JUSTICE BLACK AND THE NEW DEAL

JOHN P. FRANK*

His 30th year on the Supreme Court is a great milestone in Justice Black's career as America's senior warrior for individual liberty. Yet this is not at all the career which President Roosevelt expected of Hugo Black when he appointed the Senior Senator from Alabama to the Court in 1937. That Black would become a great civil libertarian was predicted by the thoughtful; it required no change in his outlook. But the fact remains that his concern for civil liberties, which has seemed to heavily dominate his work for the last half of the 30 years, was not the purpose of the appointment in the first place. Black was appointed first and foremost to be a New Dealer on the Court.

The shift of career emphasis has been so gradual that contemporary commentators have fallen into the practice of speaking of Black's libertarianism as though this were the whole of him. That shift is illustrated in three comments made over a wide spread of years in the Lawyers Guild publication:

1. In a review of Black's first year on the Court, a 1938 commentator analyzed his major opinions, which were in the fields of rate regulation, taxation, and other aspects of substantive due process. The writer summarized Black's point of view thus:

> Legislators, administrative officials, even juries, should be allowed a freer hand. Somewhat paradoxically he is bold in the assertion of lack of [judicial] power.[1]

Black's economic-constitutional views were compared to Chief Justice Taney's. The writer anticipated that Black would be on the Bench for most of "the next thirty years," and predicted that he would lead the way back to a Taney approach to constitutional law.[2]

2. Eighteen years later, the same publication noticed Black's 70th birthday. By this time, Black's work in the field of civil liberties had already become substantial. The shift from a primary service to the New Deal to a primary service to old freedoms was well underway, and this was the main tone in the chorus of good wishes. A perceptive essayist, noticing this, said:

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[1] Havinghurst, *Mr. Justice Black*, 1 NAT'L. LAW. GUILD 181, 182 (1938).
[2] *Id.* at 185.

> Currently Justice Black's fame as a libertarian has tended to obscure his egalitarian drives. Future historians will bring it into balance. For his contributions to this area, both as a legislator and as judge, have helped to build into the social and economic structure reforms so vital to the little people that they will in time be seen to be as important as his striving to keep the country from straying from the paths of freedom.[3]

3. In 1960, the same publication had an essay on Black's 74th birthday. The title was *Justice Hugo Black — First Amendment Fundamentalist.* The text said, very correctly,

> The popular image of Black is as distinct as that of any Justice in the history of the Court. He is our First Amendment Fundamentalist.[4]

The preoccupation with Black the civil libertarian is reasonable; for the past 15 or more years this has been the most important part of his work and his greatest contribution. But to make it exclusive would be to see less than the whole man. For Hugo Black was not only the first New Dealer to go to the Court; he is still the senior New Dealer in American public life.

The shift in focus does not mean that the Justice himself is a changed man. Black recently teased himself about consistency of view, reminding an audience that his classmates at the University of Alabama Law School in 1906 noted of him in their yearbook that "this fellow seems to possess but one idea, and that is a wrong one."[5] In the field of civil liberties, he has been a "one idea man" with a lifetime pattern of extraordinary consistency, particularly in the area of fair criminal procedure and of freedom of speech.[6]

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[3] Weissman, *Mr. Justice Black at 70, The Man and His World,* 16 LAW. GUILD REV. 101 (1956).

[4] Gordon, 20 LAW. GUILD REV. 1 (1960). This interest in the Justice as a civil libertarian is reflected endlessly. For example, Irving Dilliard's useful volume, ONE MAN'S STAND FOR FREEDOM (1963) gives this focus in its title. The leading analytical work on Black's jurisprudence, Reich, *Mr. Justice Black,* 76 HARV. L. REV. 673 (1963) covers all fields. However, it includes about 25 pages in "exploration" of Black's "philosophy"; and every case cited is in the civil liberties area.

[5] Black, Reminiscences, 18 ALA. L. REV. 1, 8 (1965).

[6] I have given illustrations in my MR. JUSTICE BLACK ch. 2 (1949). *See also Id.* at 55-56. As a former prosecutor, he knew what could be expected of a high principled prosecutor, and he expected it. For example, in connection with the nomination of Judge John J. Parker to the Supreme Court in 1930, some question arose relating to Parker's handling of certain war frauds cases for the Justice Department prior to his appointment to the Court of Appeals. The suggestion was made that Parker had suppressed evidence favorable to a defendant (a charge which I have no reason to suppose was true). Black did not prejudge the charge; he simply asked Parker's sponsors in the Senate to get the information and report it to the body. Black said, "If it be true that as a prosecutor he had in his possession evidence which tended to show the innocence of a defendant, and at the same time prosecuted him, I feel sure that he would get no votes for confirmation. Therefore, I think it is exceedingly important that from some source, someone who knows, this statement be disproved if it can be disproved." 72 CONG. REC. 7811 (1930).

The shift in focus, then, reflects not a change in Black but a change in the problems confronting the country. For example, the late Senator McCarthy of Wisconsin was not yet even a cloud on the horizon when Black went to the Court. Besides, there were civil liberties issues from the beginning of his Court service, and Black took a decided hand in dealing with them. Three of his greatest civil rights triumphs came in his first five years on the Court when he began his long series of right to counsel opinions.[7]

But civil liberties issues were all at the margin of the important in the 1930's when lusty battles were raging over Franklin D. Roosevelt and his New Deal. The Hugo Black on the Supreme Court today is properly thought of as the inheritor of the tradition of Thomas Jefferson and James Madison, but the Black who was sent to the Court was also the special inheritor of the tradition of John Peter Altgeld and of old Bob LaFollette, whose son was his close companion in the Senate. The Black of the appointment was George Norris's most effective Democratic ally. The Black whom FDR sent to the Court in 1937 was in sum, the hard-hitting, infinitely energetic representative of the Populist-Progressive-New Deal tradition in America.

Major concerns of the era of his appointment, as well as what his own friends and supporters thought of him, are reflected in a rave editorial from the Philadelphia Record, a good enough synthesis of the 1937 point of view to warrant an extensive quotation:

> A GREAT NOMINATION
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> The President has made a great nomination to the Supreme Court. Senator Hugo L. Black, of Alabama, is an outstanding liberal, a man of wide knowledge and acute understanding. He will make a splendid judge. Senator Black is, in fact, the first nominee since Louis D. Brandeis and one of the few Supreme Court nominees in our history who does not come from the bench or the corporations but from an active career in public service.
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> He clashed with the big Navy lobby in 1929. He dug out the yellow-dog contract decision that blocked confirmation of John J. Parker for the Supreme Court in 1931. He fathered the 30-hour-week bill in 1933, and despite lack of administration support, put it through the Senate by a vote of 53 - 30 before it was sidetracked by the N.R.A. He exposed the ocean and air subsidy scandals. He uncovered the fake telegram campaign

[7] Johnson v. Zerbst, 304 U.S. 458 (1938); Chambers v. Florida, 309 U.S. 227 (1940); and the dissent in Betts v. Brady, 316 U.S. 455 (1942), a dissent which finally became the law almost 25 years later in Gideon v. Wainwright, 372 U.S. 335 (1963). Dilliard, *supra* note 4, quotes ten opinions in his collection of Black's civil rights work from the first six years; on the other hand, he had 14 opinions from the last two years in his collection, 1961 to 1962.

against the Utility Holding Company Act. He put the spotlight on the Liberty League-Hearst-Crusader combination of Tory stooges and Facist termites working to undermine American democracy in the last campaign. He has been more liberal than the White House on many issues.

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He is cosponsor of the new Federal minimum-wage and maximum-hour bill and he has not hesitated to meet southern objections head-on. "These wages," he said, "make southern industry prosperous — for its owners. But the dividends go North."

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His fight against the Power Trust and for Government operation of Muscle Shoals began long before the New Deal. He has demonstrated his courage. He attacked Heflin in 1928, and voted to seat Bankhead instead of the Alabama demagogue in a contested election. He blocked immediate consideration of two of the President's appointments to the Maritime Commission recently when they were charged with being antiunion. Though Black's name is sure to invoke protest from the tories, they will find it hard to block his confirmation. He is a Senator. He is a southern Democrat. He is a small-town Baptist. He is no professor or brain truster. But a product of Main Street America.

Politically, the President has made a shrewd choice. He has also made a wise one. Hugo Black's liberalism will wear well.[8]

Hugo Black's transfer from the United States Senate to the United States Supreme Court was no gentle transition from the world's greatest gentlemen's club to the calm of the Marble Palace. Indeed, President Roosevelt sent his first appointee over to the Court, in an atmosphere of shot and shell, as if it were an enemy position to be occupied. For the appointment fight was the last real battle in Roosevelt's war with the Supreme Court and Black was the President's one-man army of occupation.

THE SENATE INHERITANCE

The years 1929 to 1932 signified the failure of the old order.

Whether it was true in fact, it was true in popular belief that the control of American life had been turned over to the businessman; and in 1932 the people demanded an accounting. They forced the old political order into bankruptcy and were ready to enforce drastic changes in the economic order. So the old barriers against trade unions, against social legislation, against state interference in, and competition with, business broke down, the more easily that the pressure against them was now at least a generation old.[9]

[8] Philadelphia Record, Aug. 13, 1937, reprinted in 81 CONG. REC. (App.) 2090-91 (1937).

[9] D. BROGAN, THE ERA OF FRANKLIN D. ROOSEVELT 360 (1950).

