MR. JUSTICE BLACK: THE NEGRO PROTEST MOVEMENT AND THE RULE OF LAW

A. E. Dick Howard*

This term marks the thirtieth anniversary of Mr. Justice Black's appointment to the Court. In this tribute Article Professor Howard examines the manner in which the Negro protests have posed the issue of civil disobedience, and the fashion in which the Supreme Court, in the "direct action" cases of the 1960's, has handled the constitutional questions involved. He proceeds to suggest a theory of Justice Black's view of the "rule of law," not only as it governs the conduct of those who live under the law, but also as it governs those who make and apply the law.

THE CHALLENGE OF DIRECT ACTION

IN EASTER season of 1963 direct action came to Birmingham. It had been eight years since the organized bus boycott in Montgomery, and three years since the first lunch counter sit-ins by Negro college students in North Carolina. Now the Negro protest movement was moving in on the city which Martin Luther King, Jr., called "the most segregated city in America." The complaints which King and his followers lodged against Birmingham were legion: segregated schools and hospitals, inadequate parks, lack of access to white lunch counters, unsolved bombings of Negro churches and homes of civil-rights leaders, obstacles to voting, police brutality. As a focal point for protests in the spring of 1963, the Negro leaders chose the city's business community where, by withdrawing their patronage, Negroes could hit at the white businessman's pocketbook.

While the demonstrations gained momentum, the city's response was restrained. The old city government, which was contesting the right

---

*Professor of Law and Associate Dean, University of Virginia School of Law. B.A., 1954, University of Richmond; LL.B., 1961, University of Virginia; B.A., 1960, M.A., 1965, Oxford University. Professor Howard was law clerk to Mr. Justice Black for the 1962 and 1963 Terms.


2 King has recorded the events in Birmingham in WHY WE CAN'T WAIT (1963).
of the recently elected, more moderate administration of Albert Boutwell to take office, had a better weapon than physical force: a court injunction against the demonstrations, which the city had obtained on April 10. This move by the city posed a special tactical problem for King. If he obeyed the injunction, he risked dissipating the momentum established in the Birmingham demonstrations and disillusioning his followers. If he defied the injunction, he risked losing the good will and support of many white moderates, North and South, who would find it hard to appreciate subtle distinctions drawn between defiance of the courts by a white segregationist and defiance by a black integrationist.

King chose defiance. He went ahead with a march planned for April 12, Good Friday, and was promptly hauled off to jail along with others in the march. The same day eight Alabama clergymen signed a public statement calling the Negro demonstrations “unwise and untimely.” They expressed their concern about the Negroes’ increasing reliance on direct action at a time when the advent of a new, more moderate city administration held out the promise of a dialogue about racial problems in Birmingham. Pointing to the current demonstrations, “directed and led in part by outsiders,” the clergymen concluded:

> We further strongly urge our own Negro community to withdraw support from these demonstrations, and to unite locally in working peacefully for a better Birmingham. When rights are consistently denied, a cause should be pressed in the courts and in negotiations among local leaders, and not in the streets. We appeal to both our white and Negro citizenry to observe the principles of law and order and common sense.⁸

King’s answer came in the form of what is perhaps the most eloquent position paper of the civil rights movement: *Letter from Birmingham Jail*. King’s *Letter*, in part a statement of philosophy and in part a tract to deflect criticism at a critical time, is a defense of direct action, civil disobedience, and the bypassing of the courts.⁴ King recounts efforts at negotiation with the white leaders in Birmingham, consistent refusals by the city fathers to negotiate “in good faith,”

---


⁴ M. King, *Why We Can’t Wait* 76-95 (1963). Quotations from the *Letter* in this Article are from that version of the *Letter*, which, as King points out, was “polished” for publication though “in substance unaltered” from the original version. *Id.* at 76.
broken promises by the business community, and the resulting disappointments and shattered hopes of the Negro community. The only alternative, King concludes, is direct action.

You may well ask: "Why direct action? Why sit-ins, marches and so forth? Isn't negotiation a better path?" You are quite right in calling for negotiation. Indeed, this is the very purpose of direct action. Nonviolent direct action seeks to create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue.\(^5\)

The most serious issue raised by the statement of the eight clergymen was their charge that King's conduct was in effect lawless since he was taking his people into the streets in disregard of the courts and the processes of the law. By way of answer, King has developed a theory of "just" and "unjust" laws, drawing for sustenance on his understanding of the thinking of St. Augustine and St. Thomas Aquinas. As King puts it in the *Letter*:

You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we so diligently urge people to obey the Supreme Court's decision of 1954 outlawing segregation in the public schools, at first glance it may seem rather paradoxical for us consciously to break laws. One may well ask: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all."\(^6\)

It is this appeal to the "higher" law which makes a study of the Supreme Court cases arising out of the Negro protest movement more than simply a study of the clash between state and federal laws. It is true, as Professor Charles Black has argued, that much of what is called "civil disobedience" is, when viewed in a federal context, ultimately not a challenge to the authority of positive law.\(^7\) Those who engage in civil disobedience of state laws or local ordinances may, and frequently do, base their conduct on a claim of federal constitutional right. This

---

\(^5\) *Id.* at 79.

\(^6\) *Id.* at 82.

may be viewed as an appeal from one kind of positive law (state or local) to another (federal). And it is this kind of appeal, whether made at the time of the conduct involved or whether supplied in the course of subsequent litigation, which the Supreme Court has so frequently vindicated in the cases arising from Negro direct action in the 1960's. But it would grossly oversimplify the legal and philosophical questions raised by the modern doctrine of civil disobedience to treat all instances of direct action ultimately as appeals to federal law.

Neither in theory nor in practice has King given us to understand that the bounds of legitimate action on the part of the Negro civil-rights movement are to be measured by that which the Constitution allows. His theory is made altogether clear by such documents as Letter from Birmingham Jail. There, of the several examples which King gives of “unjust” laws, only one is a law which is unjust because it violates a constitutional right—a parade permit used by local authorities to deny citizens their first amendment rights of peaceful assembly and protest. The other examples—laws which do not square with “the moral law or the law of God,” laws passed in a political process in which the minority has no voice, laws binding on the minority but not on the majority—are, in King’s Letter, appeals not to the Constitution, but to the “higher” law.

King’s practice reflects this same broad view of legitimate action and appears in such actions as his decision in March 1965 to disregard an order of a federal district (not state) court and to proceed with his plans for the Selma march. This decision was based not on constitutional considerations, but on King’s belief that his “confrontation with injustice” demanded that he not disappoint the “hundreds of clergymen and other persons of good will” who had come to Selma to take part in the march. Other examples could be given, such as King’s assertion of a “supralegal trusteeship” of a slum building in Chicago.

