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Justice Hugo L. Black: The Balancer of Absolutes

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A concatenation of contradictions might best describe to many the life and decisions of Hugo LaFayette Black. Consonant with the mood of a former America, he arose from a frontier farmhouse in the hills of Clay County, Alabama—"[a] county of small farms and businesses, of local government and stubborn individuals"¹—to become, in the eulogistic words of Chief Justice Warren E. Burger, "one of the authentic legal philosophers of our time."²

He was considered by many to be an anomaly because he came forth as a child of the rural South, steeped in the evangelical virtues of the Baptist religion, exuding the heritage of populism, and tainted with an association with the Ku Klux Klan.³ Yet he was a herald of the New Deal economic reformation, a staunch defender of dissident voices during the McCarthy era, a protector of the constitutional rights of the accused, a delineator of new lines between government and religion, a proponent for rights of racial equality, and a chief instrument in the creation of equal rights in legislative apportionment. To many he was self-contradictory, at one time claiming to be a complete chauvinist,⁴ at another

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1. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 754 (1963).

2. Oakland Tribune, Sept. 26, 1971, at 1, col. 4.

3. Reich, *supra* note 1, at 675-76.

4. *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549, 562 (1962) (interview by Edmund Cahn with Justice Black, Biennial Convention of the American Jewish Congress, New York City, Apr. 14, 1962).

emphatically defending preachers of doctrines radically opposed to the existing order.⁵ And still others found it difficult to understand how a former Baptist Sunday School teacher could continuously vote to strike down all laws dealing with obscenity.⁶

He was also criticized on a more specific basis by legal experts as sometimes avoiding a narrow victory in favor of a defeat on his broad absolutist basis and as inconsistent in not relying on a consensus of the general public to decide free speech issues, since it is they who are supposedly enlightened by free communication.⁷ Certain of his critics detected other inconsistencies when he criticized the "balance test" as applied to the Bill of Rights in many instances⁸ but proposed its use in others,⁹ or when he insisted on what might be called judicial activism in some cases¹⁰ but severely criticized judicial intervention in others.¹¹

Justice Black did indeed appear to be a paradox, but he was well aware of his critics and could respond to them with equanimity:

Some who oppose my views have been satisfied with efforts to destroy them by pure logic and reason; others have added rhetoric and emotion; still others have expressed a sort of sympathy and sorrow because of the naïvety or ignorance which alone in their judgment could account for views with which they so violently disagree.¹²

These paradoxical elements make him a challenge to anyone searching out the essence of his legal philosophy. The challenge is compounded by the recognition that, being a man exposed to such a uniquely long range of legal problems, Justice Black's ideas changed and developed over the years. Some of his more important views, such as the "absoluteness" of the first amendment, appeared relatively late in his career,¹³ although he ardently maintained that this in particular

5. *Dennis v. United States*, 341 U.S. 494, 579-81 (1951) (Black, J., dissenting).

6. H. BLACK, *A CONSTITUTIONAL FAITH* 46-48 (1969) (a revised version of three lectures given in the Columbia University School of Law's James S. Carpentier Series, Mar. 1968) [hereinafter cited as *A CONSTITUTIONAL FAITH*].

7. Krislov, *Mr. Justice Black Reopens the Free Speech Debate*, 11 U.C.L.A.L. REV. 189, 191-92 (1964).

8. *E.g.*, *Konigsberg v. State Bar*, 366 U.S. 36, 74-80 (1961) (Black, J., dissenting); *A CONSTITUTIONAL FAITH* 50-52; H. Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 878-79 (1960) (New York University School of Law's first James S. Madison Lecture, Feb. 17, 1960).

9. *Cf.* *Cox v. Louisiana*, 379 U.S. 559, 575-84 (1965) (Black, J., concurring and dissenting).

10. *E.g.*, *Chambers v. Florida*, 309 U.S. 227, 241 (1940) (urging the use of due process to translate the shield of constitutional rights into living law).

11. *Galloway v. United States*, 319 U.S. 372, 396-97 (1943) (Black, J., dissenting); *New York Life Ins. Co. v. Gamer*, 303 U.S. 161, 176-77 (1938) (Black, J., dissenting). In both of these cases Justice Black chided the Court for invading the province of the jury.

12. *A CONSTITUTIONAL FAITH* 64.

13. Reich, *supra* note 1, at 674.

was always deeply embedded in his philosophy.¹⁴ He frequently attempted "to reconcile his current views with earlier opinions,"¹⁵ making it even more difficult to ascertain his philosophy in any finalized form. Thus, while some have classified him as a Madisonian,¹⁶ in effect he defied classification.

