al.*, 315 U.S. 722 (1942); *National Labor Relations Board v. Fruit and Vegetable Packers and Warehousemen, Local 760*, 377 U.S. 58 (1964). At times Black did not vote to sustain the right to picket. See *Giboney v. Empire Storage and Ice Company*, 336 U.S. 490 (1949); *Hughes v. Superior Court of the State of California*, 339 U.S. 460 (1950); *Building Service Employee International Union v. Gazzam*, 339 U.S. 532 (1950); *National Labor Relations Board v. Denver Building Council*, 341 U.S. 675 (1951); *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 341 U.S. 694 (1951); *Local 74 United Brotherhood of Carpenters and Joiners of America, A.F. of L. et al. v. N.L.R.B.*, 341 U.S. 707 (1951); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Incorporated*, 391 U.S. 308 (1968); Cf. *United States v. Petrillo*, 332 U.S. 1 (1947).

After studying Black's record in selected First Amendment cases, it becomes evident, as others have found, that Black cannot be classified with regard to all cases.¹⁸⁸ But he can be classified when the classifier isolates particular areas. In 1946 Justice Black wrote to Jerome A. Cooper:

You and I know very well indeed that any man who stands for position of any advance nature at all is always subject to criticism by those who get most benefit from maintenance of the status quo. No man could ever hold public office who is unable to accept with equanimity the best or the worst invectives that can be hurled at him. Nothing that has been said or done will alter my course.¹⁸⁹

With this frame of mind, Black later remained undaunted when Senator James Eastland of Mississippi counted the justice's votes in favor of communists (102-0) and reported this judicial record on the Senate floor.¹⁹⁰ Black participated in moderating the Court's stance with regard to the First Amendment freedoms and unorthodox political advocacy and association, but the Court did not fully accept his absolutist theory in these cases. He also influenced the Court to give broader interpretation when dealing with obscenity, libel, press coverage of trials in progress, and practice of unpopular religions. In these cases Black well deserved the titles of libertarian, Madisonian, Jeffersonian, literalist, absolutist, and dean of American liberalism when he clearly expressed his views about First Amendment protections.¹⁹¹ His legal position was definitive and compelling in the following statements:

. . . this Court is without constitutional power to censor speech or press regardless of the particular subject discussed. I think the federal judiciary because it is appointed for life is the most appropriate tribunal that could be selected to interpret the Constitution and thereby mark the boundaries of what government agencies can and cannot do. But because of life tenure, as well as other reasons, the federal judiciary is the least appropriate branch of government to take over censorship responsibilities by deciding what pictures and writings people throughout the land can be permitted to see and read. (*Mishkin v. New York*)¹⁹²

¹⁸⁸Haigh, *op. cit.*, pp. 15, 43; Decker, *op. cit.*, pp. 1335, 1337.

¹⁸⁹Cooper, *Sincerely Your Friend. . . Hugo L. Black*, p. II.

¹⁹⁰108 Cong. Record 7599.

¹⁹¹Edmond Cahn, "The Firstness of the First Amendment," 65 *Yale Law Journal* 464, 470, 475 (1956); Strickland, *op. cit.*, p. 271; Daniel M. Berman, "Freedom and Mr. Justice Black: The Record After Twenty Years," 25 *Missouri Law Review* 155 (1960); Irving Dilliard, "The Individual and the Bill of Absolute Rights," *Hugo Black and the Supreme Court*, ed. Stephen Parks Strickland (Indianapolis: Bobbs-Merrill Company, Inc., 1967), pp. 97-101; Berman, *op. cit.*, p. 52.

¹⁹²383 U.S. 502, 516 (1966).