THE SUPREME COURT’S RESPONSE

From the end of the Reconstruction era down through the 1950’s it is fair to say that the victories won by those seeking new rights for the Negro were won not in legislative halls or in the streets, but in the courts. The impressive list of cases won by the NAACP and other litigants since World War II is a monument to the success of the deci-
sion to look to the federal courts. The sit-ins and demonstrations of the 1960’s changed the pattern sharply. Now Negroes were claiming, with King, that the job was too much for the courts, and that victories won in court tended to take too long to achieve and too often proved, in their eyes, to be of insufficient proportions and of illusory permanence. This impatience, strongest among the left wing of the Negro movement, produced those familiar phenomena of recent years: the sit-ins, kneel-ins, wade-ins, lie-ins, and other forms of direct action, some occurring on the streets and in other public places, some on private property. Such direct action produced conflict with local authorities and ultimately provided constitutional questions for the Supreme Court to decide.

An examination of the decisions rendered by the Supreme Court in these direct action cases reveals some interesting facts. First, one cannot help but be struck by the remarkable variety of legal theories—“state action” violating the equal protection clause, no evidence to support a conviction, the first amendment, abatement, void-for-va
gueness, and others—used in a host of factual situations to reach a single result: the reversal of the convictions of civil rights demonstrators. Until the Court decided Adderley v. Florida in November 1966, by a five-to-four vote, it avoided affirming a conviction in any of the numerous direct action cases reaching the Court. The consistency of result before Adderley reveals the remarkable extent to which the Court has been able to give a stamp of legitimacy to conduct which, when undertaken, may have been assumed on all sides to be “illegal.”

Second, if one traces the direct action cases between 1961 and 1966, he observes the dissolution of the Court’s unanimity on the issues before it. After unanimous, and even per curiam, decisions in 1961 and 1962, dissents and dwindling majorities appeared, as the momentum of the civil-rights movement picked up in the country at large, and as the number of direct action cases reaching the Court increased in number. In 1963 a number of sit-in cases were decided in which the Court was virtually unanimous. But by the following year cases were being decided by votes of six-to-three or five-to-four, though in every case at least a bare majority was mustered for reversal.

Third, as the majorities for reversal declined, the temperature of the dissenting opinions rose. Increasingly, the dissents, notably those of Mr.

Justice Black, were more than simple disagreements with legal theories advanced by the majority; they were evidence of a growing apprehension on the Court about the implications for the legal order posed by the instances of direct action.

Fourth, as the dissenters expressed increasingly vocal doubts about the direction of the Court's decisions, majority opinions began to use cautionary language reminding the leaders of civil rights demonstrations that they should not assume that they would be able to count on the federal courts for support no matter what their conduct might be. In short, warning signals were being sent out: while the Constitution and the courts might be able to absorb and legitimize much conduct, there were limits.

The first notable direct action case, *Garner v. Louisiana*,\textsuperscript{11} reached the Court in 1961, but gave little trouble. Petitioners, Negro students, had staged sit-ins at lunch counters and had been convicted for disturbing the peace. The Court reversed on due process grounds, finding no evidence to support the convictions.\textsuperscript{12} In the next case, *Taylor v. Louisiana*,\textsuperscript{13} decided in 1962, the Court reversed per curiam the breach-of-the-peace convictions of six Negroes who had refused to leave the white waiting room of a bus station in Louisiana.

By 1963 sit-in cases were coming to the Court in large numbers. During a single day the Court decided a series of cases from Louisiana, Alabama, South Carolina and North Carolina. In all these cases the convictions of the sit-in demonstrators were reversed, with the decisions turning on such factors as a city ordinance requiring segregation in restaurants\textsuperscript{14} or the effect of statements by public officials that sit-in demonstrations would not be allowed.\textsuperscript{15} There was one doubter, Justice

\textsuperscript{11} 368 U.S. 157 (1961). Earlier cases to reach the Court included Wolfe v. North Carolina, 364 U.S. 177 (1960) (trespass on golf course), dismissed as resting on adequate state grounds, and Boynton v. Virginia, 364 U.S. 454 (1960), in which the Court held that the Interstate Commerce Act supported the right of a Negro interstate bus passenger to service in the restaurant of a bus terminal.

\textsuperscript{12} The Court relied on the doctrine of Thompson v. City of Louisville, 362 U.S. 199 (1960). In concurring opinions, Douglas found "state action" violating the fourteenth amendment, while Justice Harlan relied upon the first amendment grounds. 368 U.S. at 176, 185.

\textsuperscript{13} 370 U.S. 154 (1962). The opinion's rationale was a mixture of the "no evidence" rule of *Garner* and a federally guaranteed right to be free of segregation in interstate transportation facilities.

\textsuperscript{14} Peterson v. City of Greenville, 373 U.S. 244 (1963).

\textsuperscript{15} Lombard v. Louisiana, 373 U.S. 267 (1963). The other sit-in cases decided the same day were either reversed on the authority of *Peterson* or vacated and remanded for
Harlan, who in a separate opinion expressed concern about the "broad strides" with which the Court had set aside the convictions in the cases then before it.16

1963 found the Supreme Court focusing on another aspect of the Negro protest movement: demonstrations in public places. The sit-in cases had involved direct action on private property, but Edwards v. South Carolina,17 decided in February 1963, brought to the Court breach-of-peace convictions of nearly 200 Negro students who had gathered on the grounds of the South Carolina statehouse to protest racial discrimination. The Court overturned the convictions. Mr. Justice Stewart, for the Court, observed that the convictions did not rest on any narrowly drawn statute evincing a legislative judgment that specific conduct should be limited or forbidden. His conclusion was that South Carolina had violated petitioners' constitutional rights of free speech, free assembly, and freedom to petition for redress of grievances.

Mr. Justice Clark, dissenting, read the record in Edwards differently. His concern for the potential explosiveness of racial demonstrations in the South was evident in his remark that "anyone conversant with the almost spontaneous combustion in some Southern communities in such a situation will agree that the City Manager's action [in ordering the students to disperse] may well have averted a major catastrophe."18

In 1964 primary attention again focused on sit-ins. In June the Court decided five sit-in cases, which were only a small part of the large and growing number of such cases either already before the Court or on their way. As the concurring opinion of Mr. Justice Douglas in Bell v. Maryland19 and the dissenting opinion of Mr. Justice Black20 make clear, the five cases were taken with the expectation that the Court would provide an answer to the worrisome question of whether the fourteenth amendment, of its own force (that is, in the absence of any consideration in the light of the case. Avent v. North Carolina, 373 U.S. 375 (1963) (vacated and remanded); Gober v. City of Birmingham, 373 U.S. 374 (1963) (reversed).

In a case related to Gober, the Court reversed the convictions of two Negro ministers for having aided and abetted criminal trespass on the part of the students in Gober. Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963). In another case the conviction of six young Negroes for refusing to leave a public park customarily used by white people was reversed on both due process and equal protection grounds. Wright v. Georgia, 373 U.S. 284 (1963).

18 Id. at 244.
20 Id. at 318.
congressional legislation), forbade a state to use its trespass laws to convict a Negro who was denied service at a privately owned restaurant and who refused to leave on the request of the owner. But this question was never answered.

