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HUGO L. BLACK: A JUDICIAL VIEW OF AMERICAN CONSTITUTIONAL DEMOCRACY

MICHAEL R. KLEIN*

I. INTRODUCTION

As the 1967 Term of the United States Supreme Court came to a close, the curtain was also drawn on the thirty-first year of service by Justice Hugo Lafayette Black. Few men have served as Justice longer than Black.[1] Few have had the impact, however long their tenure. This article is an attempt to condense and evaluate that part of his service which represents his approach to the system of American constitutional democracy. In other words, what is sought here is a restatement of Justice Black's contribution to the way we view our form of government, a form of government which he has characterized as "the last best hope of earth."[2]

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1. Only six justices have served longer: Field (34 1/2); Marshall (34 1/2); Harlan (33 4/5); Story (33 3/4); McLean (32 4/5); and Wayne (32 1/2). Dilliard, *Hugo Black and The Importance of Freedom*, 10 AMER. U.L. REV. 7, n.1 (1961).

2. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 169 (1961).

A. *The Limits of This Study*

There are depressing limitations which inhere in any attempt to write comprehensively in the constitutional field. The cases rarely raise other than the weighty, issue-laden questions of the times. Study of them involves the interminable interrelations between one question and another, between one case and another, and between one Justice and another. The problem is not that of finding fascinating points of discussion, it is rather in finding a basis for delimiting and organizing discussion in order to produce a readable and yet useful analysis. The greatest challenge is the need for meaningful limitations on verbosity.

In an attempt to respond to these problems, the writer has chosen to follow a building block approach. It proceeds by: (1) outlining the mode of analysis; (2) giving a brief glimpse of Justice Black as a person, yet an historical figure; (3) analyzing his responses to the three most fundamental constitutional conflicts related to democracy in America; and (4) concluding with a brief attempt to provide an overview and evaluation of Black's service. Hopefully, the approach will prove successful.[3]

B. *The Perspective of This Study*

The cases which find their way before the Supreme Court are rarely simple or clear cut, especially those presenting constitutional issues. Most people seem willing to accept this reality. Yet it seems equally clear that both layman and lawyer are oftimes driven to befuddlement by the not infrequent appearance of decisions and opinions marked by conflict within the Court, as well as within a line of opinions written by individual members of the Court.

There are numerous explanations available and reasons why these nine men, all of whom take the same oath to support, defend and interpret the same Constitution divide among and within themselves on the import of that duty and document to given cases. From those possible explanations, this writer has chosen one upon which the ensuing analysis builds. The gist of the chosen explanation is conveyed by the phrase, "reasoned prejudices." Reduced to its elemental assumptions, this notion

3. Some other limitations of the paper should be conceded at the outset. One such limitation is that the paper is dependent upon the writer's knowledge and the published expressions of the Justice himself. Only rarely has reference been made to sources other than his opinions or speeches. While a sincere effort has been made to include all of his relevant opinions in the analysis, no effort has been made to scrutinize records on appeal or transcripts of oral argument, and certainly no access to personal papers is pretended.

Finally, it must be stated at the outset that no attempt has been made to thoroughly critique individual opinions or groups of opinions, other than the overview critique with which the paper concludes. For those who might seek such analysis, some effort has been made to provide, via footnote, reference to articles which have sought to achieve this objective. This is, therefore, far more a general paper about Justice Black and democracy, than it is a general paper about constitutional law.

proceeds from an appreciation of the particular desire of judges for rationality, yet an equal appreciation of the inevitable influence of personal prejudices upon the capacity for rationality and consistency. Thus the term "reasoned prejudice" is an attempt to accommodate the press of ideological preferences upon the institutionally imposed duty of rational judicial resolution of constitutional conflicts. The distinctive blend of these two somewhat conflicting influences is felt to render the "reasoned prejudice" notion particularly valuable in light of the individual Justice here under examination.

Given a desire to make such an accommodation, it follows that our analysis should commence with a search for those prejudices. And it seems equally compelling that such a search commence with an attempt, however brief, to understand something of the man who, some thirty years ago, rose to the exalted position of Associate Justice of the United States Supreme Court.

II. THE MAN WHO BECAME A JUSTICE

As befitting his position in our history, Black's life and career are nearly exemplary of the aspirations and values most popularized by conventional American biographies.[4] He was born eighty years ago in a small Alabama town to parents of moderate means. From those relatively humble beginnings, largely by the force of his own abilities and of the times, he has risen to the highest level of achievement and respect our nation offers to those in the legal profession. The path his life took along the way to that office offers itself to at least brief examination.

Hugo Black's early years were unmarked by events or achievements of great consequence. His chief biographers place principal emphasis on the populist leanings of his father and their middle class economic station as formative influences. Their emphasis would certainly appear justified in terms of his evidenced perspective of our political and economic institutions.

The populists were characterized by their then brazen suggestions regarding use of the political process to effect reform of the economic order. The suggestion has since matured into reality, albeit still brazen to some, and in that transformation Justice Black, as Senator Black, played a principal role. Few men more typified the New Deal legislator than did the Senator from Alabama. Indeed it was this congruity which probably placed him on the Court.

4. As of this writing, there have been two efforts of a biographical nature and the ensuing discussion draws equally on both. They are: J. FRANK, MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS (1949); C. WILLIAMS, HUGO L. BLACK, A STUDY IN THE JUDICIAL PROCESS (1950). Another more integrated analysis of his life and his writings is Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963). Still another recent work is STRICKLAND, HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM (1967).

His economic status is similarly an appropriate aspect of his early life to single out for its influence on him. The middle station on the economic ladder carries with it some distinctly advantageous consequences for those in search of perspectives. The middle lies close enough to the lower rungs to render one as aware as he desires of the plight of those less fortunate; and yet, it sufficiently enables one to appreciate the opportunities for further climbing, should that be a desired course. Hugo Black made full use of both of these perspectives. His affection for progressive economic legislation more than amply demonstrates his solicitude for the interests of the unfortunate. It is a solicitude which took other forms as well, some of which will be further examined, but he was very accurately characterized by Senator Norris as a person to whom the unfortunate could look for understanding and assistance. Yet at the same time, Hugo Black was markedly a person possessed by the aspiring perspective which so typifies the middle class. Despite hard economic times and periodic setbacks, his efforts from the very start were those of a young man in pursuit of all the achievement both conscience and circumstance would permit.

His early legal experiences are highly illustrative of his attitude. He had not begun with a commitment to a legal career. It came by circumstance, a negative one. Seeking admission to college in preparation for a medical career, he found himself unsuited for that study and was deflected into the profession in which he has since ascended to the peak. His initial efforts in private practice were primarily that of a claimant's counsel, a vocation for which he found himself well suited and hence highly successful. It cannot be overlooked that throughout this time, Black's sensitivity to the causes of the injured (and against the insurers) were at least reinforced if not molded.

When he took his first step into public office, however, it could well have been a change of course for the young attorney, for it was as a prosecuting attorney that his official career commenced. But the views of the man were already framed, and Black turned his tenure as prosecuting attorney into a somewhat different experience than that typically felt and achieved by others in similar positions. His major efforts as prosecutor were to expose and destroy police abuses. In many ways the years he spent in this position, and subsequently as police judge, proved more about his mettle than any prior experience. His performances were those of a reformer, sensitive to the circumstances of the unfortunate and willing to use public office as a tool to reshape those circumstances.

It was largely on the strength of those performances, as well as his outstanding reputation and capacity for advocacy, that Hugo Black managed to wend his way into the high office of United States Senator in 1926. It was expectable that the same inclinations and capacities he

previously displayed would also serve him as the guidelines in his new capacity. For a brief period of time he played the quiescent role of novice within that select rank, but his strong convictions and talents soon came to the fore. In short course he could be grouped with a select few, such as Senators George Norris and Claude Pepper, as a principal architect and advocate of the economic reform spawned by Roosevelt and those depressing times.

Chief among the proposals he supported were utility cooperatives, minimum wage and maximum (35) hour legislation, the attempt at Court-packing, and the investigation of abuse by big business. His investigatory activities would seem to merit further comment.

Black came to the Senate with less than devoted obeisance to the industrial and commercial giants. He also came with acknowledged flair and expertise as a trial attorney, skilled in the ways of interrogation and discovery. The prejudice and the talent combined with opportunity when Black became the chairman of a Senate committee empowered to look into various abuses consummated by business, and often accomplished with the full complicity of various governmental officials. Looking back on his service in that role, one may say that only the committee's capacity for accomplishment of its aims commends itself to positive evaluation. To say that, as a Senator, Black demonstrated little judicial temperament, that he evinced little respect for the Supreme Court as an essential participant in our nation's institutional framework, indeed, to say that he showed little or no concern for trangressing constitutional barriers, is to remain well within the bounds of understatement. It should not be surprising, then, to note that an uproar, rarely equalled in our nation's history, accompanied his appointment to the Court. More surprising was the immediate excuse, if not the cause, of that uproar.

In his early days in Alabama politics, and for some period thereafter, Black had become affiliated with the Ku Klux Klan. When his ascendancy to the Court became imminent, a reporter for the Pittsburgh *Post-Gazette* broke a story which disclosed that aspect of his past and charged that Black maintained the affiliation. The force of this disclosure was enormous, and it cast a pall over his recently confirmed nomination that forced the nominee to break with longstanding precedent in an effort to calm the aroused nation. Having made that attempt, whatever its success, Black promptly took his position on the Court. And it is the consequences of that transition with which we are here concerned.

III. Assuring Legislative Primacy

Our examination of Justice Black's service begins, as the text of the Constitution itself began, with an examination of the scope and import of his commitment to the democratic premise. Article one of the

Constitution directed the attention of all to the most fundamental innovation of the American scheme of government—the root allocation of legislative authority in popular will. This principle has served as the first article of faith for Justice Black as well; it appears accurate to characterize the concept of democratic rule as his most deeply held and clearly motivating prejudice.

Black came to the Court in 1937. The year was perhaps the most pivotal in our judicial history:

> The crucial issue prior to 1937 was whether the Constitution prohibited government— state and federal—from interfering with the free play of economic forces (outside the field of public utilities)—no matter how great the public need. Federal legislation dealing with other phases of national or interstate industry was on important occasions found to invade powers reserved to the states. State laws were frequently found invalid because they impinged on the field of interstate commerce committed by the Constitution to the Federal Congress. And the due process clauses of the Fifth and Fourteenth Amendments were held to bar both state and federal governments from regulating such economic factors as prices, wages and labor relations in businesses "not affected with a public interest."[5]

The persistent frustration of legislative enactments via this tripartite formulation threatened to push aside the Supreme Court as an institutional partner in the Constitutional scheme. And, it should be noted, as a Senator, Black stood among those who were willing to man the bulldozer. As history has had it, the bulldozing was not accomplished, and when Mr. Justice Black took his place on the Court a substantial degree of the pressure had been alleviated. Yet, it is also true that these three barriers to legislative primacy remained as the major issues which he was called upon to resolve in his earliest years, and it is thus fitting that we begin our examination by consideration of his responses to them.

A. *Federal Legislative Authority*

Section eight of article one of the Constitution enumerates the bulk of the authority reposed in the federal legislative branch. As a constitutional issue, the significant power has proven to be the power given to Congress to regulate interstate commerce. Strict construction of this grant of authority was an oft employed device with which economic interests were insulated from governmental interference by the pre-1937 Court. The interpretative gloss, heavily weighted and confined by talismanic phrases, placed all manner of commercial activity beyond the effective

5. Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 VAND. L. REV. 445, 446 (1951) (footnotes omitted).

reach of Congress, notwithstanding explicit Congressional determination that an area was of sufficient national concern to warrant federal regulation.

This gloss and its effects were shattered and buried soon after Black came to the Court. As a junior he participated primarily by votes,[6] rather than by opinions, in the line of decisions which, by 1942, saw the Court reject wooden phrases in favor of a more realistic construction attuned to the nature of twentieth century commercial activity.[7] He joined, for instance, a 1942 majority in *Kirschbaum v. Walling*[8] which upheld the constitutionality of labor legislation as applied to an elevator operator which sharply constrasted with a 1936 decision[9] which held that labor regulations of the coal industry were not within the reach of the interstate commerce power. Similarly, he was party to the unanimous decision of the Court in *Wickard v. Filburn*,[10] which held that the production of an individual wheat farmer could be within the reach of the commerce power—a sharp contrast to earlier decisions like the first *AAA* case.[11]

Yet Black was not forever mute on the commerce clause issue. In 1944 he authored the Court's opinion in *United States v. South Eastern Underwriter's Ass'n*,[12] which offered a first glimpse of his perspective of the constitutional areas of interstate commerce, as well as his approach to the role of the Court as Constitutional implementor.