In his many years on the Supreme Court, Justice Black addressed the full scope of juridical problems. During the latter part of the New Deal he was embroiled in the legal battle over governmental regulation of business; during the war years he rendered decisions affecting national security; during the McCarthy period he addressed the problem of congressional investigations; and more recently he concerned himself with problems of racial equality, legislative apportionment, and anti-trust enforcement. Study of his work in all these areas is necessary to fully comprehend his legal philosophy, but the one field that best lends itself to this task is that pertaining to the guarantees of the first amendment since, by his own admission, this was at the very heart of his jurisprudence:

[I] view the guaranties of the First Amendment as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned. Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body.¹⁷

He repeated the importance of this concept to his philosophy in the James S. Carpentier Lectures that he delivered at Columbia University School of Law in 1968:

The First Amendment, as I have frequently said, is the heart of our Bill of Rights, our Constitution, and our nation. Where rights of communication, assembly, and protest are made secure, which is what our First Amendment is intended to do, people develop a sturdy and self-reliant character which is best for them and best for their government.¹⁸

This particular concern with the first amendment may have several subconscious roots: the individualistic emphasis of his southern rural background, his boyhood during the troublesome reconstruction period, or the more immediate influence of juridical tradition in Alabama where he practiced law and which historically has held for the

14. See A CONSTITUTIONAL FAITH 53.

15. Reich, *supra* note 1, at 701.

16. Strickland, *Black on Balance*, in HUGO BLACK AND THE SUPREME COURT 245, 271-72 (S. Strickland ed. 1967) [hereinafter cited as HUGO BLACK].

17. *Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 301-02 (Black, J., dissenting).

18. A CONSTITUTIONAL FAITH 63.

primacy of the Bill of Rights.¹⁹ But my concern is not the subconscious or historical origins of his jurisprudential thought; rather, it is with the conscious delineation and explication he himself gave to it, hoping to find a clearer understanding of that which lay beneath.

Instead of attempting to identify Justice Black with any particular school of legal thought, I will set forth the foundations of his legal philosophy using as the focal point the personal rights enunciated in the first amendment. His insistence upon the importance of the first amendment and his repeated assertion of an absolutist position with regard thereto delineates Justice Black's view of the broader issue—the relationship between society and the individual. Through his decisions and in his off-the-bench remarks, he proposed pragmatic solutions to the ever-present problem of the priority between the individual and the social order. Justice Black's proposed solution to this problem is not as simplistic and naive as at times he made it appear, for he underwent a long and excruciating process of balancing, not on a statutory or constitutional level, but on a jurisprudential level,²⁰ and it is only in terms of this broader balancing that his "absolutes" can be understood.

In order to receive a clearer understanding and, hopefully, a better appreciation of this deeper balancing process of Justice Black's, I have chosen to analyze his absolutist position on the first amendment within the context of three jurisprudential settings: the individual versus the state; a monolithic society versus a pluralistic society; and the rule of law versus the rule of man. I thus hope to give a more jurisprudential perspective to his position than he himself was to give because of his concern with the sheer pragmatics of making specific decisions within the confining orbit of statutory and constitutional law.

I

THE INDIVIDUAL VERSUS THE STATE

When Justice Black was elected to the United States Senate from Alabama, he undertook an extensive self-education program that centered mainly on the historical sources of our constitutional form of government. In these studies he was deeply impressed with the case of one John Lilburne, for on more than one occasion he refers to the incident in which this Puritan dissenter was "whipped, put in the pillory, sent to

19. See Krislov, *supra* note 7, at 205.

20. The term "jurisprudence" as used in this Article is to be understood as the philosophy of law; that is, the questions posed and the answers given concerning the ultimate values of the legal and governmental order. Jurisprudence is here understood to be that philosophy of law more concerned with what law ought to be than what it is. The terms "jurisprudence" and "philosophy of law" are used interchangeably.

prison, heavily fined and banished from England"²¹ through a bill of attainder passed by Parliament in 1637. For Justice Black this historical example illustrated the basic defect of the Magna Carta and the statutes complementing it: they were not binding upon Parliament, which in effect meant that Parliament was unlimited in the exercise of its power. There was simply a shift from monarchical absolutism to parliamentary absolutism. It was the awareness of this particular condition that prompted John Lilburne to observe: "[T]hat which is done by one Parliament, as a Parliament, may be undone by the next Parliament; but an Agreement of the People begun and ended amongst the People can never come justly within the Parliament's cognizance to destroy."²² This proposed "Agreement of the People," Liburne continues to argue, could be changed only by the people and so would bind Parliament as the supreme law of the land. According to Justice Black, it was this idea that was picked up and included in the constitutions of Massachusetts and New Hampshire and finally became the foundation of the constitutional form of government adopted by the founding fathers.²³

In Justice Black's thinking, this is what significantly differentiates the British and United States forms of government.²⁴ The United States Government is restricted by a written agreement of the people—the Constitution—which serves as the supreme law of the land. As Justice Black remarked:

It is of paramount importance to me that our country has a written constitution. This great document is the unique American contribution to man's continuing search for a society in which individual liberty is secure against governmental oppression.²⁵

This document arose from an awareness of the British experience in which there existed bills of attainder, trials without counsel, and self-incrimination. It was in the light of this background and in reaction to these legal shortcomings that the United States Constitution took form.

During the framing of the "Agreement of the People," many basic jurisprudential factors had to be weighed and balanced so that a sound foundation could be laid that was consistent with the newly felt aspirations for personal freedom. Justice Black felt that after many agonizing questions were debated and discussed, the solutions were expressed in the Constitution, which was to serve as the guideline of governmental and societal functioning until changed by the people. Precisely because

21. H. Black, *supra* note 8, at 868.

22. *Id.*, quoting *LEVELLER MANIFESTOES OF THE PURITAN REVOLUTION* 423 (D.M. Wolfe ed. 1944) (omitting emphasis in original and slightly changing the punctuation).

