BLACK VERSUS BLACK: DIVISION WITHIN A JUDGE

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BLACK VERSUS BLACK: DIVISION WITHIN A JUDGE

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By

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CHAPTER I

INTRODUCTION

Beginning in the fall of 1964, readers of popular news publications could find sporadic mention of "the new jurisprudence of Justice Black," "a more conservative philosophy," "the end of the Warren Court."¹ In essence these undocumented articles cited Justice Hugo L. Black's recent practice of voting with Supreme Court conservatives Harlan, White, Stewart, and Clark² against the Court liberals to create an opposition to and sometimes a defeat of liberal issues. Some of Black's recent opinions discussed by U. S. News and World Report in April, 1967, were a dissent from permitting picketers to crowd a courthouse, a dissent from approving a Negro sit-in at a library, a majority conviction of Florida demonstrators, a dissent from striking down the


²Lazarus, op. cit., p. 7.
Virginia poll tax, a five-to-four decision permitting the Georgia legislature to select the contested governorship, a majority decision permitting a search without a warrant.\(^3\)

The *Wall Street Journal* makes this comment on Justice Black:

"If Justice Black remains on the Court for another 25 years," muses one legal scholar, "he might well become the Court's conservative leader." A parallel could be drawn with the late Justice Frankfurter, who came in liberal and departed a conservative.\(^4\)

And finally, *The New Leader* offers this suggestion:

Black's apostasy must be understood for the unique phenomenon that it is, however. His change of heart reflects neither a crude sense that the pendulum has swung too far, as some commentators have suggested; nor a totally uncharacteristic deference for public opinion.

As a purely intellectual matter, Black's new jurisprudence has its own stamp.\(^5\)

Unfortunately, popular news comment has not been matched by scholarly investigation of "the new jurisprudence of Justice Black." Few scholars have questioned reporters' evaluations of Hugo Black to determine if the Supreme Court's oldest and longest-serving member has altered his judicial philosophy and if so, in what direction. Since the fall of 1965, only three law journals have given attention to the possibility of change in Justice Black's

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\(^3\)"A Shift in the Supreme Court," *op. cit.*, p. 68.

\(^4\)Graham, *op. cit*.

opinions. The first,\textsuperscript{6} which appeared in 1965, considers the various labels which have been put on Black, such as "absolutist," "libertarian," "activist," and concludes that because of several recent decisions, particularly Cox v. Louisiana\textsuperscript{7} and Griswold v. Connecticut,\textsuperscript{8} these labels are inadequate to characterize Justice Black. Author Strickland's reasoning is that Black is a Madisonian, one who believes that every part of the Constitution should be upheld. Therefore, any atypical opinions from Black are simply indications of his complexity.

Two other articles appeared in the UCLA Law Review in January, 1967, in honor of Black's thirtieth anniversary on the United States Supreme Court and noted the justice's decisions in the civil rights demonstration cases. One article\textsuperscript{9} concerns only Black's approach to the demonstrators and sees no problem in the justice's vote, first in favor of the sit-ins and then consistently against them, although the nature of the demonstrations has not changed.\textsuperscript{10} The

\begin{itemize}
\item \textsuperscript{6}Stephen P. Strickland, "Mr. Justice Black: A Reappraisal," \textit{Federal Bar Journal}, XXV (Fall, 1965), 365-382.
\item \textsuperscript{7}Cox v. Louisiana, 379 U. S., 536 (1965).
\item \textsuperscript{8}Griswold v. Connecticut, 381 U. S., 479 (1965).
\item \textsuperscript{10}All Negro civil rights demonstrations thus far considered by the Court have been peaceful marches or sit-ins in protest of racially discriminatory practices.
\end{itemize}
author concludes that Black's vote against the demonstrations is based on the fact that the conduct involved is subject to state regulation.

The second article is very broad in scope; it concerns Justice Black's whole philosophy of the First Amendment. The author outlines the major issues which have arisen as First-Amendment questions and indicates that Black has upheld invariably First-Amendment claims, until the recent issue of the demonstrations in behalf of civil rights. The author calls Black's refusal to extend First-Amendment protection to demonstrators a "puzzle," but he makes no attempt to solve it. That will be the task of this thesis.

As the news reports indicate, Justice Black's generally "liberal" vote has seemingly shifted to a more "conservative" one in other areas besides the First Amendment. However, for several reasons this thesis will be limited only to his possible shift in that area and will concentrate on the civil-rights movement. First, there has been a continual line of Negro demonstration cases, beginning in 1961, and extending to the 1966 term of Court. Data within this area are plentiful and examinable. In contrast, other reported shifts, such as Black's dissent from the Virginia poll tax

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12Ibid., p. 449.
invalidation\textsuperscript{13} or his vote to permit the Georgia legislature to select the contested governorship\textsuperscript{14} are unusual cases without direct precedent. There is no way to contrast Black's earlier vote with voters on these specific issues in order to detect a change, whereas in the demonstration cases a mere quantitative examination would reveal that for a time he voted to uphold civil-rights demonstrations and then he later voted to convict the demonstrators.

But more important than its looking at the shift from approving to disapproving the sit-ins, this thesis will examine the possible shift in Black's attitude toward the First Amendment. Probably more than any other Supreme Court justice, Hugo L. Black has vocalized the "absoluteness" and the "preferred position" of the First Amendment. He has achieved more than most judges ever do in their service on the Court--he has developed a philosophy of decision-making which in spirit, if not in fact, he has put to work during most of his thirty years on the Court. He has rarely been able to persuade others to adopt it, with perhaps only Justice William Douglas ever becoming as thorough a devotee of the absolutist philosophy; but for Justice Black, the absoluteness of the First Amendment has been invaluable in decision-making. It has become his creed and trademark.


\textsuperscript{14}{\textit{Fonten v. Morris}, 27 S. Ct., 446 (1966).}
There is another reason for exploring Justice Black's judicial philosophy. Most people would agree that Justice Black is the most outstanding member of the present Court. Some might add "in inconsistency," and others would add "in brilliance"; however, Black is the oldest member of the Court and has served the longest. In addition, he has written the most Court opinions and has long been called the "liberal leader" of the United States Supreme Court. As he nears the end of his judicial career, it seems a valuable exercise to look at the most recent First-Amendment issue that has presented itself to the Court to determine whether Black has continued to be "the most vigorous defender of civil liberties to sit upon the Supreme Court" and "our First Amendment Fundamentalist," both of which tags he has worn gladly, or whether he has now abandoned the Bill of Rights and the First Amendment in his last years on the Court.

There is a final reason for looking closely at the issue of the demonstrations. For the past decade various forms of demonstrations have been the most successful exercise of First-Amendment privilege that the Negro has had to


express protest against practices of racial discrimination. Until 1963, both the Supreme Court and its "liberal leader" Hugo Black approved this method of protest. However, in that year Black changed his mind about the legality of Negro civil-rights demonstrations and began writing strong dis-sents to the Court's continued approval. By 1966, Black had persuaded enough of his colleagues on the Court to rule against the demonstrations that Negro protest in this fashion was denied legality. The closing of this avenue to the Negro in his attempt to gain racial equality and Black's role in that development serve as valuable areas for study in mid-twentieth-century race relations.

Methodology for this thesis will be Supreme Court opinion analysis, the device used by other students of Black, as well as by students of other justices.\footnote{Four books have been written about Jugo L. Black. All employ opinion analysis to relate Black's judicial attitudes, although the Frank and Williams books are chiefly biographical. John P. Frank, \textit{Mr. Justice Black: The Man and His Opinions} (New York, 1949); Wallace Mendelson, \textit{Justices Black and Frankfurter: Conflict in the Court} (Chicago, 1961); Stephen Strickland, editor, \textit{Hugo Black and the Supreme Court} (Indianapolis, 1967); Charlotte Williams, \textit{Hugo L. Black: A Study in the Judicial Process} (Baltimore, 1950).} \footnote{Similar treatment of other judges is given by other authors; see Samuel J. Konefsky, \textit{The Legacy of Holmes and Brandeis. A Study in the Influence of Ideas} (New York, 1956); Alpheus T. Mason, \textit{Harlan Fiske Stone, Pillar of Law} (New York, 1956); J. F. Paschal, \textit{Mr. Justice Sutherland: A Man against the State} (Princeton, 1951); Merlo J. Pusey, Charles Evans Hughes (New York, 1951); Helen S. Thomas, \textit{Felix Frankfurter: Scholar on the Bench} (Baltimore, 1960).}
Justice Black's opinions have also been successfully handled quantitatively; however, in these publications Black's attitudes have been only a small concern of the total design. These books have attempted to examine over a significant period of time on many issues the judicial behavior of many justices, only one of whom is Hugo Black. Because the scope of these books is broad, they are successful in the use of quantitative analysis. But for a scope as narrow as one judge's attitude toward a specific issue which has existed over only a six-year period, quantitative analysis would be a useless method. Instead a careful examination of case opinions found in the United States Reports will be used.

Questions to be answered will be these: (1) has Black abandoned his philosophy of the "absoluteness" of the First Amendment which has long been his basis of decision-making in problems involving the First Amendment, and (2) has he ceased to maintain his strong position for individual liberties?

Chapter II will lay the framework of Black's libertarian and absolutist philosophy as he has spoken before the advent of the demonstrators. Chapter III will examine his views of the demonstrators and his efforts at consistency, and Chapter IV will offer conclusions as to that consistency.

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CHAPTER II

THE "ABSOLUTIST" VIEWS OF JUSTICE BLACK

Before it is possible to determine whether a judge has "shifted" in his judicial behavior, it is necessary to examine his attitudes of the past and then compare those previous views to present ones. The subject of this chapter will be the "old" attitudes of Justice Black, as he has verbalized them. As stated in the introduction, the primary tool of determining attitudes will be Court opinions, for the obvious reason that this is the place for judicial attitudes to be exposed. Judges are rarely prolific writers off the bench.¹

Nevertheless, Hugo Black has produced some non-opinion material which is useful in understanding his philosophy of the Bill of Rights and the First Amendment. In a public lecture² and an interview³ Black goes further to synthesize his views on individual liberties than he has in any of his Court opinions. Of course, those two off-bench.

¹However, consider the credits of William O. Douglas.


pronouncements cannot stand alone to expound his attitudes; nevertheless, they create a valuable beginning to be generously supplemented by judicial opinions.