The five cases stayed in the lap of the Court for an unusually long time. Argued in October 1963, they were not decided until June 1964. In the principal case, Bell, six of the nine Justices in fact reached the broad "state action" question, but because they split three-to-three on that question, it was not decided. A bare majority of five Justices agreed, in an opinion by Justice Brennan, that the conviction should be vacated and remanded for the Maryland Court of Appeals to consider, as a matter of state law, the effects of a Maryland public accommodations statute passed since the sit-ins in question had taken place.21

Similarly, in the other four sit-in cases decided the same day as Bell the Court was able to reverse all the convictions without reaching the broad "state action" problem. Trespass convictions in Bouie v. City of Columbia22 and Barr v. City of Columbia23 were held to violate the due process clause because in the majority's view the South Carolina statute prohibiting entry on another's land after notice not to enter failed to give fair warning that it would be applied to remaining on land after notice to leave.

The other two cases, Robinson v. Florida24 and Griffin v. Maryland,25 turned on findings of impermissible "state action" which violated the equal protection clause of the fourteenth amendment—in Robinson, a state health board regulation which required segregated toilet facilities and therefore burdened restaurants that might wish to serve all races; in Griffin, the fact that an amusement park employee who had ordered Negroes off the property was also a deputy sheriff.

The five 1964 sit-in cases opened wide splits in the Court. Only in Robinson did all nine Justices agree to the result. Bouie, Barr, and Griffin were all decided by votes of six-to-three, while the Justices in Bell divided in the manner already described. Equally significant with the

21 The existence of the Maryland law was, as Mr. Justice Douglas acidly noted, well known to the Court throughout the time Bell was before the Court, and he objected to the law's being "resurrected" to dodge the merits of the fourteenth amendment claim. Id. at 242-43 (concurring opinion).
presence of dissents was the strong language they contained. It is at this point in our survey of the direct action cases that Justice Black enters the scene. In none of the direct action cases decided before June 1964 had Justice Black expressed any views, either in a majority opinion or otherwise. With *Bell* and its companion cases Black broke into print in a way which could hardly help but attract the attention of the bar and public alike.

Black's principal effort was in *Bell*, where he dissented from the Court's vacating and remanding the case. He would have reached the merits of the "state action" question.\(^{26}\) In a concurring opinion Justice Goldberg, joined by the Chief Justice and Justice Douglas, had reached the merits and had given his views why the convictions could not stand.\(^{27}\) Justice Black, joined by Justices Harlan and White, believed that nothing in the fourteenth amendment precluded a state from applying its trespass law, as Maryland had done, to Negroes who demanded service in a restaurant and refused to leave on request.

In his dissent in *Bell* Black dealt with a number of legal and constitutional questions, but one theme ran through his entire opinion: a concern about lawlessness and violence, and a belief that what was at stake in these cases was the "rule of law" and the peaceful and judicial settlement of disputes.

Against petitioners' argument that their conviction by the state court was "state action" forbidden by the fourteenth amendment, Black replied that to attribute to the state the bias or prejudice of the property owner would "severely handicap a State's efforts to maintain a peaceful and orderly society."\(^{28}\) Black showed special concern that people might be tempted to take the law into their own hands:

> Our society has put its trust in a system of criminal laws to punish lawless conduct. To avert personal feuds and violent brawls it has led its people to believe and expect that wrongs against them will be vindicated in the courts. Instead of attempting to take the law into their

\(^{26}\) *378 U.S.* at 318.

\(^{27}\) *Id.* at 286.

\(^{28}\) *Id.* at 327. Black's vote in *Reitman v. Mulkey*, 35 U.S.L.W. 4473 (U.S. May 30, 1967), shows a similar view of "state action." In that case the Court, by a five-to-four vote, held that the amendment to the California Constitution prohibiting state abridgment of a property owner's right to sell or lease to whom he pleased involved California in private racial discrimination to an extent that violated the fourteenth amendment. Black joined Harlan's dissent in which it was argued that all California had done was to remain "neutral" in the realm of private discrimination in the sale or leasing of residential property. *Id.* at 4478.
own hands, people have been taught to call for police protection to protect their rights wherever possible. It would betray our whole plan for a tranquil and orderly society to say that a citizen, because of his personal prejudices, habits, attitudes, or beliefs, is cast outside the law's protection and cannot call for the aid of officers sworn to uphold the law and preserve the peace.\textsuperscript{20}

In dealing with petitioners' argument that their demand for service was a form of expression protected by the first amendment, Black voiced a concern about lawless conduct. "The right to freedom of expression," he said, "is a right to express views—not a right to force other people to supply a platform or a pulpit." And Black closed his opinion in a passage which could leave the reader no doubt about the dimensions of Black's concern:

A great purpose of freedom of speech and press is to provide a forum for settlement of acrimonious disputes peaceably, without resort to intimidation, force, or violence. The experience of ages points to the inexorable fact that people are frequently stirred to violence when property which the law recognizes as theirs is forcibly invaded or occupied by others. Trespass laws are born of this experience. They have been, and doubtless still are, important features of any government dedicated, as this country is, to a rule of law. Whatever power it may allow the States or grant to the Congress to regulate the use of private property, the Constitution does not confer upon any group the right to substitute rule by force for rule by law. Force leads to violence, violence to mob conflicts, and these to rule by the strongest groups with control of the most deadly weapons. Our Constitution, noble work of wise men, was designed—all of it—to chart a quite different course: to "establish Justice, insure domestic Tranquility ... and secure the Blessings of Liberty to ourselves and our Posterity." At times the rule of law seems too slow to some for the settlement of their grievances. But it is the plan our Nation has chosen to preserve: both "Liberty" and equality for all. On that plan we have put our trust and staked our future. This constitutional rule of law has served us well. Maryland's trespass statute does not depart from it. Nor shall we.\textsuperscript{30}

These are strong words, expressing a deep-felt conviction. Many who read these words in June 1964 must have wondered whether this

\textsuperscript{20} 378 U.S. at 327-28.
\textsuperscript{30} Id. at 346.
was the same Black who through the turbulent years of the 1950's had so often spoken out, usually in dissent, for the right of unpopular groups, notably Communists, to the full protection of the first amendment. How is one to compare the Black who upheld in *Bell* the claims of property owners against a minority group urging the right to freedom of expression, with the Black so well known for his view that the first amendment is an "absolute" and is the keystone to other liberties? This is among the questions to be explored in the latter part of this Article.

Only eleven days after the Court's decision in *Bell*, Congress passed the Civil Rights Act of 1964.31 Title II of the Act, by requiring certain defined restaurants to serve all comers without regard to race, deflected the sit-in cases which otherwise would have continued to come to the Court. The Court, in *Hamn v. City of Rock Hill*,32 had one more occasion to pass on sit-ins in private restaurants, but it held, with four Justices dissenting, that the 1964 statute operated to abate sit-in convictions which had been pending at the time of the Act's passage.