Prior to the *Underwriter's* case a line of the Court's decisions had characterized the business of insurance as state commerce for the purposes of rendering the industry amenable to state regulation and taxation. This case, however, presented the opposite issue. Activities within the industry had led the federal government to proceed against some companies for alleged violation of the Sherman Anti-Trust Act, an Act whose effective reach was, on the whole, premised upon and thus confined by the interstate commerce power. It was the contention of the companies that the Act was not intended to apply to the insurance industry, and that even were it so read, it could not constitutionally apply inasmuch as the Court had previously characterized their business to be *intrastate*, not *interstate* commerce.

6. Wickard v. Filburn, 317 U.S. 111 (1942); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942); Kirschbaum v. Walling, 316 U.S. 517 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); Gray v. Powell, 314 U.S. 402 (1941); United States v. Darby, 312 U.S. 100 (1941).

7. "[Q]uestions of the power of Congress are not decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and for close consideration of the actual effects of activity in question upon interstate commerce." Wickard v. Filburn, 317 U.S. 111, 120 (1942).

8. 316 U.S. 517 (1942).

9. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

10. 317 U.S. 111 (1942).

11. United States v. Butler, 297 U.S. 1 (1936).

12. 322 U.S. 533 (1944).

The plea posed an ostensible dilemma for Justice Black, seemingly pitting his prejudice in favor of economic regulation against his prejudice in favor of preserving the domain of legislative authority, albeit state authority. Equal to the challenge, he boldly passed through the horns of the dilemma and reached an accommodation of all of his preferences. In what was to become characteristic fashion, he combined a literal reading with an historical development in order to explain his view of the commerce clause. Discounting as irrelevant the cases upon which the industry relied, he held the business of insurance to be subject to federal regulation to the extent that it engaged in commercial activity via interstate activity and subject to state regulation for those aspects of its business transacted in any one state. The enunciated basis of his conclusion was a sense of judicial restraint firmly rooted in the legislative prerogative:

> Our basic responsibility in interpreting the Commerce Clause is to make certain that the power to govern intercourse among the states remains where the Constitution put it. That power, as held by this Court from the beginning, is vested in Congress, available to be exercised for the national welfare as Congress shall deem necessary.[13]

The culminative impact of this decision and those which preceded it has been to render nearly moot the question whether Congress has correctly determined that a given activity should fall within the reach of its interstate commerce power. As a result, there have been few subsequent occasions for further exposition by Justice Black in this area. Yet the dearth of additional opinions should not serve to minimize the significance of his efforts in this area to his overall philosophy. As was illustrated by his concurring opinion in *Heart of Atlanta Motel, Inc. v. United States*,[14] the view he takes of the commerce clause is but one part of his comprehensive and affectionate protection of all levels of legislative authority in our federal system and his dislike of judicial supervision of that authority. It is a view, as he has explained, which is much akin to that of Chief Justice Marshall:

> The genius and character of the whole government seems to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.[15]

The view is one which he has carried onward into the battle against the

13. *Id.* at 552-553.

14. 379 U.S. 241 (1964).

15. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824), as quoted by Black in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 at 273 (1964).

second pre-1937 device: strict construction of state legislative authority in the economic arena.

B. *State Legislative Authority*

A second device employed by the pre-1937 Court to inhibit legislative encroachments on the laissez-faire framework was narrow construction of state power in the area of regulation and taxation of commerce. The Constitutional footing for this device is an implication arising out of the Article One grant to Congress of authority of the power to regulate commerce among the several states. The implication is that, absent delegation of this authority, Congress possesses its power to the exclusion of the states. At once, the boundaries of interstate commerce were narrowly defined (to limit the reach of the federal Congress), and broadly defined (to exclude the states from trespassing upon the federal province). The practical effect and obvious purpose of this formal contradiction was clearly neither concern for nationalism nor for state's rights. Black saw it for what it was, an example of the use of judicial doctrine to frustrate legislative authority in order to protect an economic philosophy held by judges but rejected by the popular majority. Accordingly, he has spent a substantial portion of his efforts in an attempt to destroy these implied negatives of state authority. Unlike the narrow construction of federal authority, however, his efforts in this area have met with less success. Thus, it must be pre-warned that the views about to be examined here do not command a majority of the Court as of this writing.

The cases in this area of state legislative competence fall into two broad categories, regulation and taxation. In both, Mr. Justice Black's prejudice in favor of legislative authority has led him to deny the constitutional validity of the implied pre-emption of state legislative power.

Easily the starting point for this discussion is the dissent Mr. Justice Black wrote in the 1945 *Southern Pacific Railway* case,[16] a challenge to the authority of a state to regulate the length of interstate trains while in its territory. The majority opinion, written by Chief Justice Stone, relied upon the doctrine of pre-emption and rejected the conclusion of the state's legislature that a significant local interest was involved sufficient to justify intrastate regulation of the interstate carrier. Black categorically rejected each of the foundations for the majority's conclusion. Among them was the idea that congressional silence in the face of widespread state regulations should not imply congressional acquiescence to the state legislation. Another was the idea that the Court could infer an unconstitutional burden on interstate commerce simply from possible increased cost which could result from a given regulation. But,

16. Southern Pacific Ry. Co. v. Arizona, 325 U.S. 761 (1945.)

at the heart of his dissent was his opposition to any judicial doctrine which would allow the judgment of a court to be substituted for that of the popularly elected legislative representatives.

> [T]he determination of whether it is in the interest of society for [an aspect of commerce] to be governmentally regulated is a matter of public policy. Someone must fix that policy—either the Congress, or the state, or the courts. A century and a half of constitutional history admonishes this Court to leave that choice to the elected legislative representatives of the people themselves, where it properly belongs both on democratic principles and the requirement of efficient government.[17]

Characteristically, he refused to be swayed by arguments about the complexity and variety of possible ramifications of state regulations affecting interstate aspects of commercial affairs.

> The balancing of these probabilities, however, is not in my judgment a matter for judicial determination, but one which calls for legislative consideration. Representatives elected by the people to make their laws, rather than judges appointed to interpret those laws, can best determine the policies which govern the people. That at least is the basic principle on which our democratic society rests.[18]

This has remained Black's view even in cases where the majority of the Court concluded that the motive behind state regulation was "economic Balkanization."[19] It is not that Justice Black is unaware of the need for the federal principle of open commerce among the states,[20] nor that he rejects the historically documentable goal of national unity which apparently motivated the allocation of regulatory power over interstate commerce to the Federal Congress. Rather, it appears to be another instance of a choice which he has made between two alternative approaches to the interpretation of constitutional provisions: one of express procedural allocation, the other of implied substantive content. As elsewhere, he stakes his faith in more objective procedural approach, and

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17. *Id.* at 789.

18. *Id.* at 794-795.

19. *See* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Hood & Sons v. DuMond, 336 U.S. 525 (1949).

20. In Hood & Sons v. DuMond, 336 U.S. 525, 550 (1949), he wrote:

> Reconciliation of state and federal interests in regulation of commerce always has been a perplexing problem. The claims of neither can be ignored if due regard be accorded the welfare of state and nation. For in the long run the welfare of each is dependant upon the welfare of both. Injury to commercial activities in the states is bound to produce an injurious reaction on interstate commerce, and vice versa. The many local activities which are parts of interstate transactions have given rise to much confusion. The basic problem has always been whether the state or federal government has power to regulate such local activities, whether the power of either is exclusive or concurrent, whether the state has power to regulate until Congress exercises its supreme power, and the extent to which and the circumstances under which this court should invalidate state regulations in the absence of an exercise of congressional power.

thereby precludes judicial encroachment on the legislature's realm. Reduced to its essence, Mr. Justice Black believes simply that the commerce clause "means that Congress can regulate commerce and that the courts cannot."[21]

The Justice's views in the area of state taxation are consistent with those in the regulatory area, and a good deal more graphic. As in the regulatory field, he stands apart from his brothers in rejecting the need for or wisdom of a broad judicially administered doctrine of pre-emption. He finds little constitutional language authorizing judicial restrictions on state legislative authority. His prejudice in favor of legislative primacy bends him toward accommodating implications from Congressional silences. And his sympathy is rarely invoked by industry in a court contest between the enacted will of the people and the fiscal interests of commercial enterprises.

As in the area of regulation, the recurrent constitutional issues in state taxation are whether the law affects interstate commerce at all, if so whether it "burdens" it, and if so whether it does so unconstitutionally. In taxation, moreover, there is an additional frequent plea challenging the jurisdiction of a state legislature to reach the subject of the tax. In all of these, Justice Black's position appears primarily to be shaped by a compelling reasoned prejudice in favor of relatively untrammeled legislative prerogative. In that sense, Justice Black's response to these issues is reduceable to a single embracive rule with one narrow exception. Absent overt and outright discrimination against interstate commerce, the Court is without power to do more than construe express Congressional promulgations on the subject.[22] He discounts and discards all of the familiar spectres of multiple taxation, Balkanization, undue burden, etc., as mere makeways for judicial expropriation of authority which he believes the Constitution allocated as an exclusive Congressional province.[23]

In rejecting these contentions, his responses are as often pragmatic as philosophical.[24] To a claim of undue economic burdens, he may chide the commercial litigant on the responsibility of all to bear their legislatively determined share of the governmental enterprise,[25] directing them to the political rather than judicial arenas for their redress. To a

21. Morgan v. Virginia, 328 U.S. 373, 386 (1946). (Interestingly, Black concurred in this decision which struck a racially discriminating law as a burden on interstate commerce.)

22. *See* Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 446 (1939): ("[S]tate laws are not invalid under the Commerce Clause unless they actually discriminate against interstate commerce or conflict with a regulation enacted by Congress.")

23. *E.g.*, "I think that whether state legislation imposes an 'undue burden' on interstate commerce raises pure questions of policy, which the Constitution intended should be resolved by Congress." *Morgan, supra*, note 21 at 387.

24. *See* J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 316 *et. seq.* (1938) for a comprehensive statement of Black's practical perspectives.

25. *E.g.*, Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 444-445 (1939).

claim raising the spectre of oppressive multiple taxation, he responds by first discounting the spectre, and follows that pronouncement with a discourse on the inadequacy and inappropriateness of the judicial process as an institution for resolution of the complex interest-balancing involved in all such pleas.[26] And even in those cases where his exception of outright discrimination is alleged, he looks long and hard, commencing his reasoning from his prejudices in favor of legislative resolution and against judicial rejudgment of those dispositions.

In thirty years on the Court, he has yet to author an opinion which struck as unconstitutional a state levy under the commerce clause. Only twice has he joined in decisions which in any way appear to delimit the state's authority to tax commerce until otherwise commanded by Congress.[27] And even in those instances in which Congress has spoken, he reasons from an accommodating prejudice which would leave both the federal and state governments the broadest legislative latitude consistent with the Congressional expression.[28]

Once again, it seems important to search for the most essential prejudices motivating his views. It is not simply antipathy to the pre-1937 spectacle of judicially immunizing a commercial enterprise from its legislatively determined share of the costs of government. Nor does the basis seem to be his evident preference for regulation and taxation of business, nor necessarily his apparent faith that legislative dispositions are superior to the courts in economic affairs. While each of these prejudices do appear deducible from his opinions here and elsewhere, and may well add force and form to the conclusions he reaches, it is submitted that somewhere along the line a more fundamental prejudice began to work—that in favor of effectuating the democratic premise of popular rule.

Black's (and he submits, the Constitution's) faith is initially and primarily placed in the most comprehensive body politic, the Congress, and until they clearly act, in the state legislatures as a power reserved to them. Propelling this conviction is the clear commitment of this Justice to the essence of the democratic form and reliance upon the

26. Central R.R. Co. v. Pennsylvania, 370 U.S. 607 (1962); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).

27. *Compare* Brotherhood of Locomotive Engr's v. Chicago, R.I. & Pac. R.R., 382 U.S. 423 (1966) and Campbell v. Hussey, 368 U.S. 297 (1961) *with* Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942). *See also* his view of the foreign commerce area, especially as related to alcoholic beverages. *E.g.*, Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945) (his dissent to the "original package doctrine"); Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 340 (1964); Hostetter v. Idelwild Bon Voyage Liquor Corp., 377 U.S. 324 (1964).

28. While vitriolic in his attacks upon the doctrine, Mr. Justice Black has had little success in defining it himself. In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 277-278 (1964), he proffered the view that its original meaning was "according to the law of the land." It would seem less than a precise guideline for decision making.

democratic forums for the adjustment of divergent economic interests, and he would have that power unrestricted by other than explicit constitutional limitations.