Mr. Roosevelt himself summarized the problems of the day in September of 1932 when he said:

> A glance at the situation today only too clearly indicates that equality of opportunity as we have known it no longer exists. Our industrial plant is built; the problem just now is whether under existing conditions it is not overbuilt. Our last frontier has long since been reached, and there is practically no more free land. More than half of our people do not live on the farms or on the lands and cannot derive a living by cultivating their own property. There is no safety valve in the form of a Western prairie to which those thrown out of work by the Eastern economic machines can go for a new start. We are not able to invite the immigration from Europe to share our endless plenty. We are now providing a drab living for our own people. . . . The independent business man is running a losing race. . . . If the process of concentration goes on at the same rate, at the end of another century we shall have all American industry controlled by a dozen corporations, and run by perhaps a hundred men. But plainly, we are steering a steady course toward economic oligarchy, if we are not there already.[10]

To do something about it after he was elected, the President called a special session of Congress. In the first hundred days, he and a cooperative Congress hammered out the first action program in American history directed at economic depression and the social evils which accompanied it:[11]

9 March	Emergency Banking Act
20 March	Economy Act
31 March	Civilian Conservation Corps
19 April	Gold standard abandoned (ratified 5 June)
12 May	Federal Emergency Relief Act
12 May	Agricultural Adjustment Act
12 May	Emergency Farm Mortgage Act
18 May	Tennessee Valley Authority Act
27 May	Truth-in-Securities Act
13 June	Home Owner's Loan Act
16 June	National Industrial Recovery Act
16 June	Glass-Steagall Banking Act
16 June	Farm Credit Act

In the years following, the list grew mightily.

Hugo Black was elected for his second term as Senator simultaneously with Mr. Roosevelt's election to his first term as President. Black swiftly became a major force for the President's program; indeed, as the *Philadelphia Record* editorial suggests, he was at times ahead of it.

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[10] A.M. SCHLESINGER, THE CRISIS OF THE OLD ORDER 425 (1957), gives the excerpt from the Commonwealth Club speech used here and comments on it.

[11] The list is taken from S.E. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 954 (1965).

Black's bill to restrict hours of labor to thirty a week led the way for what became the Fair Labor Standards Act of 1938, the last major piece of New Deal legislation. Without his lobby investigation, the Public Utility Holding Company Act of 1935 would never have passed; it was Black's exposure of the utility interests' corruption of newspapers, and of their false flood of spurious letters and telegrams against the legislation which got the bill through.[12]

President Roosevelt helped the country out of the depression but his accomplishments did not delight all of his fellow citizens. In 1935 and 1936, opposition to the President reached a point of frenzy;[13] and in the politically embattled country of 1936, the New Dealers gave at least as good as they got. We know in retrospect that it was an uneven war; the President was re-elected in 1936 by the most overwhelming vote in a hundred years. But public opinion polling had not reached a point of efficiency which made his re-election predictable, and the fight of 1936 was fought as though it might go either way.

Black was very much in the middle of that fight.[14] As an extraordinarily able public speaker, he was used extensively around the country. In this very bitter battle, the Supreme Court seemed clearly to the New Dealers to be siding with the enemy. Vital elements of the New Deal program had been invalidated by the Court; others were severely menaced. Even state legislation dealing with elementary economic problems had been held unconstitutional.

With the President's overwhelming re-election in 1936, it was apparent that either the Court or the New Deal would have to give,

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[12] For an account of Black's role in the New Deal, see FRANK, *supra* note 6, at ch. 4. One element of the early New Deal was wholly unacceptable to Black. Schlesinger summarizes it:

> The tenets of the First New Deal were that the technological revolution had rendered bigness inevitable; that competition could no longer be relied on to protect social interests; that large units were an opportunity to be seized rather than a danger to be fought; and that the formula for stability in the new society must be combination and cooperation under enlarged federal authority.

A.M. SCHLESINGER, THE COMING OF THE NEW DEAL 179 (1959). Black had no problem in accepting the federal authority, but the theory that "competition could no longer be relied on to protect social interests" was the one major element of the New Deal which was in total conflict with earlier Populist-Progressive theory. The principal manifestation of this attitude in the first Roosevelt administration was the National Industrial Recovery Act, a system of business "codes" which Black voted against.

[13] For discussion of the rise of the opposition, see SCHLESINGER, *supra* note 12 at § VII.

[14] Never, however, in a personal way. Black had been sized up by his law school classmates in 1905 as one who would "use the devil himself with courtesy," Black, *supra* note 5, at 8. Black hit his share of hard blows, particularly in the 1936 campaign, but always impersonally. A striking feature of the 1937 confirmation controversy is the evident regard of his fellow Senators for Black's courtesy in his dealings with them. As I said in another place, "few spirits are so little rusted with rancor." Frank, *Mr. Justice Black*, 65 YALE L.J. 454, 462 (1956).

and the President had no doubt about which it should be. In 1937 he called upon Congress to authorize him to appoint up to six additional Justices. Black was once more, a leading supporter of the President. He made a series of speeches in behalf of the Court plan and the speeches, both on the floor of the Senate and around the country, leave us with an extraordinarily clear picture of his conception of the proper role of the Supreme Court and of a Supreme Court Justice on the eve of his appointment.

By Justice Black's 30th year on the Supreme Court, we have moved so far from the mechanistic theory of constitutional interpretation that it is by now almost impossible to realize that it was only recently the dominant concept of constitutional interpretation in the United States. Charles Beard has told us that when he began the study of constitutional law in 1902,

> [A] Justice of the Supreme Court, in the theory of the classroom, seemed to be a kind of master mechanic. Indeed, as I heard the budding lawyers and judges talk, I was often reminded of a machine once used in the Bank of England to test the coins deposited day by day. When a coin was gently placed on its delicately balanced receptacle, the machine trembled for a second or two and then dropped the coin, right or left, into the proper chest as sound or spurious according to its monetary merits.[15]

The view that there was range in constitutional interpretation, a wide permissive area of choice, in which the economic, social, and political preconceptions of the judge would necessarily influence the ultimate determination was still the minority view of a few iconoclasts like Professors Thomas Reed Powell at Harvard or Douglas Maggs at Duke. As late as 1936, Justice Roberts had been able to say for a majority of the Supreme Court, in validating the Roosevelt administration's agricultural program, that in a constitutional case the sole duty of the Court was "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."[16]

Black was with the iconoclasts. He saw it as "no charge against the integrity of any prospective judge that with reference to economic predilections after he goes on the bench he will still be the same man that he was before he went there."[17] As he further saw it, the dominant bloc of the Court was espousing and reading into the Constitution its own economic philosophy which had been overwhelmingly rejected by the country. Referring to that majority bloc, he said,

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[15] Beard, *Introduction* to FRANK, MR. JUSTICE BLACK at viii (1949).
[16] United States v. Butler, 297 U.S. 1, 62 (1936).
[17] 81 CONG. REC. 2828 (1937).

> It is proper to add that the political and economic constitutional interpretations of these five Justices followed along the direct trail of the dominant interpretations since Justice Field succeeded in overturning previous constitutional principles many years ago.[18]

His repeated theme was that the economic philosophy of the Court's majority of the moment was "contrary to the letter and spirit of our Constitution."[19]

Black argued that the Court and its members showed a "distinct line of demarcation" on all cases relating to property as against all matters concerning human rights and human interests,[20] and by this he meant that the Court was wrongly deciding cases relating to economic programs. As he saw it, the general social philosophy of the anti-New Dealers outside the Court had

> led us to business chaos and in the direction of social and political disintegration. It brought starvation wages; health-breaking long hours of work; child labor in mills; business to

[18] Radio Address, Feb. 23, 1937, reprinted in 81 CONG. REC. (App.) 306 (1937).

[19] *Id.* at 307. The President's initial argument had been that judicial efficiency required younger Justices, an argument which given the Court of the period was so unpersuasive that the President largely abandoned it. So far as judicial efficiency was concerned, Black was also dissatisfied because he thought that the Court had proved itself unable to deal with the personal injury cases which came before it. As an old tort lawyer, just dealings with injured employees seemed to him as important as great constitutional questions. When the friends of the Court said that it was disposing of all "important" cases, Black strenuously disagreed; it was not disposing of cases of injured railroad workers or seamen. In March 1937, he and three other Senators discussed in detail a particular injury case which had arisen from California some years before in which the Court had denied certiorari. Five years later, it took a similar case and reached a result opposite to that of the California court five years earlier. Meanwhile the California courts had treated the denial of the certiorari as an adjudication of the legal point involved. So far as Black was concerned, the argument that the denial of certiorari had not decided the particular point, but merely left the law as it found it, was so much flap-doodle; the bald fact remained that for five years persons in the position of that employee in California had had no coverage. "It may be true," he said, "that the case was not of great constitutional importance to all the people of the nation. It was a case of great importance to the individuals who lived in the State of California, and who were injured while in the employment of their masters." He argued that the employee injury cases with precedent value should have "the status of importance essential even under their own rules." To deal with all these cases, he thought that more Justices were needed, 81 CONG. REC. 2828-29 (1937). Black also gave other illustrations of his contention that the Court had too much to do; one example being that the Court had not yet decided the validity of the Tennessee Valley Authority. *Id.* at 2830.