Even without lunch counter and restaurant sit-ins, the Court was by no means relieved of the need to wrestle with the problem of direct action. There remained, after all, direct action in the streets and on public property, and in January of 1965, with its decision of *Cox v. Louisiana*,33 the Court plunged anew into the problem of demonstrations in public places.34

*Cox* arose out of a protest by Negro students at Southern University in Baton Rouge, Louisiana, against the arrest of a number of their fellow students for picketing stores with segregated lunch counters. About 2,000 students, led by the Reverend Elton Cox, marched from the campus to the courthouse where the other students were in jail. Massed on

---

32 379 U.S. 306 (1964). Justice Black dissented, denying that the statute had been meant to give persons improperly refused service "a 'right' to take the law into their own hands by sitting down and occupying the premises for as long as they choose to stay." *Id.* at 318.
34 Prior to *Cox*, the Court's important experience with this question had been *Edwards v. South Carolina*, 372 U.S. 229 (1963). See note 17 supra and accompanying text. Between *Edwards* and *Cox*, the Court decided *Henry v. City of Rock Hill*, 376 U.S. 776 (1964), and *Fields v. South Carolina*, 375 U.S. 44 (1963). Both cases involved breach-of-the-peace convictions of Negroes who had been demonstrating on public property and would not disband on police orders. In each case the Supreme Court, after an initial remand to the Supreme Court of South Carolina for consideration in light of *Edwards*, reversed in a brief per curiam opinion.
the sidewalk across the street from the courthouse, the 2,000 students sang hymns and prayed. Cox then made a speech urging the students to sit in at the local lunch counters, and at this point the sheriff moved to break up the gathering. When the demonstrators did not disperse, tear gas bombs were exploded, and the demonstrators scattered. Cox’s arrest followed the next day.

Cox was convicted on three counts: disturbing the peace, obstructing public passages, and picketing before a courthouse. On appeal, the Supreme Court reversed each of the three convictions. All nine Justices agreed that the breach-of-the-peace conviction, based on a generally worded statute, could not stand. On the conviction under a statute prohibiting the obstruction of public passages the Court split seven-to-two, with the majority, per Justice Goldberg, resting on the ground that the statute contained no standards to guide local officials in deciding which parades and meetings to permit.

The narrowest vote was on the conviction for picketing a courthouse. On this the Court split five-to-four for reversal of Cox’s conviction. Significantly, Justice Goldberg, for the majority, upheld the statute on its face as being a “precise, narrowly drawn regulatory statute which proscribes certain specific behavior.” However, the conviction was reversed because a local official had at one point acquiesced in holding the demonstration on the sidewalk.

Justice Black agreed with the majority’s reversal of the convictions for breach of the peace and for obstructing public passages, though in both instances he drew a careful distinction between the state’s power to regulate conduct, including picketing, as opposed to speech. It was on the third conviction—for picketing near a courthouse—that Black parted company altogether with the Court, and with feeling. The record left no doubt, he thought, that the purpose of the protest was to do precisely that which the statute meant to guard against: to influence the judge and other court officials. Here, as in Bell, Black showed his deep concern about the implications of direct action and the bypassing of the courts:

> The streets are not now and never have been the proper place to administer justice. Use of the streets for such purposes has always proved disastrous to individual liberty in the long run, whatever fleeting benefits may have appeared to have been achieved. And minority groups, I venture to suggest, are the ones who always have suffered

35 379 U.S. at 562.
and always will suffer most when street multitudes are allowed to substitute their pressures for the less glamorous but more dependable and temperate processes of the law. Experience demonstrates that it is not a far step from what to many seems the earnest, honest, patriotic, kind-spirited multitude of today, to the fanatical, threatening, lawless mob of tomorrow.\textsuperscript{36}

And Black reserved his gravest criticism for those who encouraged minorities to take to the streets—a criticism which one might fairly interpret as being directed at the Court’s majority: “Those who encourage minority groups to believe that the United States Constitution and federal laws give them a right to patrol and picket in the streets whenever they choose, in order to advance what they think to be a just and noble end, do no service to those minority groups, their cause, or their country.” \textsuperscript{37}

Black’s concern had an interesting echo in the language of Justice Goldberg’s majority opinion. While overturning the obstructing public passages conviction, Goldberg took care to say: “We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.” \textsuperscript{38} The caveat was repeated when Goldberg came to the conviction for picketing near a courthouse. Although the conviction was reversed, Goldberg felt compelled to declare that nothing in the Court’s opinion was to be taken “as sanctioning riotous conduct in any form or demonstrations, however peaceful their conduct or commendable their motives, which conflict with properly drawn statutes and ordinances designed to promote law and order, protect the community against disorder, regulate traffic, safeguard legitimate interests in private and public property, or protect the administration of justice and other essential governmental functions.” In short, using Goldberg’s language: “There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations.” \textsuperscript{39}

This language, which would have fitted without the least strain into

\textsuperscript{36} Id. at 583-84.
\textsuperscript{37} Id. at 584.
\textsuperscript{38} Id. at 555.
\textsuperscript{39} Id. at 574.
Black's dissent, shows how far the Court had come by 1965 in its handling of direct action cases arising from the Negro protest movement. If the warning flags were not clear enough with the Black dissents in *Bell* and *Cox*, they were to be found throughout Goldberg's majority opinion in *Cox*. The narrowness of the grounds on which the picketing near a courthouse conviction was reversed, and the fairly broad implications of the Goldberg language just quoted, suggest that by 1965 the Supreme Court was becoming a less sure refuge for civil rights leaders who would use the techniques of direct action and would rely upon the Court to reverse any conviction which ensued.

A year after the decision in *Cox*, the Court decided *Brown v. Louisiana*[^40], which involved a "stand-in" protest in a public library. Five young Negroes went to a regional library and asked for a book. The librarian, finding that the library did not have the book on its shelf, told the Negroes she would request the book to be sent to them from the state library. When the men made no move to go, the librarian asked them to leave. They remained, and a few minutes later the sheriff arrived, having been told earlier by the local chapter of CORE that there would be a demonstration. Still the Negroes would not leave, and they were arrested.

There is a great deal more to the case than these facts suggest. Mr. Justice Fortas, announcing the Court's judgment reversing petitioners' conviction under the breach of the peace statute, conceded (or rather, assumed) that the librarian had in fact given the Negroes the same service that a white person would have received. But the Negroes had a purpose beyond simply obtaining a book; even though they might have gotten service themselves, they were in the library to protest the segregated policies of the regional library system which, among other things, had separate bookmobiles for white and colored. In Mr. Justice Fortas' words, the "business in hand," as far as these Negroes were concerned, was to stand in the library as "monuments of protest" against racial segregation in the library system[^41].

A bare majority of the Court agreed on reversing the convictions, but those five Justices could not agree on a theory. Justice Fortas wrote only for himself, the Chief Justice and Mr. Justice Douglas. Fortas rested his result on two grounds: that there was in fact no evidence that petitioners had done anything which would amount to a breach

[^41]: *Id.* at 139.
of the peace, and that in any event they were exercising a first amendment right to protest "in a peaceable and orderly manner" segregation in the regional library system.  

Justice Black protested the Court's ruling. His dissenting opinion, in which he was joined by Justices Clark, Harlan, and Stewart, bristled with passages recalling the feeling evident in his dissents in *Bell* and *Cox*. Black emphasized that petitioners got complete service in the library, that they were treated with "every courtesy and granted every consideration," and that, in short, "there simply was no racial discrimination practiced in this case." Black could agree with the prevailing opinion on one point: petitioners came, not for a book, but to stage a protest. And it was on the dimensions of the right to protest that Black had reason to state his most vigorous disagreement with Fortas' reasoning. Said Black: "It is high time to challenge the assumption in which too many people have too long acquiesced, that groups that think they have been mistreated or that have actually been mistreated have a constitutional right to use the public's streets, buildings, and property to protest whatever, wherever, whenever they want, without regard to whom such conduct may disturb."  