23. *Id.* at 868-69.

24. See H. Black, *supra* note 8, at 870.

25. A CONSTITUTIONAL FAITH 3.

the Constitution formulated answers to fundamental jurisprudential questions through the process of popular agreement, no change in those answers can be made apart from the procedure of popular consensus. This is the concept of limited government: it must function within the limits established by the specific answers given to the basic jurisprudential questions. Once accepted and established, these jurisprudential conclusions must function as absolutes within the legal structure. This is not to say, however, that they are absolutes in any metaphysical sense, for obviously these basic jurisprudential questions can be answered in various ways; but when once answered in constitutional form, they must function as absolutes until revoked or amended by the same process in which they were established. Nor is this to say that once a set of jurisprudential answers has been constitutionally accepted do they become moral absolutes; they may be moral absolutes for some but not for others.

When Justice Black used the term "absolutes," he was not referring to either metaphysical or moral absolutes, although he personally considered certain freedoms guaranteed by the first amendment to be moral rights. Rather, he spoke of legal absolutes that emanate from jurisprudential decisions made on a level deeper and more fundamental than that of normal legal decisions. He was quite clear on this matter in his James Madison Lecture at the New York University School of Law on February 17, 1960:

Of course the decision to provide a constitutional safeguard for a particular right, such as the fair trial requirements of the Fifth and Sixth Amendments and the right of free speech protection of the First, involves a balancing of conflicting interests. . . . I believe however, that the Framers themselves did this balancing when they wrote the Constitution and the Bill of Rights. They appreciated the risks involved and they decided that certain rights should be guaranteed regardless of these risks. Courts have neither the right nor the power to review this original decision of the Framers and to attempt to make a different evaluation of the importance of the rights granted in the Constitution. 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 in the manner provided by the people.²⁶

Thus, although on the surface Justice Black appeared to be an uncompromising philosophical absolutist, he could readily accept change on the level of legal philosophy if accomplished through legally consistent procedures. However, to effect jurisprudential changes through

26. H. Black, *supra* note 8, at 879.

statutory law or under the guise of constitutional interpretation fails to recognize the all important difference in level and opens the way for logical and legal inconsistencies. For one thing, Justice Black felt that to permit fundamental questions regarding the individual-state relationship to be answered in the routine operation of government would be to return by default to the British experience of 18th-century parliamentary (legislative) supremacy, or unrestricted government, which our Constitution was intended to prevent. Furthermore, to tolerate a day-by-day, case-by-case balancing of the relations between state and individual confuses two quite separate classes of decisions: decisions that form the nature and character of government (jurisprudential or structural decisions) and decisions regarding its execution and operation (operational decisions). To confuse these two areas of decision-making in effect denies the historical fact that these deeply jurisprudential decisions have already been made and nullifies the legal procedure agreed upon in coming to those decisions.

In Justice Black's reading of history, the basic jurisprudential and philosophical decisions regarding the place and function of the United State Government are embodied in the Bill of Rights.²⁷ It is precisely for the reason that the Bill of Rights relates mainly to jurisprudential questions and not operational questions that it must be accepted as enunciating *legal* (not philosophical or moral) absolutes. In fact, he saw the Bill of Rights taking precedence over the rest of the Constitution. Although Justice Black adduced historical reasons for this view, his basic reason was that the jurisprudential balancing between person and state was done in this portion of the Constitution.

Although some may question the historical accuracy of Justice Black's position, his view was not without rational foundation. The function of the Bill of Rights is to delineate specific answers to the old question of whether the individual exists for the state or the state for the individual. According to Justice Black, the generation that wrote the Bill of Rights "deeply feared and bitterly abhorred

27. It should be noted that, for Justice Black, the Bill of Rights comprised more than the first ten amendments:

What is a bill of rights? In the popular sense it is any document setting forth the liberties of the people. I prefer to think of our Bill of Rights as including all provisions of the original Constitution and Amendments that protect individual liberty by barring government from acting in a particular area or from acting except under certain prescribed procedures. I have in mind such clauses in the body of the Constitution itself as those which safeguard the right of habeas corpus, forbid bills of attainder and ex post facto laws, guarantee trial by jury, and strictly define treason and limit the way it can be tried and punished. I would certainly add to this list the last constitutional prohibition in Article Six that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

Id. at 865-66.

the existence of arbitrary, unchecked power in the hands of any government official, particularly when it came to punishing alleged offenses against the state."²⁸ Accordingly, "our Constitution with its Bill of Rights was expressly intended to make our Government one of strictly limited powers. The Founders were intimately familiar with the restrictions upon liberty which inevitably flow from a Government of unlimited powers."²⁹ The Bill of Rights thus enunciates the fundamental philosophy that serves as the underpinning of the entire governmental structure, and because of this philosophic priority, it must likewise have legal priority.