C. *Due Process of Law*

Mr. Justice Black's insistence on explicit constitutional limitations brings us to consideration of the third device employed by the pre-1937 Court as a restraint on legislative authority in the economic arena—the due process clauses of the fifth and fourteenth amendments to the Constitution. However expressly present in the Constitution, the due process clauses are far from explicit in the usual sense of the word. For what is "due process of law?"[29] Indeed, the task of defining that amorphous phrase lies at the very heart of the problems connected with it. For our purposes, it only seems necessary to sketch a broad outline of the definitional content afforded it through judicial usage. That outline reduces the phrase into three sub-categories, respectively labeled the "substantive," "procedural" and "jurisdictional" aspects of due process of law. It was via substantive and jurisdictional due process that the pre-1937 Court imposed restraints on economic legislation, and thus it is with those two aspects that we are here concerned.

The notion of "substantive" due process consists of a presumed duty of the judiciary to evaluate the substance of legislation in order to determine whether the law is unconstitutional by reason of being arbitrary, capricious, unreasonable or the like. The notion of "jurisdictional" due process consists of a presumed duty of the judiciary to determine whether a given state has unfairly or unjustly exceeded its legitimate jurisdiction in attempting to reach subjects outside its territory or otherwise beyond its competence as a law-making body. Utilized by judges who were opposed to legislative involvement in the marketplace, it was not uncommon for such apparently subjective determinations to result in a conclusion of unconstitutional abridgment of property rights of one sort or another. But neither was it uncommon to find Justice Black objecting to both the usage and the results.

His intense distaste for the use of the due process clause as a tool to immunize business from legislatively enacted taxes or regulations was illustrated soon after his ascent to the bench. The opportunity came in a case in which the Court faced a challenge levied by an insurance company against a state tax law under the due process clause of the fourteenth amendment.[30] In a blistering dissent, Justice Black declared his willingness to set aside prior decisions in order to hold that corporations were not "persons" protected by that amendment and hence not entitled to the protection against state transgressions of due process standards.

29. Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938).
30. Polk Co. v. Glover, 305 U.S. 5, 15 (1938).

But the attack was clearly aimed at the wrong target, and Mr. Justice Black admitted as much by abandoning the argument thereafter. The frustration of legislation was not being accomplished by the notion of "persons" but by that broad subjective verbalism, "due process of law." As employed by the Court, the substantive and jurisdictional aspects of the concept were translated into only slightly more meaningful euphemisms, such as "reasonable," "just," "fair," to be contrasted with "arbitrary," "capricious." True enough, these phrases had long provided a basis for resolving disputes between private parties. But in the constitutional field they were being employed to re-weigh interests, re-determine policy, and re-balance judgments which had previously been so treated by the legislative (and thus popular) arm of government.

This spectacle deeply disturbed Black both as a Senator and as a Justice, for it seemed to alter markedly the Constitutional allocation of decision-making power. "Under our constitutional plan of government," he protested in 1938, "the exclusive power of determining the wisdom of policy rested with the legislature."[31] If the Court were allowed to reconsider those determinations, then the constitutional form of government was being replaced by another, in which "the final determination of the wisdom and choice of policy has passed from legislators—elected by and responsible to the people—to the courts."[32]

Recognizing this impact, the Justice refused to take comfort in the fact that the replacement was being effectuated in the name of fine sounding phrases. The phrases, in both the substantive and jurisdictional context, were hardly replacements for the right of the people to participate as decision-makers in order to effect their desired will. When, in the case of *International Shoe Co. v. Washington*,[33] the Court composed a jurisdictional due process requirement of "sufficient minimum contacts so as not to offend traditional notions of fair play and substantial justice," Black wrote a scathing separate opinion despite his concurrence in result.

The opinion is such a clear illustration of his awareness of the real and potential destructive impact of these vague euphemisms that it is here set forth in extensive part:

> There is strong emotional appeal in the words "fair play," "justice," and "reasonableness." But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives. No one, not even those who most feared a democratic government, ever formally proposed that courts should be given power to invalidate legislation under such an

31. *Id.* at 15.
32. *Id.* at 19.
33. 326 U.S. 310 (1945).

> elastic standard. Express prohibitions against certain types of legislation are found in the Constitution, and under long-settled practice, courts invalidate laws found to conflict with them. This requires interpretation, and interpretation, it is true, may result in the extension of the Constitution's purpose. But that is no reason to restrict a State's power to tax and sue those whose activities affect persons . . . within the State . . . . Superimposing the natural justice concept on the Constitution's specific prohibitions could operate as a drastic abridgment of democratic safeguards they embody such as freedom of speech, press and religion, and the right to counsel. . . .[34]
>
> This result, I believe, alters the form of government our Constitution provides.[35]

It can be reported that at least part of Justice Black's crusade against judicial reevaluation of legislative policy decisions has met with success. Despite the persistence of the "reasonableness" language, the present accepted application sustains all economic laws from substantive due process attack in the federal courts unless the Court is unable to conceive of a rational basis for its enactment, with all presumptions in favor of the legislature's reasonableness.[36] And while there continues to be some frustration in his battle against jurisdictional due process, the pendency of proposed federal legislation in the area of state taxation appears to suggest that he may yet be vindicated, if only by Congressional fiat.

D. *Summary: Black and Legislative Primacy*

It seems appropriate to summarize and briefly assay Justice Black's response to the tripartite barriers of the pre-1937 Court. Stated affirmatively, the response is singular: effect popular rule via legislative supremacy. From that proposition, the preceding discussion seems to acquire its fullest meaning. What is the federal commerce power? It is whatever the national constituency, via Congress, says it is. What is the state province in commerce? Again, it is primarily a matter for political resolution, first in the states, and thereafter for Congress where abuses appear to threaten national interests. What is due process of law? It is a limited assurance that legislatures and courts will reach their decisions according to approved procedures; it is not laissez-faire economic philosophy. The unifying consequence is an expansion of popular rule—of democracy.

While it is one thing to generalize stated propositions, it is quite another to understand the basis for the choice of one proposition as opposed to another. Clearly, his economic views served as a motivating

34. *Id.* at 325.
35. *Id.* at 326.
36. *See* Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 N.W.U.L. REV. 13 (1958).

prejudice. Professor Reich suggests that it took some while for Mr. Black the Senator to mature into Mr. Black the Justice. Yet matured or not, his opinions in these early cases were rationalized in terms of democracy, not economics, and he has not deviated from the rationalization or the results since that unknown point at which he did mature. Thus, while it may help us to understand that the Justice who faced these issues was only briefly separated from the Senator who led the legislative innovators, that understanding does not preclude the possibility of more philosophical footing.

The same can be said of other proffered analyses. One of those is that he is a "State's Rights" advocate. Still another is the view that Justice Black mistrusts the judiciary at large. Another, and less complimentary, is the view that Black himself lacks the capacity to deal with the complexities inherent in the Constitutional area of economic rights, and thus seeks merely to avoid them.

Easily a more acceptable analysis revolves around that prejudice which I have already characterized as his principal motivation—the fundamental democratic premise. Given this analysis, that which has preceded corresponds with that which follows. It is an approach which seems to make use of all expressions on nearly all of the constitutional issues to which he has responded.

Was Black merely picking any rule that would allow the legislature maximum sway, simply because he concurred with the notions of the New Deal and supported the particular legislation? Perhaps so, but perhaps it was so because of the frustration he experienced as a legislator. The experience was of knowing the extent to which you were expressing the desires of your constituents, and knowing how they were being frustrated by judicial restraints upon your capacity to effect their desires. It is this sort of perspective that makes Black less a "States' Rights" advocate than a simple democrat, and it is similarly this perspective that renders meaningful his vitriolic opposition to infringement upon that effective democracy by both the Court and the Executive.

In the pages which follow, we will leave Senator Black the Populist and New Dealer, and swiftly find the Justice who still sits upon our highest courts. He will be examined by way of his responses to two of the more significant constitutional issues which he has been called upon to face. Throughout that examination, the recurrent suggested theme is that he is most markedly a Democrat. By this brief statement, the reader is invited to test that premise, and, if he likes, to search for another.

IV. *Assuring Legislative Representivity*

The commitment to legislative primacy depends, for its validity, upon faith in the integrity of the legislative forum. In terms of constitutional issues, this premise has produced extensive litigation of major

proportions in two areas. One of them, discussed in the pages which follow, concerns the assurance that the legislators, state and federal, actually represent those in whose names they act. It seems essential to the American democratic theory that they represent "the people." In fine, we now breach the area of voting rights.

Mr. Justice Black has shown himself more than willing to obtain the assurances of representation by "the people." Yet there are many aspects of assuring representivity, and upon them the Court has been sharply divided. Indeed, of late, some have suggested that Black has parted from his former footing—the heinous offense of inconsistency. We shall have to see. But before beginning examination of the cases themselves, it seems important to offer a few observations about the jungle into which we tread.

The voting right cases contain an additional bonus for our overall analysis of Justice Black. At work in each voting case are three of the prejudices by which Black has found himself strongly influenced. First, inasmuch as state legislatures are the constitutional repository of most of the decision-making authority in this area, there is invoked his prejudice in favor of broad latitude for the exercise of this power. Second, since the cases themselves are pleas for judicial review of legislative decisions, the corollary prejudice against judicial infringement upon legislative primacy makes its bid. Third, because deprivation of the right to vote leads to a perversion of democracy, there is at work what I have characterized as his most fundamental prejudice, the prejudice in favor of popular rule. In the process of deciding these cases, therefore, Justice Black has been forced to choose and weigh these competing prejudices. His determinations, therefore, reveal much about the primacy of these values within the framework of his philosophy.

Mr. Justice Black had his first opportunity to deal with voting rights in 1946. The case was *Colegrove v. Green*.[37] For the majority, *Colegrove* presented only the threshold issue—justiciability. Frankfurter was chosen to write the Court's opinion, a task he discharged in his classic pose, denying relief for reasons of precedent and judicial restraint. Malapportionment pleas were said to go beyond the realm of judicial competence, "because due regard for the effective working of our Government revealed the issue to be of a peculiarly political nature and therefore not meet for judicial determination."[38]

Black had a different view of the requirements of an effective Government, which was also a democratic one. In a dissent which previewed the Court's reversal on the justiciability question, as well as its standard for almost twenty years, he put aside his prejudices for legislative latitude and against judicial supervision. For him, the apportionment issue had

37. 328 U.S. 549 (1946).
38. *Id.* at 552.

to be justiciable, the cases should be resolved in accordance with the fundamental premise that:

> [T]he constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast.[39]

Yet it remained for Justice Black to more fully expound upon the basis of his convictions. His first opportunity to do so came in *Wesberry v. Sanders*,[40] which, like *Colegrove*, was a congressional malapportionment case. Writing for the Court, he reaffirmed the standard of constitutionality in language which has become the guidepost for all further apportionment matters, that "as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's."[41] This time, he took special pains to explain the reasons for judicial involvement:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that *unnecessarily* abridges that right.[42]

Those who maintain some familiarity with Supreme Court Reports may instinctively raise an eyebrow at the concluding sentence of the pronouncement, especially at the use of the term "unnecessarily." A study of his opinions in the cases which have followed these earliest voting rights contests reveals the response to be an accurate one.

Justice Black sees more to the problem of assuring representative government than justiciability and the simplistic mandate of one man—one vote. Because of this perspective we are in one of those few areas in which Black has left the "liberal" fold, much to the befuddlement of those who have so categorized him. It may prove instructive, therefore, to direct our attention to the instances of departure and the reasons for them.

The early voting cases presented the single problem of apportionment. In this area the Court is asked to reject as unconstitutional state systems in which votes of some were given less weight than those of others. Justice Black's position on this issue concurs with that of a majority, and all of the "liberals" on the Court. It is that there is simply no acceptable constitutional basis for discrimination between qualified electors by weighting their votes differently. Similarly, Black aligns himself with the liberal bloc on matters of racially objectionable voting qualifica-

39. *Id.* at 570.
40. 376 U.S. 1 (1964).
41. *Id.* at 8.
42. *Id.* at 17-18. (Emphasis added).

tions. His position here, dictated by the clear mandate of the civil war amendments, is that race is one consideration which is unequivocally precluded as a foundation for state exercise of the authority to prescribe voting qualifications. Hence, upon proof that discrimination is an aim or effect of a state election law, he is quick to strike the law as unconstitutional.[43] Moreover, Justice Black has suggested greater use of the power granted Congress by the final clauses of the fifteenth and fourteenth amendments as a means to legislatively effect the national goal of rendering race an irrelevant factor as regards the franchise.[44] But there are voting issues other than race or weighting which have been presented to the Court. And it is within those issues that Black has left his assigned fold.