Black introduces "The Bill of Rights" with the definition that a bill of rights is a document setting forth the liberties of the people. It intends to bar government from certain acts, as passing bills of attainder or requiring religious tests for office, as well as doing such things as are forbidden in the first ten amendments. For purposes of this discussion he confines his consideration to limits on the national government. There are several views as to the extent which Congress should heed the Bill of Rights; among the views that Black lists are these:⁴ (1) The Bill of Rights serves as a general guideline for congressional limitation, but there is nothing absolute about it. (2) Particularly, Congress can ignore the Bill of Rights when free exercise of a listed right creates a clear and present danger of a substantive evil that Congress has authority to prevent. (3) When an individual right weighed against the public interest serves to harm the group, Congress can ignore the individual right entirely. (4) There are certain absolutes in the Constitution which cannot be abridged whatsoever by Congress. These absolutes create the limits that Justice Black observes in his judicial

approach: "It is my belief that there are 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolute.'"\textsuperscript{5}

To prove the correctness of his view Black goes into a historical discussion of the reasons for placing limits on the United States Government when it was created. He looks at the examples of British Puritan John Lilburne and his struggle for due process in the courts, and Roger Williams, who suffered religious persecution.\textsuperscript{6} The Framers had familiarity with and hatred for this history. In addition, Black considers our unique governmental features which reflect limits: (1) the Constitution, a single document, (2) constitutional supremacy over Congress, (3) a functional system of separation of powers and checks and balances, and (4) an independent judiciary.\textsuperscript{7} For these reasons—the familiarity of the Framers with governmental tyranny and the unique structure of the new United States Government, absolute limitations were created by the Bill of Rights on actions of the national government.

Black next examines the "precise" language of the Bill of Rights. He looks at each amendment and points out the

\textsuperscript{5}Ibid., p. 867.
\textsuperscript{6}Ibid., pp. 867-869.
\textsuperscript{7}Ibid., pp. 869-870.
absoluteness of many chosen words. This is his strongest argument in support of prohibitions on governmental deprival of individual rights. The natural meaning of the Framers is evident merely by literal words themselves, e.g., in Amendment I, "Congress shall make no law . . . abridging the freedom of speech"; in Amendment V, "No person shall be . . . deprived of life, liberty, or property without due process of law." As Black reiterates, to his way of thinking the history and language of the Constitution and the Bill of Rights . . . make it plain that one of the primary purposes of the Constitution with its amendments was to withdraw from the Government all power to act in certain areas—whatever the scope of those areas may be.8

The final portion of Black's lecture closely describes an antithetical approach to limiting Congress—the "balancing" approach, which assumes that at times individual rights must not be regarded as absolute and that powers given to Congress can dominate for the good of the majority. For example, the "necessary-and-proper" clause can be used to abridge an individual right, such as right of habeas corpus, freedom from bills of attainder, no deprival of property without just compensation, or freedom of speech. Black's reaction to the balancing justice is horror: "When closely analyzed, the idea that there can be no 'absolute' constitutional guarantees in the Bill of Rights is

8Ibid., pp. 874-875.
frightening to contemplate."9

What happens, one is led to ask, if two individual rights clash? Black answers, "Where conflicting values exist in the field of individual liberties protected by the Constitution, that document settles the conflict, and its policy should not be changed without constitutional amendments by the people."10 This quotation is not taken out of context to simplify. It is in fact the extent of Black's answer concerning how to resolve conflicts within the Bill of Rights. Black does offer an additional clue in conclusion. He calls the First Amendment, "the heart of the Bill of Rights":11

The Framers balanced its freedoms of religion, speech, press, assembly, and petition against the needs of a powerful central government, and decided that in those freedoms lies this nation's only security.12

Black's only proof that "the document settles the conflict" comes in the assertion that free speech is the deadliest enemy of tyranny.13

He speaks in more detail about the absoluteness of the First Amendment in an interview conducted by Edmond Cahn of the New York University Law School. By answering Cahn's

9Ibid., p. 876.
10Ibid., p. 879.
11Ibid., p. 881.
12Ibid.
13Ibid.
questions, Black is partially able to clarify his absolute views of the First Amendment. Cahn begins by asking Black to define his word "absolute," and Black responds by saying that "absolutes" are words, affirmative and negative, written in the Constitution and intended to be taken literally. He has no reason "to challenge the intelligence, integrity, or honesty" of the great authors of the document. But, Cahn asks, what about the necessity of government to protect its security and in that act make reasonable restrictions on freedom of speech as listed in the First Amendment? Black answers that certainly government should protect itself, but the important issue is "how?" Black's "how" would exclude ANY restriction on speech.15

Cahn then lists several kinds of speech which are not always considered by the Court as a whole to be protected by the First Amendment: sensational news reporting that deprives an accused criminal of a fair trial, libel and slander, false shouts of "fire" in a crowded theater, and obscenity. On each of these issues Black responds that the First Amendment creates absolute restriction on curtailing freedoms. Regarding freedom of press versus fair trial: "I want both fair trials and freedom of the press."16 The

15Ibid., p. 554.
16Ibid., p. 556.
jury system checked by the solemn responsibility of the
judge to insure fair verdicts is an equal rival with sensa-
tional press coverage. It is mere assumption that the press
can influence a whole state to deprive an accused criminal
of a fair trial.

Regarding libel, Black looks only at public libel:
historical studies indicate that the Framers intended libel
to be protected by the First Amendment, he reports. Public
libel "is nothing in the world except the prosecution of
people who are on the wrong side politically."17

Regarding "fire" in the crowded theater, Black has this
to say:

Nobody has ever said that the First Amendment gives
people a right to go anywhere in the world and say
anything in the world they want to say. Buying the
theater tickets did not buy the opportunity to make
a speech there. We have a system of property in
this country which is also protected by the Consti-
tution. . . . If a person creates a disorder in a
theater, they would get him there not because of
what he hollered but because he hollered.18

Regarding obscenity, Black informs that obscenity was
forbidden by Roman law after Augustus became Caesar. It
then became obscene to criticize the emperor. He says,

It is not any trouble to establish a classification
so that whatever it is that you do not want said is
within that classification. . . . Without deviation,
without exception, without any ifs, buts, or where-
ases, freedom of speech means that you shall not do

17Ibid., p. 559.

18Ibid., p. 560.
something to people either for the views they have or the views they express.¹⁹

For Justice Black the Bill of Rights constitutes the difference "between a free country and a country that is not free."²⁰ Absolutes are found within the Bill of Rights, and no so-called sophisticated "shock-the-conscience" or "offensive-to-universal-sense-of-decency" standards can substitute.²¹

This latter jump in discussion from the First Amendment to the Bill of Rights is a device that Black has used before, but in reverse. In his lecture, his subject was "the Bill of Rights"; however, conveniently and shrewdly, when he was called upon to decide a conflict within the Bill of Rights, he substituted the First Amendment as his subject to affirm that the First Amendment is the heart of the Bill of Rights. In the interview, as he is about to be pressed into clarifying why the First Amendment has priority over other portions of the Bill of Rights, he shifts to the generalized importance of the Bill of Rights. For him, they are almost synonymous; however, others see the obvious possibility of conflict between the First Amendment and other provisions in the Bill of Rights, for example, the Fifth Amendment, and cannot so easily substitute one for the other. Black himself

¹⁹Ibid., p. 559.
²⁰Ibid., p. 560.
²¹Ibid., p. 562.
recognizes the problem of claimed free speech, shouting in
a theater, versus property, the theater owner's right to
an orderly theater. How does Black decide to elevate one
absolute over another absolute, if the Bill of Rights as a
whole is absolute? But then, has Black said only that the
First Amendment is absolute? Obviously, it will be neces-
sary to look to other sources for clarity of Black's
"absolutist" philosophy. Paradoxically, his lecture and
interview are straightforward and simple, and yet confusing.
Still, in them Black makes three important statements of his
philosophy: (1) There are absolutes within the Bill of
Rights which protect the citizen from acts of government.
(2) The heart of the Bill of Rights is the First Amendment.
(3) The First Amendment offers an absolute protection.

In his Court opinions he reveals a philosophy of greater
complexity than that of his off-bench dicta. In his
opinions he faces squarely the issues that he dodged in the
lecture and interview and develops a rich and persuasive
process of decision-making.

A reading of Justice Black's First-Amendment opinions reveals three major problems which he has solved by a fairly
systematic and consistent process. The first is the problem
of pure exercise of a First-Amendment right by an individual
vis-à-vis the power of government to protect itself and its

22 The two religion clauses of the First Amendment except as they relate to speech are excluded from consideration in this thesis.
citizens in general. The second problem is the mixed exercise of a First-Amendment right with regulatable conduct vis-à-vis the power of government to protect itself and its citizens, and the third problem is pure exercise of a First-Amendment right by an individual vis-à-vis another individual right, in particular the Fifth Amendment's property right. Justice Black's answers to these problems formulate his First-Amendment philosophy.

The first question, does the First Amendment mean that all speech must be unrestricted, irrespective of a governmental need to protect its security and the security of all citizens, has generally been answered by the Supreme Court and by Hugo Black in opposite ways, as illustrated by the number of dissenting opinions he has written in "pure speech" issues. The Supreme Court majority usually has placed five kinds of speech beyond the protection of the First Amendment. These are seditious, obscene, defamatory, contemptuous, and disorderly speech. In case after case the Court majority has ignored First-Amendment claims, while Justice Black has emphatically supported the absolute protection afforded by the First Amendment.

Of the five kinds of "unprotected" speech, sedition has been most consistently punished by the Court. In 1951, the first case came to the Supreme Court testing the Smith

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Act which among other provisions made it a crime to advocate the violent overthrow of the United States Government or to conspire to advocate such overthrow. The Court upheld the Smith Act by a six-to-two vote; Black dissents in vehement terms:

The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids.