In opting for the "limited government" concept, the founding fathers embodied in the Constitution a liberal (limited government), individualist (*laissez-faire*), and humanist, rather than collectivist, philosophy. Their choice was thus for a philosophy that sees the state existing for the individual. This was a fundamental jurisprudential decision made by "agreement of the people"; it therefore cannot be changed or modified except through a similar agreement. In the words of Justice Black:

To my way of thinking, at least, 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. If I am right in this then there is, at least in those areas, no justification whatever for "balancing" a particular right against some expressly granted power of Congress. If the Constitution withdraws from Government all power over subject matter in an area, such as religion, speech, press, assembly, and petition, there is nothing over which authority may be exerted.

The Framers were well aware that the individual rights they sought to protect might be easily nullified if subordinated to the general powers granted to Congress.³⁰

Justice Black concretely reiterated this position in one of his famous dissents regarding freedom of speech, in which he scolded the Court for blurring this distinction between levels:

The Court, by stating unequivocally that there are not "absolutes"

28. *Green v. United States*, 356 U.S. 165, 209 (1958) (Black, J., dissenting).

29. *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 163 (Black, J., dissenting). See also H. Black, *supra* note 8, at 867:

The historical and practical purposes of a Bill of Rights, the very use of a written constitution, indigenous to America, the language the Framers used, the kind of three-department government they took pains to set up, all point to the creation of a government which was denied all power to do some things under any and all circumstances, and all power to do other things except precisely in the manner prescribed.

30. H. Black, *supra* note 8, at 874-75.

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 rest. The Founders of this Nation attempted to set up a limited government which left certain rights in the people—rights that could not be taken away without amendment of the basic charter of government.³¹

The questions posed on the jurisprudential level are of such seriousness that in practice they orient the whole operational aspect of government in one direction rather than another. They are thus of such magnitude that they should be decided by the community whose authority brings government into existence and should be kept outside the jurisdiction of government itself.

One may certainly disagree with Justice Black's historical evaluations,³² and one may question his moralistic assertions of the existence of "inalienable rights," but it is difficult to discount the logic of setting up a hierarchy of legal authority and his insistence upon the distinction between the basic philosophy and the operational aspects of government. And one can hardly disregard his deep concern that confusion concerning these matters would cause philosophical obfuscation, so that all important jurisprudential questions are determined in an unconscious, unknowing, unreflective manner, perhaps culminating in rule by indiscriminate chance rather than rule by conscious determination.

II

A MONOLITHIC SOCIETY VERSUS A PLURALISTIC SOCIETY

Justice Black was a vital force in the Senate in the early years of the New Deal, and he was Franklin Roosevelt's first appointment to the Supreme Court to effectuate his reform there. Undoubtedly, because of action in Congress as a crusading Senator for social and economic reform and because of his dissenting opinions in his early years on the Court, Justice Black will be thought of as a chief contributor toward the

31. *Konigsberg v. State Bar*, 366 U.S. 36, 67 (1961) (Black, J., dissenting).

32. According to Justice Black, one of the main purposes of the Constitution with its amendments was to withdraw from government all power to act in certain areas. The question is not so much whether in fact this was historically the intention of the founding fathers; it is only important for our purposes to understand that this is the way that he read constitutional history. We seek here his jurisprudential reasons for wanting to read history that way.

creation of a centralized and collectivized American society in which the individual has gradually become the organization man whose uniqueness and individuality is seriously threatened.³³ Yet in his dissenting opinions, especially in cases dealing with freedom of speech, Justice Black expressed the fear that this excessively monolithic trend had been sanctioned by many Supreme Court decisions, because "these decisions have held that the 'interests of government' are increasingly more important than those of the individual. They have placed ever less value on individualism, nonconformity, and dissent as significant elements in society."³⁴ He later tried to balance out this process to make it consistent with his liberal-humanist-individualistic philosophy, for it was in fact this philosophy that initiated his belief in the collectivistic process. Justice Black always felt that the focus of American democracy should be kept on the individual:

[I]n the early days of [Justice Black's] Court service, even in his opinions dealing with such things as interpretations of the Commerce Clause and the laws passed under it, he always kept one eye on the effects of statutes and situations on the individual. It is for this reason that, in particular, he continues to be suspicious of corporate mergers—because they move us still further from the days when more individuals had a better chance to control or at least affect the economic enterprises they were involved in, into an era where more individuals are more likely *to be* controlled by the highly mechanized-computerized, smoothly oiled economic enterprises in which they find themselves. Big, powerful government, of the kind implicit in the causes of the New Deal and the Great Society, is accepted insofar as it helps to liberate man from social and economic pitfalls, but is attacked when it too becomes an agent of restriction.³⁵

In his support of economic reform under the New Deal, Justice Black's liberal-humanist philosophy was operative because it allowed for greater participation in the economic wealth of the country by a greater number of individuals, thereby enabling individuals to be less dependent on the financial conglomerates that were then controlling the financial condition of the country. Therefore, it was not inconsistent to demand that the subsequent development of that reform comport with his basic philosophy that government and society must function as instruments to develop and foster the unique potentialities of the individual.³⁶