It may be well to spell out the Constitution's allocation of authority in the field of prescribing voting qualifications as a prerequisite to the discussion of these cases. As a power reserved to them, the Constitution allocates to the states the plenary authority to determine the qualifications for the electors of their own officers. Under the provisions of article one those same state determinations describe the qualifications of electors of members of the Federal House of Representatives, and the seventeenth amendment extended the reach of those laws to the election of federal senators. Hence, it is state legislative authority with which we deal. The limitations on this constitutional power, other than the specific prohibitions regarding race, religion or sex, are confined to the general notion of equal protection and the power, however exercised by Congress under clauses of the fourteenth and fifteenth amendments, which give it authority to pass laws deemed appropriate to achieve the objectives of these amendments. In effect, then, the allocation of authority appears somewhat of a turnabout of the commerce clause's allocation, with original authority placed in the states subject to certain specified prohibitions, a general principle of rationality in classification, and the possible enactment of federal legislation to insure that rationality. Indeed, it is clear that Justice Black treats the issues in a manner which is strikingly analogous to his efforts as a defender of state legislative authority in the commerce cases. As in those cases, he can be described as attaching every presumption of correctness to the exercise of that power by the states, regarding as somewhat sacrosanct the state prerogatives in the field, and viewing with undisguised antipathy the Court's effort to employ as vague a notion as equal protection to invalidate the enacted will of the states. These attitudes appear to contrast with those of his liberal colleagues, who are far less concerned with the allocation of decision-making prerogatives than with preserving the "integrity of the franchise" in all cases. It is a contrast which has led him to part from their familiar ranks,

43. *Compare* Wright v. Rockefeller, 376 U.S. 52 (1964) *with* Louisiana v. United States, 380 U.S. 145 (1965) and United States v. Mississippi, 380 U.S. 128 (1965).

44. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 678-679 (1966).

as is illustrated by their division over three (or perhaps four) cases; all appearing within the last few years: *Harper v. Virginia Board of Elections*,[45] *Carrington v. Rash*,[46] *South Carolina v. Katzenbach*,[47] and *Fortson v. Morris*.[48]

The twenty-fourth amendment was incorporated into our Constitution on February 4, 1964. Its effect was to prohibit the state imposition of a poll tax as a prerequisite to voting for federal officials.[49] It did not prohibit the states from imposing such a tax as a qualification for the status of an elector of state or local officials. Soon after that adoption, however, the Court was called upon to effect that second prohibition in *Harper v. Virginia Board of Elections*.[50] Much to Black's amazement and distaste, a majority of the Court, speaking through Mr. Justice Douglas, assented to the request. The announced ground of the opinion was the equal protection clause of the fourteenth amendment; more specifically, the conclusion reached was that: "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process."[51]

Mr. Justice Black was unwilling to join in this opinion, despite his expressed personal view that the right to vote should not depend upon the payment of a poll tax. But he did not see the wisdom of a poll tax as a major issue of the case. To him the issue was amendment of the Constitution by judicial fiat, and his dissent accordingly struck at the old problem of judges imposing their own economic and political theories on legislatures, the problem which he had faced in the commerce cases three decades before. In view of his evident distaste for the poll tax, the striking similarity of his dissent in *Harper* to his opinions in those early cases goes far to discredit the view that his own economic philosophy was the motivating force behind his position in those earlier cases.[52] Without

45. *Id.*

46. 380 U.S. 89 (1965).

47. 383 U.S. 301 (1965).

48. 385 U.S. 231 (1966).

49. In Harman v. Forssenius, 380 U.S. 528 (1965), Mr. Justice Black joined in an opinion lauding the objective of that amendment and securing its effectiveness against an effort by the State of Virginia to circumvent that objective.

50. 383 U.S. 663 (1966).

51. *Id.* at 668.

52. Another explanation, of course, and equally plausible is that Black has simply been caught up in his own methodology, shaped by his early expressions and reactions. This explanation is rendered even more plausible by his recently evidenced tendency in other areas to reach similarly difficult contradictions between his avowed personal preferences and the decision required by the application of his adopted methodology. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965), discussed above, as well as his approach in El Paso v. Simmons, 379 U.S. 497 (1965). In *Griswold* his adherence to literalism precluded him from assent to including "privacy" as a first amendment penumbra despite many prior opinions in which he clearly endorsed such an interest. In *El Paso*, his "absolutism" and "literalism" was somehow applied to the prohibition against laws impairing the obligation of contract, a result which comports with his methodology but which seems substantively inconsistent with the preference for legislative latitude which permeates his opinions in all other related fields.

totally discrediting the value of the equal protection doctrine in the hands of the judiciary, he demanded that it be employed with great deference for enacted expressions of the popular will. Unless the Court was willing to take the position he regarded as untenable, that there was *no* conceivable rational basis for this poll tax qualification, he refused to regard the wisdom of such a law as subject matter outside the realm of political resolution.

The propriety of applying this "commerce analogy" to the voting rights area, whatever the similarity of the judicial-legislative conflict, need be examined with regard to the problems peculiar to voting. It is one thing to refer grievances regarding economic legislation to political forums; it is quite another to deny judicial supervision as regards the franchise. Reference to the alternative of political redress has a hollow sound for the disenfranchised, for the essence of their grievance is the unavailability of that redress. In light of that perspective, it is suggested that judicial supervision is required if Black's principles are to be meaningful. Yet the thrust of this argument is not of equal force in every case. In *Harper*, for instance, no one was permanently effected by this tax, nor was any racial animus shown to be effected by its imposition. So long as it presented no such invidious, forbidden overtone, political resolution of its wisdom or propriety remains an acceptable alternative. A different case was presented in *Carrington v. Rash*,[53] a case in which Black himself utilized the equal protection clause to strike a state qualification. The abusive qualification he saw in *Carrington* was that a different standard was used to measure the residence requirements of military personnel, as opposed to other "residents." The principal basis of Justice Black's objection was that the law was aimed at precluding participation by the relatively transient military residents, because it was believed they would take a "wrong" view of the needs of the communities wherein they resided.[54]

There is at least a superficial inconsistency between *Carrington* and *Harper*. And yet, somehow, it seems an understandable inconsistency if we keep in mind the nature of the abuses in each. The poll tax was capable of resolution by those injured by the qualification; the manipulation of residence requirements was not. In terms of Black's desire to accomodate the interests in open franchise with latitude for the legislative branch, *Harper* and *Carrington* seem to present an appropriate point of difference.

More difficult to fit into the general Black framework is his decision in the recent "Georgia Governor" case.[55] Viewed as a voting case, it is difficult to justify election of a minority governor by a malapportioned

53. 380 U.S. 89 (1965).

54. There are two interesting observations. First, there is the first amendment overtone of the objection. The other is that this very objection, the views of the aggrieved targets of the law serving as a basis for the law, was proffered by Justice Black as one *acceptable* rational basis in the poll tax case.

55. Fortson v. Morris, 385 U.S. 231 (1966).

legislature. That was the claim of the litigants, and seemingly the view taken by the minority of the Court which included the liberal bloc. But it was not the view taken by Black in two respects. First, he directed the Court to its own holding that the legislature in question was apportioned constitutionally; secondly, he simply stated that it was not a "voting case." If anything, his decision stands for the proposition that Governors need not be directly elected by the people. As such it implies an interesting modification of Black's adherence to the democratic premise: it implies that he regards democracy as adequately assured by preserving legislative integrity. This is an implication somewhat consonant with a perspective of the Executive branch which he evinced some years earlier in the "steel seizure" case,[56] but it seems directly at odds with his position in *Gray v. Sanders*.[57] Despite the timeliness and greater applicability of *Gray*, I tend to believe that if he had to choose between those two opinions, he would retract *Gray*. But since he need not face that choice, the surmise remains little more than that.

The final touchstone for discussion in the voting area is the dissenting opinion Justice Black authored in *South Carolina v. Katzenbach*.[58] In many ways, it is one of his most revealing pronouncements. It is his strongest expression relating to the proper status of the states in our federal system; it seems to indicate his typically stringent repudiation of judicial supervision of legislation; and yet, at the same time his approach to the issue seems, in effect, a repudiation of that very notion as he has most often enunciated it.

The case arose as an attack levied by the state of South Carolina against federal voting rights legislation. The Court approved the legislation in its entirety, but Justice Black withheld his approval in two respects. His first objection was that the Court enunciated the wrong ground for ascertaining that the coverage formula of the Act was constitutional. Said the Justice, "I do not base my conclusion on the fact that the coverage formula is rational, for it is enough for me that Congress by creating this formula has exercised its hitherto unquestioned and undisputed power to decide when and where, and upon what conditions its laws shall go into effect."[59] The familiar tone of that pronouncement,

56. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-89 (1952):
In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make the laws which the President is to execute. The first section of the first article says that 'All legislative powers herein granted shall be vested in a Congress of the United States***'. . . . The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice.

57. 372 U.S. 368 (1963).

58. 383 U.S. 301 (1966).

59. *Id.* at 356.

however, was followed by a glimpse at a side of Justice Black hitherto undisclosed.

One section of the law required states who came within its coverage to seek federal judicial or adminstrative approval of any law or constitutional amendment affecting voting. Of the two objections he posed to this provision, easily the most compelling for him was the import it had for Black's view of federalism. In his view, the effect of that provision was "to render any distinction drawn in the Constitution between state and federal power almost meaningless."[60] It was the demeaning method employed here which Black most strenuously objected to. "A federal law which assumes the power to compel the states to submit in advance any proposed legislation they have for approval of federal agents approaches dangerously near to wiping out the States as useful and effective units in the government of our country."[61]

The conclusion he reached is not half as significant as the method he employed in getting there. For language, he turned to the Republican form guarantee and the ninth amendment's reservation of certain powers to the states, both of which represent the very class of vague provisions against whose use he has so violently reacted. Moreover, his discussion goes far to convince a reader that the same result would have been reached without either of these provisions. Consider this paragraph:

> I see no reason to read into the Constitution meaning it did not have when it was adopted and which have not been put into it since. The proceedings of the original Constitutional Convention show beyond all doubt that the power to veto or negative state laws was denied Congress. . . . The refusal to give Congress this extraordinary power to veto state laws was based on the belief that if such power resided in Congress the States would be helpless to function as effective governments.[62]

It was precisely this type of judicial decision making that Justice Black so violently and eloquently opposed in the commerce area. The opinion prompts one to ask the Justice whether he is the same Justice who insists on express provisions, who repudiates implied historical readings of vague provisions, who is irritated when confronted with a colleague reading his personal preferences into the Constitution as a restraint on legislative decision-making. Certainly his own opinion in this case is fraught with all these devices.

For such a spectacle, it is submitted, there is but one explanation. We see in *South Carolina v. Katzenbach* a deeply motivating prejudice of Mr. Justice Black in favor of a more complementary federalism, a prejudice for an actual partnership rather than a chain of command.

60. *Id.* at 358.
61. *Id.* at 360.
62. *Id.* at 360.

That the prejudice is revealed for us to see in a "voting case" is perhaps the best proof of the observation that, once again, voting cases for some on the Court are not merely voting cases for Justice Black. For while he is vitally committed to assuring the "demos" of democracy, he is no less committed to preserving the Constitutional structure within which our forefathers felt democracy would best prevail. It is this duality of commitment which is clearly one of the principal elements of his approach to the task of building a philosophy of American constitutional democracy.

V. ASSURING THE CAPACITY FOR SELF-GOVERNMENT

Surpassing both in pagination and impact his efforts in all other areas of constitutional law is Justice Black's work in the field of our political liberties.[63] Interestingly, the area is one of the few aspects of his overall approach to constitutional issues which has shown a marked alteration and growth over the years. Yet the alteration was not so marked that the historian Charles Beard was precluded from ranking the Justice in 1945 "even above Justice Holmes and Justice Brandeis in the record of judicial resistance to government encroachments on the liberties of press and speech."[64] As an effort to trace the evolution of his views has already been ably made by Professor Charles Reich,[65] the primary goal of the discussion which follows is an evaluation of the current posture of his convictions in the area of political liberty.

It is difficult to present an adequate condensation of this area. Political liberty has so many aspects, so inextricably interrelated, that some attempt to structure the discussion need be made lest our analysis degenerate into meaningless perambulation. Accordingly, Mr. Justice Black's philosophy in these respects will be developed as responses to three fundamental questions about the judicial protection afforded the varied parts of this constitutional labyrinth. First, What are the interests and activities which should be protected? Second, What should be the degree of the protection afforded the various interests? Third, From what infringements and abridgements should they be protected?