Ten years later another test of the Smith Act came to the Supreme Court. This time the Court was asked to speak on the provision of the Smith Act which made it a crime knowingly to be a member of any organization which advocates the forceful overthrow of the United States Government. Again, the Court upheld the Act, and again, Black dissented. In this dissent he repudiates the "balancing test":

This, I think, demonstrates the unlimited breadth and danger of the "balancing test" as it is currently being applied by a majority of this Court. Under that "test," the question in every case in which a First Amendment right is asserted is not whether there has been an abridgment of that right, not whether the abridgment of that right was intentional on the part of the Government, and not whether there is any other way in which the Government could accomplish a lawful aim without an invasion of the constitutionally

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guaranteed rights of the people. It is, rather, simply whether the Government has an interest in abridging the right involved and, if so, whether that interest is of sufficient importance, in the opinion of a majority of this Court, to justify the Government's action in doing so. This doctrine, to say the very least, is capable of being used to justify almost any action Government may wish to take to suppress First Amendment freedoms.27

Still within the area of sedition is the problem of individuals with "past Communist affiliations" and their right of privacy vis-à-vis the government's need for information on current Communist activities. In numerous cases Black and the Court majority have disagreed as to the extent of First-Amendment protection for these individuals. The question of the loyalty oath for state employees was tested and struck down in Wiener v. Updegraff,28 and in a rare concurring opinion, Black emphasizes the danger of loyalty oaths to our free government:

With full knowledge of this danger [speech criticizing government] the Framers rested our First Amendment on the premise that the slightest suppression of thought, speech, press, or public assembly is still more dangerous. This means that individuals are guaranteed an undiluted and unequivocal right to

27 Scales, at p. 262. Also in 1961, the Court upheld the registration requirement for "communist-action organizations" of the Subversive Activities Control Act of 1950, 50 U. S. C., Sec. 781 (1958 edition). Black again dissented; he would reverse this case and "leave the Communists free to advocate their beliefs in proletarian dictatorship publicly and openly among the people of this country with full confidence that the people will remain loyal to any democratic government truly dedicated to freedom and justice." Communist Party v. Subversive Activities Control Board, 367 U. S., 1 (1961), at p. 169.

28 Wiener v. Updegraff, 244 U. S., 183 (1952).
express themselves on questions of current public questions as of right and not on sufferance of legislatures, courts, or any other governmental agencies. It means that courts are without power to appraise and penalize utterances upon their notion that these utterances are dangerous. In my view this uncompromising interpretation of the Bill of Rights is the one that must prevail if its freedoms are to be saved.29

Similar ideas are contained in his Barenblatt30 and Wilkinson31 dissents regarding the tactics of the House Committee on Un-American Activities and in his second Konigsberg32 opinion regarding denial of bar admission for a lawyer who refused to answer questions about his past political affiliations:

The Court, by stating unequivocally that there are no "absolutes" under the First Amendment, necessarily takes the position that even speech that is admittedly protected by the First Amendment is subject to the "balancing test" and that therefore no kind of speech is to be protected if the Government can assert an interest of sufficient weight to induce this Court to uphold its abridgment. In my judgment, such a sweeping denial of the existence of any inalienable right to speak undermines the very foundation upon which the First Amendment, the Bill of Rights, and, indeed, our entire structure of government rests.33

In addition Black would extend the absolute right of the First Amendment not to be punished for speech or

29Wieman, at p. 194.
33Konigsburg, at p. 67.
association to resident aliens:

As previously pointed out, the basis of holding these people in jail is a fear that they may indoctrinate people with Communist beliefs. To put people in jail for fear of their talk seems to me an abridgment of speech in flat violation of the First Amendment. I have to admit, however, that this is a logical application of recent cases watering down constitutional liberty of speech. I also realize that many believe that Communists and "fellow travelers" should not be accorded any of the First Amendment protections. My belief is that we must have freedom of speech, press, and religion for all or we may eventually have it for none. I further believe that the First Amendment grants an absolute right to believe in any governmental system, discuss all governmental affairs, and argue for desired changes in the existing order. This freedom is too dangerous for bad, tyrannical governments to permit. But those who wrote and adopted our First Amendment weighed those dangers against the dangers of censorship and deliberately chose the First Amendment's unequivocal command that freedom of assembly, petition, speech and press shall not be abridged.34

Therefore, because the Framers intended it, because we are a great nation that can well afford to let people speak, because, in fact, we need that speech to remind us how great a nation we are, and because to restrict Communist speech means that eventually we could restrict any kind of speech, the First Amendment is absolute in protecting sedition, so long as the sedition is confined to speech.

Obscenity has been another kind of speech, the protection of which Justice Black and the rest of the Supreme Court have disputed. In the Roth35 case the Court

prescribed a new test for obscene material, unprotected by the First Amendment. The new test would be this: any materials taken as a whole, appealing to the prurient interests of the average man whom the materials were intended to reach would be unprotected. Black unhaltingly joins Justice Douglas in rejecting this test:

The test of obscenity the Court endorses today gives the censor free range over a vast domain. To allow the State to step in and punish mere speech or publication that the judge or the jury thinks has an undesirable impact on thoughts but that is not shown to be a part of unlawful action is drastically to curtail the First Amendment.37

In Kingsley Black seriously, though humorously, concurs with the Court in refusing to ban the movie, "Lady Chatterley's Lover," as immoral:

Prior censorship of moving pictures, like prior censorship of newspapers and books, violates the First and Fourteenth Amendments. If despite the Constitution, however, this Nation is to embark on the dangerous road of censorship, my belief is that this Court is about the most inappropriate Supreme Board of Censors that could be found.39

Justice Black's rule-of-thumb for "obscenity" decisions is

36Obscenity has never been accepted by the Court as a whole as legitimate speech. The earlier Hicklin rule for determining obscenity was far more stringent than the new Roth rule. The Hicklin rule defined as obscene and unprotected any materials which had selective parts that might influence the most susceptible member of society. Regina v. Hicklin, L. R. 3 Q. B. 360 (1868).

37Roth, at p. 509.


39Kingsley, at p. 690.
"no prior censorship."

Likewise, the Court has forbidden libelous and slanderous speech. Justice Black, on the other hand, is very reluctant to extend even a subsequent punishment to speakers for defamatory speech. Particularly, he refuses to punish for libel or slander persons who criticize public officials or groups of people in general. When in *New York Times v. Sullivan* the Court reversed a libel grant in which a state official was awarded damages for an advertisement which supposedly defamed him, Black concurred with the opinion in the tone that sounds dissenting, as he lectures the Court for overturning the case on a near-technicality instead of going to the real First-Amendment issue:

A state has no more power than the Federal Government to use a civil libel law or any other law to impose damages for mere discussing public affairs and criticizing public officials. The power of the United States to do that is, in my judgment, precisely nil. Such was the general view held when the First Amendment was adopted and ever since. . . . To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials.41

Similarly he lectures the Court, this time in dissent, when


the majority upholds a group libel law that permits
punishment of an individual who defames any group of people:

No rationalization on a purely legal level can conceal the fact that state laws like this one present a constant overhanging threat to freedom of speech, press, and religion. Today Beauharnais is punished for publicly expressing strong views in favor of segregation. . . . 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 it deems to be the danger of public discussion, holds the scales are tipped on the side of state suppression, and upholds state censorship.42

For Justice Black not only is prior restraint forbidden under the command of the First Amendment, but also is subsequent punishment for speaking on public issues outlawed, if the First Amendment is to have significance.

Contempt of court has been punishable probably for as long as courts have existed. Again, as in the other areas of "pure speech," Justice Black would extend the privilege of speech as far as possible. No hypocrite, he as a public official, though appointed, will accept criticism in the name of the First Amendment. In a five-to-four decision,43 Black writes the majority opinion overturning a contempt-of-court charge:

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to

speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. 44

Justice Black has also protected in dissent as "pure speech" what the Court has labeled "disorderly speech." In Feiner v. New York 45 a young student spoke to a crowd about racial discrimination; the facts in the case indicated the following situation:

"Police heard and saw "angry mutterings," "pushing," "shoving and milling around," and "restlessness." Petitioner spoke in a "loud, high pitched voice." He said that "colored people don't have equal rights and they should rise up in arms and fight for them." One man who heard this told the officers that if they did not take that "S ... O ... B ..." off the box, he would. 46

The Court believed that the police could fairly conclude that riot was imminent; therefore, the arrest of Feiner was proper. However, Black's concept of the situation is the reverse; the rioters should have been arrested, if necessary, in order for Feiner to speak freely. Black says this:

Moreover, assuming that the "facts" did indicate a critical situation, I reject the implication of the Court's opinion that the police had no obligation to protect petitioner's constitutional right to talk.

44 Bridges, at pp. 270-271.


46 Feiner, at p. 324.
The police of course have power to prevent breaches of the peace. But if, in the name of preserving order, they ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him. . . . Their duty was to protect petitioner's right to talk, even to the extent of arresting the man who threatened to interfere. Instead, they shirked that duty and acted only to suppress the right to speak.47

Seemingly this speech, although still in the category of "pure," borders on conduct that the state has a right to prevent. Yet Black supports it.

In all five areas, regardless of how many supporters he can draw for the First Amendment's protection, he stands firm in his view that indeed the First Amendment offers absolute protection for speech of any kind. For him the decision is easy if a case involves pure speech—the speech cannot be prevented or punished.

However, the second problem—what is the decision if a case involves both speech and conduct intertwined—brings up a whole new set of subissues. Whereas Black was vehement in his assertion of "no balancing!" in pure-speech issues, he is not at all disinclined to balance when speech takes on some kind of conduct that government may reasonably prevent. His dictum in Barenblatt v. United States48 readily states his position on mixed speech and conduct:

I do not agree that laws directly abridging First Amendment freedoms can be justified by a

47Feiner, at pp. 326-327.

congressional or judicial balancing process. There are, of course, cases suggesting that a law which primarily regulates conduct but which might also indirectly affect speech can be upheld if the effect on speech is minor in relation to the need for control on the conduct. With these cases I agree.\(^9\)

It is at the outset somewhat difficult to understand how a judge could give "absolute" protection to a speaker such as Feiner, whose speech bordered so closely upon conduct, and say that generally his approach for decision-making in "mixed" cases will be that of balancing. However, an opinion analysis reveals that almost always regulation of conduct infringes more than indirectly upon speech in Black's eyes; therefore, he generally rules in favor of First-Amendment claims, irrespective of any balancing he may have done.

One of the big issues which has presented to the Court the matter of speech and conduct intertwined is the distribution of handbills on public streets and in other public places. Obviously, handbills, commercial or other, are a form of speech, and equally obviously, government has the responsibility of regulating conduct on public streets and in other public places. Numerous times conflicts have occurred between plenary power of states and the First Amendment, and nearly every time Justice Black has upheld the First-Amendment claim.