His exposure to historical developments over the past 60 years

33. See Reich, *supra* note 1, at 753.

34. *Id.*

35. Dilliard, *The Individual and the Bill of Absolute Rights*, in HUGO BLACK, *supra* note 16, at 97, 129.

36. See *Adler v. Board of Educ.*, 342 U.S. 485, 496-97 (1952) (Black, J., dissenting).

led Justice Black to make a basic distinction between economic rights on the one hand and personal freedoms in the area of intellectual investigation, religion, the arts, and politics on the other. These two areas of rights are not equivalent, and in his judgment the latter must take precedence over the former because they are of a different order. Economic or property rights can and should be engineered to enable man to exercise more fully his personal freedoms. Justice Black early explicated this philosophy in the case of *Hague v. CIO*,³⁷ in which he joined with Justice Roberts in an opinion that sought to place individual liberty, including free speech, under the fourteenth amendment's privileges and immunities clause, thus effectuating a different treatment of property rights and individual liberty.³⁸ He maintained this philosophy and this distinction in his later decisions, as is exemplified in the case of *Marsh v. Alabama*.³⁹

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.⁴⁰

Justice Black insisted that this jurisprudential balancing between property rights and individual freedom has already taken place in our society and has been given legal expression in the Constitution. The Constitution, through the commerce clause and the necessary and proper clause, has left to different branches of government the power and responsibility of balancing out conflicts that may arise between property rights and the general welfare of society. But through the Bill of Rights, it has created absolutes that deny this balancing power to government with regard to personal freedoms, even though those freedoms can at times conflict with that same general welfare.⁴¹

In some of his later opinions Justice Black seemed to modify this position, for in his Carpentier Lecture he stated that "no matter how urgently a person may wish to exercise his First Amendment guaran-

37. 307 U.S. 496 (1939).

38. Reich, *supra* note 1, at 691.

39. 326 U.S. 501 (1946).

40. *Id.* at 509.

41. I . . . 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. I happen to believe this was a wise choice and that our free way of life enlists such respect and love that our Nation cannot be imperiled by mere talk.

Speiser v. Randall, 357 U.S. 513, 531 (1958) (Black, J., concurring), *quoting* *Carlson v. Landon*, 342 U.S. 524, 555-56 (1952) (Black, J., dissenting).

tees to speak freely, he has no constitutional right to appropriate someone else's property to do so."⁴² And in further clarifying his position in this same lecture, he said:

I hope it is clear that my belief is while the First Amendment guarantees freedom to write and speak, it does not guarantee that people can, wholly regardless of the rights of others, go where they please and when they please to argue for their views. Such conduct can be regulated. The streets and highways, for example, are basically dedicated to the use of travellers who wish to go from one place to another. Anything that interferes with this basic purpose interferes to a greater or lesser extent with the basic purpose of highways.⁴³

This qualified position arose with the civil rights cases, but there remained a certain consistency in his position: what he is balancing in these cases is not individual freedoms against social or economic engineering, but an individual freedom against an individual freedom. Thus, even in these opinions his individualistic philosophy surfaces and is given new expression.⁴⁴

This deep concern for the individual is the source of Justice Black's most vehement dissenting opinions, in which he defended the right of the dissident individual to express his opinions and views.⁴⁵ Several of these opinions are worth quoting, for they bring out the true sentiments of his deep convictions on this subject:

The Court assures us that today's encroachment on liberty is just

42. A CONSTITUTIONAL FAITH 57.

43. *Id.* at 61-62.

44. *Cf.* *Cox v. Louisiana*, 379 U.S. 559, 575-84 (1965) (Black, J., concurring and dissenting). See also A CONSTITUTIONAL FAITH 60:

Obviously Louisiana could not be allowed "to pick and choose among the views it is willing to have discussed on its streets." This, however, is not to take away from government its necessary power to control its property, but only forbids it to do so in a way that amounts to aiding some views, beliefs and causes over others, which amounts to precisely the kind of governmental censorship the First Amendment was written to proscribe.

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

I dissent from the Court's judgment

Adler v. Board of Educ., 342 U.S. 485, 496-97 (1952) (Black, J., dissenting).

a small one, that this particular statutory provision "touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint." But not the least of the virtues of the First Amendment is its protection of each member of the smallest and most unorthodox minority. Centuries of experience testify that laws aimed at one political or religious group, however rational these laws may be in their beginnings, generate hatreds and prejudices which rapidly spread beyond control. . . .

Fears of alien ideologies have frequently agitated the nation and inspired legislation aimed at suppressing advocacy of those ideologies. At such times the fog of public excitement obscures the ancient landmarks set up in our Bill of Rights. Yet then, of all times, should this Court adhere most closely to the course they mark. . . .⁴⁶ Nevertheless, since prejudice manifests itself in much the same way in every age and country and since what has happened before can happen again, it surely should not be amiss to call attention to what has occurred when dominant governmental groups have been left free to give uncontrolled rein to their prejudices against unorthodox minorities. . . .⁴⁷

In emphasizing his belief that the basic jurisprudential decision has been made in favor of the individual as against the government and society in general, he adduced the words of James Madison:

[T]he Bill of Rights' limitations point "sometimes against the abuse of the Executive power, sometimes against the Legislative, and in some cases against the community itself; or, in other words, against the majority in favor of the minority."⁴⁸

Justice Black's philosophy stood in contrast to that of Roscoe Pound, who maintained that individual and social interests are basically the same phenomena viewed from a different perspective.⁴⁹ Justice Black felt this division was more real and irreconcilable, for on the one side he saw growing centralized government and pressures for social conformity, and on the other side he saw the individual attempting to exercise his uniqueness and creativity. He seemed to manifest a deep fear that monolithic structuring through centralization and conformity would destroy the pluralism of the American society, a society the best parts of which derived from diversity and individuality. But his concern was more than simply to preserve the American society he knew. He was concerned about the interplay of this dualism on a deeper level, and he resolved it by setting up a hierarchy of values in which the legal

46. *American Communications Ass'n v. Douds*, 339 U.S. 382, 448-53 (1950) (Black, J., dissenting).