A. *Defining the Protected Liberties*

Evaluation of the political interests and activities which should be protected would seem best begun by an evaluation of the purpose Justice Black regards as underlying the relevant constitutional provisions. There

63. Mr. Justice Black's efforts in this area are discussed and evaluated more frequently than any other aspect of his service on the Court. For those who are interested, many of the important opinions and articles relevant to this section have been collected in I. DILLIARD, ONE MAN'S STAND FOR FREEDOM (1964). *See also* Gordon, *Justice Hugo Black—First Amendment Fundamentalist*, 20 LAW. GUILD REV. 1 (1960).

64. As discussed in Gordon, *Mr. Justice Black at 70*, 16 LAW. GUILD REV. 102, 103 (1956).

65. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963). This study, by the Justice's former law clerk, now a professor at Yale Law School, embraces nearly all of Mr. Black's work in an effort to trace his "evolution."

are two approaches to this question, each with some distinct significance, yet generally overlapping. One approach is to regard *all* express and interpreted negatives on government authority as a commitment to individual freedom. In this respect, we fall into that line of expressions characterizing ours as a free society. This section of the paper, however, draws upon the more limited category of "political liberties."

The term "political liberty" represents a purposeful sub-categorization of some of the liberties assured by the constitutional negatives. It also represents a second approach to our inquiry, an approach which Justice Black apparently regards as allowing for the more central significance of certain of our safeguards. The additional political facet constitutes a modification of the free society generalization and introduces us to a perspective which Mr. Black shares with a majority of the present Court,[66] although he would extend the political adjective further than most of his colleagues.

The central theme of this perspective is its attempt to functionally relate the areas of activity set apart by the negative commands of the first amendment to the democratic premise upon which our nation rests. Hence it is not an attempt to limit the significance of these or other guarantees as assurances of personal freedom from potential "non-political" abuses of government, but an attempt to more fully effect their intended scope wherever there is sensed a functional relationship between the activities protected and the capacity of the people to govern themselves. The consequences which flow from this perspective are multifold. One is that the political liberties are given a "preferred position"[67] as regards the other assurances of the Bill of Rights in that it leads to different standards of measuring the public interests in delimiting certain activities. Perhaps the most graphic illustration of the distinction between this preferred position and the more generalized view of all of the negatives as conditions conducive to a free society is offered by the recent attempts to adjust the law of libel to the needs of self-government.[68] In this area, the use of the political sub-category is leading the Court to restrict the scope of the libel action as it effects political discussion without any correlative restriction where political ramifications are absent.

The gist of Justice Black's perspective was presented in *Milkwagon Drivers' Union v. Meadowmoor Dairies, Inc.*:

> [I] view the guarantees of the First Amendment as the foundation upon which our governmental structure rests and

66. *See generally* an article by Justice Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

67. For a thorough critique of the "preferred position" notion, see P. FREUND, THE SUPREME COURT OF THE UNITED STATES 60-87 (1965).

68. *E.g.*, Time, Inc. v. Hill, 385 U.S. 374 (1967); Rosenblatt v. Baer, 383 U.S. 75 (1966); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Barr v. Matteo, 360 U.S. 564 (1959). *See also* Beauharnas v. Illinois, 343 U.S. 250 (1952).

> without which it could not continue to endure as conceived and planned. Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death.[69]

The import of this perspective goes well beyond recitation of melodramatic metaphors. For Justice Black, it is a charge to be ever sensitive to any limitations, however sophisticated, imposed upon those aspects of liberty assured by the Constitution which relate to the political processes. This charge is ever the more compelling for him in light of his expressed conviction that:

> The area set off for individual freedom by the Bill of Rights was marked by boundaries precisely defined. It is my belief that the area so set off provides adequate *minimum* protection for the freedoms so indispensable to individual liberty. Thus we have only to observe faithfully the boundaries already marked for us.[70]

These then are the interests which Justice Black believes should be protected. There is the general interest in individual freedom, and then, super-imposed, both in scope and degree, there is the heightened interest of a people committed to the principle of government by popular will.[71] The extent of that heightened interest is best explained by progressing into a discussion of the activities he has sought to protect by interpretation and exposition.

When Black prepared himself for service on the Court, he spent much of his time reading history. The lessons of that body of knowledge led him along much the same path in responding to cases involving first amendment freedoms as he took in the area of legislative supremacy. For history demonstrated to him that great mischief would and could be done by a judiciary which conceeded the liberties on the one hand, but reserved the right to reinterpret their substance or balance their implications on the other.

Thus it is that the great bulk of his efforts have been against the intricacies of judicial craftsmanship. In this view he was aided greatly by the simplistic nature of the first amendment's language. Believing the choice of language to have been deliberate, he resists at every turn

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69. Milkwagon Drivers' Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 301-302 (1941).

70. Braden v. United States, 365 U.S. 431, 444-45 (1961).

71. In Speiser v. Randall, 357 U.S. 513, 530 (1958), he wrote:

"We should never forget that the freedoms secured by that Amendment—Speech, Press, Religion, Petition and Assembly—are absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed citizenry . . . ."

efforts to read into it any qualifications as well as efforts to read substance out of it by definition. No law abridging the freedoms means just that to Justice Black, and the freedoms themselves—speech, press and petition—carry no less force.

Moreover, he refuses to be lulled into agreement based upon notion that definitional limitations obstensibly unrelated to political liberty are any less an evil. More than once he has pointed to historical examples in an effort to demonstrate that such exceptions have all to often become the rule. Clearly in this category is his adamant refusal to go along with efforts, early and recent, which would allow censorship of any kind rooted in what he considers the illusive theory that such expressions ought to be considered beyond the Constitution's protection for reasons of their alleged "obscenity." In fact, his position on this point has led him to refuse even to evaluate the content of allegedly obscene material when that issue is presented to the Court. The many reasons for his position and practice in this area invites our first analysis of one of the major contributions he has made to thought in this area of constitutional law—the notion of first amendment[72] literal "absolutes."

Justice Black's notion of liberal absolutism includes two implications of major significance. One of them, primarily his literalism, is present in our immediate quest for definitions of the area protected as political liberty. The other, primarily the absolutism, speaks more fully to the task of determining the degree of the protection, discussed more fully in the next subsection of this paper. For the purposes of both, it appears important to understand that part of Mr. Justice Black's reasoning which has led him to espouse this absolutist position.[73] While any such attempt is admittedly a risky proposition, an effort in that direction is nonetheless proffered in hopes of laying a meaningful foundation for the discussion which is to follow.

Ours is a governmental arrangement premised first and foremost upon democratic rule. But in terms of our liberties, that initial commitment can cut two ways, both paths leading from the notion of popular rule itself. Popular government seems in large part premised upon the hope that an informed, intelligent electorate is competent to order the responsibilities of both the individual and the whole of society. Thus wisdom, especially political wisdom, must be defined as that which a majority of the participating electorate determine to be the best course of conduct through the processes of the political forum: exposure to information and ideas; debate and individual evaluation of those ideas; and finally, periodic conclusions manifested through the balloting proc-

72. As previously indicated, the literal-absolute method has recently been applied, perhaps out of a desire for consistency, to the prohibition of the impairment of obligations of contract clause, triggered by the term "no law." *See* El Paso v. Simmons, note 52 *supra*.

73. *See* Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960).

ess.[74] It must be recognized, therefore, that this premise requires the continued vitality of this political process. How then, are we to be assured of this continuation? An unequivocal commitment to democracy, "absolute democracy," if you will, would delegate this responsibility to the people themselves. Indeed, this would appear to have been a path initially permitted by the Constitutional authors. But that choice was expressly rescinded by the incorporation of the Bill of Rights, which, *inter alia,* restricted the power of the people by withholding from their Congress the power to pass any law abridging freedom of speech, press, assembly or petition. Justice Black clearly believes that this decision was a wise one. It was reached, he believes, in light of the historical context of governmental abuses which led to the formation of the colonies and the nation, and reflected an additional "frank recognition" of the "common human characteristics"[75] which made unequivocal democracy, in Rosseau's words, "unsuitable for men."

The same reasons which lead Justice Black to approve of the first amendment as a limitation on the reach of democratic rule leads him to seek a policy and tools which might best assure the effective permanency of the political processes upon which that rule is based. The principle of those reasons are repeatedly illustrated by his opinions in these cases. The illustrations most typically consist of allusions to the human frailities, and historical illustrations of the political intolerance which is likely to flow from that frailty, if it is unchecked. His individualistic response to this challenge has been to insist upon the broadest construction of the language of the first amendment consistent with its ordinary meaning, an approach which has led others to use the term "literal absolutes" as a description of his approach.

We return, then, to the task of defining the interest and activities which should be protected by the first amendment. Prior to our attempt to develop the rationale underlying the absolutist theory, we were involved in a discussion of the obscenity issue. It is an appropriate focus to continue our examination, for the area seems to contain almost every major manifestation of the prejudices from which he reasons in the first amendment area.

When applying the prohibitions against interference with freedom of speech and press in obscenity cases, he is typically found recanting

74. In United Public Workers of America v. Mitchell, 330 U.S. 75, 114 (1947), he wrote:

> Our political system, different from many others, rests on the foundation of a belief in rule by the people—not some, but all the people. . . . In a country whose people elect their leaders and decide great public issues, the voice of none should be suppressed—at least such is the assumption of the First Amendment. That amendment, unless I misunderstand its meaning, includes a command that the Government must, in order to promote its own interest, leave the people at liberty to speak their own thoughts about government, advocate their own favored governmental causes, and work for their own political candidates and parties.

75. Green v. United States, 356 U.S. 165, 198 (1958).

the historical abuses to which the notion of obscenity has been subject. The first and paramount abuse inheres in the term itself. What is obscenity? Justice Murphy, it will be recalled, assured us of two things: that the area was "well-defined and narrowly limited,"[76] and that obscenity was one aspect of speech which was without significant social value. The cases, as Black is swift to point out, repudiate both assurances. In the recent *Mishkin*,[77] *Fanny Hill*,[78] *Ginzberg*,[79] debacle, both of these assurances provided the focus of Justice Black's attention:

> Whether a particular treatment of a particular subject is with or without social value in this evolving, dynamic society of ours is a question upon which no uniform agreement could possibly be reached among politicians, statesmen, professors, philosophers, scientists, religious groups or any other type of group.[80]
>
> * * * * * * * *
>
> My conclusion is that certainly after fourteen separate opinions handed down in these three cases today, no person, not even the most learned judge, much less a layman, is capable of knowing . . . whether certain material comes within the area of "obscenity" . . .[81]

Moreover, he has demonstrated in other opinions that much the same can be said about nearly every other category that the Murphy opinion or others would have excluded from the ordinary literal definition of the categories of speech and press. For Black, the lesson is clear. There can be no exclusions from these freedoms for reasons of their content. More importantly, this lesson has led him to redefine the direction of his search for a preserving policy. For given the performance of the judiciary, the problem which he sees is not merely to find effective safeguards to protect these liberties in the courts; the need is equally great that the safeguards protect us from the courts. The intended thrust of the first amendment was to preserve the integrity of the political processes against all assaults, not merely to substitute the Courts for the Congress as the appropriate body to preside over its demolition.[82] In *Konigsberg v. State Bar*[83] he explained:

76. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).
77. Mishkin v. New York, 383 U.S. 502 (1966).
78. Memoirs v. Massachusetts, 383 U.S. 413 (1966).
79. Ginzburg v. United States, 383 U.S. 463 (1966).
80. *Id.* at 480.
81. *Id.* at 480-81.
82. Indeed he expressed the view in Braden v. United States, 365 U.S. 431, 445 (1961), that the intended effect of the first amendment was to forbid,

> any agency of the Federal Government—be it legislative, executive or judicial—to harass or punish people for their beliefs, or for their speech about, or public criticism of, laws and public officials. The Founders of this Nation were not then willing to trust the definition of First Amendment freedoms to Congress or this Court, nor am I now. History and the affairs of the present day show the Founders were right.

83. 366 U.S. 36 (1961).