The employee injury cases did become "important" after Black went to the Court and in no area of the law has his personal influence been as strong as in the rejuvenation of the trial jury and in the development of new rules concerning employee injuries. See Green, *Jury Trials and Mr. Justice Black*, 65 YALE L.J. 482 (1956). Leading Black opinions on employee injuries are Galloway v. United States, 319 U.S. 372, 396 (1943), a comprehensive dissent on jury trial, most of the practical principles of which are now largely accepted in practice; and Tiller v. Atlantic Coastline R.R., 318 U.S. 54 (1943), an opinion holding that Black's favorite *bete noir* of practice days, the doctrine of assumption of risk, had been totally obliterated in the railroad field by the Federal Employers' Liability Act.

[20] 81 CONG. REC. 2833 (1937).

> bankruptcy; and farmers to crushing mortgages that could not be met with 5-cent cotton, 10-cent corn, 20-cent wheat, and other farm prices in proportion.[21]

The Roosevelt administration had sought to deal with those crises of American economic life, and the Court, by reading its economic philosophy into the Constitution, was barring these reforms, said the Senator. The Court was blocking sensible public utility rate regulation. It was blocking reasonable business regulations. It was grossly unfair to organized labor, particularly by holding that the yellow dog contract could not be barred.

Black attacked the course of decisions both generally and specifically. He believed that Congress could provide work for the jobless; that Congress and state legislatures could improve working conditions; that they could prohibit overly long hours and provide minimum wages; that they could control agricultural prices; that the Congress could develop the rivers of America both for flood control purposes and to provide public power.

Speaking more generally, he attacked the entire concept of substantive due process of law:

> A bare majority of the members of the Supreme Court of the United States have been for a number of years assuming the right on their part to determine the reasonableness of State and Federal laws. The Constitution never gave that majority any such power.[22]

So far as Black was concerned, the people of America had chosen the program of the New Deal by 46 states to 2 and they would not be stayed. "The time has arrived when those who favor fitting laws to modern needs in order to correct and cure social and industrial injustice must face their problem squarely and fairly." He had a specific remedy to propose: the country needed "new ideas on the bench."[23]

When Black went on the Supreme Court he carried with him several firm intellectual convictions which were to affect his own work and the work of the Court:

1. Black recognized that there were clear areas of the law, but he also recognized that there were very large areas in which the answers to particular questions were uncertain — honestly and genuinely uncertain. In those areas, he realized that judges would necessarily, and to some undefined degree, decide the cases and determine the law in the light of the economic, social and philosophical predilections they took with them to the bench.

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[21] 81 CONG. REC. (App.) 307 (1937).
[22] 81 CONG. REC. (App.) 638 (1937).
[23] *Id.* at 307.

2. He was committed to certain specific approaches to constitutional interpretation. For example, he was committed absolutely to the proposition that it was never the business of judges to pass upon the reasonableness of legislation. He rejected substantive due process root, branch, and entirely.

3. On the affirmative side, Black was committed to a concept of congressional constitutional power broad enough to deal with the economic needs of the nation, and he took a comprehensive view of which economic needs could be dealt with. The government could regulate:

a. Labor relations.

b. Labor conditions, including wages and hours.

c. Agricultural conditions, including all factors that related to the production and pricing of farm products.

d. Any other matters which related to the control, prevention, or avoidance of economic depression.

e. The complete development of national resources, including the development of public power.

f. All phases of marketing, including security.

g. Whatever was needed to insure a competitive economic order.

4. His strong belief was that it was the proper business of government "to correct and cure social and industrial injustice,"[24] and that this broad charter included regulation of industrial accidents and their consequences, with the Supreme Court having a duty to do a full job of effective and broad interpretation of industrial accident legislation.

These, then, were the "new ideas" — some of them not really so new — that Black took as the first representative of the New Deal to the Supreme Court. Had these represented the totality of his thought, his mark would have been less lasting. With the passage of time, some of the specific problems covered in this list would have taken care of themselves, as indeed many largely did.

But there was something more. Black was a New Dealer, but he was not a doctrinaire New Dealer, limited to the concepts of the program as it then existed. Far more important than Black's specific ideas and convictions was a mind unabashed by change. His basic attitude had been expressed in 1934 when the Senate debated the confirmation of Rexford Tugwell as Undersecretary of Agriculture. There had been a good deal of mealymouthed support for Tugwell in the Senate by Senators who were really a little embarrassed about

[24] *Id.*

the appointment because of claims of Tugwell's radicalism. This was not Black's stance. He said:

> It is my intention to vote for Dr. Tugwell, because I am for him. I am for the views he has expressed, as I understand those views to be written in his books. I am for him because I believe that he is one man who is not content with looking backward, who for every thought he has in mind is not bowed down by slavish precedents. I am for him because he dared to express his unbelief in some of the theories which have been announced by theorists of the past, and because he does not accept a principle of political economy which has been announced and which has been organized and which has been accepted in the past merely because it has been accepted in the past.[25]

The spirit with which Black went to the Court as a New Dealer was one of solid determination to do a job. What he had said only a few months before in the Senate in behalf of his own wage-hour bill has a certain direct appositeness to the constitutional revolution about to come:

> We have waited too long for it already — at what cost in dollars and cents as well as in flesh and blood no one will ever know.
>
> Now we are through waiting. The Democratic Party has promised the country this kind of legislation. The President has pledged it. The mandate of the election has ordered it.
>
> And at long last the American people are going to have it![26]

The American people were going to have what the Democratic Party had promised, what the President had pledged, and what the election of 1936 had demanded, and Hugo Black was going to do all within the power of one man to help give it to them.

THE BIGGEST WIN — DUE PROCESS

The conservative forces of American politics had, at least in a way, won an important victory in the Court fight. True, while the President had not obtained his bill, the Court even before the Black appointment had conducted a strategic retreat by upholding both minimum wage legislation and the National Labor Relations Act.[27] Yet in form, at least, the President had lost. The appointment of an extreme New Dealer to fill the vacancy left by the retirement of conservative Justice Willis Van Devanter robbed the victors of their fruits.

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[25] FRANK, MR. JUSTICE BLACK 65 (1949).
[26] *Id.* at 93.
[27] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, (1937) (National Labor Relations Act); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (minimum wages).

Their hostility rose to a passionate howl when the *Pittsburgh Gazette* began an attack on Black's pre-1926 Klan membership.

The attack on Black's past associations became the violent tail of the Court fight storm. Riding in the same wind was an attack on Black's competence. The two bodies of work before the Court are constitutional and statutory interpretation, with their ancillary areas of procedure and jurisdiction. Black could be expected to be comfortable with statutes. He might, however, be predicted to be much less comfortable with the Constitution, with its vast encrustation of history and judicial precedents, and with jurisdiction and procedure. Indeed, it was widely anticipated by the opinion-making critics of the country, and particularly by the press, that he would be wholly incompetent.

The most remarkable feature of Black's switch from Senate to Court was the surefootedness of his transfer. Thirty years later, those who follow the Court are unanimously aware that Black needs a ghostwriter about as badly as Shakespeare or John Marshall; the always pleasant but fundamentally minor role of his law clerks in his professional life is well documented.[28] But even the critics of the 30's who were impressed with his early opinions could not swiftly admit their own errors of anticipation; thus it was initially speculated that Black's beginning work must have been done by some off the Court ghostwriter such as his intimate friend and a principal New Deal advisor, Thomas Corcoran.[29]

The first five years did have bobbles, but they were astonishingly few. None were on the New Deal side, in the area of economic problems. Nor did Black make any early mistakes in the basic civil liberties questions of freedom of speech or press or fair trial.[30]

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[28] Meador, *Justice Black and his Law Clerks*, 15 ALA. L. REV. 57 (1962); and for a description of his method in the earlier years, see FRANK, MR. JUSTICE BLACK 135-36 (1949). A "poem" enjoyed with some hilarity at a recent Black law clerk's affair was universally accepted as an accurate allusion to the clerk's place in the order of things. This literary work, written by someone with intimate knowledge of the process, in one quatrain describes the clerk's satisfaction when he gets a word in:

> The colons and the commas and
> The adjectives are right,
> And the sentence YOU inserted
> Stays in there nice and tight.

[29] See material cited Barnett, *infra* note 47, at 21, note 2; for the most patronizing of the early attacks, see Childs, *The Supreme Court Today*, 176 HARPER'S 581 (May, 1938).

[30] See note 7 *supra* and accompanying text. Two of Black's more noteworthy errors, errors of plain inexperience or of insufficient opportunity in earlier life to study the subject matter, were in two civil rights cases. In the first flag salute case, he joined in the opinion of Justice Frankfurter upholding the validity of the flag salute requirement, a conclusion on which he swiftly confessed error and reversed himself. See Minersville School Dist. v. Gobitis, 301 U.S. 586 (1940), and the expression of opposite view of Jones v. Opelika, 316 U.S. 584 (1942), culminating

Isolated instances of conceptual error are mentioned in the footnote to demonstrate their rarity. The striking feature of the first two years is how ready and equipped Black was to take his definitive positions. Nowhere is this better demonstrated than in the field of substantive due process, and the related matter of judicial superintendence of utility rate-making.

The most astonishing single creation of the Supreme Court in the 50 years preceding Black's appointment had been the development of substantive due process. Under this concept, the Court could review the "reasonableness" of state and federal legislation. In determining the validity of social and regulatory legislation the Court balanced the public interest as against private property rights. It held, for example that state regulation of health and labor conditions under the police power could not unduly infringe on private property and its use. This concept of the essential substantive right of private property and its use, including the sanctity of private contracts, necessitated a judicial review of legislative decisions which in any way affected the property and contracts of individuals and businesses and resulted in the invalidation of wage and hour legislation and other social legislation as well.