47. *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 145-46 (1951).

48. H. Black, *supra* note 8, at 871.

49. See Krislov, *supra* note 7, at 207-08.

absolutes in the Bill of Rights take precedence, protecting the rights of the individual in reference to society in general. Balancing is allowed in this area only where there is a conflict of personal interests.

Philosophically, Justice Black personally agreed with the hierarchy of values he saw in the Constitution, which made it so easy for him to enforce the provisions of the Bill of Rights with conviction.⁵⁰ Although he recognized that values accrue to society by unfettering the creative powers of the individual, basically it was not this consideration that led him to place the individual at the apex of his value system. Rather, the individual has that position because of his intrinsic nature. His emphasis on the intrinsic worth of the individual person apart from any contribution to society identified him psychologically and temperamentally with the ethos of Protestantism and the spirit of individualism that was reflected in the thinking of so many of the framers of the Constitution. But, paradoxically, this also identified Justice Black with the mood of the "new revolution," which is reacting so vehemently to organizational structuring, both governmental and societal, and its demands for conformity and subservience of the individual. It is this basic jurisprudential judgment of Justice Black's that made him so appealing to the "new generation," especially as his philosophy is concretely set forth in his decisions regarding free speech under the first amendment.

III

THE RULE OF LAW VERSUS THE RULE OF MAN

The concept of absolutes was for Justice Black a concrete expression of his search for "the rule of law"⁵¹ that will encase those value judgments in favor of the individual so as to protect them from the power of the state or other collective powers that may develop in society. In a word, Justice Black's establishment of absolutes was a "plea for constitutional adjudication with definite standards";⁵² he wanted to remove basic jurisprudential problems from the jurisdiction of governmental power, which is normally exercised only by a few.

In this search for the curtailment of power through the "rule of law," Justice Black was not so naive as to suppose that the law should function in a mechanistic and automatic manner. But he was constantly searching for legal techniques that would place the status of the individual's rights in the intellectual, religious, and political spheres outside the purview of governmental and societal powers. He accom-

50. Some might say, of course, that this made it easy for him to "see" the hierarchy itself.

51. See Reich, *supra* note 1, at 743.

52. *Id.* at 744.

plished this by creating as legal absolutes those rights guaranteed in the Bill of Rights, which he maintained cannot be manipulated by any power in government except through a general consensus of the people.

The historical source of the legal processes of our Anglo-American society was the common law, under which the legal system developed through a continuing process of adjustment to the contingencies of time and place, which in turn enhanced the role of the judiciary in making law by a case-to-case process. The common law tradition, in its emphasis on the adaptability of law, places particular importance on man's ability to make allowances in the application and creation of law, which in turn places more emphasis on the rule of man than on the rule of law.⁵³ But a written constitution compensates for this defect in the common law tradition, because it establishes a legal structure that delineates the areas to be decided through a common law approach and sets them apart from deeply jurisprudential areas, which are outside the purview of the men who happen to be in positions of power. According to Justice Black, as a matter of historical fact, the latter concept of government was the one established by consensus of the American people: "I think there is something to our people's aspirations for a government of laws and not of men."⁵⁴

Once these basic guidelines have been established by the Constitution, the primary responsibility and duty of the judiciary is that of "giving force and effect to constitutional liberties and limitations upon the executive and legislative branches."⁵⁵ In all cases the judiciary is to apply these basic provisions of the Constitution with clarity and consistency, which are the true aids in the accomplishment of any attempt to establish a rule of law. The executive and legislative branches are to be controlled by the rule of law through the judiciary, which applies the Constitution and, most especially, effectuates the absolutes enunciated in the Bill of Rights.⁵⁶

But the same restrictive principle is to be applied to the judiciary itself. Anyone familiar with the many dissenting opinions of Justice Black, especially in the McCarthy era, was aware of his fear of the rule of man as it can be exercised by the judiciary. Through his experience in the early New Deal period, in which he felt that Justices on the Su-

53. *Id.* at 737.

54. A CONSTITUTIONAL FAITH 41.

55. H. Black, *supra* note 8, at 870.

56. The Framers were well aware that the individual rights they sought to protect might be easily nullified if subordinated to the general powers granted to Congress. One of the reasons for adoption of the Bill of Rights was to prevent just that. Specifically the people feared that the "necessary and proper" clause could be used to project the generally granted Congressional powers into the protected areas of individual rights . . .