\(^{49}\)Barenblatt, at p. 109.
In Lovell v. City of Griffin\(^5^0\) he signed the majority opinion written by Chief Justice Hughes in which a city ordinance was struck down because it required the permission of the city manager for the distribution of any handbills. This clearly violated the First Amendment. The next year Justice Black was permitted to write a similar majority opinion\(^5^1\) in which the Court struck down several city ordinances that placed an absolute ban on the distribution of handbills. The cities claim that they possess plenary power to keep streets free of litter and that abridgment of speech is only an indirect consequence of the regulatory power of the state. However, Justice Black and the Court take another view:

We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. Amongst these is the punishment of those who actually throw papers on the streets.\(^5^2\)

When another "handbill" case\(^5^3\) came to Court, the question for determination was whether a city could require

\(^{50}\textit{Lovell v. City of Griffin}, 303 U. S., 444 (1938).


\(^{52}\textit{Schneider}, at p. 162.

\(^{53}\textit{Talley v. California}, 362 U. S., 60 (1960).\)
all handbills to contain the name of the distributor. Black again delivered the majority opinion in which he said that this case fell entirely within the boundaries of the Griffin and Schneider cases: no prior restraint of any kind on handbills, regardless of the conduct involved in delivery.

A second area for mixed speech and conduct is that of soundtrucks as a means of communication. Of course, such a device for speech necessarily involves conduct, that is, volume, which a city can regulate. When the Court majority upholds a city ordinance which indiscriminately forbade the use of soundtrucks, Black dissents in terms which will be important in considering the demonstrators:

The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition. Laws which hamper the free use of some instruments of communication thereby favor competing channels. Thus, unless constitutionally prohibited, laws like this Trenton ordinance can give an overpowering influence to views of owners of legally favored instruments of communication. This favoritism, it seems to me, is the inevitable result of today's decision.

There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places.54

Once again, the absoluteness of the First Amendment prevails, despite any balancing that Black may have done.

The area closest in character to the civil-rights demonstrations that has come before the Supreme Court is the labor pickets. In many cases the Court has been called upon to determine if free speech in the form of pickets can supersede state and national power to regulate labor. The Court majority has wavered in the true balancing tradition; Justice Black has ruled against speech only once. His balancing, if he employs it in decision-making, is certainly subtle.

The first case which involved labor pickets was Thornhill v. Alabama. Justice Murphy, writing for the Court and joined by Black, struck down a state law which forbade the picketing of a lawful business for the purpose of inducing others not to trade with the business. Very succinctly the opinion handles the First-Amendment issue:

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.

The next year the Court ruled against picketing in labor disputes because the Court found violence in the conduct of the picketers. Black dissented because he could not find such violence; therefore, restriction of pickets amounted to deprival of a First-Amendment right. Here is his

56Thornhill, at pp. 101-102.
view:

When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the Illinois courts to prevent or punish is obvious. Furthermore, this is true because a state has the power to adopt laws of general application to provide that the streets shall be used for the purpose for which they primarily exist, and because the preservation of peace and order is one of the first duties of government. But in a series of cases we have held that local laws ostensibly passed pursuant to this admittedly possessed general power could not be enforced in such a way as to amount to a prior censorship on freedom of expression.57

The following year Black is in dissent again as the majority upholds an injunction to stop picketing in a labor dispute: "Accepting the Constitutional prohibition against any law 'abridging the freedom of speech and of the press'--I would reverse."58

Next, the Court hears Giboney,59 which seems to be a reversal of Black's position on picketing, for here he condemns the picketers; however, the facts distinguish Giboney from other cases. In previous cases union members picketed employers of non-union employees to lessen the business of such employers. However, in Giboney picketers were acting to compel a monopoly, in violation of laws


forbidding combinations in restraint of trade. Black writes the majority opinion denouncing the conduct of the picketers:

It rarely has been suggested that the constitutional freedom of speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now... Neither Thornhill... nor Carlson60... supports the contention that conduct otherwise unlawful is always immune from state regulation because an integral part of that conduct is carried on by displays of placards by peaceful picketers.

Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.61

But in NLRB v. Fruit and Vegetable Packers62, while emphasizing the two aspects of picketing—speech and conduct which can be controlled—and the necessity to balance, he once again upholds free speech against a restrictive statute:

The statute in no way manifests any government interest against patrolling as such, since the only patrolling it seeks to make unlawful is that which is carried on to advise the public, including consumers, that certain products have been produced by an employer with whom the picketers have a dispute.... Thus the section is aimed at outlawing free discussion of one side of a certain kind of labor dispute and cannot be sustained as a permissible regulation of patrolling.63

60Carlson v. California, 310 U. S., 106 (1940), simply applied the Thornhill rule.


63NLRB, at pp. 78-79.
In fairness to Justice Black, lest it be said that he concedes to the concept of balancing and never follows it in practice, it should be pointed out that in two decisions in which speech and conduct were intertwined he balanced away from speech. In *Cox v. New Hampshire*\(^{64}\) a city ordinance required a permit for street parades, and a group of Jehovah's Witnesses held their street parade without attempting to gain a permit; Black signed the majority opinion punishing their conduct. He agreed that the required permit was a proper exercise of state police power.

In *Prince v. Massachusetts* Black likewise upheld the state law which prohibited children from selling goods and printed matter in public places. Pointing out that the law would be invalid if applied to adults, Black nevertheless writes that "the state's authority over children's acts is broader than over like actions of adults."\(^{65}\)

But note the reluctance even here to rule against the First Amendment. Yet again in fairness to Black, he has not "balanced away" his First Amendment even in the "mixed" cases; it is only in the extreme instances of speech involving picketing for monopolies or raucous street parades or child labor that he even considers stepping away from the absoluteness of the First-Amendment protection for

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\(^{64}\) *Cox v. New Hampshire*, 312 U. S., 569 (1941).

speech. The decision in cases involving conduct mixed with speech is not much more difficult for Justice Black. His rule-of-thumb here seems to be--only in the most extreme instances of illegal conduct mixed with speech, rule away from the First Amendment; otherwise, the First is still absolute.

The third problem which Black has had to solve with regard to the First Amendment is the matter of clashing individual rights--which takes precedence, for example, the First or the Fifth Amendment, when they conflict? In several instances of clash between the First and the Fifth Amendment's property right Black has resolved the conflict in favor of the First Amendment, so that his decision-making in this problem can be tagged granting a "preferred position" to the First Amendment in clash of individual rights.

A good example of such a clash came in 1946, with *Marsh v. Alabama*.66 Chickasaw, a suburb of Mobile, was owned entirely by Gulf Shipbuilding Corporation. The Corporation sought to restrict a Jehovah's Witness from distributing her literature by denying her the proper permit required for her activity. Until the United States Supreme Court gave its decision, the Corporation had been successful in restricting her actions, because of the private property (the town streets) upon which she wanted to distribute her materials.

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However, the Supreme Court overturned the lower courts, Justice Black writing:

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lie at the foundation of free government by free men" and we must in all cases "weigh the circumstances and ... appraise the ... reasons ... in support of the regulation ... of the rights. Schneider v. Irvington. 67

Once again Black has had to resort to balancing to determine a difficult problem before the Court. Even though he has conceded that the First Amendment is not absolute in the clash of individual rights, he weighs it much heavier in the balancing process. It is interesting to note the case from which Black draws his justification for the heavier weight afforded the First Amendment--Schneider, not at all a clash of individual rights, but a problem involving speech and conduct vis-à-vis the power of government to regulate conduct. Black has made an illogical jump to prove his point of view. Nowhere does the Constitution "settle the conflict" as he stated in his "Bill of Rights" lecture. 68 Justice Black himself settles the conflict by giving preferential support to the First Amendment.

Another statement in the Marsh case which was significant to that case and will become important in considering

67Marsh, at p. 509.

the demonstrators is this:

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 constitutional rights of those who use it. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.69

Similarly, an area of conflict for individual rights is that of the "doorbell ringers." Here again is the problem of freedom of speech and right to employment in opposition to a householder's right of privacy and peace within his home. In Martin v. Struthers70 a city ordinance forbade handbill distributors from summoning a resident to his door to receive such a handbill. The Court, with Black writing, struck down the ordinance, despite the fact that the ordinance was created to protect the sleep and rest of shift workers in an industrial town. Balancing, Black says:

We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens, whether particular citizens want that protection or not. The ordinance does not control anything but the distribution of literature, and in that respect substitutes the judgment of the community for the judgment of the individual householder.71

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71Martin, at p. 143.
When the more conservative Court majority of 1951 rules against bell-ringing magazine salesmen, Black has this dissent:

Today's decision marks a revitalization of the judicial views which prevailed before this Court embraced the philosophy that the First Amendment gives a preferred status to the liberties it protects. I adhere to that preferred position philosophy. It is my belief that the freedom of the people of this Nation cannot survive even a little governmental hobbling of religious or political ideas, whether they be communicated orally or through the press.72

In the third problem--clash of individual rights--even as he balances, Black always assumes that the First Amendment is heavier.

Opinion analysis of Justice Black's First-Amendment decisions readily indicates an unassailable loyalty to its absoluteness,73 despite claims of balancing for decision-making in matters of mixed speech and conduct versus governmental power to regulate and of clashing individual rights. In the last few years Justice Black has faced a new issue which clearly claims First-Amendment privileges--the civil-rights demonstrations. It becomes fascinating to watch him try to solve the new issue in keeping with the foregoing "absolutist" philosophy.