Substantive due process had become the principal constitutional tool of the laissez-faire social order, and coupled with the narrow interpretation of the commerce clause it meant that neither the state nor the federal government could deal effectively with what to Black were the shrieking needs of the age. Justice Holmes had already protested. Referring to the "constitutional rights of the states," Holmes had said, "As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable."[31]

Black knew this constitutional story when he was appointed. It was at the heart of his attack on the Supreme Court during the Court

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in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). But the flag salute case involved only the application of an accepted principle to a particular fact situation; it involved no fundamental theory of the Constitution. A greater error of the early years was Black's joinder in Justice Cardozo's opinion in Palko v. Connecticut, 302 U.S. 319 (1937), in which Justice Cardozo laid down his theory of selective incorporation of the Bill of Rights into the fourteenth amendment. This theory of selective incorporation is in the teeth of Black's later, full-scale position that the entirety of the Bill of Rights is subsumed into the fourteenth amendment, one of the most important articles of the Justice's credo. For Black's comprehensive development of this position, see Adamson v. California, 332 U.S. 46 (1947) (dissent). The Justice's *Adamson* statement, ten years after *Palko*, was the product of at least two years of very substantial work and thought, and *Palko* can only be regarded as a major matter on which the Justice had not yet studied the subject thoroughly enough to have made up his mind.

[31] Baldwin v. Missouri, 281 U.S. 586, 595 (1930). For illustration of an instance in which Holmes found a violation of due process, see Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1923).

fight.[32] The difference between Holmes and Black was that while Holmes wanted to temper the abuses of substantive due process, Black wanted to abolish it. Substantive due process, whether it be regarded as a "creation" or a "concoction" of the Supreme Court, is wholly judge made, and so is its subdivision, constitutional review of utility rates. Black's position in the Court fight had been that the power of the Court to pass upon the reasonableness of legislation did not exist at all.[33]

His attack was along three lines. First, he said that the "persons" covered by the due process clause meant only natural persons and did not cover corporations. It was not hard to demonstrate historically that when the country adopted the fourteenth amendment "the people were told that its purpose was to protect the weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments."[34] Nonetheless, in 1886 under Chief Justice Morrison Waite the Supreme Court had extended the provision to corporations.[35] Black would reverse the 1886 decision. As a practical matter, this would largely end substantive due process, since almost always in the rate field and usually in the regulatory field, it was corporations which invoked the protection of the clause.

In the cases involving the setting of public utilities rates, the earlier decisions of the Waite Court held ratemaking unreviewable under the due process clause; thus the entire structure of judicial review of rates from the constitutional standpoint would be abolished. He joined with Justices Douglas and Murphy in re-invoking those cases which "emphatically declared price fixing to be a constitutional prerogative of the legislative branch, not subject to judicial review or revision."[36]

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[32] See, for example, his speech of February 23, 1937, 81 CONG. REC. (App.) 306 (1937).

[33] See note 22 *supra* and accompanying text.

[34] Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 87 (1938).

[35] Stone v. Farmer's Loan & Trust Co., 116 U.S. 307 (1886).

[36] Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 599, 600 (1942). For further development, see Justice Douglas's opinion of the court in Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944). Perhaps the most colorful opinion of Black's first year was a lone dissent in McCart v. Indianapolis Water Co., 302 U.S. 419, 423 (1938). At issue was the so-called "reproduction new" method of calculating utility rates. The ultimate question was the proper rate structure for the water company in Indianapolis. This matter had been in litigation seven years by the time the Court wrote, and a majority sent it back for further proceedings. Black as a lone Justice criticized any judicial participation in rate-making, 302 U.S. at 427-28, thus becoming the first voice on the Court since 1890 to attack the entire conception. But assuming there was to be judicial review, no one had laid such impious hands on the theory of valuation before. He analyzed and demonstrated the "phantom concepts of property" and made the entire reproduction cost theory of valuation look preposterous. A particularly devastating passage, analyzing a cost element attributed to possible, but wholly hypothetical claims of persons who would lose sailing rights as a result of the utilities operation, led to Black's conclusion of "an imaginary damage to these imaginary sailors"; 302 U.S. at 433. This was Black's first major dissent, and it

The contemporary prevalence of these views has resulted in the virtual abolition of the federal constitutional law of rate-making.[37]

In dealing with economic regulatory legislation, Black both attacked the theory that the Court might review the reasonableness of legislation and also argued that in any given case, the legislation was clearly reasonable. An early illustration of this position is found in *Polk Co. v. Glover*.[38] In that case it was held that a challenge to the validity of Florida legislation governing cans used in shipping citrus juice must be tried. Black dissented alone on the ground that there was nothing to try. "Even according to the presently prevailing interpretation of the Due Process Clause" he thought, there was nothing wrong with this statute. He saw no need for the trial court to weigh and pass upon the relative judgment, poise and reasoning ability of the one Florida legislator who had voted against the law, as contrasted with the 94 legislators and the Governor who favored it; and the wisdom of this policy rested with the legislature of Florida subject to the veto power of Florida's governor.[39] The dissent in *Polk Co. v. Glover* is the law today and it represents the largest single triumph of Black the New Dealer.

This is not to say that the demise of substantive due process has been due solely to Justice Black. First, the whole concept was badly overaged and ripe for interment. Second, any development in the course of Supreme-Court-made law requires at least five Justices, and as the New Dealers came to the bench, they commonly had the same point of view on substantive due process. Justice Douglas in particular put in strong strokes against the dying doctrine.[40] But along with the Douglas opinion in the *Olsen* case, the two major opinions on substantive due process of the past 30 years are Black's, one (*Lincoln Federal*) in 1949 and one (*Ferguson v. Skrupa*) in 1963.[41] *Lincoln Federal* dealt with

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attracted more general attention than any other opinion of his first year except the corporations and fourteenth amendment opinion, in Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938). The doctrine of the *McCart* dissent is the law today. As for the practical result, it is my undocumented understanding that the Company took a voluntary reduction.

[37] The subject has largely dropped out of the legal literature. For illustration, the leading authority, James Danbright, in his PRINCIPLES OF PUBLIC UTILITY RATES (1961) has little or nothing on constitutional aspects.

[38] 305 U.S. 5 (1938).

[39] *Id.* at 13. Black quoted Powell v. Pennsylvania, 127 U.S. 678, 686 (1888):

> If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the legislature, or to the ballot box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.

[40] *See* Olsen v. Nebraska, 313 U.S. 236 (1941), a far-reaching opinion by Justice Douglas overruling Ribnik v. McBride, 277 U.S. 350 (1928), a leading due process case which had held that a state might not regulate the compensation of employment agencies.

[41] Lincoln Fed. Labor Union v. Northwestern Iron Metal Co., 335 U.S. 525 (1949); Ferguson v. Skrupa, 372 U.S. 726 (1963).

the validity of state legislation prohibiting yellow dog contracts, or contracts by which employees were barred from joining labor unions; and the issue in *Ferguson v. Skrupa* was whether a state could regulate the business of "debt adjusting," a specialized type of financial counseling.

In *Lincoln Federal,* Black for the Court spoke of the basic decisions and principles of substantive due process as having been "deliberately discarded" and said that the Court has "consciously returned closer and closer to the earlier Constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal Constitutional prohibition, or of some valid federal law."[42] The reference to "specific federal Constitutional prohibition" is the key to the matter — "due process" is clearly unspecific. In *Ferguson v. Skrupa* in 1963, Black had the ultimate pleasure of declaring the law to be what in 1937 he had told the Senate it ought to be:

> A bare majority of the members of the Supreme Court of the United States have been for a number of years assuming the right on their part to determine the reasonableness of state and federal laws. The Constitution never gave that majority any such power. (Senator Black, March 24, 1937.)
>
> The doctrine that prevailed in [several cases] that due process authorized courts to hold laws unconstitutional when they believe the legislature has acted unwisely has long since been discarded. We have returned to the original Constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. (Mr. Justice Black, *Ferguson v. Skrupa,* April 22, 1963.)

Not since the day Black joined the Court has any state economic regulation been invalidated on the grounds of denial of substantive due process. As a practical matter, "no claim of substantive economic rights would not be sustained by the Supreme Court."[43]

The only emergence of substantive due process in contemporary times with any substantial judicial support is *Griswold v. Connecticut,*[44] the Connecticut birth control case. Justice Harlan and White voted to invalidate the Connecticut statute against the use of birth control materials on substantive due process grounds. Justice Douglas for the Court expressly rejected substantive due process, relying instead on a right of privacy said to be within a penumbra of the Bill of Rights.

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[42] 335 U.S. at 536.

[43] Quoted in a useful, concise note, LOCKHART, KAMISAR, CHOPER, CONSTITUTIONAL LAW 611.

[44] 381 U.S. 479 (1965), the Douglas opinion appearing at 480 for the Court; the Goldberg concurrence, which the Chief Justice and Justice Brennan joined at 486; the Harlan concurrence at 499; the White concurrence at 502; the Black dissent at 507; and the Stewart dissent at 527.

Justice Goldberg relied principally upon a conception of ninth amendment rights.