H. Black, *supra* note 8, at 875.

preme Court were imposing their own peculiar economic theories on the Nation as a whole, and during the McCarthy period when he felt that the Court was succumbing to the pressures of public sentiment, he became particularly pessimistic regarding the Court's role in preserving a rule of law. He explicated this fear quite clearly in his Carpentier Lecture:

[T]here is a tendency now among some to look to the judiciary to make all the major policy decisions of our society under the guise of determining constitutionality. The belief is that the Supreme Court will reach a faster and more desirable resolution of our problems than the legislative or executive branches of the government. To the people who have such faith in our nine justices, I say that I have known a different court from the one today. What has occurred may occur again. I would much prefer to put my faith in the people and their elected representatives to choose the proper policies for our government to follow, leaving to the courts questions of constitutional interpretation and enforcement. . . .⁵⁷

In accordance with his deep concern for the rule of law, especially as it pertains to personal liberties expressed in the Bill of Rights, Justice Black was a "judicial activist" in applying the Constitutional restrictions on the executive and legislature. But that same concern, coupled with his legal experience, made him exceedingly fearful of placing too much faith in the Court. The fear that judicial power would undermine the proper functioning of the rule of law was again expressed in the Carpentier Lecture:

Power corrupts, and unrestricted power will tempt Supreme Court justices just as history tells us it has tempted other judges. For, unfortunately, judges have not been immune to the seductive influences of power, and given absolute or near absolute power, judges may exercise it to bring about changes that are inimical to freedom and good government.⁵⁸

It is this fundamental judgment that made him particularly critical of two specific theories propounded by some of his contemporaries on the Court: the "natural law" theory and the "balancing" theory. In his view, both of these positions would serve only to undermine the constitutional restrictions that have been placed on the Court and give to the Justices a latitude that enables them to decide those deeply jurisprudential questions that have been taken out of their sphere of competence by the absolutes of the Constitution.

According to the natural law school, the Justices are free to decide cases by norms set forth in an unwritten law, one above and undefined

57. A CONSTITUTIONAL FAITH 11.

58. *Id.* at 12.

by the Constitution.⁵⁹ Under this theory statutes may be invalidated because they violate such unwritten norms as "fair play," "justice," and "reasonableness," without any reference to a specifically posited law or judicial precedent. Justice Black saw in this approach a subtle reversion to the rule of man approach, because it places the deeply jurisprudential questions at the discretion of judges. This theory, in effect, delegates to the judiciary the responsibility of making ultimate value judgments regarding the most important questions, and in so doing places unlimited power in the judiciary. Power is commensurate with the nature and importance of decisionmaking responsibilities, and those organs of society that decide the ultimate questions are thereby made the seats of ultimate power.

In *International Shoe Co. v. Washington*,⁶⁰ Justice Black pointed out specifically his opposition to the natural law theory:

Superimposing the natural justice concept on the Constitution's specific prohibitions could operate as a drastic abridgment of democratic safeguards they embody, such as freedom of speech, press and religion, and the right to counsel. This has already happened. For application of this natural law concept . . . makes judges the supreme arbiters of the country's laws and practices. . . .⁶¹

In *Adamson v. California*,⁶² he contrasted his approach to that of the "natural law" proponents:

[T]o pass upon the constitutionality of statutes by looking to particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of "natural law" deemed to be above and undefined by the Constitution is another. "In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people."⁶³

It must not be concluded, however, that Justice Black opposed the concept of natural law as a jurisprudential theory. When he referred to the natural law theory as "degrad[ing] the constitutional safeguards of the Bill of Rights,"⁶⁴ he was referring to it as a principle of decisionmaking in specific cases, not as a philosophical theory of the

59. See *id.* at 35.

60. 326 U.S. 310 (1945).

61. *Id.* at 325-26 (separate opinion).

62. 332 U.S. 46 (1947).

63. *Id.* at 91-92 (Black, J., dissenting), quoting *Federal Power Comm'n v. Pipeline Co.*, 315 U.S. 575, 601 n.4 (1942).

64. 332 U.S. at 70.

sources of law. These two considerations are quite distinct, and it was consistent for Justice Black on the one hand to adhere to the natural law as a legal philosophy and, on the other, to reject the natural law theory as a methodology in coming to decisions in specific cases.

In fact, it would have been inconsistent for him to hold otherwise, because in recognizing a very fundamental distinction between these two levels, he emphasized that everyone (judges as well as citizens) should be consciously aware of the level within which they were operating. The case-to-case decisions should be made upon the basis of the jurisprudence that has been established at a more ultimate and important level. In adhering to the natural law solutions of the founding fathers, he was consistent in refusing to reopen the question in day-to-day decisions. In effect, he encased the theory in the protective covering of legal absolutes and enthroned it as legally unimpeachable in his search for the rule of law.

From the *Slaughter House Cases*⁶⁵ through a long line of fourteenth amendment cases, the Supreme Court has rejected requests to adopt the natural law theory as a part of the due process clause,⁶⁶ and so in recent times, by far the most threatening danger to the constitutional restrictions on the Court has been the balancing theory. According to this theory, when conflicts arise between the exercise of personal freedoms protected in the Bill of Rights and certain state and social interests, the Court is to weigh the conflicting interests and decide the case through a process of comparing the respective evils and goods that are to accrue to either the state or the individual.⁶⁷ Under this test the question in every case is "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 the Supreme Court*, to justify the government's action in doing so."⁶⁸ In the estimation of Justice Black, this is tantamount to substituting the rule of man for the rule of law, for it allows the Court to decide the basic questions regarding the relationship that should exist between the individual and the state. He felt that this not only violated the constitutional absolutes set forth by the founding fathers, but that, pragmatically, in times of emergency and stress, this could give the state the power to do what it thinks necessary to protect itself at the discretion of the nine Justices of the Supreme Court.⁶⁹

65. 83 U.S. (16 Wall.) 36 (1873).