. . . freedom to discuss public affairs and public officials is unquestionably . . . the kind of speech the First Amendment was primarily designed to keep within the area of free discussion. To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. . . . An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment. (*New York Times v. Sullivan*)¹⁹³

Doubtlessly, dictators have to stamp out causes and beliefs which they deem subversive to their evil regimes. But governmental suppression of causes and beliefs seems to me to be the very antithesis of what our Constitution stands for. The choice expressed in the First Amendment in favor of free expression was made against a turbulent background of men such as Jefferson, Madison, and Mason—men who believed that loyalty to the provisions of this Amendment was the best way to assure a long life for this new nation and its Government. Unless there is complete freedom for expression of all ideas, whether we like them or not, concerning the way government should be run and who shall run it, I doubt if any views in the long run can be secured against the censor. The First Amendment provides the only kind of security system that can preserve a free government—one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us. (*Yates v. United States*)¹⁹⁴

Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bound of express constitutional prohibitions. (*West Virginia State Board of Education v. Barnette*)¹⁹⁵

First Amendment, as I have frequently said, is the heart of our Bill of Rights, our Constitution, and our nation. Where rights of communication, assembly, and protest are made secure, which is what our First Amendment is intended to do, people develop a sturdy and self-reliant character which is best for them and best for their government. (*Constitutional Faith*)¹⁹⁶

Black left a legacy of well-worded explanations of First Amendment freedoms. In the future litigants and judges can rely upon the standards outlined by the justice, who had great loyalty for the constitution. Black once suggested to another justice who was writing a

¹⁹³376 U.S. 254, 296-297 (1964).

¹⁹⁴354 U.S. 289, 343-344 (1957).

¹⁹⁵319 U.S. 624, 644, (1943).

¹⁹⁶Hugo L. Black, *A Constitutional Faith*, p. 63.

dissenting opinion that he should "strike for the jugular, strike for the jugular."¹⁹⁷ That was Black's style; what he believed, he fiercely supported. Justice Black, who described himself as "a rather backward country fellow," came to the Court as "his own man" and gained the reputation for giving "more to the growth of American law than any man since Chief Justice Marshall more than a century ago." As a "compact man with the bounce of a boxer, the courtliness of a Southern gentlemen," Hugo Black, the underdog, put on his robe in the judicial arena and fought for First Amendment freedoms, sometimes stumbling, but never totally losing sight of his high ideals.¹⁹⁸

At one of the last Judicial Conferences of his Circuit, Black became a bit sentimental when he said that he hoped that people would think of him as a person "who tried his dead level best to serve his people and his country with every ounce of energy, love and devotion that he could muster in his life."¹⁹⁹ If back in 1937 Senator Joseph T. Robinson had not died suddenly at the time when the President wanted him to fill Justice Van Devanter's seat, that senator may or may not have had the same impact on economic decisions that Black did. He was less liberal in his views in this area.²⁰⁰ It would be highly speculative and coincidental to say that by 1971 the Court would have been nudged and prodded to expand First Amendment freedoms to the extent that Black influenced the Court. Justice Black felt this amendment was the foundation of the democratic process. The impact of Justice Black's philosophy and interpretation will be judged by legal scholars in the years to come. The opinions over which he labored with his clerks are in the *United States Reports* for present and future generations. If the Court seeks to go beyond the words of the constitution and develop new constitutional law, his opinions may serve as a moderating factor; if the Court approves laws that strangle communication, association, and religious endeavors, his eloquent and expansive statements may become a first line of defense for aggrieved litigants. Perhaps in the long run, his ideals with regard to First

¹⁹⁷"Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Black, 405 U.S. ix, lvii (1972).

¹⁹⁸Cahn, "Justice Black and the First Amendment 'Absolutes': A Public Interview," *op. cit.*, p. 553; "Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Black," 405 U.S. ix, liii (1972); Rodell, "Justice Hugo Black," *op. cit.*, p. 143; Fred Rodell, "A Sprig of Laurel for Hugo Black at 74," 10 *The American University Law Review* 1 (1961).

¹⁹⁹"Proceedings in the Supreme Court of the United States in memory of Mr. Justice Black," 405 U.S. ix, xiv (1972).

²⁰⁰Swindler, *op. cit.*, p. 77.

Amendment freedoms, sometimes set so high even Justice Black could not abide by them, will preserve the First Amendment that he treasured and the Supreme Court that he esteemed.²⁰¹

²⁰¹Reich, *op. cit.*, p. 150; see Anthony Lewis, "Hugo Black's Vision Vindicated," *The Kansas City Times*, March 21, 1986.