Black was unable to see any important functional difference among the three positions, the one outspokenly resting on substantive due process and the other two relying upon what seemed to him re-emergences of the same basic concept that one way or another, the Court could review the reasonableness of legislation. To dramatize that the case was for him an acid test of due process principles, he made explicit that the Connecticut law was totally offensive to him; he subscribed to Justice Stewart's opinion, which emphasized the absurdity of the law. Black made clear that if the case could have been put into a first amendment posture in which the doctor was punished for engaging in free speech with his patient, he would have considered the problem quite differently. But so far as he was concerned, the Court has simply no power at all to review "the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous." While he reasserted his belief in the principle of judicial review, he said,

> I do not believe that we are granted power by the Due Process Clause or any other Constitutional provision or provisions to measure Constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct."[45]

Black demonstrated that the cases relied upon by Justices White and Goldberg had themselves been opinions of Mr. Justice McReynolds which had been based on substantive due process cases, many of which had been overruled by name by the Court. So far as Black was concerned, after more than 40 years in the Senate and on the Court combatting the concept of judicial review of the policy of legislation, the suggestion that somehow this could be done under the ninth amendment was "shocking doctrine."

But while the bizarre Connecticut statute received what may perhaps be described as somewhat remarkable doctrinal treatment by the Supreme Court, the basic result remains. In the main area of its consequence, substantive due process has been at least dormant for 30 years, and thus must be regarded as a major work of the New Deal and of Justice Black.

COMMERCE AND ECONOMIC REGULATION

Mr. Dooley, in commenting on Theodore Roosevelt's report of

[45] 381 U.S. at 513.

Spanish-American War military action, observed that it might well be called "Alone in Cuba." That error of over-focus must be avoided for Black; he was not "Alone on the Supreme Court" for long.

Yet he was "alone" for a time. It is the custom of historians to speak of a First New Deal and a Second New Deal. The First New Deal is the period of 1933 and 1934, the beginning of which was described earlier. This early program was blocked by some fourteen adverse Supreme Court decisions between 1934 and 1936. The response to these decisions, in the form of such new legislation as the National Labor Relations Act, has been called the Second New Deal.[46]

Justice Black, too, had his First and Second New Deal. The First were his first two years on the Court — the 1937 and 1938 terms or October, 1937 to June, 1939. After this initial two years, there were other New Dealers in force on the Court. By 1940, apart from the other newcomers, there were Black, Douglas and Murphy making an unshakeable trio until Murphy's death in 1949. By 1942, the turnover was almost total; only Roberts and Stone of the pre-Black Court were still on the bench. By the time Mr. Roosevelt's "Dr. New Deal" had been replaced by his "Dr. Win-the-War," "Dr. New Deal's" prescriptions had passed their constitutional tests.

The resultant shift in Black's own role is numerically demonstrable. In the 1937 and 1938 terms, the Court decided 126 constitutional cases. Black dissented in 13 of them and concurred specially in 17. Thus, in 24 per cent of the constitutional cases in his first two years, Black disagreed with the majority either as to its result or as to its reasoning. On the other hand, in the 1939 term, Black dissented only twice and concurred specially only once.[47]

The largest single doctrinal victory of the Court's New Deal phalanx was the total overthrow of the commerce power restrictions, and the establishment of that power as the foundation stone of congressional power to govern. The commerce power war was over so quickly and conclusively that what was once the greatest constitutional issue before the country is now quite dead. The story is a familiar one. In 1936, before the election and before the Court fight, the Court held that Congress under the commerce power could not reach and regulate the conditions of the bituminous coal industry, the poultry sales industry, or agriculture.[48] In 1937, after the Court plan was before the Court,

[46] Eriksson, *New Deal* in DICTIONARY OF AMERICAN HISTORY 95-96 (Adams ed. 1940).

[47] Barnett, *Mr. Justice Black*, 8 U. CHI. L. REV. 20 (1940). This excellent article, valuable both for information and for insight, is the most indispensable writing on Black for the early Court years.

[48] Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); United States v. Butler, 297 U.S. 1 (1936). The leading work on the development narrated in the text above is Stern, *The Commerce Clause and the National Economy*, 1933-46, 59 HARV. L. REV. 645 (1946).

and before Black's appointment, the Court found that under the same power the Congress could regulate labor relations in the steel industry.[49] Within five years, the 1936 cases were totally gone; because of its general effect on commerce Congress could regulate the transfer and use of wheat from a farmer's field to his barn.[50]

Though Black wrote none of the important commerce clause opinions from 1937 to 1942, his was the majority opinion in the 1944 *Southeastern Underwriters* case which upheld the extension of national regulatory power to the insurance industry by determining that the antitrust laws applied to that industry.[51] The striking effect of the decision on the powerful insurance industry, coupled with the fact that it was a four to three opinion due to two disqualifications, led to a greater controversy than any of the other commerce clause cases and resulted in a modification of the effect of the decision by an act of Congress.[52] The effect of all of these decisions was to put aside the restrictions on the national power over business and industry developed between 1890 and 1936 — to return the commerce power to the broad charter of federal government which John Marshall had conceived in the country's beginnings.[53]

Two of the "new" commerce cases involved bills Black had very materially helped to pass. The Fair Labor Standards Act, adopted after Black was on the Court, passed the Senate on July 31, 1937.[54] Black had been floor leader for the bill, then known as the Black-Connery Bill, in the debate from July 27th to the 31st. It was, without doubt, the most important legislation Black ever personally saw through the Senate and its handling reflects an experienced dexterity.[55]

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[49] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[50] Wickard v. Filburn, 317 U.S. 111 (1942).

[51] United States v. Southeastern Underwriters Ass'n., 322 U.S. 533 (1944). The opinion discarded the contrary decision of long standing, Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868).

[52] The McCarran Act, 59 Stat. 33 (1945), 15 U.S.C. § 1011-15.

[53] I follow here the argument of Mr. Stern on the scope of the phrase interstate commerce, 41 A.B.A.J. 823 (1955), SELECTED ESSAYS ON CONSTITUTIONAL LAW 298 (1963), though with some misgivings. It is true that the contemporary rule on the Commerce Clause is within the very broad language of Marshall in Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824), but the entire concept of the use of the power in the mid-20th century is so utterly alien to anything Marshall could have conceived of that the analogy may be more verbal than real. On the other hand, for illustration of the effect of Gibbons v. Ogden, *supra*, on Black's thinking as a Senator, see text accompanying note 63 *infra*.

[54] The vote was 56 to 28; 81 CONG. REC. 7957 (1937), but many amendments were much closer.

[55] Pearson and Allen, nationally syndicated column, Aug. 16, 1937, said of the Act, "that it emerged from the committee and later passed the Senate was due largely to his parliamentary skill and dogged perseverance. The feat is one of the outstanding personal triumphs of the session." The debate also reflects Black's tendency to use historical materials to buttress his arguments. He spoke to the Senate of the English experience in 1833 and 1845 including an eloquent quotation from Charles Dickens; as he made his concluding remarks a few moments before passage of the bill, he had in his hand a hundred year old "Speech of Mr. Noodle,"

The dates tell the constitutional story. The Black-Connery bill moved through the Senate when the Court plan had just been tabled but was not assuredly dead; the wage-hour bill, passed only a few days before Black was to be appointed. Black seemed to lean over backward to keep his legislation from being mingled with the Court bill. The opponents of the Court bill were also restrained — the wage-hour bill was popular, had been a major plank in the 1936 Democratic platform and had clearly been vindicated in the preceding election, and clearly was going to pass in some form. Court plan opponents also could not afford to get into the constitutional issue for if they opposed the wage-hour bill on constitutional grounds they might very well be aiding the Court bill.

The Court plan factions took their positions in different ways. The bill covered wages and hours and prohibited child labor, and the child labor portion of the bill could not be valid unless the earlier decision of *Hammer v. Dagenhart*[56] was overruled. Black discreetly stayed away from this subject. His position was that the act regulated those businesses "which engage in the transportation of their goods in interstate commerce"; and his position was that this was authorized "under the doctrine of the *Shreveport* decision[57] — with which, I am sure, every lawyer in this body is familiar — would authorize action in connection with those businesses and industries that are seriously competing with and having a substantial effect upon the flow of interstate commerce."[58]

Senators Wheeler of Montana and Johnson of Colorado, on the other hand, had opposed the Court plan, but they were for the abolition of child labor and thus opposed *Hammer v. Dagenhart.* They had therefore devised an amendment to the Black bill as their own plan which, as Senator Wheeler put it, "would for all practical purposes put an end to child labor."[59]

The validity of the act came before the Supreme Court in 1941, with Black then four years on the bench. In a unanimous opinion by Justice Stone, the act was upheld and *Hammer v. Dagenhart* was ex-

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a satire on legislators who "were usually for the principle, they were for the objective, but they were against the method. They were for the principle and for the objective, but they wanted to have a commission appointed. They told their constituents that they were for the principle and for the objective." 81 CONG. REC. 7945-46 (1937). The "Noodle" text, by Sidney Smith reprinted 27 HARV. CLASSICS 236 is still a Black favorite and was within his ready reach in 1966.

[56] 247 U.S. 251 (1918).

[57] The Shreveport Rate Case, 234 U.S. 342 (1914).

[58] 81 CONG. REC. 7648 (1937).

[59] See as illustrative of this discussion the statements of Senator Johnson and Senator Wheeler, *Id.* at 7663-67. The chief reliance of these Senators for authority to circumvent Hammer v. Dagenhart was the prison labor case, Kentucky Whip Collar Co. v. Illinois Central R.R., 299 U.S. 334 (1937).

pressly overruled.[60] The Court rested its decision both on the relatively narrow ground and authorities offered by Senators Wheeler and Johnson and, expressly, on the broader ground offered by Senator Black; a New Deal senatorial argument thus became contemporary constitutional law.