Black's opinion represents precisely such a challenge. He closed on the same theme with which he had concluded his dissents in *Bell* and *Cox*—a fear that the Court was undermining the rule of law by inviting protesting groups to take the law in their own hands.  

I am deeply troubled with the fear that powerful private groups throughout the Nation will read the Court's action, as I do—that is, as granting them a license to invade the tranquility and beauty of our libraries whenever they have quarrel with some state policy which may or may not exist. 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. . . . But I say once more that the crowd moved by noble ideals today can become the mob ruled by hate and passion and greed and violence tomorrow. If we ever doubted that,

---

42 Id. at 142. Justice Brennan based his concurrence on the over-broadness of the statute, Justice White on equal protection grounds. Id. at 143, 150-51.
43 Id. at 160.
44 Id. at 162.
we know it now. The peaceful songs of love can become as stirring and provocative as the Marseillaise did in the days when a noble revolution gave way to rule by successive mobs until chaos set in. The holding in this case today makes it more necessary than ever that we stop and look more closely at where we are going.45

If this passage left any doubts as to the depth of Black's feelings on the matter, such doubts must have been dispelled in the courtroom when the Court handed down the opinions in Brown. A newspaper reporter who was in the courtroom commented that Black's dissent, as delivered, was "one of the most bitter and heated" in recent memory. Described as "shaking his finger at the courtroom audience," Black was reported to have delivered "a 30-minute verbal assault that made his strongly worded written dissent seem pale by comparison." 46 Those who are accustomed to the vigor and energy with which the Justice delivers his opinions will be inclined to discount somewhat the hyperbole of the reporter's account. Nevertheless, such a report coming from the pen of one who regularly covers the Court certainly reinforces the conviction, gained from a reading of the Black opinions in Bell, Cox, and Brown, that Black treated these cases as being of uncommon significance to the Court and to the country.

Black finally had his day in Adderley v. Florida,47 decided in November 1966. It was another five-to-four decision, but for the first time since the Court had reached the merits of Negro direct action cases, the vote was to affirm, rather than reverse, demonstrators' convictions. Petitioners in Adderley were students at Florida A. & M. University who had gone to a jailhouse in Tallahassee to protest the arrest of students who had tried to integrate public theatres. Warned by the county sheriff that they must leave the grounds of the jail, petitioners refused and were arrested and convicted under a Florida statute proscribing "trespass with a malicious and mischievous intent."

Black, for the majority, had no trouble distinguishing Edwards v. South Carolina: capitol grounds are a place traditionally open to the public, jails are not. More to the point, both in Edwards and Cox convictions had been obtained under vague, general statutes; the Florida statute, thought Black, was specific and was aimed at "conduct of one limited kind"—that is, trespass with malicious and mischievous intent.

45 Id. at 167-68.
To Black there was nothing to suggest that the sheriff had ordered petitioners off the jailhouse grounds because of what they said, only that he had objected to what they did. To Black the rule governing the case could be stated quite simply:

Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute against those refusing to obey the sheriff's order to remove themselves from what amounted to the curtilage of the jailhouse. The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.48

Justice Douglas, writing for the four dissenters, believed that a jailhouse, like an executive mansion, a courthouse or a statehouse, was "one of the seats of government." Like the Tower of London or the Bastille, a county jail, if it held prisoners thought to be unjustly held, was "an obvious center for protest." Black, in the earlier cases, had shown his concern about rising disorder. Now it was Douglas' turn. By suppressing protests such as the one in Tallahassee, Douglas concluded, "we only increase the forces of frustration which the conditions of second-class citizenship are generating amongst us." 49

One would have to be truly a prophet to chart future decisions in direct action cases. Five-to-four decisions are rarely safe bases from which to scout the future. The vacancy on the Court which occurs at the end of the 1966 Term and the ever-present chance of further vacancies increase this uncertainty. It may well be, for example, that Adderley will prove to be an ephemeral departure from the Court's otherwise consistent record of reversing the convictions of civil rights demonstrators.50 On the other hand, certain areas undoubtedly are now

48 Id. at 47.
49 Id. at 56.
50 Before the decision in Adderley, the Court had dismissed certiorari as improvidently granted in three direct action cases which it had heard argued. In one case, a Negro had gone onto a college campus, had urged students to boycott classes, and had told them, to enforce the boycott, "Let's go through the classrooms." Record at 111. The students had then marched through the classroom buildings, and the speaker, Diamond, had been arrested and convicted of breach of the peace. The Supreme Court dismissed the case in Diamond v. Louisiana, 376 U.S. 201 (1964). In the second case, demonstrators at a city airport had been convicted of unlawful assembly. The Court dismissed in Dresner v. City of Tallahassee, 378 U.S. 539 (1964). In the other case, the Savannah branch of the NAACP had picketed a local white grocer who allegedly had slapped a colored boy caught stealing merchandise. For harm to his business the grocer had re-
Mr. Justice Black

reliably marked out—for example, the Court's approval in Cox of statutes which, like that of Louisiana, prescribe in careful language the limits to picketing a courthouse.

Prediction, however, is not the concern of this Article. Rather it is to take the views of Mr. Justice Black as they appear in the direct action cases, and to see, when these views are taken with his opinions in other cases throughout his service on the Court, what picture one can form of the man's philosophy of the Constitution. In particular, one may well inquire whether his views, as hammered out in the dialogue over Negro direct action, are consistent with the views which he has developed over the years on such questions as the judicial process, the role of the judge, standards for constitutional interpretation, the first amendment, and the "rule of law."

Black and the Rule of Law

Black and the Negro

Not long ago, I was talking with a third-year law student from a Northern law school, and our conversation turned to Mr. Justice Black and the direct action cases. The student said that when his course in Constitutional Law brought the students to a reading of cases like Cox, there was considerable feeling among the students that the Black who registered his views in those cases was the "Alabama Black." This is a view which one is apt to hear expressed by some lawyers and some laymen: there are at least two Justices Black, the onetime libertarian and the newly discovered conservative of the sit-in and demonstration cases. Possibly this is what was in the mind of a national newspaper columnist who wrote that the result in the Adderley case "was made possible only through the Court's very dean of liberalism, Justice Hugo Black."

Who is the real Mr. Justice Black? Or so the law student and the columnist seem to be asking. In light of such comments, it seems useful to lay to rest, without qualification, any thought that somehow Mr. Justice Black has "deserted" the "cause" of equality for the Negro, and that the liberal Justice who gained such a reputation as a judicial activist is now abandoning his old principles through fear of the turmoil which

---

covered damages against both the local chapter and the national NAACP. The Supreme Court's grant of certiorari was limited to whether the national organization had had sufficient relation to the tortious acts to be held liable. The Court, four Justices dissenting, dismissed the case in NAACP v. Overstreet, 384 U.S. 118 (1966).

the New Jacobins will bring. In truth, neither the old myths about Justice Black nor the new suspicions are very helpful in understanding the man's judicial views.