> Judges, like everyone else, vary tremendously in their choice of values. This is perfectly natural, and indeed unavoidable. But it is neither natural or unavoidable in this country for the fundamental rights of the people to be dependent upon the different emphasis different judges put on different values at different times. For those rights, particularly the First Amendment rights involved here, were unequivocally set out by the Founders in our Bill of Rights in the very plainest of language, and they should not be diluted by "tests" that obliterate them whenever particular judges think values they most highly cherish outweigh the values most cherished by the Founders.[84]

Yet all the allusions in the world to the intended breadth of the original language and its "plain" meaning cannot *ipso facto* resolve the question of their meaning. Unless another legal system is desired, judges must perform that task. All that Justice Black can hope to do is to tender his understanding of the original plain meaning of the political freedoms, and hope for the adoption of his definitional outlines as the reigning law. This he has certainly done.

The term speech, argues Justice Black, was chosen to assure the vitality of our political form, and hence it should be read so as to preclude any qualification on speech which turns upon the content of the expression. The first amendment prohibits any exceptions contingent upon the social value of the expression. His position is that the guarantee of free speech assures the absolute freedom of any citizen or group to say or think anything. A similar interpretive gloss is urged by him for the protection of press, assembly and petition. And the reason for this gloss is that he trusts no one, including the Justices of the Court, to effectively limit the destructive impact of erstwhile "well-defined and narrowly limited" exclusions from this unequivocal construction of these terms. This position is not, I submit, evidence that he has abandoned the functional classification of preferred political freedoms; instead it is evidence of his belief that the task of policing the line between that which is political and that which has no political or social value bears tragic potential for those who depend upon the wisdom of an informed, intelligent electorate for legislative policy.

It is not that he deems all speech to be socially valuable; rather it is that the very existence of excluded categories presents unavoidable potential for abuse. Hence, he would recognize *no* exclusions whatsoever. And thus, the activities which he thinks must be protected include the obscene, not because obscenity has or does not have social value, but because the category can, and historically has, resulted in abusive expansion. For the same reason every type of political discussion, no matter how hatefully disloyal or inflammatory, is protected. And this definitional

84. *Id.* at 75.

policy applies whether the expressions proposed revolution,[85] racial hatred,[86] or alleged subversion.[87]

In the continuing line of cases concerning those laws by which the States and the Congress attempted to legislate away the Communists, his position has been eloquent repudiation of both the effort and the rationale upon which it rests:

> I believe the abridgement of liberty here, as in most of the other cases in that line, is based upon nothing more than the fear that the American people can be alienated from their allegiance to our form of government by the talk of zealots for a form of government that is hostile to everything for which this now stands or ever has stood. I think this fear is groundless. . . . It was [an opposite] kind of faith in the American people that brought about the adoption of the First Amendment, which was expressly designed to let people say what they wanted about the government—even against the government if they were so inclined. The idea underlying this then revolutionary idea of freedom was that the Constitution had set up a government so favorable to individual liberty that arguments against the government would fall harmless at the feet of a satisfied and happy citizenship.[88]

And, he adds a pragmatic warning, born of his sensitive awareness of the cruel lessons of history:

> [T]he Framers thought (and I agree) that . . . we cannot take away the liberty of groups whose views most people detest without jeopardizing the liberty of all others whose views, though popular today, may themselves be detested tomorrow.[89]

The policy and tools he employs to define the protected activities are easy to summarize. Under no circumstance will Black admit any definitional exceptions based upon the content of the expression. Speech is protected, and speech means all speech, hence the description "literal absolutes." Yet at times he goes further than his literalism would suggest. Given a capacity to fit an activity into the ambit of the terms speech, press, assembly, or petition, he has assented to numerous decisions which provide a protective cloak for the penumbra essential to their exercise. Hence he has agreed that the right to free speech must include the right to remain silent where the response would effect an abridgment for reason of what would be said.[90] Likewise, speech must

85. *See, e.g.*, In re Anastaplo, 366 U.S. 82 (1961).
86. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952).
87. *See, e.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961) and Barenblatt v. United States, 360 U.S. 109 (1959).
88. Konigsberg v. State Bar, 366 U.S. 36, 77-78 (1961).
89. Aptheker v. Secretary of State, 378 U.S. 500, 518-519 (1964).
90. Barenblatt, *supra* note 86, at 140.

include the right to hear what others have to say, and it includes the right to gather together in associations for the purposes of discussion.[91] The right to publish, includes the right to circulate the publication,[92] the right to distribute it,[93] and there is a right in the recipient to receive publications[94] regardless of the content of the published expression. Moreover, Justice Black recognizes all manner of first amendment "interests" in the activities, such as picketing,[95] which are described as demonstrable activity. In brief, the interests as defined by Justice Black are as broad as the language of the first amendment would appear to permit.

Nonetheless, there are limits to the activities which Mr. Justice Black is willing to recognize as either first amendment activities or their protected penumbra. Recently this sense of limitation led him to dissent from his liberal colleagues in *Griswold v. Connecticut*.[96] Brief attention to this case offers an interesting grasp of the texture of his approach in this area, for his dissenting opinion summarizes the prejudices from which Justice Black operates while defining the protected liberties. In an opinion which surprised many of his admirers, he rejected the majority's addition of a right of privacy to the ennumerated freedoms of the first amendment. With the indulgence of the reader, several portions of his dissent are quoted below in an effort to better convey the essence of his approach to the task of defining the liberties upon which we depend:

> One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words, words more or less flexible and more or less restricted in meaning. . . . I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used.[97]
>
> . . . .
>
> [It is stated] without proof satisfactory to me, that in making decisions on this basis judges will not consider "their personal or private notions." One may ask how they can avoid considering them. Our Court certainly has no machinery with which to take a Gallup poll. . . .[98] I realize that many good and able men have eloquently spoken and written, sometimes in rhap-

91. Communist Party, *supra* note 86.
92. Breard v. Alexandria, 341 U.S. 622, 650 (1951).
93. *Id.*
94. Lamont v. Postmaster General, 381 U.S. 301 (1965).
95. NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 77 (1944).
96. 381 U.S. 479 (1965).
97. *Id.* at 509.
98. *Id.* at 518.

> sodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned, I must add it is good enough for me.[99]

Surely, nothing more need be said about the approach of Justice Black to the task of defining the language used to describe our political liberties.

B. *Defining the Degree of Protection*

Having examined the definitional aspect of Justice Black's approach to political liberty, it now is possible to begin an examination into the questions of degree. Stated in the negative, to what extent, if any, does Justice Black agree that political expression sometimes goes too far?

Much of his response to that question is revealed by the label commonly assigned to his first amendment philosophy—absolutism. Yet that revelation may convey too much. Perhaps we had best ask, absolute as compared to what? There are several answers to that query and each of them deserves some examination.

In its most frequent usage, the term "absolute" is an attempt to dramatize the contrast between the problem-solving technique utilized by Justice Black and the various balancing tests with which the Court continues to resolve the conflict of interest which everyone, Black included, admits to inhere in the questions involving the first amendment liberties. For despite the categorical fashion in which Mr. Black rejects the balancing technique, it is submitted that he necessarily engages in such pursuits, albeit under differently labeled devices.

The accuracy of this proposition will best be tested by a step by step comparison of the two approaches as they are used in resolving similar categories of problems. The problems of which I speak seem most effectively analyzed by utilizing the Court's balancing framework as the basis for structuring our discussion. This is best begun by attempting to identify the interests which might be balanced by the Court in determining the degree of protection which should be afforded freedom of expression in various situations.

Easily the focus of most of the conflict between Justice Black and

99. *Id.* at 522.

his brethren are the cases involving restraints on the freedom of political discussion. For much the same reasons which we have examined regarding due process in the economic area, equal protection in the voting area, and literalism in the definition of political liberty, Justice Black has violently protested against the device of interest-balancing as a means of judicially determining the degree of protection which should be afforded the political liberties. Simply stated, he is as unwilling to trust judges in this area as in any other, in fact more so. And in view of the emotionally-laden context in which most abridgments of political expression occur, his reasoning seems all the more persuasive.[100] Accordingly he has opposed the right of the judicial balancing as a violation of the literally unequivocal command of the first amendment. Again, it is not that he suggests that balancing of competing interests is alien to the field of political expression; rather it is his position that the authors of the first amendment did all the balancing that is to be done in this area.[101] Indeed, in light of his conviction that the preservation of a vibrant public forum is the indispensable prerequisite to our continued existence as a democratic nation, and given his further declared belief that the first amendment provides only the absolute minimum assurances required for that preservation, it would be unthinkable for Black to say otherwise.

And yet there are cases to resolve. How are they resolved by the balancers? At the outset, it is essential to identify the interests which they weigh against the interest of preserving the public forum. For purposes of our analysis, it seems possible to delineate three general categories of expressions presenting interests which may be urged as outweighing the interest in freedom of expression in an attempt to limit the extent of its protection: (1) expressions said to inflict private injury; (2) expressions deemed offensive to the public; and (3) expressions which allegedly threaten peace and order. It is to be noted, at the outset, that these categories are listed in inverted order of their ostensible importance to political expression. Hopefully this arrangement will add to, rather than detract from, the development of an understandable analysis.

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100. In Barenblatt, *supra* note 86, at 151, he wrote:

> History should teach us then, that in times of high emotional excitement minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs and attempts will be made to drive them out. It was knowledge of this fact, and of its great dangers, that caused the Founders of our land to enact the First Amendment as a guarantee that neither Congress nor the people would do anything to hinder or destroy the capacity of individuals and groups to seek converts and votes for any cause, however radical or unpalatable their principles might seem under the accepted notions of the time.

101. Black's absolute literalism, therefore, has a dual application. The liberties themselves, *i.e.*, speech, press, are broadly and literally construed. In addition, the prohibition on Congress stated in terms of ". . . no law. . . ." is similarly given unequivocal interpretative effect. In general usage the notion of absolutism is used to describe the negative sweep of the first amendment more than the literal definition of the protected liberties. In the text discussion which has preceded and which follows, however, the absolute literalism of Justice Black is treated as having equal force for both applications. *See generally*, Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960).

1. PRIVATELY INJURIOUS EXPRESSIONS

It should be immediately apparent that major definitional problems are presented by the category of political expressions which may be said to inflict private injury. Some of them, like the private/public, political/non-political, distinctions, are concededly beyond accurate definition. Others, such as identifying the types of political expression which may fall within this category, are only slightly less difficult. As a result, here and elsewhere, it will be the practice to avoid these potentially interminable difficulties by selecting illustrations from actual cases which seem to fall within the general outlines of each category.

Accordingly, it would seem appropriate to consider the recent libel cases in this category, for the interest there urged as a factor to be weighed against the interest in publishing harmful statements is that of securing the object of the remark from its injurious impact. The paradigm is *New York Times v. Sullivan*.[102] In weighing the interests in that case, a far more protectively minded bench than those we will subsequently examine determined that the interests of society in assuring intelligent self-government require that a conditional privilege be afforded to expressions critical of the conduct of public officials, despite demonstrable legal injury inflicted upon the object of the alleged libelous expressions. For the Court, the extent of the protection to be afforded was determined by a balancing accommodation of the conflicting interests, and the balance was struck by qualifying the privilege with a test of "malice." Although the decision represented an expansion of previous protection afforded in this area, Justice Black was not satisfied. True to his absolutist label he wrote, "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."[103] It is a position from which he has continued to operate throughout the subsequent libel cases.[104] In one sense, by expanding markedly the application of the rule to "public affairs" as well as officials, the Court has extended its view of the scope of the public interest, but it has as yet not shown itself willing to make the privilege an absolute one.

Other than the cases involving demonstrable conduct on or near private property (*e.g.*, picketing, sit-ins, door-to-door solicitation), which are, for explained reasons, treated separately, the only other cases in which public injury is the interest balanced against the interest of expression have instead turned on the presence or absence of any public interest which need be weighed against the private injury. The *Chaplinsky* categories, *supra*, afford the best illustration. There, it will be recalled, the

102. 376 U.S. 254 (1964).

103. *Id.* at 297.

104. Indeed, in both Rosenblatt v. Baer, 383 U.S. 75, 95 (1966) and Time, Inc. v. Hill, 385 U.S. 374, 398 (1967), he reviewed his insistence on the absolute, unconditional protection he feels required by both the language and object of the First Amendment.

enumerated categories of expression were held totally outside the constitution's protections, not because of any balance struck, but because the Court recognized no societal interest in such expressions to balance against their injurious effect.

In this sense what the *Chaplinsky* case demonstrates is that the balancing approach is itself dependent upon definitional judgments, albeit definitions of interests rather than of constitutional phraseology. The lesson is not lost on Justice Black, for it is precisely that aspect of the balancing approach against which he directs the great bulk of his criticism. Thus when I suggested previously that he might dissent from *Chaplinsky* were it presented to him today, that was a conclusion principally predicated upon his since-developed conviction that the Court is not to be trusted with these most precarious tasks of definitions. To rephrase the taxation maxim, he sees in the power to define the power to destroy.