73 The only case which does not fit into the foregoing framework is Chaplinsky v. New Hampshire, 315 U. S., 568 (1942), in which Black voted with the majority to convict a Jehovah's Witness for using "offensive language" in address to another person, despite First-Amendment claims. Since Black did not write an opinion, it is difficult to determine the particular reason he voted as he did.
Placed upon the background of extensive support that Justice Black has given First-Amendment claims, his vote in favor of the civil-rights demonstrators in 1961 came with no surprise. His repeated support of demonstrators' claims in 1962, and 1963, similarly could be predicted. However, something was unusual about those cases with regard to Black's vote. Although consistently from 1961 to 1963, he voted with the majority to overturn convictions of the Negro demonstrators who opposed racial discrimination by means of "sit-ins" and "stand-ins," he never once wrote a decision, either majority or concurring; Black has never been bashful in expressing his opinions. It was not until 1964, that he wrote an opinion: the majority opinion to overturn a conviction of breach of the peace for a sit-in


2Taylor v. Louisiana, 370 U. S., 154 (1962). Although this is a per curiam decision, Black's comments in later cases indicate that he voted with the majority here.


and in the same case, a dissenting opinion to uphold the conviction of trespass involved in the sit-in. Thereafter, from 1964 to 1966, Black wrote a dissenting opinion in every case but one, in which he signed the dissenting opinion to uphold conviction of the demonstrators. Finally, in 1966, Black gained a majority to uphold conviction, and writing again, this time he spoke for the Court. Once more in 1967, the Court majority voted to convict the demonstrators, but Justice Stewart wrote, and Black signed.

Before an opinion analysis of Black's decisions to convict the demonstrators attempts to reconcile his vote on the civil-rights issue with his First Amendment philosophy as formalized in Chapter II, it is necessary to look at the total issue of the demonstrations, as they have presented for the Court not only a First-Amendment issue, but also an "equal-protection" and a "due-process" issue.

The first case involving civil-rights demonstrators came to the United States Supreme Court in 1961, and by a


8Walker v. City of Birmingham, 87 S. Ct., 1824 (1967).

unanimous vote the Court reversed the conviction of numerous Negroes who sat down at the white lunch counter of Kress Department Store, which served both races, separately for eating purposes and together in all other departments. The Negroes were asked to leave by police who soon arrived, but the demonstrators refused and remained seated at the white lunch counter. They did nothing to attract attention, made no speeches, and carried no picket signs; nevertheless they were arrested for breach of the peace, defined by state law as doing specific violent, boisterous or disruptive acts and "any other act in such manner as to unreasonably disturb or alarm the public." Evidence at the trial showed no boisterous conduct or even passive conduct likely to cause a disturbance. Citing Thompson v. City of Louisville, the unanimous Court ruled that these convictions were so totally devoid of evidentiary support as to violate due process of law as guaranteed by the Fourteenth Amendment.

Claims of petitioners that they were denied the First Amendment's freedom of speech and the Fourteenth Amendment's guarantee of equal protection of the laws were ignored by the Court. The state's claim that the mere presence of Negroes at the white lunch counter would cause a disturbance of the peace was dismissed by the Court, as it says:

10Garner, at p. 165.
There being nothing in the record that the trial judge took judicial notice of anything, these convictions cannot be sustained on the theory that he took judicial notice of the general situation, including the local custom of racial segregation in eating places, and concluded petitioners' presence at the lunch counters might cause a disturbance which it was the duty of the police to prevent.\(^1\)

With the Court's decision Justice Black agreed.

The next demonstration case was decided with a per curiam opinion. \textit{Taylor v. Louisiana}^1\(^2\) concerned the sit-in demonstration of six Negroes in a bus depot reserved for white patrons. Again, the demonstrators were arrested for breach of the peace under the same statute as involved in \textit{Garner}. The only evidence entered as to the nature of that breach of the peace was that the presence of Negroes in a white waiting-room was likely to cause a breach of the peace. The trial court accepted the evidence that a violated custom was likely to result in violated peace. The Supreme Court, however, reversed convictions on the basis that racial discrimination was not permitted by federal law in inter-state transportation facilities.

\textit{Edwards v. South Carolina}^1\(^3\) was the first demonstration case to be turned on the First-Amendment claim. Justice Black again subscribed to the Court's opinion. As the facts will indicate, this Negro demonstration was the most

boisterous of all cases considered in this thesis. In the demonstration 187 high school and college students peacefully gathered at the South Carolina statehouse to express their grievances caused by South Carolina laws. When told by police that they would have to disperse in fifteen minutes, they began to sing patriotic and religious songs, and one member of the group delivered a religious harangue. In addition, between two hundred and three hundred onlookers watched, but police testified at the trial that these people were not arrested because they were causing no disturbance in any way. Although evidence showed that neither were the demonstrators causing violence, they were arrested for breach of the peace under a statute similar to the Louisiana one in Garner and Taylor. The Supreme Court majority passes over the due-process claim as established in Garner, and overturns the conviction on the First-Amendment issue:

The state courts have held that the petitioners' conduct constitutes breach of the peace under state law, and we may accept their decision as binding upon us to that extent. But it nevertheless remains our duty in a case such as this to make an independent examination of the whole record. . . . And it is clear to us that in arresting, convicting, and punishing the petitioners under the circumstances disclosed by this record, South Carolina infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances. . . .

The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views.15

15Edwards, at pp. 235-237.
Justice Clark, as the only dissenter, would sustain conviction of the demonstrators because "a dangerous situation was really building up."16 During the busy noon period the demonstrators defied dispersal orders, and for Clark this amounted to a breach of the peace. But even in this extreme circumstance of singing, shouting students, Black upholds the First Amendment's freedom of speech, as applied to states through the Fourteenth Amendment.

In 1963, the Court for the first time heard demonstration cases in which petitioners sought to have their convictions overturned on the basis of the equal-protection clause of the Fourteenth Amendment. In all three cases, the Court accepted equal-protection claims; the petitioners were denied equal protection of the laws as guaranteed by the Fourteenth Amendment when they were arrested for trespass in Peterson and Shuttlesworth and for criminal mischief in Lombard. The facts in Peterson18 were these: ten Negro boys and girls had seated themselves, again in the Kress Store at the white lunch counter. Police came and the store manager stated that the lunch counter was closed and requested everyone to leave the area. When petitioners refused to

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16Edwards, at p. 239.


18Shuttlesworth and Peterson are essentially identical cases occurring in different cities.
leave, they were arrested for violating a state trespass law which forbade remaining on private property "without legal cause or good excuse." The store manager testified in the trial court which convicted the demonstrators that he had asked them to leave for two reasons; to serve them would (1) be "contrary to local customs," and (2) violate a city ordinance that compelled the separation of the races in eating places. Although First-Amendment and due-process rights were claimed in accordance with previous cases, the Supreme Court in this case used only denial of equal protection as its basis for reversal of convictions. The fact that the city had an ordinance requiring racial discrimination amounted to state action in violation of the Fourteenth Amendment.

Again, in , state action was found to the extent that denial of equal protection of the laws occurred. This was a more subtle kind of state action, but agreed that rights under the Fourteenth Amendment had been denied. In this case three Negro students and one white student entered McCrory Dime Store in New Orleans and sat at the refreshment counter, where they were refused service and asked to leave, not because they were disorderly, but because they were Negroes and the counter was operated on

19 at p. 245.
20 at p. 246.
a segregated basis. When they remained as a sit-in, they were arrested under a criminal mischief statute which made illegal remaining in a place of business after having been asked to leave. Prior to this demonstration the mayor and the police chief had urged in newspapers and in conferences with businessmen that "demonstrations . . . would not be permitted." In Lombard, as in Peterson and Shuttlesworth, the Court finds state action as it speaks: "A state or a city may act as authoritatively through its executive as through its legislative body." The city would not permit desegregated services, according to statements of officials; therefore the city must be treated as if it contained such an ordinance.

In this case Justice Harlan was the only dissenter. He emphasized in his opinion the great stretch that the Court was making to find state action in general announcements of city officials. In addition, their announcements were designed to urge Negro and white citizens not to insist upon integrated facilities and thereby disturb the peace, he wrote. Black could not agree.

To this point in the civil-rights demonstration cases, Justice Black has completely agreed with the Court majority that sit-ins by Negroes in efforts to achieve racial

22* Lombard, at p. 273.
equality cannot be prevented by state breach of the peace, trespass, or similar law. But rather, based on First-Amendment rights applied to states by the Fourteenth Amendment and the due-process and equal-protection provisions of the Fourteenth Amendment, civil-rights demonstrations are permissible.

For the first time in 1964, Justice Black voted against a civil-rights demonstration, when he joined Harlan's dissent in *Griffin v. Maryland*. This case was not turned on a First-Amendment claim but instead, as in *Peterson*, on an equal-protection denial. The facts were somewhat unusual. Several Negroes entered a privately owned and operated amusement park, which through advertisements sought patronage of the general public but, in fact, practiced the exclusion of Negroes, even though no warning signs indicated the practice. The Negroes entered the park in hopes that the management would change its policy; since they encountered no resistance at the gate, they boarded the carousel with transferable tickets purchased by other people.

One of the park employees under the direction of park management was a special policeman who also was deputized as a sheriff of Montgomery County. Seeing the Negroes, he reported to the manager, who in turn told the policeman to arrest them if they did not leave immediately. When they

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would not leave, but chose to demonstrate their protest, they were arrested for trespass. The Supreme Court reversed the conviction because the majority saw the state, manifested in the deputy sheriff, enforcing private racial discrimination.

Justice Harlan, joined by Black and White, could see no state action in a policeman's carrying out his duty to stop trespass. This is Black's first step away from the Court majority with regard to the demonstrators. It is not a verbal step, but worth noting, for in fewer than one-hundred pages in the United States Reports, Black will write a vigorous dissent to the Court's decision in Bell v. Maryland. In Bell twelve Negro students participated in a sit-in demonstration at Hooper's restaurant, where, solely because of their race, they were refused service, asked to leave, and arrested for violation of the Maryland trespass statute, when they remained seated. The majority refused to reach the merits of the case but rather reversed and remanded it to the trial court because during the judicial proceedings of the case, the Maryland legislature and the Baltimore city council had altered their laws so that it

24"Any person . . . who shall enter . . . the land, premises or private property of any person . . . after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor." Griffin, at p. 133.

would constitute a crime for any restaurant to deny service to any person on the basis of his race.

Black, on the other hand, joined by Harlan and White, agreed that merits should have been reached and for the purpose of affirming conviction. Black states clearly that he views the demonstrations as another area for balancing as he says:

We know, as do all others, that the conditions and feelings that brought on these demonstrations still exist and that rights of property owners on the one hand and demonstrators on the other largely depend at this time on whether state trespass laws can constitutionally be applied under these circumstances.26

Black then sweepingly deals with the three claims before the Court: denials of due process of law, equal protection of the laws, and First-Amendment rights. In response to the first claim, that the trespass law is void for vagueness, he simply affirms that it is not.27 He has more to say regarding asserted state action in violation of the equal-protection clause of the Fourteenth Amendment:

There is no Maryland law, no municipal ordinance, and no official proclamation or action of any kind that shows the slightest state coercion of, or encourage ment to Hooper to bar Negroses from his restaurant. Neither the State, the city, nor any of their agencies has leased publicly owned property to Hooper. It is true that the state and city regulate the restaurant--

26Bell, at p. 323.