In the first place one should understand Mr. Justice Black's attitude towards the aspirations of the Negro. It is certainly true, as I have tried to make clear in the earlier part of this Article, that Justice Black has repeatedly—in Bell, in Cox, in Brown, and elsewhere—expressed a deep concern over the readiness of the Negro protest movement to take to the streets or to others' property as a means for airing their grievances. Yet to suppose that this view betrays a lack of sympathy for Negro aspirations or a willingness to leave the Negro without remedy is to ignore a formidable list of Black opinions in cases other than those already mentioned.

The list begins early in Black's career on the Court with Chambers v. Florida,52 decided in 1940. Four colored men had been arrested after the murder of an elderly white man and had undergone five days of continuous interrogation until they confessed. In finding a denial of due process to the Negro petitioners, Black recalled that dictatorial criminal procedures had often been used to make scapegoats of "helpless political, religious, or racial minorities" and declared that the courts should be a refuge for those who are "non-conforming victims of prejudice and public excitement." 53

While one could detail the cases arising after Chambers, it seems more to the point simply to advert here to cases involving Negro rights which were decided during the several years in which the Court has been concerned with the direct action cases. At a time when Black was registering his apprehensions about Negro direct action, his concern that the just claims of the Negro should receive judicial vindication ought to be suggested by his opinions in cases during the 1960's involving public schools, voting rights, "state action," and the power of Congress to provide legislative remedies.

For example, in May 1964, shortly before the decision in Bell, Black spoke for the Court in deciding that Prince Edward County, Virginia, through a combination of closed public schools and tuition grants for private schools, had denied Negro school children the equal protection of the laws.54 In March 1965, a few weeks after Cox, Justice Black wrote the

52 309 U.S. 227 (1940).
53 Id. at 236, 241.
54 Griffin v. County School Bd., 377 U.S. 218 (1964). See also Black's denial of an
majority opinion in *Louisiana v. United States*,\(^5^6\) affirming a district court judgment for the United States on a complaint that had charged Louisiana with denying Negro citizens the right to vote. And repeatedly Black has endorsed the power of Congress under the fourteenth and fifteenth amendments to legislate on behalf of the Negro.\(^5^8\)

The point hardly requires elaboration. It would seem a bit fanciful to suggest that Mr. Justice Douglas doesn’t believe in civil rights merely because he dissented from the Court’s allowing the Civil Rights Commission to hold hearings in which those accused of discrimination in administering state voting laws were not allowed such procedural rights as the right to know the identity of their accusers or the right to confront and cross-examine witnesses.\(^5^7\) It seems equally fanciful to suppose that because he dissented in the direct action cases, Justice Black has gone “soft” on equal rights for Negroes.

**Black’s “Simplistic” Views**

Justice Black’s opinions in the direct action cases, being as conspicuous as they were and touching questions about which few can be detached, have come in for no small measure of criticism. One of the most interesting of these criticisms is the charge that on questions of free speech, state action, and other problems, Black has been unsophisticated and unaware of the nuances involved. For example, one commentator complains that the distinction drawn by Justice Black in *Cox* between speech and conduct for first amendment purposes seems “overly simplistic.”\(^5^8\) Similarly, another observer objects to Black’s analysis of the “state action” problem in *Bell* as not having been sophisticated enough to recognize that every resolution by a state of the conflicting claims of private individuals involves, so that observer says, the fourteenth amendment.\(^5^9\)

---


Such complaints against Justice Black are hardly new; certainly they were voiced before the sit-in and demonstration cases of the 1960's. A disciple of Mr. Justice Frankfurter says this of Black:

Mr. Justice Black understands the power of the elemental. His characteristic tools are the great unquestioned verities. He draws no subtle distinctions. The niceties of the skilled technician are not for him. His target is the heart, not the mind. His forte is heroic simplicity. His opinions attain great power because they seldom bother with mundane considerations that baffle others—e.g., application of a winged principle in a less than ideal world; or the impingement of one vast Platonic truth upon another. 60

Much of the popular image of Black rests on the Justice's search for simplicity and clarity in the law—his search for legal principles which can be as readily understood by those not versed in the mysterious science of the law as by those who are. Indeed, Justice Black has described himself as "a rather backward country fellow" who believes that when the first amendment says that Congress shall make "no law" abridging freedom of speech, it means "no law." 61 Hence Black is heard to make such statements as: "It is my belief that there are 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'" 62 This kind of talk has produced a good measure of snorts and snickers among some commentators. 63

This search for a clear line in constitutional matters is not, with Black, confined to the first amendment. It is not hard to discover parallels in a number of other areas. Hardly less controversial than Black's first amendment "absolutes" has been his doctrine that the fourteenth amendment was intended to apply to the states the Bill of Rights in its entirety—the well-known doctrine of "incorporation." 64 Here, as with the first amendment, one finds a Black "absolute": the proposition that in deciding due process cases, the Court should stick to the "clear" commands of the Bill of Rights, nothing more, nothing less.

63 Griswold, Absolute Is In the Dark, 8 Utah L. Rev. 167 (1963).
64 See Adamson v. California, 332 U.S. 46, 71-72 (1947) (dissenting opinion).
Or consider Black’s approach to the commerce clause. Even though the Court has, since its early days, been willing to decide whether state legislation imposed an “undue burden” on commerce, Black would leave that problem altogether to Congress. Or what could draw a cleaner— and, for some, a more startling—line than Black’s proposition that notwithstanding earlier decisions of the Court, corporations were not intended to be among the “persons” protected by the fourteenth amendment. A like “simplicity” may be detected in Black’s analysis of the “state action” problem in his dissent in Bell v. Maryland.

There is no doubt that Black’s law, like Black’s use of language, aims for clarity. Each Justice has his “style.” Mr. Justice Frankfurter had a taste for the comprehensive in opinion writing. Mr. Justice Douglas’ opinions are as well traveled as the man himself. For Justice Black, the object is simplicity. He dislikes a pretentious word where a simple one will do. His opinions are notably—and deliberately—free of Latin tags, those badges of erudition of which lawyers are so proud. He has been known to admonish a law clerk, in his own writing, “to use, not the language of Oxford, but the language of your country forebears.”

Why this concern for clarity and simplicity? Of course, it is possible to argue that the simply written opinion and the neat compartments and distinctions are simply techniques for reaching a result the Justice wants, without really showing you how he got there or without betraying the fact that life and law are not, after all, that simple. Unquestionably the drawing of simple, clear lines does bring Justice Black to the results he wants. His “incorporation” theory, as developed in Adamson v. California, has the double-edged effect of increasing judicial protection of individual liberties while loosening judicial supervision of state and federal regulation of economic problems.