And yet there are differences in defining interests and weighing them, as compared to defining the liberties themselves, and those differences are reflected in some limited qualification of Black's antipathy to this aspect of the Court's methodology. Thus, it may be observed, he has not suggested that all libel law be deemed per se unconstitutional, but only as that body of law which relates to the discussion of "public affairs" despite the poignant definitional problems of the public/private variety. Similarly, he might well assent to the *Chaplinsky* exception for "fighting words," but the important understanding is that whether he would do so would probably be determined by his willingness to trust the Court to determine when and where there was an absence of any "social value." Fittingly, this understanding serves as an appropriate introduction into the second category of cases.

2. PUBLICLY OFFENSIVE EXPRESSIONS

We here consider a second category of claims which have been urged as justifications for limiting the degree of protection afforded political expression. Two comments seem suggested by the label assigned to this category. First, the fact that the interests urged in support of restraint are "public" distinguishes this category, if only by degree, from the first. Second, the category is described in terms of "offensiveness" because the word was thought to aptly subsume all of the purported public interests which may support restraint short of the interest in preserving order (which is the category examined under the next heading). Having tendered these explanations, it seems best to begin discussion by inquiry into the nature of the interests which *are* included in this category.

The word offensive is perhaps too mild to accurately convey the emotional context which so frequently accompanies, if not generates,

the plea for restraints upon expression. It is most typically the true believer who is found advocating the suppression of thoughts he deems subversive, the indignant mothers who press for the imposition of their morality, the incensed minority group who would outlaw offensive references to their number. These are the champions and the temperaments which have most often forced the Court to determine the extent to which public sentiment can be allowed to enlist official support for the promotion or preservation of some ideas at the expense of others. Whatever the Court's approach, Justice Black has a ready and unwavering response for all such pleas. Whether the offending expression produces annoyance or great indignation, whether it engenders mere dislike or deep hatred, whether the opposition to it be from a few or the view of many, no interest of this nature can justify the slightest dimunition of the absolute protection commanded by the language of the first amendment.[105] It is only actual disturbance of public order triggered by the expression, not the response of the audience that marks the line for Justice Black.

This was not always the view taken by Mr. Justice Black. In the early years of his tenure on the Court he was willing, for instance, to uphold the power of the government to condition its employment upon the political views of the applicant.[106] Yet he has since made it more than clear that no such device nor any other restraint can pass muster under his present view of the requirements of a democratic society.[107] He has reached this position as a consequence of at least three factors.

One factor, undoubtedly rendered even more compelling as a result of his experiences during the McCarthy era, is his ever-present prejudice against entrusting the Court with any unnecessary latitude in the first amendment area. So much has already been said about the force of this prejudice in the development of his approach to other questions that the point will not be belabored further. Nor does it seem necessary to spend more than a few sentences in an effort to fix the likely thrust of this prejudice in cases in which the Court itself phrases the issue in terms of the *degree* of protection. Unless the response to that issue is absolute, the liberty of expression, which he has characterized as assuring the "life-giving and life-preserving qualities"[108] essential to our form of government, are dependent upon nothing more or less than the inclination and capacity of five Justices to resist the moods of intolerance and emotion which so typically serve as the setting for the cases. In light of the Court's performance, he reads this alternative as requiring the nation "to

105. Thus in Braden v. United States, 365 U.S. 431, 442 (1961), he declared, "Liberty, to be secure for any, must be secure for all—even for the most miserable merchants of hatred and unpopular ideas."

106. Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938).

107. Weiman v. Updegraff, 344 U.S. 183 (1952); Adler v. Bd. of Education, 342 U.S. 485 (1952); *cf.*, United Public Workers v. Mitchell, 330 U.S. 75 (1947).

108. Braden, *supra* note 104, at 444.

sit complacently by while those freedoms are being destroyed by sophistry and dialectics."[109]

The substance of this part of Mr. Justice Black's objection was revealed in a blistering dissent he wrote in response to a Frankfurter opinion which upheld a criminal libel statute under first amendment attack.

> We are told that freedom of petition and discussion are in no danger "while this Court sits." This case raises considerable doubt. Since those who peacefully petition for changes in the law are not to be protected "while this Court sits," who is? I do not agree that the Constitution leaves freedom of petition, assembly, speech, press or worship at the mercy of a case-by-case, day-by-day majority of this Court. I had supposed that our people could rely for their freedom on the Constitution's commands, rather than on the grace of this Court on an individual basis.[110]

The *Beauharnais* dissent introduces with equal persuasion, the other factors which have led Mr. Black to reject the balancing approach. I refer to what Black regards as the perversion of interest identification and weighing as manifested by the Frankfurter opinion. In rejecting the approach because of its inherent susceptibility to these tragically debilitating perversions, he began by explaining his own view:

> I think that the First Amendment, with the Fourteenth, "absolutely" forbids such laws without any "ifs" or "buts" or "whereases." Whatever the danger, if any, in such public discussions, it is a danger the Founders deemed outweighed by the danger incident to the stifling of thought and speech. The Court does not act on this view of the Founders. It calculates what is deemed to be the danger of public discussion, holds the scales are tipped on the side of state suppression, and upholds state censorship. This method of decision offers little protection to First Amendment liberties "while this Court sits."[111]

It is this total disagreement with the definition and weighing of the interests, (in addition to his instinctive opposition to the consequence of dependency upon the humans who populate the Court it engenders), which has confirmed his opposition to the balancing technique. It is a disagreement regarding the weight to be given on both sides of the balance. The point is often made in the opinions in which, having stated his absolutist response to questions of degree, he goes on to demonstrate how he would balance the interests were such a course open to him.

In effect he would both define and weigh the interests to be balanced

109. *Id.*
110. Beauharnais v. Illinois, 343 U.S. 250, 274-275 (1952).
111. *Id.* at 275.

in a fashion strikingly different from that usually employed by the Court. When an individual's first amendment freedoms are infringed upon by some action, Justice Black would define the first amendment interest in terms of society, not the individual.[112] Where the opposing social interest is hatred of an idea, or disgust with it, or fear of its polluting potential (or any other reaction to its offensiveness), he so thoroughly discounts the interest as to inevitably find the balance struck in favor of absolute freedom of expression. Indeed, it is not surprising to find him pointing out the presence of important first amendment interest in the very quality which so often leads to the offense—the prodding, provoking, disturbing effect of an idea which fails to conform to the accepted notions of the day.

In a sentence, then, it is Mr. Justice Black's position that, regardless of the depth of its intensity or the breadth of its consensus, no interest justified in terms of the offensiveness of an idea or expression can ever outweigh the interest which a democratic society has in preserving unqualified freedom in the market-place-of-ideas.

3. PUBLIC ORDER AND POLITICAL FREEDOM

The final, and easily the most troublesome category, at least from Justice Black's standpoint, consists of claims that the public interest in preserving order should, on balance, result in some limiting of political expression. Indeed, the claims do present him with a conflict between his great fear of judicially administered limitation on discussion and his admitted conclusion that government has a duty to preserve peace and order.[113] But it is not a conflict that he would solve by choosing one interest over the other or by balancing. Instead he has developed an alternative set of tools designed to reach an accommodation between order and expression while also permitting as little judicial latitude as is possible.[114]

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112. Konigsberg v. State Bar, 366 U.S. 36, 73 (1961):

> The interest in free association at stake here is not merely the personal interest of the petitioner . . . It is the interest of all the people in having a society in which no one is intimidated with respect to his beliefs or associations.

113. "[T]he preservation of peace and order is one of the first duties of government." Milkwagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 317 (1941).

114. The gist of his objection to the weighing test was set forth only recently in his separate opinion in Time, Inc. v. Hill, 385 U.S. 374, 399-400 (1967):

> Some of us have pointed out from time to time that the First Amendment freedoms could not possibly live with the adoption of that Constitution-ignoring-and-destroying technique, when there are, as here, palpable penalties imposed on speech or press specifically because of the views that are spoken or printed. The prohibitions of the Constitution were written to prohibit certain specific things, and one of the specific things prohibited is a law which abridges freedom of the press. That freedom was written into the Constitution and that Constitution is or should be binding on judges as well as other public officers. The "weighing" doctrine plainly encourages and actually invites judges to choose for themselves between conflicting values, even where, as in the First Amendment, the Founders made a choice of values, one of which is a free press. Though the Constitution requires that judges swear to obey and enforce it, it is not altogether strange that

Mr. Justice Black begins his approach by reiterating his conviction that society has no legitimate interest of any degree sufficient to justify repressing ideas as ideas. Law and order are not disrupted by ideas, but by conduct. Hence his attempt to accomodate the two great values of political expression and the preservation of order is phrased in terms of the distinction between ideas and their expression on the one hand, and conduct and its disruptive effect on the other. Yet the distinction is not always a clear one and would seem to warrant some development.

There are at least three difficult categories of overlap which complicate the speech/action dichotomy urged by Justice Black. One consists of the cases in which the speaker expresses disliked ideas, which thereby invoke violent response on the part of the listeners and endanger both the speaker and public order. A contemporary example of this category is offered by the recent speaking tours of Governor Wallace. A second, often closely related category, is that of speech which is as much, if not more, conduct than it is speech. The notorious hypothetical false shout of "Fire!" in the theatre is the most graphic illustration of this type of problem. Still another problem for the dichotomy are the cases of demonstrable conduct, in which action is used to serve the function of speech. Sit-in's and draft card burning's are examples of this category.

The cases presenting these difficult problems arise when the government, in the name of preserving peace and order, enacts laws or administers regulations which have the effect of limiting the freedom of expression. Mr. Black has an interesting approach to these problems aimed at allowing reasonable general regulations and still protecting speech. If, either as written or applied, the regulation tends to turn on the content of the expression, he calls it a "direct" infringement on freedom of expression and strikes it down as an outright abridgment of speech without concerning himself with the public order considerations. Conversely, if the law is a regulation applied even-handedly, without regard for the content of the expression, he will proceed to consider it in terms of the interest in public order. If we integrate this direct/indirect approach with the categories of difficulty for the speech/action distinction, we can see its effect.

Where the speech only constitutes a threat to the public order because the audience dislikes it, Mr. Black insists that the thrust of an interest in preserving the peace is to penalize the disruptive conduct in the audience. For to do otherwise would allow audiences to effect "direct" abridgments in the name of law and order by themselves provoking disturbance of law and order.[115] Moreover, because the speaker

all judges are not always dead set against constitutional interpretations that expand their powers, and that when power is once claimed by some, others are loath to give it up.

115. *See, e.g.*, the description of direct in Konigsberg v. State Bar, 366 U.S. 36, 71 (1961), as aimed at "control of the content of speech."

is only speaking, not acting, there is no basis to subject him to other than the indirect incidental restraints of time and place regulation.

Where, however, the speech is action itself, either by triggering action or by using acts as a means of expression, it is permissable to regulate it so long as the regulation is of conduct and not of the idea content. The situation is essentially the same in the category of demonstrable conduct except that the usual substance of the demonstration is such that Black sees more potential application of indirect regulation than with the more verbal mediums of expression.[116]

It is important to explain how Black's approach differs from those who balance the interests. There are two major points of distinction. First, by limiting the balancing process to conduct as opposed to speech, Black exempts vast categories of expression from any balancing at all. Second, even when he balances, the direct/indirect analysis enables him to focus on the critical considerations of selective animus which truly lie at the heart of the first amendment problems.[117] In these ways he defines the extent of its protection.

C. *Defining the Prohibited Abridgements*

Our attention is now directed toward discovering the identity of the actors and actions against which Justice Black would have the Court

116. In Cox. v. Louisiana, 379 (U.S. 537, 577 (1965), he wrote:

> A state statute . . . regulating *conduct*—patroling and marching—as distinguished from *speech*, would in my judgment be constitutional, subject only to the condition that if such a law had the effect of indirectly impinging on freedom of speech, press or religion, it would be unconstitutional if under the circumstances it appeared that the State's interest in suppressing the conduct was not sufficient to outweigh the individual's interest in engaging in conduct closely involving his First Amendment freedoms.