27This was an ordinary trespass law, making a crime of remaining on private property after having been asked to leave.
but not by compelling restaurants to deny service to customers because of their race. License fees are collected, but this licensing has no relationship to race.\textsuperscript{28}

In addition, he rejects the Shelley rule\textsuperscript{29} as applied to the conviction of demonstrators, just as he did in the Griffin case:

The Fourteenth Amendment does not forbid a state to prosecute for crimes committed against a person on his property, however prejudiced or narrow the victim's views may be. Nor can whatever prejudice and bigotry the victim of a crime may have be automatically attributed to the state that prosecutes.\textsuperscript{30}

Coming to the First-Amendment issue, Black recognizes that the demonstrators are engaging in speaking activity as he says:

We do not doubt that one purpose of these "sit-ins" was to protest against Hooper's policy of not serving Negroes. But it is wholly clear that the Maryland statute here is directed not against what petitioners said but against what they did—remaining on the premises of another after having been warned to leave, conduct which States have traditionally prohibited in this country. And none of our prior cases has held that a person's right to freedom of expression carries with it a right to force a private property owner to furnish his property as a platform to criticize the property owner's use of that property.\textsuperscript{31}

\textsuperscript{28}Bell v. Maryland, 378 U. S., 226 (1964), at p. 333.

\textsuperscript{29}Shelley v. Kraemer, 334 U. S., 1 (1948), decided that although restrictive covenants in property sales are not outlawed per se, they cannot be enforced by the courts, because such involvement of a governmental agency in private discrimination would amount to state action in violation of the equal-protection clause of the Fourteenth Amendment.


\textsuperscript{31}Bell, at p. 325.
Black makes two other statements in this case in dicta reflecting his attitude toward the concept of demonstrations. The first concerns the "public-service doctrine" that he had set up in *Marsh v. Alabama;* he now finds that doctrine inapplicable as relates to civil-rights demonstrators:

In the first place, that argument *public-service doctrine* assumes Hooper's restaurant had been opened to the public. But the whole quarrel of petitioners with Hooper was that instead of being opened to all, the restaurant refused service to Negroes.

It could be readily pointed out that in *Marsh* the whole quarrel of petitioner with Gulf Shipbuilding Corporation was that instead of being opened to all, the corporation refused service to Jehovah's Witnesses; however, Black apparently has forgotten the earlier case.

The other comment relates to the power of the national government over demonstrations: "The case before us does not involve the power of Congress to pass a law compelling privately owned businesses to refrain from discrimination on the basis of race. . . . The Fourteenth Amendment standing alone does not."34

*Bell v. Maryland* is an exceptionally important case for stating Black's view of the demonstrators, for he will

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32"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 . . . constitutional rights of those who use it." *Marsh v. Alabama,* 326 U. S., 501, at 506.


34*Bell,* at p. 343.
refer to it again and again in later decisions, the first of which is *Bouie v. City of Columbia*. This case again concerns Negro demonstrators who entered a drugstore. Immediately they were asked to leave, and as they refused, they were arrested for trespass. Under the Maryland trespass law, a notice prohibiting entry onto private property was required before a valid conviction of trespass could take place. The Court majority overturned the convictions based on a due-process claim, that the store owner did not warn them not to enter his property before they came onto it; hence, any judicial gloss that might be put on the ambiguous statute would be inapplicable to the case at hand.

After referring the Court to his *Bell* dissent, Black briefly berates the Court for fitting its reasoning to a desired end; after all: "It has long been accepted as the common law of that State that a person who enters upon the property of another by invitation, if he refuses to leave when asked to do so becomes a trespasser."36

In one of the strangest combinations of opinion writing that the Court has done, *Barr v. City of Columbia* offers an additional clue to Black's attitude toward the demonstrators. Here peaceful sit-in demonstrators refused to

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36*Bouie*, at p. 366.
leave a drugstore after the police and store manager asked
them to leave. They were charged with both trespass and
breach of the peace. The Court majority handled the two
charges separately, as it overturned both. Justice Black,
for the first time since he began dissenting in these cases,
spoke for the majority on the breach-of-the-peace charge.
There was no evidence of any breach of peace whatsoever, as
the demonstrators peacefully sat at the counter; therefore,
to convict them would be to violate due process of law,
which requires evidence. The Court majority also reversed
the trespass conviction, by a per curiam application of
Bouie; however, Justice Black dissented from the reversal
of trespass. He referred followers of the Court to his
dissent in Bell.

To this point, despite the seeming change in Black's
attitude, he has been consistent in his treatment of the
demonstrators. He has said that civil-rights demonstrators
cannot be convicted for breach of the peace, when there is
no evidence of any violence or physical disturbance caused
by their demonstrations. He has also said that demon-
strators cannot be convicted of trespass or similar statute,
such as criminal mischief, when there is clear state action
involved in private racial discrimination. However, state
action must be blatantly obvious before he will recognize it.
Convictions in these two situations violate due process and
equal protection of the Fourteenth Amendment and freedom of
speech of the First Amendment, applied by the Fourteenth. However, in the absence of state action, private property owners, irrespective of how they use their property, have the constitutional right to discriminate and have arrested for trespass anyone who remains on their property after being told to leave.

One more case came to the Court and was decided on a due-process claim before the Court began to view the demonstrators as a First-Amendment issue. Following Hamm v. City of Rock Hill, however, the Court clearly faced the First-Amendment claim. Hamm came as a test of Black's dicta in Bell regarding the power of the federal government to deal with demonstrators. This 1964 case began in the trial court before the final passage of the 1964 Civil Rights Act and the case arrived in the United States Supreme Court after the passage of that act. Hamm involved, as in other cases, sit-in demonstrations at retail-store lunch counters.

Clark, writing for the majority, in a liberal decision announced that it is the general practice of the Court to look at the law during final appeal, and, of course, the 1964 Civil Rights law was fully in effect by the time of final appeal. According to Sections 201 and 202 of that Act, "all persons shall be entitled to full and equal enjoyment of the

goods, services . . . of public accommodation. Further, Section 203 provides that

No person shall (a) withhold, deny, or attempt to withhold or deny or deprive or attempt to deprive any person of any right or privilege secured by section 201 or 202, . . . or (c) punish or attempt to punish any person for exercising any right or privilege secured by section 201 or 202.41

Senator Humphrey, floor manager of the bill, further clarifies the meaning in this way:

This plainly means that a defendant in a criminal trespass, breach of the peace, or other similar case can assert the rights created by 201 and 202 and the State courts must entertain defenses grounded upon these provisions.42

As fond as Justice Black is of legislative history, he rejects the majority reasoning, based on legislative history; Black says this:

I have grave doubts about the power of Congress acting under the Commerce Clause and the Necessary and Proper Clause to take the unprecedented step of abating these past state convictions. . . . In the early days of this country this court did not so lightly intrude upon the criminal laws of a state.43

He cannot understand how the Court can permit demonstrators to "take the law into their own hands,"44 before the Civil

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40 Ibid., Sec. 2000a.
41 Ibid.
43 Hamm, at pp. 320-321.
44 Hamm, at p. 318.
Rights Act was passed. The general "saving clause"\(^{45}\) would prevent the extinction of a penalty unless the repealing law makes the provision to extinguish. Although Black will permit Congress to pass a public accommodations law, as he upholds it in other cases,\(^{46}\) he is quite conservative on the matter of timing; he will not give to the national government one day before final passage of the act power to protect demonstrators.

Three cases contain Black's most elaborate opinions on the civil-rights demonstrations. \textit{Bell v. Maryland} was one. The second is \textit{Cox v. Louisiana}.\(^{47}\) Cox again found Justice Black in dissent as the Court majority approved the largest demonstration ever tested by the Court. This time two thousand Negro students protested segregation by engaging in an orderly march toward the Baton Rouge courthouse. The police chief ordered the march to be confined to the west side of the street, and the students followed these orders. The demonstration concluded with several speakers urging the entire group to sit-in at various white lunch-counters. As soon as the sheriff heard these exhortations, he ordered immediate dispersal of the group; when the dispersal was not


\(^{47}\) \textit{Cox v. Louisiana}, 379 U. S., 536 (1965); the third case is \textit{Brown v. Louisiana}, 383 U. S., 131 (1966), to be discussed later.
immediate, he ordered teargas for a catalyst, following
which, the petitioners were arrested for disturbing the
peace, obstructing public passages by means of pickets, and
picketing near the courthouse, all of which were forbidden
by law. The Louisiana breach-of-the-peace statute had been
revised following the Garner and Taylor decisions to read
as follows:

Whoever with intent to provoke a breach of the peace,
or under circumstances such that a breach of the peace
may be occasioned thereby ... crowds or congregates
with others ... in or upon ... a public street
or public highway, or upon a public sidewalk, or any
other public place or building ... and who fails
or refuses to disperse and move on ... when ordered
to do so by any law enforcement officer of any munic-
ipality or ... of the state of Louisiana, or any
other authorized person ... shall be guilty of
disturbing the peace.48

Despite this revision, the Court found the act unconstitu-
tionally vague and overly broad so as to violate due process.
The law forbidding obstruction of public passages also vi-o-
lated due process because it left use of the streets to the
"unbridled discretion of local officials,"49 when it per-
mitted some kinds of picketing (specifically, labor union
picketing), but left other kinds to be stopped by officers.
Finally, the law forbidding picketing near the courthouse
was unconstitutionally applied to infringe upon First-
Amendment rights, although it was valid as drawn. When the

48Louisiana Revised Statutes, Sec. 14: 103.1 (Cum. Sup.
1962).

police chief gave permission to the demonstrators to walk on the west side of the street, he in effect said that the location of the picketing was satisfactory and would not obstruct the activities of the courthouse.