That Justice Black reaches the “result” he wants is a statement which neither surprises nor informs, certainly not until one explores what

---

69 See, e.g., Douglas’ opinion arguing that the racial composition of New York’s 17th and 18th Congressional Districts are comparable to the Electoral Register System in British India and the Constitution of Cyprus. Wright v. Rockefeller, 376 U.S. 52, 59 (1964) (dissenting opinion).
70 332 U.S. 46, 69 (1947) (dissenting opinion).
is meant by “result”—something which I propose to do in the follow-
ing pages. For the moment, suffice it to say that Justice Black’s “sim-
plicity”—both in his language and in his law—has a logic about it. The
writing of simple opinions in clear language is a direct function of the
Justice’s belief that the law and its ways ought to be as intelligible to
the citizenry of Clay County, Alabama, as to the law faculty of a great
university. And the search for simple doctrine—which, more than
Black’s style, is the concern of this Article—can be summed up, I
submit, as a reflection of Black’s dedication to the notion of the “rule of
law.”

This concern of Black is, I think, visible in at least three respects. His
decisions and opinions reveal a belief in a rule of law binding on judges,
whose discretion should have clear limits; on the people, who should
put their trust in the legal and judicial process rather than in lawless-
ness; and on the electoral and legislative process, which should reflect
open and unfettered debate of issues, genuine participation, and results
subject to being tested by clear constitutional principles. The risk that
one runs in reading the Black opinions in the Negro direct action cases,
Bell, Cox, and the rest, is that he will focus on Black’s concern for the
rule of law as it applies to the people who live under the law, and will
not bring that concern into perspective through an awareness of Black’s
continuing sense of the ways in which a rule of law binds those who
make the law and those who interpret and apply it.

The Court and the Constitution

In 1963 Charles A. Reich wrote an article entitled Mr. Justice Black
and the Living Constitution. The title would suggest a Justice who
saw the Constitution as something to be updated as the times might
demand—a Justice who believed in an active, creative role for the judge
called upon to decide constitutional questions. In the course of his
article Professor Reich referred to “Black’s method of construing pro-
visions of the Bill of Rights in the light of contemporary problems.”
At that point Professor Reich was speaking of the Court’s discarding
precedents in deciding Brown v. Board of Education, but the impli-
cations of such language are rather broader than the question of the
effect of judicial precedents.

An article which links Justice Black with the idea of a “living con-

---

72 Id. at 714.
stitution” would align Black with the activism of Chief Justice Marshall, as expressed in the oft-quoted admonition that we should never forget “that it is a constitution we are expounding . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.” That a constitution is not to be read and construed in the same way as a private contract is a proposition which few modern lawyers or judges would doubt. Yet there is in the Marshall dictum, especially in the hands of some of its modern exponents, an obvious implication that where the Constitution is found wanting in the solution of current problems, courts sit as committees of revision to bring the instrument into tune with the times.

The effort to associate Justice Black with this school of constitutional thought runs into difficulties when faced with Black’s dissent in Bell. In that case Mr. Justice Goldberg, concurring, sought to prove by recourse to the history of the fourteenth amendment that the amendment, of its own force and without implementation by congressional legislation, obliged privately owned restaurants to refrain from discrimination on the basis of color. But Goldberg went on to say that, historical evidence aside, the Court was entitled to decide the case simply on the basis of what it thought to be the “present place” of restaurants and other accommodations in American life. This, according to Goldberg, was the “logic of Brown v. Board of Education,” which in turn had been based on the “fundamental principle of constitutional interpretation proclaimed by Chief Justice Marshall.”

Mr. Justice Black disagreed. To him, the fact that the case was being decided under a constitution (rather than under the common law, for example) meant something quite different from what it meant to Goldberg:

We are admonished that in deciding this case we should remember that “it is a constitution we are expounding.” We [the dissenters] con-

---


One of Black’s chief critics, Wallace Mendelson, in dubbing Black an “inspired activist,” quotes from the Reich article as proof. But in an epilogue added in 1966 to the second edition of his otherwise unchanged and highly partisan 1961 book, Justices BLACK AND FRANKFURTER, Mendelson cites Black’s views in Bell and other recent cases. He asks whether Black has “changed his mind” about the role of courts in a democracy or whether, Mendelson dubitante, Black “is convinced that—whatever friends and foes may think—he has always been an anti-activist, adhering to the plain mandates of the written law?” Id. at 132, 134. I hope that those who read the present Article will be in no doubt which answer I give to that question.

75 378 U.S. at 316 (concurring opinion).
clude as we do because we remember that it is a Constitution and that it is our duty “to bow with respectful submission to its provisions.” And in recalling that it is a Constitution “intended to endure for ages to come,” we also remember that the Founders wisely provided the means for that endurance: changes in the Constitution, when thought necessary, are to be proposed by Congress or conventions and ratified by the States. The Founders gave no such amending power to this Court.76

Bell was not the first occasion on which Black had disassociated himself from the “flexible” school of constitutional interpretation symbolized by the “it is a constitution” aphorism. In his 1960 Bill of Rights lecture, delivered before the direct action cases began reaching the Court, Black, in attacking the “balancing” of guarantees in the Bill of Rights, imagined a hypothetical judicial opinion in which a judge, relying on the Marshall dictum, “balanced” away a property owner’s right to just compensation under the fifth amendment for property taken for public use.77

From these two instances—Black’s dissent in Bell and his Bill of Rights lecture—a picture begins to emerge. We see, in Bell, a concern that judges, under a “flexible” view of the Constitution, will feel themselves free to use the Constitution to do more than it was meant to do. In the 1960 lecture we see a fear that judges, under the same approach, will do less than that which the Constitution intended. In short, these two passages suggest that Black recoils from a doctrine of constitutional interpretation under which a judge can do either too much or too little.

What one may infer from the two instances cited is borne out in Black opinions in a variety of areas. Beginning with some of Black’s earliest opinions on the Court, and coming down through some of his most recent, one is struck by the constancy of Black’s search for clear standards by which the judge is to approach his job of interpreting the Constitution—standards which limit the judge’s discretion to do what he thinks best. Early examples are found in due process cases and commerce clause cases; later the theme appears in first amendment cases; and more recently it is to be found in cases touching the contracts clause, the ninth amendment, and the equal protection clause.

Due Process of Law

When Mr. Justice Black was appointed to the Court, fresh in every-

76 Id. at 341-42 (Black, J., dissenting) (footnotes omitted).
one's memory was the use by the Court, over several decades, of the due process clause to hamstring state and federal regulation of economic and social questions. The charge against the Court, of course, was that the Justices had used due process to make constitutional doctrine of their personal economic philosophies. As Mr. Justice Holmes, in a memorable dissent, had put it: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." 78 It was this attitude of Justice Holmes which Black brought to the bench.

Substantive due process may have gone into decline since the constitutional "revolution" of the 1930's, but Black has found repeated occasions to object to the Court's use of due process of law. Probably Black's best known attack on the Court's "elastic" approach to due process of law came in 1947, with his dissent in Adamson v. California. 79 There the Court held that even if it were assumed that the fifth amendment privilege against self-incrimination prohibited comment in federal court on a criminal defendant's failure to take the witness stand, the due process clause of the fourteenth amendment did not impose a like prohibition on the states. In so doing the Court followed the approach laid down earlier by Mr. Justice Cardozo in Palko v. Connecticut, 80 that of the various guarantees of the Bill of Rights only those which are "implicit in the concept of ordered liberty" are applied to the states by virtue of the fourteenth amendment.