The second major case arising from Black's handiwork as a Senator involved the Public Utility Holding Company Act of 1935. This statute sought to abolish or limit the network of holding companies by which operating utilities were gathered together under layers of management and ownership concerns which added to the cost of electric power in the United States with no perceptible benefits in efficiency or service. Black was against the holding company system for all areas of the economy. He told the Senate:

> I am against the holding company system, whether in power, railroads, telephones, aviation, shipping, or any other business where there is given to those who manipulate the holding company the power to execute a device to defraud their stockholders, to impose upon the public, to extract exorbitant profits from the consumers, and under the name of salaries and bonuses to press down a burden upon the operating business of this country which if not prevented will sooner or later destroy it.[61]

As noted earlier, Black's prime function in the passage of the Public Utility Holding Company Act was his investigation of the means used to oppose it. It was this which caused Ray Clapper, Washington columnist of that era, to write, "if the death sentence finally goes into the utilities bill, it will be another notch in the gun of Senator Hugo Black."[62]

But Black had a second duty. Much of the debate on the bill was on its constitutionality and a considerable share of the argument in behalf of it fell to Senator Wheeler, its sponsor, and to Black. On May 27, 1935, the National Industrial Recovery Act was declared unconstitutional by the Supreme Court on the ground, among others, that it regulated "production" and therefore was beyond the reach of the commerce power.[63] A principal constitutional debate on the holding company act came before the Senate just a week later, on June 4, 1935. The point in time is important — the Supreme Court was just beginning its role as the detonator of the New Deal. At this point, no one had any idea of solving New Deal problems by a frontal attack on the Court itself. The NRA decision was something to be lived with and worked around. In the debate in which Senator Hastings of Delaware, home of the holding companies, attacked the bill and Senators

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[60] United States v. Darby, 312 U.S. 100 (1941).
[61] 79 CONG. REC. 9045 (1935).
[62] FRANK, MR. JUSTICE BLACK 81 (1949).
[63] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

Wheeler and Black defended it, Black's constitutional position, synthesized from his statements on the Senate floor on that day, was this:

> [I]n order to require registration, the person must either sell, transport, transmit, distribute, or own or operate some of these things for the transmission of electric energy or gas in the interstate commerce . . . . I think it would be immaterial whether the person was actually causing the transmission in interstate commerce. If he were in partnership or in agreement with someone else and they were working together to act in interstate commerce, then, it would be a joint undertaking. . . .
>
> [I]f the plant is used for the purpose of producing electricty which is immediately to be transmitted in interstate commerce, there is every presumption that the operation of the plant, so closely connected with the transmission of the electricity, would come within numerous decisions as to burdening or directly affecting interstate commerce.[64]

It was not Black's contention that the plant itself would be in interstate commerce, but that its activities would be:

> Let us suppose, for instance, that a plant is producing electricity in such a way that it unnecessarily directly raises the price up to ten times what it should be, right on the verge of transmitting the electricity across a State line. There we have the question of an unnecessary, wasteful, unfair, exorbitant burden upon interstate commerce.[65]

Senator Hastings had read at length from the decision of John Marshall in *Gibbons v. Ogden.* Black said:

> The Senator a few minutes ago read from the case of Gibbons against Ogden a quotation, with which I fully agree, to the effect that the authority of the Federal Government over interstate commerce is just as sovereign as the authority of the State over intrastate commerce. Admitting that, I believe the Senator certainly will agree that the Federal Government is not helpless, insofar as interstate commerce is concerned, to protect itself from a method of production which might be a burden to, or injure or destroy, interstate commerce.[66]

To Black this meant that the federal government could deny the entry into interstate commerce of any article produced even under intrastate regulation if its "entrance into interstate commerce would destroy interstate commerce, or would unduly fetter and burden interstate commerce."[67] On the authority of *Gibbons v. Ogden* with its reference to the unrestricted power over commerce, Black believed that "where the indirect effect of the exercise of the Government's sovereign power

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[64] 79 CONG. REC. 8627-28 (1935).
[65] *Id.* at 8628.
[66] *Id.*
[67] *Id.* at 8629.

over interstate commerce is to even partially regulate production, that does not deprive the Government of its power to regulate interstate commerce."[68] With reference to the recent decision of the Supreme Court to the effect that production was an intrastate matter, Black said,

> [C]onceding that unquestionably to be the law the Senator also read from a case in which it was held that, so far as interstate commerce is concerned, as I caught it, this country is as though there were no State lines. . . . That means that the Federal Government has complete, unrestricted power to regulate interstate commerce. . . . unless there is something in the Constitution itself which directly stands in the way of that regulation of interstate commerce.[69]

In Black's view, it was immaterial whether the interstate commerce was "legitimate" or "illegitimate," whether the items under control was "deleterious" or whether it was not. For his view of the commerce power, "if electricity were produced in such a way as to fetter and burden interstate commerce, the federal government would have a right to remove the burden from interstate commerce in any way it saw fit to do so."[70]

Eleven years later Justice Murphy wrote the unanimous opinion of the Supreme Court upholding the constitutionality of the Public Utility Holding Company Act.[71] I do not know and do not mean to suggest that Justice Murphy read the Congressional debate of June 4, 1935, but if he did not, it is but further evidence that the Black and Murphy minds ran in strikingly parallel channels. Murphy said that the commerce clause

> does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. . . . Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature. . . . This power permits Congress to attack an evil directly at its source, provided that the evil bears a substantial relationship to interstate commerce. . . . The fact that an evil may involve a corporation's financial practices, its business standards or its security portfolio does not detract from the power of Congress under the commerce clause to promulgate rules in order to destroy that evil. Once it is established that the evil concerns or affects commerce in more states than one, Congress may act.[72]

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[68] *Id.*
[69] *Id.*
[70] The quotations are taken and put together from 79 CONG. REC. 8627-29 (1935).
[71] North American Co. v. SEC, 327 U.S. 686, 705-06 (1946).
[72] The authority most heavily relied upon by Senator Hastings in his attack on the Public Utility Holding Company Act was Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869), holding that insurance was not commerce and not subject to regulation;

The constitutional attack is not only a stroke to the jugular, an attempt to kill particular legislation; it is a double blow, seeking simultaneously to emasculate legislative power in a particular area. Such strokes against the New Deal legislation had all been fended off, so far as the commerce clause was concerned, early in Black's judicial career. But the next means of attack is to render impotent statutory construction or to encourage lackadaisical enforcement. From the standpoint of the New Deal opponents, it was not essential, though it might be desirable, that the New Deal laws be terminated; it would be enough if they fell into desuetude. The interpretation and enforcement of statutes is an everlasting task which never stops.

To analyze Black on the interpretation and operation of the National Labor Relations Act, Black on the interpretation and enforcement of the Fair Labor Standards Act, Black on all the rest of the New Deal statutes would require the telling of an excessively long story, and yet it is very close to the heart of the present subject. The initial task was to establish the power of administrative agencies to do their jobs. In his first three years on the Court, the Court had twenty-six cases involving federal administrative action and reversed administrative rulings five times. Black dissented in each of these five cases.[73] His position was consistently that the agencies must come to their own conclusions and that the courts should not substitute judicial for administrative judgment. A dramatic illustration was *NLRB v. Waterman S.S. Corp.*[74] Nowhere in the country was resistance to labor legislation more intransigent than in Black's native South. In *Waterman*, the National Labor Relations Board expressly petitioned the Supreme Court for review on the ground that the Fifth Circuit Court of Appeals was consistently failing to give effect to Board conclusions of fact.

Black was thus called upon to review the practice of his own circuit and his own region. The substantive charge was that Waterman was "guilty of a most flagrant mass discrimination against its employees," and the evidence as Black comprehensively analyzed it showed, at a minimum, that there was a substantial basis for the Board's conclusion. The opinion concluded:

> The Court of Appeals' failure to enforce the Board's order resulted from the substitution of its judgment on disputed facts for the Board's judgment, — and power to do that has been denied the courts by Congress. Whether the court would reach the same conclusion as the Board from the conflicting evidence is immaterial and the court's disagreement with the Board

79 CONG. REC. 8671 (1935); for discussion of the Black opinion overruling the *Paul* case, see note 51 *supra* and accompanying text.

[73] Barnett, *supra* note 47, at 34.