117. The role of animus is most clearly apparent in the civil rights demonstration suits. Black has had particular difficulty with these cases, and often has departed from his liberal colleagues as regards their treatment of them. He was especially upset by their decision to retroactively apply federal legislation in order to reverse convictions for sit-ins. Hamm v. Rock Hill, 379 U.S. 306 (1964). Justice Black is motivated here by an uneasiness with the "modern" type of demonstration, especially with regard to its implications for private parties to be left alone, for government's duty to preserve order, and for the people and the government to protect against interference with the orderly administration of public responsibilities. It was not surprising, therefore: to find him dissenting in Bell v. Maryland, 378 U.S. 226 (1964); or to find him pleading for further clarification by the court regarding the desire of "many earnest, honest, good people in this Nation . . . to know exactly how far they have a constitutional right to go on in using the public streets to advocate causes they consider just" in Cameron v. Johnson, 381 U.S. 741, 742 (1965); or in this last term when he more clearly extended his interests to private property as well, in a dissent in Amalgamated Food Imp. U. Local 590 v. Logan Valley Plaza, —U.S.—, —, 88 S. Ct. 1601 1614 (1968): "I believe that whether this Court likes it or not the constitution recognizes and supports the concept of private ownership of property. . . . This means to me that there is no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets." Finally, it was not surprising to find him in Adderly v. Florida, 385 U.S. 39 (1967) writing the Court's first opinion in a long while sustaining convictions of such demonstrators for mischievous trespass on state jail grounds, conditioning the holding, of course, on the "even-handed enforcement" of the law without regard to the content of the expression.

defend the protected liberties. An appropriate starting point is the notion of "incorporation," easily the most distinctive of Justice Black's contributions to thought in this area. Apparently the incorporation doctrine was not a notion the Justice brought with him when he first took his place upon the bench. Black was nearly ten years into his tenure before he initially declared his conviction, in *Adamson v. California*,[118] that the first section of the fourteenth amendment was designed by its authors to incorporate all of the provisions of the Bill of Rights, and thereby make all of those assurances available as restraints upon the exercise of state power as they had served as limitations upon the power of the federal government.[119] This proposition was an alternative and a reaction to the prevailing interpretation afforded the fourteenth amendment which consisted of piecemeal selective incorporation of certain of the rights. It is in contrasting the incorporation theory with the existing interpretative regime that its significance as a contribution to constitutional thought is most clearly demonstrated.

At the outset at least, the incorporation theory afforded far more protection than the more general due process view in force at the time. When first announced by Justice Black, only the just compensation principle and the general outlines of the first amendment guarantees had been given effect under the prevailing rubric of fundamental rights essential to the concept of "ordered liberty."[120] Black's theory would have immediately made all of the provisions applicable. A second major innovation flowing from incorporation concerns the standards of their judicial enforcement. Under the fundamental liberty rubric, the standards could be different from those employed in cases of federal action. Generally this meant greater latitude for the states and thus less protection of the liberties. Under Black's approach, the states would be required to comply with the same degree of protection that was accorded the rights in the federal arena.

It is interesting to trace the subsequent support afforded the incorporation theory. In the years since its enunciation in *Adamson*, the theory has commanded the endorsement of many of the justices who have sat upon the Court, but has never commanded a majority in any case. Nonetheless, its influence may be measured by other standards, the most telling of which has been the steady progress toward the goals of incorporation by majorities which continue to adhere to the selective approach. As of this writing, almost all of the provisions of the Bill of Rights have been made applicable to the states, and the bulk of them have been applied with equal force under uniform national standards.[121]

118. 332 U.S. 46 (1947).

119. For a critique of his historical analysis see, Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949).

120. Palko v. Connecticut, 302 U.S. 319 (1937).

121. The present status of incorporation was developed by Justice Goldberg in Pointer v. Texas, 380 U.S. 400, 410-414 (1965).

In short, while Justice Black has yet to win the battle of incorporation, it appears that he is well along the way toward triumph in the war.

Whichever reading of the Fourteenth Amendment's content prevails, the incorporation theory, and the more flexible selective absorption policy raise additional issues regarding the identity of the action and actors against which our liberties are to be protected. Unlike the First Amendment, whose prohibitions are directed only at Congress, the Fourteenth is phrased in terms of the "state." This contrasting thrust has presented the Court with a critical task of definition.

At the outset, one might have expected Justice Black, driven by his evidenced prejudice for preserving the realm of permissible state activity and equally motivated by his fear of expandable judicial standards, to insist upon a narrow, literal construction of the term "state." Indeed, an interpretation limiting the reach of the fourteenth amendment to action of the state legislature would have been consistent with the equality of federal/state treatment demanded by his incorporation doctrine. Yet such constructions have never been espoused by Mr. Justice Black. Instead he can be placed in the midst of those endorsing an expansive, indeed a flexible, construction of the term "state" which has thus been transformed into the concept of "state action."[122] Justice Black has generally assented to the line of cases which now requires that all branches of the states' official complex, as well as many quasi-official and officially "colored" activities, conform their efforts to the principles and prohibitions of our fundamental liberties. Indeed, most of the limits he has drawn in the state action cases seem designed to preserve viable latitude for the states and can be confined to infrequent instances in which he has insisted upon greater proof of official animus rather than by narrowing the construction of state action.[123]

On the whole, Justice Black has sought to expand the protective reach of the libertarian negatives through a rather organic and hence flexible approach to the state action question. Perhaps his most eloquent effort in this area came in the company-town case of *Marsh v. Alabama*.[124] In many ways, his opinion in that case explains all that need be explained relating to his reasons for approving the broad construction of the term "state." In rejecting the contention of the town owners that their property rights entitled them to impose restraints upon expression, he chided, "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and con-

122. *See,* for a somewhat slanted but interesting discussion of Justice Black's position on the "state action issue," Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action,* 1965 DUKE L.J. 219.

123. *E.g.,* Bell v. Maryland, 378 U.S. 266 (1964), and the cases he discusses therein. *See also,* Evans v. Newton, 382 U.S. 296 (1966).

124. 326 U.S. 501 (1946).

stitutional rights of those who use it."[125] Yet there was more than a lecture on good conduct involved in *Marsh*; Justice Black saw the interests of democracy involved. To protect that interest, he held the town to be within the ambit of the state action concept, and his opinion tells us why:

> Many people in the United States live in company owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of their community and the nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored.[126]

Justice Black's response in the *Marsh* case is typical of his perspective throughout the entire fourteenth amendment area. Significantly, his methodology contrasts markedly with the approach we have heretofore examined. He does not manifest his characteristic insistence on fixed, objective standards. There is no attempt to apply literalism; there are no expressions of frustration or despair with judicial expansion of the plain meaning of the term "state" such as he offers in the cases dealing with definitions of the first amendment liberties themselves. Indeed, there seems to be little or no concern with methodology at all.

This is a different Justice Black at work. It seems as though the considerations which led him to resist judicial latitude in all of the areas we have previously discussed somehow no longer are compelling for him when he addresses himself to the challenge of protecting the liberties once they have been defined. Focused upon that somewhat different challenge, Black himself becomes both the proponent and the practitioner of judicial activism.

That the change in the tact is the dividing line for the change in his approach is readily ratified by even a summary overview of his varied efforts to identify and judicially reject both sophisticated and simple minded forms of infringements on political liberty. Whenever he sees real or potential abuse of this kind, he reacts by calling for whatever extension of the protections can be marshalled from the language or implications of constitutional provisions. Thus, the bill of attainder prohibition, rarely considered by his fellow justices as anything than an incongruous antique, is invoked so frequently and emotionally by Justice Black[127] as to suggest myopia on someone's part. Loyalty oaths, once accepted by him as a reasonable exercise of legislative authority, are now the subject of con-

125. *Id.* at 506.

126. *Id.* at 508.

127. Dennis v. United States, 384 U.S. 855 (1966); United States v. Brown, 381 U.S. 431 (1965); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Barenblatt v. United States, 360 U.S. 109 (1959).

tinued attack by the Justice on various constitutional grounds, especially for first amendment reasons.[128] He wages a persistent if somewhat lonely battle against the abuses pregnant in the contempt power.[129] A similar response is invoked whenever the economic status of the citizen is used to influence his choice of associations or beliefs, whether the device employed is tax incentive[130] or job discrimination.[131] However small, however justifiable as mere incidents of one's employment, forced contributions are likewise rejected if the use of the funds could be shown to delimit the freedom to choose which political ideals one wishes to support.[132] Justice Black is frequently found exhorting his brethren to expand the notions of liberty[133] and punishment[134] so as to widen the effective scope of the protections against the abuses of a more sophisticated government in our more interdependent era. Similarly, he is to be found employing the maxims of both strict construction[135] and broad overview[136] of legislative and administrative regimes in order to first expose and thereafter invalidate those which are predicated on ideological discrimination. Whatever the device, however direct or indirect the method, however blatant or subtle the camouflage, Justice Black raises his hypersensitive antennae and levels the abridgements with a sweep of his protective pen.

Considered as isolated expressions relating to less commonly invoked aspects of constitutional law, these efforts may seem insignificant to the more comprehensive analysis of Justice Black's philosophy. Collected and related to the interests he seeks to protect, however, they suggest considerations of substantial significance. Professor Reich suggests that these efforts, as indications of a heightened sensitivity to abuse in all forms, qualifies Justice Black as the promoter of a "living constitution."[137] While I would hesitate to join in that sweeping characterization, it does seem appropriate to reach some understanding of the forces which lead Black to manifest and urge this sensitivity.

The question is really one of perspective. And we need not guess

128. *E.g.*, Wieman v. Updegraff, 344 U.S. 183 (1952); Adler v. Bd. of Education, 342 U.S. 485 (1952).

129. *E.g.*, Green v. United States, 356 U.S. 165 (1958); Bridges v. California, 314 U.S. 252 (1941).

130. Speiser v. Randall, 357 U.S. 513 (1958).

131. *See Weiman* and *Adler, supra* note 127; Barsky v. Bd. of Regents, 347 U.S. 442 (1954).

132. Lathrop v. Donhue, 367 U.S. 820 (1961); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

133. *E.g.*, In re Anastaplo, 366 U.S. 82 (1961); Barsky v. Bd. of Regents, 347 U.S. 442 (1954); Shaughnessy v. United States, 345 U.S. 206 (1953).

134. *E.g.*, Peters v. Hobby, 349 U.S. 331 (1955); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

135. *E.g.*, Zemel v. Rusk, 381 U.S. 1 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964).

136. *E.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

137. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963).

about the forces which impel Black to that perspective for he has gone to great length to explain them. Responding to what he considered to be the potentially debilitating effect of Frankfurter's penchant for judicial craftsmanship, he explained his perspective regarding the provisions of the Bill of Rights[138] in these terms:

> I cannot consider the Bill of Rights to be an outworn 18th Century "straitjacket" .... Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same *kind* of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgement the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its *basic purposes are conscientiously interpreted, enforced, and respected, so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes....*
>
> I would follow what I believe was the original purpose of the First and Fourteenth Amendments—to extend to all the people of the nation the complete protection of the Bill of Rights.[139]

And if this belief has led him to abandon, in this limited area, his distaste for judicial subjectivity, it is a price which he has shown himself more than willing to pay. For it is by doing so that he seeks to most fully assure the continued commitment of our people to the democratic premise upon which our nation was built.

VI. CLOSING OBSERVATIONS

It is hoped that the discussion which has preceded has made it unnecessary to tender an extended summation of Justice Black's approach to these three crucial issues of American constitutional democracy. In each examined area, his commitment to impose the most viable construction of that system is clearly the compelling prejudice which shapes his reasoning. In each, the results he reaches and the methods he employs combine with the others to provide assurance that democracy in America will have an opportunity to mature into the system promised by our Constitution.

By rejecting the right of the judiciary to restrict the scope of our legislatures' capacity to effect the will of the people, he has forced Americans to become more deeply involved in the task of self-government. By removing the power of some groups to preclude others from equal participation in electing our legislative representatives, he has assured

138. Mr. Justice Black has explained that the phrase "Bill of Rights" is a mere shorthand expression which properly includes all liberties held by the people as against the power of government. Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960).

139. Adamson v. California, 332 U.S. 46, 89 (1947) (Emphasis added).

Americans that their laws will in fact be manifestations of popular rule. And by resisting every threat of infringement upon the viability of the political forum, he has further assured each citizen of the right to determine for himself the wisdom of the policies by which we shall live.

It has been said that Justice Black has failed to demonstrate the qualities of a great jurist.[140] By the traditional lawyer's standard of "judicial craftsmanship," this is probably true. And yet it seems altogether plausible that Mr. Justice Black would just as well have it so. For his consuming motivation has not been to master the intricacies of jurisprudence or of the judicial system, but to preserve and fulfill the promise of our political system. And measured by that standard, it is submitted that he will forever occupy a place of reverence in the hearts of those who agree with him, that American constitutional democracy represents "the last best hope of earth."

140. W. MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT ON THE COURT (2d ed. 1966).