Black concurs and dissents in this case. With consistency, he agrees that the breach-of-the-peace charge cannot stand, despite the mass crowd involved in speaking, because, "The statute does not define the conditions upon which people who want to express views may be allowed to use the public streets and highways. 50

Moving to the First-Amendment issue found within the laws prohibiting the obstruction of public passageways by pickets and picketing near the courthouse, Black states his view:

A state statute ... regulating conduct--patrolling 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. 51

Although this statement is not up to Black's usual clarity, it is attempting to reassert what Black has said before, that speech when mixed with conduct takes a new characteristic.

50 Cox, at p. 577.

51 Cox, at p. 577.
--it is subject to balancing by the Court, and if the danger of the conduct to the public is sufficiently great, it may be restricted by the state, even though some minor curtailment of a First-Amendment right is involved. It will be recalled that the foregoing premise, though expounded by Black, was rarely followed in his earlier cases.

And he concurs with the majority to reverse the conviction of the demonstrators for picketing to obstruct public passages, but for a limited reason: "By specifically permitting picketing for the publication of labor union views Louisiana is attempting to pick and choose among the views it is willing to have discussed." However, if the State had wanted to bar all picketing, it could have: "I have no doubts about the general power of Louisiana to bar all picketing on its streets and highways," Black says. How strikingly this statement contrasts the equally strong assertion in Kovacs v. Cooper, in which Black stated:

The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition.

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52 Cox, at p. 581.
53 Cox, at p. 581.
55 Kovacs, at p. 102.
In the third aspect of this case, the picketing near the courthouse, Black dissented from the majority decision to reverse convictions. The majority believed that because the police had directed demonstrators in their activity, police approved their location. Black, on the other hand, believed convictions should stand:

A police chief cannot authorize violations of his state's criminal laws. There is evidence that Cox defied the order not to move. ... The statute had a purpose, to protect courts and court officers from intimidation and dangers that inhere in huge gatherings at the courthouse doors.56

Black's reasoning can be criticized; the statute did not define "near the courthouse." This was a decision left to police officers. Therefore, it would be impossible for officers to authorize violations of the state criminal law, since the officers determine what location is near the courthouse. If an officer permits picketing in a location, the location is by definition not "near the courthouse" in violation of the statute.

The test for Black's dicta regarding "the general power . . . of [a state] to bar all picketing on its streets and highways,"57 came with Cameron v. Johnson, Governor of Mississippi.58 This per curiam reversal of convictions under the Mississippi statute which forbade picketing

57 Cox, at p. 581.
that had the following result:

[Obstruction of] free ingress or egress to and from any public premises, State property, county or municipal courthouses, city halls . . . or other public buildings or property, . . . or public streets, sidewalks or other public ways adjacent thereto.59

Black cannot agree with this liberal decision and dissents with a conservative retort: "It should not be forgotten that this is a big country--too big to expect the Federal Government to take over the creation and enforcement of local criminal laws throughout the country."60

The third of Black's most extensive opinions on the demonstrators was written in a case decided by the Court in 1966. In Brown v. Louisiana61 perhaps the mildest demonstration yet tested is condemned most vehemently by Black. Five Negroes entered a small regional public library which was operated on a segregated basis. Only one librarian was there, and when petitioners requested a book, she looked for it; and not finding it, she told the Negroes that she would request it and mail it to them. They were then asked to leave, but they refused and remained quietly. The sheriff and deputies, having been alerted to the demonstration, arrived and asked petitioners to leave. When again they refused, they were arrested for breach of the

59Cameron, at p. 744.
60Cameron, at p. 753.
peace. Justice Fortas, writing for the majority, accepted both claims that due process was violated because there was no evidence to sustain conviction and that freedom of speech was ignored. In these words he speaks for the Court:

As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities.62

Somewhat unexpectedly, Black wrote a dissenting opinion. Here for the first time he approved conviction of demonstrators under a breach of the peace law, despite the non-violence of their demonstration. He states:

I do not believe that any provision of the U. S. Constitution forbids any one of the 50 states of the Union, including Louisiana, to make it unlawful to stage "sit-ins" or "stand-ups" in their public libraries for the purpose of advertising objections to the State's public policies.63

Black explains the difference in this case and previous ones involving breach-of-the-peace charges: the Garner case concerned the old breach-of-the-peace law,64 which was far too vague to convict civil-rights demonstrators; the Cox case arose over the new breach-of-the-peace law, which made


63 Brown, at pp. 151-152.

64 Breach of the peace consisted of doing specific violent, boisterous or disruptive acts and "any other act in such manner as to unreasonably disturb or alarm the public." Garner v. Louisiana, 368 U. S., 157, at p. 165.
it a crime to congregate in a public street or public building over the protest of a person rightfully in charge, and Black reversed conviction because too much infringement could be found upon free speech. Black insists in this case that a great difference can be found in public streets and public buildings, the difference between Cox and Brown, and that conduct mixed with speech is far more subject to regulation in public buildings than in streets; therefore, a conviction of breach of the peace can be sustained.

A third case which Black wants to distinguish is the Edwards case in which he reversed conviction of demonstrators for breach of the peace near a public building because of violated freedom of speech. He responds that there is a difference in state grounds ordinarily open to the public and a small library intended basically for loan, not even reading, purposes. There is far greater need to regulate conduct in such a library than on state grounds. Black has attempted to offer distinctions in the cases so that his line of reasoning will appear consistent. It is perhaps possible to accept his reasoning as validly logical until he says: "There simply was no racial discrimination practiced in this case. These petitioners were treated with every courtesy and granted every consideration to which they were entitled in the Audubon Regional Library."65

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Despite the fact that the Negro demonstrators were treated with courtesy, they were nevertheless asked to leave solely because they were Negroes in a segregated library. Had five white persons entered, they would not have been asked to leave.

Justice Black was finally able to gain a majority for a shocking extension of his views in *Adderley v. Florida*, a case which convicted demonstrators for trespass on county property when they demonstrated in front of the county jail to protest the arrest of their schoolmates. When they refused to leave jail property after having been asked, they were arrested for the following crime: "Every trespass upon the property of another, committed with a malicious and mischievous intent, . . . shall be punished by imprisonment not exceeding 3 months, or by fine not exceeding $100." The Court, perhaps validly, distinguished *Edwards* from this case, saying as in Black's dissent in *Brown v. Louisiana*, that there is a difference in a statehouse and a county jail, the former being open to the public and the latter, not in the least public. In addition, the convictions in *Edwards*, as well as in *Cox*, were struck down because the laws involved were unconstitutionally vague. But yet, the law in question appears equally vague; how could county

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67 *Adderley*, at p. 40.
property be the "property of another"? Do not the petitioners as taxpayers have some share in the property; therefore, is it not partly their property? Furthermore, the "malicious and mischievous intent" is questionably applicable. What is malicious about objecting to the arrest of one's schoolmates by singing and clapping? Without even criticizing the outcome of the case, it is possible to conclude that Black's reasoning is concocted for an outcome, not entirely consistent with the reasoning.

Four colleagues dissented; Douglas writes the opinion, criticizing the majority:

We do violence to the First Amendment when we permit this "petition for redress of grievances" to be turned into a trespass action. . . . The jailhouse grounds were not marked with "No trespassing!" signs, nor does respondent claim that the public was generally excluded from the grounds. Only the sheriff's fiat transformed lawful conduct into an unlawful trespass.68

But Black cannot be persuaded to see a clear First-Amendment issue. He sees only a loud mob whose conduct can be forbidden by the State.69

68 Adderley, at p. 52.

69 The latest demonstration case at the time of this writing can be read only in the advance-sheets of the United States Reports, and it falls somewhat out of line from the other cases, but it might be mentioned for its relevance to the total topic. The facts in Walker v. City of Birmingham, 87 S. Ct., 1824, are almost identical to those of Cox v. New Hampshire, 312 U. S., 569 (1941), with the difference that a Negro civil-rights group had violated the street parade ordinance in Walker and a religious group had done so in Cox. In Walker, as in Cox, Black voted with the majority to convict the paraders, since they had made no effort to comply with a reasonable law governing conduct.
CHAPTER IV

CONCLUSIONS

The news reporters have talked about a changed Justice Hugo L. Black, the "new conservative on the Court." The purpose of this thesis has been, in contrast to reporters' superficial view of Justice Black, to make a depth study of his most recent opinions with regard to the civil-rights demonstrations as well as his "old" views, and to determine the extent to which a change has occurred in his attitude. Particularly, the questions, has Justice Black abandoned his "absolutist" views of the First Amendment and has he lost his "libertarian" tag, because of his recent opinions, have been raised, and at this point need an answer based on evidence in the foregoing chapters.

Chapter II presented the following framework: (1) when a "pure" First-Amendment issue conflicts with a general power of government to regulate, the First-Amendment claim receives absolute protection. (2) When a mixed issue of speech and regulatable conduct conflicts with the power of government to control, it is necessary to balance the claims of each. However, only in extreme instances of illegal conduct where speech is but vaguely tangential to that conduct will the First-Amendment claim be weighed less.
heavily. (3) When two "pure" individual rights as those protected by the First and the Fifth Amendments clash, the claims of each will be weighed; however, the First-Amendment claim will receive a preferred position.

The total issue of the demonstrators does not fall directly into this framework. The division of demonstration cases in which the Negroes were arrested for breach of the peace comes clearly under the second problem. Here is mixed speech and conduct on the part of demonstrators who claim First-Amendment privileges vis-à-vis the power of government to maintain community tranquility.

The demonstration cases which involve trespass convictions call for a new division to be added to the structure of Black's First-Amendment philosophy. As a fourth problem it will be necessary to add: when a mixed issue of speech and regulatable conduct conflicts with another individual right, because of the mixture of the First-Amendment claim with conduct, does the First Amendment still have a preferred position? Black's answer becomes, no, the other individual right must take preference. In his process of balancing, the First Amendment is scarcely given any weight at all.

By definition, the demonstration cases as mixtures of speech and conduct do not receive "absolute" protection by the First Amendment, as instances of "pure" speech would. Rather, because conduct is involved, balancing an individual
right (mixed with conduct) against governmental need to regulate is the means whereby Black will determine who wins the case. Since the cases arising under breach-of-the-peace arrests offer Black the same problem that the handbills, soundtrucks, and labor picketers did earlier, it seems rather logical that he would follow his pattern of weighing the individual right heavier, even though mixed with conduct. Indeed, he does weigh individual rights heavier in all of the breach-of-the-peace cases until Brown v. Louisiana.