[74] 309 U.S. 206 (1940).

could not warrant the disregard of the statutory division of authority set up by Congress.[75]

In all these administrative and statutory matters, proper interest in an anniversary must not obscure the fact that the Justice was by no means alone. All the Roosevelt appointees were more or less of a similar point of view, and Justices Black, Douglas and Murphy, later joined by Justice Rutledge, became a solid wall in the 40's; the other Roosevelt appointees; Reed, Frankfurter and Jackson were sometimes in colorful disagreement with them. Justice Murphy tended to make the Fair Labor Standards Act a province of his own. As was perceptively served in 1940, Black was no longer "spectacularly playing a lone hand." The new appointments "brought new ideas to the group's deliberations; there has been interaction; and the result is then that the majority of his associates now share with Black, or, from another viewpoint, Black shares with his associates, a new attitude."[76]

The new attitude is nowhere better illustrated than in the antitrust cases. Black had opposed the National Recovery Act because he felt that it conflicted with antitrust principles in which he completely believed. That belief he has carried to the Court, and he has made an undeviating record of the strongest possible enforcement of the Sherman, Clayton and Robinson-Patman Acts. Black's first opinion was a trade regulation case in which a company purported to give away an encyclopedia and charge the public only for the looseleaf service which kept it up.[77] In fact, the price charged for the looseleaf service was such as to cover both the book and the service. The Court of Appeals had reversed a Commission order forbidding this practice on the ground that the Court of Appeals could not "take too seriously the suggestion that a man who is buying a set of books and a ten years 'extension service' will be fatuous enough to be misled by the mere statement that the first is given away, and that he is paying only for the second."[78] The Black opinion reversed, saying "laws are made to protect the trusting as well as the suspicious. . . . [T]o fail to prohibit such evil practices would be to elevate deception in business and to give to it the standing and dignity of truth."[79]

There have been and there are other "antitrust Justices"; Justices Douglas and Brennan are examples. Black has written his own major opinions in the field,[80] and early took a lead on the relation of patents to monopoly. Since a patent, as an exception to the antitrust laws,

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[75] *Id.* at 226.
[76] Barnett, *supra* note 47, at 40.
[77] FTC v. Standard Educ. Soc'y, 302 U.S. 112 (1937).
[78] *Id.* at 116.
[79] *Id.*
[80] *See, e.g.*, Associated Press v. United States, 326 U.S. 1 (1945).

does give a monopoly to the inventor or his corporate employer, Black seeks to confine the patent privilege narrowly under the statutes and the Constitution; he has done so since his earliest days on the Court.[81] While Black has given close attention to the matters of patent practice, his central goal (shared by Justice Douglas) has been to raise the standard of invention so that a patent will be given only for a real advance in the art. In dissenting from an opinion upholding the validity of a patent for a leakproof dry cell for a flashlight battery, Black said:

> The practice of granting patents for microscopic structural or mechanical improvements inevitably must reduce the United States Patent Office to a mass production factory for unearned special privileges which serve no purpose except unfairly to harass the honest pursuit of business. If the patentee here has "discovered" anything, it is that the creamy substance in the dry cell will not leak through a steel jacket which covers and is securely fastened to the ends of the cell. For that alleged discovery, this patent is today upheld. I do not deny that someone, somewhere, sometime, made the discovery that liquids would not leak through leakproof solids. My trouble is that, despite findings to the contrary, I cannot agree that this patentee is that discoverer.[82]

A comparison of May 31, 1966, and January 8, 1930, illustrates the oneness of today, tomorrow, and yesterday in Black's antitrust thinking. In January of 1930, it appeared that the Attorney General was being pressured to relax an old antitrust consent decree obtained against the meat packers in 1922. The meat packers wanted to go into the grocery business as a counter to the grocery chains in the meat business. On January 8, 1930, Black took the floor of the Senate to call to his colleagues' attention this matter "of extreme importance" and to ask them to urge the Attorney General not to relax the decree. He said:

> Monopoly should be discouraged, not encouraged and approved by Governmental authorities. Chain groceries, chain dry goods stores, chain drugstores, chain clothing stores, here today and merge tomorrow, grow in size and power. Railroad mergers, giant power monopolies, bank mergers, steel mergers, all kinds of mergers, concentrate more and more power and wealth in the hands of the few. In the name of "efficiency," monopoly

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[81] See for illustrations of full perception of the monopolistic consequences of patents, General Talking Pictures Co. v. Western Electric Company, 304 U.S. 175 (1938), (dissenting opinion); Crown Corp. & Seal Co. v. Gutmann Co., 304 U.S. 159 (1938) (dissenting opinion).

[82] Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., 321 U.S. 275, 279-80 (1945); I have written a little about the war between the Supreme Court and the Patent Office in FRANK, MARBLE PALACE 24-27 (1958). As was there developed, this appears to be a battle which the Supreme Court cannot win. The Patent Office can grind out patents faster than the Supreme Court can do anything about them. However, the Court keeps trying; as the most recent effort to state a rule under which "obvious" advances would not be patentable, *see* Graham v. John Deere Co., 86 Sup. Ct. 684 (1966).

> is the order of the day. The giant business enterprises spread over our Nation, extend their tentacles into our schools, politics, and business. We are rapidly becoming a Nation of a few business masters and many clerks and servants. The local business man and merchant is passing, and his community loses his contribution to local affairs as an independent thinker and executive.[83]

Black turned then to the matter, not of nationwide or regional mergers, but of mergers within towns. As he described the evil he saw, he said:

> I mean that the little chains are being absorbed by the bigger ones. One springs up in my home town of Birmingham to-day. To-morrow it is merged into a larger one. The next day it is merged into a still larger one, and they continue the merging and are gradually getting into one center.[84]

He foresaw the day when the local businessman would be simply a clerk, yielding to the instructions of a far distant employer — "it will be exactly the system that Andrew Jackson came into the Presidency to curtail and curb. I am not so sure, I will say, that it is not about time for some man of that kind again to curb the tendency toward control in the hands of a few which we find existing in the country today."[85]

In 1930, Black did not know what to do about this problem. In 1950, section 7 of the Clayton Act was amended by the Celler-Kefauver anti-merger bill, which provided against mergers in any line of commerce in any section of the country where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[86] In 1960, two grocery chains operating in Los Angeles merged, the lesser concern including thirty-six grocery stores in the Los Angeles area. The two chains were the third and sixth ranking chains in the Los Angeles area and their joint sales amounted to 7.5% of the total retail groceries sold in Los Angeles. The Government appropriately challenged the merger under section 7.

Black's opinion for the Court, holding the merger illegal, is the toughest anti-merger decision under the Clayton Act. The opinion tracks a close parallel to the 1930 speech and quotes Congressman Celler and Senator Kefauver in statements made by them in 1950 strikingly similar to the earlier observations of Black in 1930.[87]

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[83] 72 CONG. REC. 1239-40 (1930).
[84] *Id.* at 1241.
[85] *Id.*
[86] 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), amending 38 Stat. 731 (1914).
[87] Mr. Justice Brennan, who was acquainted with the Black 1930 speech, sent Black a note at the time the grocery case was pending saying, "Hugo, you should sue Estes Kefauver's estate and Manny Celler for plagiarism; they certainly put your idea into section 7."

THE INDEPENDENT NEW DEALER

Black brought his New Deal philosophy and his New Deal enthusiasms and his New Deal constitutional law and his New Deal loyalties to the Supreme Court, but he also brought his independence. As a Senator, Black had been with the President most of the time, but not all of it. He had, for example, opposed the National Industrial Recovery Act. His therefore could be regarded as a New Deal vote on the Court, but it was never in any administration's pocket.

Two illustrations of this independence both arose in cases which happened to relate to the steel industry. In *United States v. Bethlehem Steel Corp.*,[88] the Bethlehem Company had made something over $24 million on $109 million worth of ships sold to the government in World War I. The government sought to avoid paying what remained of this amount to Bethlehem and to recover some of what had been allegedly wrongfully paid earlier. It argued that Bethlehem had obtained the contract by duress and had made unconscionable profits.

No Justice ever went to the Supreme Court with a more severe distaste for war profiteering than Black. Mingling both a soldier's resentment against those who get rich by staying home and a Populist hostility to ill-gotten gains, he regarded excessive profits as simply outrageous.[89] But it seemed to Black absurd to suggest that any private corporation, no matter how powerful, was more powerful than the government of the United States. Hence, there could be no duress. And while the profits were high, they were no worse than those everyone else made in World War I. So far as Black was concerned, such war profits were scandalous; by outlining what the government might have done in World War I, he also laid down a blueprint for what the government could do in World War II, which America had just entered. The government could simply have set the price, told Bethlehem to produce, and let Bethlehem sue if it felt that the price was too low; in the alternative, the government had "the power to commandeer Bethlehem's entire plant and facilities." Hence, he concluded, "If the Executive is in need of additional laws by which to protect the nation against war profiteering, the Constitution has given to Congress, not to this Court, the power to make them."[90] Congress, given this judicial challenge and clear opportunity, promptly accepted it and adopted the Renegotiation Act to control the profits of World War II.

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[88] 315 U.S. 289 (1942).

[89] Although Black grew up in the Populist era and clearly inherits many Populist ideas, this is not to suggest that he was ever associated with the Populist Party. Indeed, it had largely disappeared while he was still a boy. A recent southern visit produced an oldtimer who recalled Black, even before he could speak clearly as saying "I am a Democrat," and he certainly was. As a boy, he did set type for local printers which included services as typesetter for the *Peoples Party Advocate.*

[90] United States v. Bethlehem Steel Corp., *supra* note 88 at 309.

In the steel seizure case, Black even more dramatically conflicted with the Democratic Administration, this time of President Harry Truman. The President had sought to end a steel strike by seizing the steel industry. The prestige of the Truman Administration was very much at stake. There was no apparent congressional authority for the seizure, and it basically had to rest upon a claim of inherent presidential power. Black reiterated what he had said in Bethlehem Steel — Congress could undoubtedly authorize the taking of the plants if it wished to do so; but "the Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times."[91] The President could not exercise it.

Another facet of Black's independence shows in his relations to the goals of organized labor. Black was in a real sense a labor Senator and he had labor's strong support in the appointment controversy. His intuitive biases are strongly in favor of working men and their organizations, and if it were possible to measure and compare opinions in terms of labor sympathy, Black's record would be almost as sympathetic to labor as any in the Court's history.