66. A CONSTITUTIONAL FAITH 35.

67. *Scales v. United States*, 367 U.S. 203 (1961); *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

68. A CONSTITUTIONAL FAITH 52.

69. H. Black, *supra* note 8, at 878.

This problem of balancing personal rights against the rights of society and the state is at the very heart of the question, for it is conceivable that unrestricted individual rights could be destructive of the state and even of the social fabric itself. Therefore, in the minds of many, this balancing must be continuously carried on by all branches of government, with each serving as a check upon the other through the checks provided by the Constitution. But in the mind of Justice Black, these checks were not even the question, because, as a matter of historical fact, the jurisprudential balancing regarding the individual and the state had already taken place, and the conclusions of that judgment were enshrined as absolutes in the Bill of Rights until amended or changed by the community at large. This jurisprudential weighing of personal freedoms having already taken place and the decision having been made by the people in the fundamental law of the land, judicial balancing is precluded:

My answer to the statement that this Government should preserve itself is yes. The method I would adopt is different, however, from that of some other people. I think it can be preserved only by leaving people with the utmost freedom to think and to hope and to talk and to dream if they want to dream. I do not think this Government must look to force, stifling the minds and aspirations of the people. Yes, I believe in self-preservation, but I would preserve it as the founders said. . . .⁷⁰

His refusal to balance the deeply jurisprudential values through the courts is not quite as unrealistically simple as it may at first appear. Justice Black realized the judicial appraisal that must take place in the application of the constitutional absolutes. For example, in *Konigsberg v. State Bar*⁷¹ he intimated that "when speech is integrally combined with conduct the problem cannot be resolved by all-out protection of the speech; if the conduct is subject to a law which is not directed at speech and does not attempt to regulate the content of speech, a weighing process may be necessary."⁷² The Court may have to undergo some agonizing analyses in order to disengage those rights that are protected absolutely when they are intermingled with conduct that is subject to regulation and restriction. But this is the very function of the Court: to distinguish those areas that are governed by a rule of law and those subject to the rule of man.

70. Justice Black and First Amendment "Absolutes": A Public Interview, *supra* note 4, at 555.

71. 366 U.S. 36 (1961).

72. Reich, *supra* note 1, at 721, discussing the dissenting opinion of Justice Black in *Konigsberg v. State Bar*, 366 U.S. 36, 68-69 (1961).

CONCLUSION

In his 34 years as an Associate Justice of the Supreme Court, Hugo Black became an embodiment of the American legal system, manifesting revisions and reversals of previous decisions and grappling with broad social questions within the context of individual cases and procedural techniques. It would be futile to conjecture on his influence upon future courts. But even his arch critics are willing to admit that he has been instrumental in establishing some impressive legal precedents. What in his early years on the Court were views of a dissenter became the law of the land, most significantly those views concerning the protection of personal rights through the application of the Bill of Rights to the states via the fourteenth amendment. Although the majority of the Court never fully accepted his absolutist view of the first amendment, his influence is certainly present in the Court's current position regarding libel, slander, and obscenity, and without a doubt he was singularly influential in forming much of the Court's strict and almost absolutist position on the right of the indigent to free counsel, the rights to counsel and silence during police interrogation, the protection against self-incrimination, the right to confrontation of witnesses, protection against illegal searches and seizures, and proscriptions against cruel and unusual punishment.⁷³

The resignation of Justice Black on September 18, 1971, brought to a close the career of a prolific and influential jurist; but his death on September 25, 1971, ended the career of one of the most searching jurisprudents in American legal history, because in the context of case decisions he attempted to both discover and manifest a legal philosophy he held to be ultimate. He attempted to protect the individual against the powerful encroachments of corporate bodies, he sought to preserve a political and religious pluralism against a growing economic and social monolith, and he tried to safeguard "The Rule of Law" against the all-pervasive "Rule of Man." All of these esoteric aims he attempted to work out in the concreteness of case decisions through his legal formula of "absolutes." This legal approach typified the character of Justice Black, just as he was symbolized by the dog-eared pocket edition of the Constitution which was his constant working document. From this well-worn document he applied words and phrases with doctrinaire rigidity to a multiplicity of cases, much in the tradition of Biblical fundamentalism with which he was so familiar from his Clay County days. He attempted to resolve the complex problems of modern society in the simplicity of constitutional fundamentalism, and perhaps in doing

73. Darnton, *A Magnificent Dissenter*, N.Y. Times, Sept. 18, 1971, at 12, col. 6 (city ed.).

so he salvaged the best of both worlds by remaining consistent with the old and yet relevant to the new. At least this is the considered judgment of one of the chief advocates of a newer and greener America—Charles A. Reich: “The America which produced Hugo LaFayette Black and his philosophy will not return. Time, storms and the coming of a new glittering society have left him a lonely sentinel—but one whose vigil looks not merely to the past but forward.”⁷⁴

74. Reich, *supra* note 1, at 754.