At this point Black considers the demonstrations in the extreme category of cases that he refused to weigh First-Amendment rights heavier: cases in which labor picketers were demonstrating to gain an illegal combination or when children were distributing literature in violation of a child labor statute or when religious parades were held in

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flagrant violation of street regulation.\textsuperscript{5}

It seems inconsistent for Black to consider Brown, the most peaceful civil-rights demonstration exercised, as deplorable as the three cases above in which he balanced away from the First-Amendment claim, but for reasons below, Black does find the demonstrators in this category of cases. For Hugo Black the demonstrators in principle, if not in fact, stand as illegal mobs, flaunting the system of rule of law:

Our society has put its trust in a system of criminal laws to punish lawless conduct. To avert personal feuds and violent brawls it has led its people to believe and expect that wrongs against them will be vindicated in the courts. Instead of attempting to take the law into their own hands, people have been taught to call for police protection to protect their rights wherever possible. It would betray our whole plan for a tranquil and orderly society to say that a citizen, because of his personal prejudices, habits, attitudes, or beliefs, is cast outside the law's protection and cannot call for the aid of officers sworn to uphold the law and preserve the peace. The worst citizen no less than the best is entitled to equal protection of the laws of his State and of his Nation. None of our past cases justifies reading the Fourteenth Amendment in a way that might well penalize citizens who are law-abiding enough to call upon the law and its officers for protection instead of using their own physical strength or dangerous weapons to preserve their rights. . . . Force leads to violence, violence to mob conflicts, and these to rule by the strongest groups with control of the most deadly weapons. . . . At times the rule of law seems too slow to some for the settlement of their grievances. But it is the plan our Nation has chosen to preserve both "liberty" and equality for all. On that plan we have put our trust and staked our future. This constitutional

\textsuperscript{5}Cox v. New Hampshire, 312 U. S., 546 (1941).
And again:

It is an unhappy circumstance in my judgment that the group, which more than any other has needed a government of equal laws and equal justice, is now encouraged to believe that the best way for it to advance its cause, which is a worthy one, is by taking the law into its own hands from place to place and from time to time. Governments like ours were formed to substitute the rule of law for the rule of force. Illustrations may be given where crowds have gathered together peaceably by reason of extraordinarily good discipline reinforced by vigilant officers. "Demonstrations" have taken place without any manifestation of force at the time. But I say once more that the crowd moved by noble ideals today can become the mob ruled by hate and passion and greed and violence tomorrow. If we ever doubted that, we know it now. The peaceful songs of love can become as stirring and provocative as the Marseillaise did in the days when a noble revolution gave way to rule by successive mobs until chaos set in.

It is because, at last in Brown, Black has realized that the demonstrators are no less than mob rule exerting illegal force which the government should avert that he approves the breach-of-the-peace conviction under the revised Louisiana statute which makes criminal the defiance of an authoritative person in a public place by means of a demonstration. It is simply Black's value judgment that demonstrators (mob rule) are as contemptible as labor picketers who advocate illegal combinations, and consequently

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that the speech of demonstrators mixed with conduct should not receive special protection by the First Amendment. Black has treated the demonstrators arrested under breach-of-the-peace laws in much the same way that he dealt with labor picketers accused of violating no-picket laws: ordinarily conduct will be protected along with speech when the two are mixed; however, in Giboney[^9] with the labor picketers and in Brown v. Louisiana with the civil-rights demonstrators, Justice Black viewed the conduct of both groups as illegal, again in the case of labor picketers, because they were picketing to gain an illegal combination, and in the case of the civil-rights demonstrators because they were defying the authority of the librarian in a small public library. Hence, it is possible to view the shift in vote in Brown as consistent with his judicial philosophy as presented in Chapter IX.

The fourth division in the foregoing judicial framework, cases which involve mixed speech and regulatable conduct vis-à-vis another individual right (property) is logically consistent for Justice Black, despite the fact that it seems inconsistent, given Black's premise that there are absolutes within the Bill of Rights, whose heart is the First Amendment—undoubtedly one of those absolutes. When conduct mixed with speech makes the First-Amendment protection no longer

absolutely applicable, the other "absolutes" in the Bill of Rights come into effect and require that the Fifth Amendment's property protection be regarded.

Earlier when Black was asked to decide between a pure First-Amendment right exercised in opposition to a pure Fifth-Amendment right, he always gave the First Amendment a preferred position. However, in none of these cases was regulatable conduct involved. In none of these cases did "a person's right to freedom of expression carry with it a right to force a private property owner to furnish his property as a platform to criticize the property owner's use of that property." Property owners have been compelled to listen to religious harangues and magazine peddling but never speeches that criticize their use of their property. But irrespective of what is said by claimers of First-Amendment protection, it is the conduct of the speakers that prevents them from enjoying the preferred position of the First Amendment. Indeed Black seems to have changed his First-Amendment views when he supports property; however, his ambiguous first premise that the Bill of Rights and the First Amendment are absolute makes it logically impossible to prove that he has changed. He should perhaps be


criticized for the ambiguity of his first premise, but he should not be called "inconsistent" when he uses the ambiguity to his advantage.

It is not, however, impossible to prove that Black has seriously altered his views regarding state action in violation of equal protection of the laws in the Fourteenth Amendment. In this aspect of the demonstration cases, Black's change not only "seems" but "is." In the Lombard case\textsuperscript{12} Black saw state action in violation of equal protection in a mayor and police chief's verbal announcements that civil-rights demonstrations would not be permitted. In Shelley v. Kraemer\textsuperscript{13} Black agreed with the majority that courts of law which enforce discriminatory housing contracts serve as state action in violation of equal protection of the Fourteenth Amendment. In neither case could Black agree with the dissenters who believed that state action as a concept was stretched in order for the Court to rule as it did. But in the demonstration cases Black reverses himself.

First, in Griffin v. Maryland\textsuperscript{14} and in Brown v. Louisiana\textsuperscript{15} Black refuses to recognize state officers as discriminatory agents. In Griffin he does not see a deputy sheriff


\textsuperscript{13}Shelley v. Kraemer, 334 U. S., 1 (1948).

\textsuperscript{14}Griffin v. Maryland, 378 U. S., 130 (1964).

as an agent of the state when he sends Negro students out of an amusement park. In Brown Black does not recognize a public librarian as a state agent telling Negroes to leave a public library solely because of their race. This is an obvious shift from Lombard.

Second, in Bell v. Maryland16 Black says that he will not view the courts of law as discriminatory state agents when the courts enforce trespass laws that result in discriminatory practices. Again, this is an obvious shift from Shelley.

In addition, Black has changed with regard to the public-service doctrine which he set up in Marsh v. Alabama17 in which he stated that "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 constitutional rights of those who use it."

The two major questions to be answered by this thesis were: has Justice Black changed with regard to his strong libertarian outlook, and has he altered his First-Amendment philosophy? The second question has been answered in the preceding pages: Black seems to have changed, but because of the intricacy of his First-Amendment philosophy, it is impossible to disprove the logic of his First-Amendment

decisions that have arisen from Negro civil-rights demonstrations. It is not impossible to disprove the logic of his equal-protection decisions, possibly because he has not attempted to build an "equal-protection philosophy" in the way that he has developed his "First-Amendment philosophy." He is vulnerable without a process of decision-making which has occupied his thoughts for thirty years.

In answer to the other question, has Black abandoned his strong defense of individual liberties, it is accurate to say, first of all, that he does not believe that he has. After all, he is still defending numerical minorities, whether they are state librarians or judges or deputy sheriffs, faced by mobs of determined Negro demonstrators. Black views the Negro demonstrators as the tyrannical majority attempting to deprive individuals of property rights or to intimidate helpless librarians. In several of his opinions he reveals a sympathy for his "minorities:"

And minority groups, I venture to suggest, are the ones who always have suffered and always will suffer most when street multitudes are allowed to substitute their pressures for the less glamorous but more dependable and temperate processes of the law. Experience demonstrates that it is not a far step from what to many seems the earnest, honest, patriotic, kind-spirited multitude of today, to the fanatical, threatening, lawless mob of tomorrow. And the crowds that press in the streets for noble goals today can be supplanted tomorrow by street mobs pressuring the courts for precisely opposite ends.18

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For the courts:

Government under law as ordained by our Constitution is too precious, too sacred, to be jeopardized by subjecting the courts to intimidatory practices that have been fatal to individual liberty and minority rights wherever and whenever such practices have been allowed to poison the streams of justice. I would be wholly unwilling to join in moving this country a single step in that direction.\textsuperscript{19}

For librarians:

[This decision reversing convictions of demonstrators] means that the Constitution requires the custodians and supervisors of the public libraries in this country to stand helplessly by while protesting groups advocating one cause or another stage "sit-ins" or "stand-ups" to dramatize their particular views on particular issues. And it should be remembered that if one group can take over libraries for one cause, other groups will assert the right to do so appealing to this Court. The states are thus paralyzed with reference to control of their libraries for library purposes.\textsuperscript{20}

Black is such a literalist that he conceives of himself as defending the true minority interest when he rules against the majority group, the demonstrators. What Black has seemingly forgotten is that state librarians, no matter how helpless they feel when confronted by Negro patrons, are still state agents who violate equal protection of the laws when they discriminate among patrons.

Irrespective of how Black views himself, the question remains, has he shifted in his libertarian outlook? The answer seems to be that he is in the process of shifting to

\textsuperscript{19} Cox, at p. 583-584.

a more conservative stance. However, in contrast to the news reporters' generally negative position that he is no longer the Court's liberal leader, a careful and objective examination of his opinions reveals that it is too soon to make the assertion that he has deserted his liberal colleagues. Black has been able, it should be remembered, to justify, however inadequately, his gradual loss of sympathy for the civil-rights demonstrators. To oust Black from the liberal camp on the basis of one issue—the civil-rights demonstration cases—would be inaccurate and unfair to the man who has worn his liberal label nobly during his thirty years on the Court, even in times of scathing criticism.

The news reports in this instance served most satisfactorily to point out the need of a careful and objective study. When Hugo Black leaves the Court, it will be worthwhile to look once again at his decisions to determine more conclusively if his last years on the Supreme Court brought "the end of the Warren Court."
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