But his is not automatic approval; labor, like Presidents, has no Black blank check. His consistent and higher loyalty is to the enforcement of the orderly processes of the law. The great, new labor weapon immediately prior to Black's appointment was the sit-down strike, a device of seizing and holding the employer's premises during negotiations. The Supreme Court held this practice warranted discharge, and that the National Labor Relations Board could not reinstate such strikers. Black, joining a dissent of Justice Reed, was unwilling to make the sit-downers outlaws to this extent; he felt that the Board's remedies should be evaluated case by case. But the dissenting opinion made very clear that sit-downs were not sanctioned as a permitted bargaining device; that violence in defiance of law would not be condoned; and that the power to compel "obedience to law still remains in the hands of the peace officers."[92]

The same attitude was reflected in the course of the miners strike of 1946 when Black's old backer, labor leader John L. Lewis, disobeyed an injunction of a federal district court. Friend or no friend, Black and Douglas said, "we agree that the court had power summarily to coerce obedience to those orders and to subject defendants to such conditional sanctions as were necessary to compel obedience. . . . Courts could not administer justice if persons were left free pending adjudication to engage in conduct which would either immediately interrupt the judicial proceedings or so change the status quo of the subject matter

[91] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952).
[92] NLRB v. Fansteel Metal Co., 306 U.S. 240, 267 (1939).

of a controversy that no effective judgment could be rendered."[93] They refer to "the duty of testing the restraining order by orderly appeal instead of disobedience and open defiance."[94]

The sharpest collision of Black's sympathies and values came when a labor organization insisted on its right of free speech through picketing to induce an employer to commit an unlawful act. Once again, good, conventional law and order carried the day. The union picketed an ice wholesaler to induce it to refrain from selling ice to non-union ice peddlers, a form of boycott which, if achieved, would have violated the Missouri restraint of trade laws. Black had supported the extension of free speech protection to picketing, though always with a careful restriction of the privilege to communication.[95]

But this was different:

> [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. . . . Appellants' power with that of their allies was irresistable. And it is clear that appellants were doing more than exercising a right of free speech or press. . . . They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade. . . . The state has provided for enforcement of its statutory rule by imposing civil and criminal sanctions. The union has provided for enforcement of its rule by sanctions against union members who cross picket lines. . . . We hold that the state's power to govern in this field is paramount, and that nothing in the constitutional guaranties of speech or press compels a state to apply or not to apply its antitrade restraint laws to groups of workers, businessmen or others.[96]

Given his firm attitude that valid laws must be enforced in an orderly way (scarcely a novel position), Black's position on racial "sit ins" has been predictable. So far as he is concerned, there are unquestionably times and places in which one is simply not entitled to express a point of view: "We have a system of property, which means that a man does not have a right to do anything he wants anywhere he wants to do it. . . . That is a wonderful aphorism about shouting 'fire' in a crowded theater. But you do not have to shout 'fire' to get arrested.

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[93] United States v. UMW, 330 U.S. 258, 330-31 (1947).

[94] *Id. at* 334, Giboney v. Empire Ice & Storage Co., 336 U.S. 490, 502-04 (1949).

[95] In a dissenting opinion in Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722, 731 (1942), Justice Black emphasized equally the power of the state "to regulate the use of its streets or the conduct of those rightfully upon them" in the interest of law and the right of "using the streets to convey information to the public." See similarly the concurrence of Justice Douglas in which Justice Black joined in Bakery Drivers v. Wohl, 315 U.S. 769, 776-77 (1942).

[96] Giboney v. Empire Ice & Storage Co., 336 U.S. 490, 502-04, (1949).

If a person creates a disorder in a theater, they would get him there not because of *what* he hollered but because he *hollered.*"[97]

As applied to a "stand in" at a public library in which the "standers" had been refused no service and in which they were not discriminated against, Black for four dissenting Justices said:

> I do not believe that any provision of the United States 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. . . . And it should be remembered that if one group can take over libraries for one cause, other groups will assert the right to do it for causes which, while wholly legal, may not be so appealing to this Court. . . . 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. . . .[98]

THE NEW DEAL AND THE PROCEDURES OF DEMOCRACY

The depression of the 1930's was the prime target of the New Deal years, but the New Deal was not confined solely to man's material needs. In the ultimate statement of the goals of the American (and British) Government in the Atlantic Charter, the freedom from want was accompanied co-equally by freedom of religion, freedom of speech, freedom from fear. Even with a prime focus on the material, there remained the problem of how these needs were to be met in a democratic way.

Hence Black's approach to the New Deal cannot be understood without considering his role as an apostle of personal freedom. Black is not two halves; his is a completely integrated philosophy of government. He continues to have, as he says jokingly of his college days, "one idea," and that idea is of a living, functioning democracy —

1. A democracy in which the people have a total capacity to govern themselves, without any appointed official of government, and certainly without any judge, deciding what is best for them. His approach is fundamentally a congressional approach; he is Congress's man. Congress has all the power it needs for any national purpose. The final accountability for the government of the United States is on

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[97] Cahn, ed., *Mr. Justice Black — An Interview*, 37 N.Y.U.L. REV. 549, 558 (1962).
[98] Brown v. Louisiana, 86 Sup. Ct. 719, 736-37 (1966).

the Congress, and within express constitutional limits, Black is prepared to enforce its conclusions to the hilt. A Justice has immense power to fill in the gaps Congress necessarily leaves in legislation, a power which Black repeatedly uses. This is a power within the congressional framework.[99] Not even a President, powerful as he is, can rise superior to his congressional power-sources.

2. A democracy in which state governments, too, have adequate powers to deal with their problems, and they, too, are not subject to a big brother on the Court who will tell them what is good for them. So long as states do not conflict with express constitutional provisions or an act of Congress, they may go their way. On the other hand, in case of conflict with either, the states must unquestionably yield. There is no stronger exponent of the supremacy of the federal power than Black.

3. A democracy in which the people are capable of governing. The people can govern themselves if, but only if, there is no restraint on their freedom to persuade each other to a given course of action. Black will sanction juggernaut government, all-powerful in its domain, but only in an atmosphere of total freedom for each citizen; for example, a free press is "a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve."[100] These freedoms include complete freedom of speech and belief, a constitutionally prescribed and precise criminal procedure for the citizen who is crosswise with his government, and complete equality for every citizen. Individual freedom is the condition on the power of the New Deal from FDR to Lyndon Johnson.

4. A democracy in which power and freedom, the power to govern and the freedom to aspire to direct government, are together conditional upon a third value — order. Maintenance of an order in which the powerful government of free men can function is the first duty of any government. America, in Black's view, can maintain that order without sacrifice of individual liberties.

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[99] This raises, of course, and does not answer the question of when the judge "merely" fills in and when he "legislates"; when he finds policy and when he makes it. Certainly Black has taken a broad policy approach to many questions; as I said in FRANK, MR. JUSTICE BLACK, 139 (1949). "His significance as a Justice is that he knows what to do with the power thus given him." Each individual Justice will have his own sticking point as to when he may go too far in cutting a new direction. Recent illustrations of a Black broad view are his position that the first amendment extends to obscenity, see, *e.g.*, Ginzburg v. United States, 86 Sup. Ct. 942, 950 (1966) (Dissenting opinion), or that the equal protection clause bars malapportioned Congressional districts, Wesberry v. Sanders, 376 U.S. 1 (1964). For illustration of a narrower approach, see his conclusion that the equal protection clause does not, at least without an act of Congress, bar a poll tax as a condition of voting, Harper v. Virginia State Bd., 86 Sup. Ct. 1079, 1083 (1966); or Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552 (1947), holding valid a Louisiana system of restricting entry into the harbor pilotage trade to members of a pilot's family, perhaps as hard a bit of deference to legislation as the Justice ever had to pay.

[100] Mills v. Alabama, 86 Sup. Ct. 1434, 1437 (1966).

There is great consistency of pattern in Black's life. On August 17, 1966, the 29th anniversary of his confirmation, Black spent the day on the tennis court, and enjoyed the evening at bridge, a game which the Justice plays with more vigor than science. Clearly, the eternal amusements have not withered with his entrance into his ninth decade, nor have the eternal verities. A month before, he spoke informally one evening to a group of some 125 people, including about 50 lawyers, at his old home, Birmingham, Alabama. While he has had supporters, his race relations opinions have frequently made the Justice less than welcome to some in Birmingham; but despite the hostilities of the community and some members of the bar, his law clerks had arranged an informal and amiable dinner.

Black remarked gently that "all lawyers are brothers" and, "I'm not mad at anybody." Change comes hard to Birmingham, as the Justice well knew, and yet the intellectual paradox of Black at 80 is that he remains changeless in his own belief in change. "I am not afraid of change if the people will it," he told his audience, "even change of the Court if the Constitution's method of amendment is preserved." He said, "When I first came to the Court, I had grave doubts about judicial review. Grave doubts. But I am now convinced that if we are to have the form of free government and free society which the Constitution intends, the Court must function as it has." With great gravity, he told his Alabama audience, "The American dream calls for a society in which every individual shall live as a free man."[101]

When Martin Van Buren appointed Peter V. Daniel to the United States Supreme Court in 1841, he wrote his own predecessor, Andrew Jackson, that he had wanted to choose a Democrat *"ab ovo"* — from the egg. When Franklin D. Roosevelt made his first appointment to the United States Supreme Court, he wanted to choose a New Dealer *ab ovo.* He did. What Senator Black told his colleagues about Justices generally during the Court fight a few months before certainly fit FDR's first selection:

> After he goes to the bench he will still be the same man that he was before he went there.

[101] The Birmingham meeting is briefly reported on the editorial page of the Birmingham News, July 17, 1966, and the event has been elaborated for me privately by a member of the audience.