In the view of Justice Black the Court was taking the position that it was "endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental principles of liberty and justice.'" Black's objections were twofold. On the one hand, the Court's doctrine operated to "degrade" the Bill of Rights, as in Adamson. On the other hand, it allowed the Court to appropriate "a broad power" not granted by the Constitution. Rather than "roam at large in the broad expanse of policy and morals," Black would have the Court abandon its natural-law formula as an "incongruous excrescence." His substitute would be the "incorporation" doctrine—the theory that the fourteenth amendment was meant to apply all the provisions of the Bill of Rights to the states. 81

79 332 U.S. 46 (1947).
80 302 U.S. 319 (1937).
81 332 U.S. at 68-70, 75, 90 (1947) (dissenting opinion).
A few years after Adamson Justice Black and Justice Frankfurter debated the question whether the Court's reliance on "vague contours" of the due process clause put too much discretion in the hands of judges. This was in Rochin v. California,82 where Frankfurter, for the majority, held that a conviction obtained after evidence was taken by stomach pump against the defendant's will violated the due process clause of the fourteenth amendment. Black would have based the holding on an application of the fifth amendment privilege against self-incrimination to the states. Black preferred the "specific guarantees" of the Bill of Rights to the "nebulous standards" used by the majority. Again, as in Adamson, Black saw two evils: the use of an "evanescent" standard to strike down "unreasonable" state legislation, and the peril posed to the Bill of Rights by the "accordion-like qualities of the Court's philosophy." 83

Frankfurter had stated the test of due process of law to be an inquiry into whether the proceedings offended "those canons of decency and fairness" felt by English-speaking peoples. He took pains to deny that due process, so conceived, left the Court without adequate guidelines. In language showing the obvious influence of Cardozo's The Nature of the Judicial Process, Frankfurter maintained:

The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial functions. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process.84

The years since Adamson and Rochin have seen what has been in some respects a victory for Black, but in other respects distinctly not a victory. On the one hand, in a series of cases in the 1960's individual provisions of the Bill of Rights have come tumbling in under the umbrella of the fourteenth amendment—such rights as the fourth amendment's ban on unreasonable search and seizure,85 the fifth amendment's

---

82 342 U.S. 165 (1952).
83 Id. at 174-75 (concurring opinion). For a recent example of Black's reiteration of his objection to reliance on the "generality of due process" instead of the specific provisions of the Bill of Rights, see his concurring opinion in In re Gault, 87 S. Ct. 1428 (1967).
84 Id. at 170. Compare B. Cardozo, The Nature of the Judicial Process 141 (1921).
privilege against self-incrimination, the sixth amendment's guarantees of right to counsel, confrontation and cross-examination of witnesses, and speedy trial, and the eighth amendment's prohibition on cruel and unusual punishment. Yet this process has been, for Black, only second best, since it represents only "selective" incorporation, the Court having failed to accept Black's demands for the incorporation of the Bill of Rights in its entirety. Further, Black has not been able to restrict the Court to the Bill of Rights, as Griswold v. Connecticut, discussed below, makes clear.

Thus of the two concerns which motivated Black's attack on the Court's use of the "vague contours" of due process in such cases as Adamson, his object of nailing down the guarantees of the Bill of Rights has met with partial, but notable success. It is fair to say that the success has been more complete as regards Black's other concern, the Court's intrusion into the states' regulation of economic problems. The story of how the doctrine of cases like Lochner v. New York has been overthrown is well known and need not be recounted here. The measure of Black's achievement here may be gathered from the following passage in his majority opinion in Ferguson v. Skrupa, a 1963 case in which the Court reversed the decision of a district court enjoining on substantive due process grounds a Kansas statute banning the business of "debt-adjusting."

The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases—that due process authorizes 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. . . . Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a "superlegislature to weigh the wisdom of legislation" . . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer,
Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas.

First Amendment "Balancing"

The concern Black had shown about the Court's standards of constitutional interpretation in the due process area shifted in the 1950's and 1960's to what seemed to him to be a similar philosophy as regarded the first amendment. What he objected to in the first amendment cases was the Court's "balancing" test, whereby the gravity of the interest which the government was seeking to protect was balanced by the Court against the seriousness of the impairment of some first amendment right in order to decide whether that first amendment right should be given effect. In his attack on "balancing" Black, as he had done in the due process cases, stressed his opposition to giving judges too much leeway.

Konigsberg v. State Bar, decided in 1961, will serve to illustrate the point. There the majority upheld the refusal of bar examiners to admit Konigsberg after he had refused to answer questions about his membership in the Communist Party. Black objected to the Court's "balancing," arguing that the first amendment's "unequivocal command" that freedom of speech not be abridged showed that "the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." Black's misgivings about leaving the standard in the hands of judges were evident in his statement that "balancing"

is necessarily tied to the emphasis particular judges give to competing societal values. Judges, like everyone else, vary tremendously in their choice of values. This is perfectly natural and, indeed, unavoidable. But it is neither natural nor unavoidable in this country for the fundamental rights of the people to be dependent upon the different emphasis different judges put upon different values at different times.

Free speech may enjoy a higher estate currently than it did when Black wrote in Konigsberg, but Black's concern persists. Even as the Court has extended the protection it will give to speech in the areas of

92 Id. at 730-32.
93 366 U.S. 36 (1961). See also Braden v. United States, 365 U.S. 431, 438, 442 n.12 (1961) (Black, J., dissenting), where he lists some of the "judicially created 'tests' now in vogue" by which basic freedoms might be abridged.
94 366 U.S. at 56, 61, 75 (dissenting opinion).
libel and obscenity, Black has held out for an “absolute” position. In
the libel area, for example, Black hopes for the demise of the New York
Times Co. v. Sullivan\textsuperscript{98} doctrine. He recently expressed this hope in
his concurring opinion in Time, Inc. v. Hill,\textsuperscript{96} where he once again
denounced the “balancing” doctrine as one which “plainly encourages
and actually invites judges to choose for themselves between conflicting
values, even where, as in the First Amendment, the Founders made a
choice of values . . . .” Black conceded, in a passage recalling Lord
Acton’s famous dictum, that it was “not altogether strange that all
judges are not always dead set against constitutional interpretations that
expand their powers, and that when power is once claimed by some,
others are loath to give it up.”\textsuperscript{97} Black objected in particular to the
Justices’ having “by their own fiat today created a right of privacy”
to be balanced against the constitutional right of a free press, and he
wondered whether tomorrow they might not “create more rights that
balance away other cherished Bill of Rights freedoms.”\textsuperscript{98}

\textit{Contract Clause}

Recent years have seen new areas of the Constitution added to the
list where Black’s worries about the unrestrained judge have focused.
The constitutional guarantee against the impairment of the obligation
of contracts might not seem a likely place for the “libertarian” Black to
be concerned about judges’ watering down the Constitution, but the
Court’s decision, and Black’s dissent, in \textit{City of El Paso v. Simmons}\textsuperscript{99}
bring into bold relief one of the theses of this Article—that Black’s
effort to confine judges within strict standards of constitutional inter-
pretation is not a function solely of his interest in free speech or in
any other particular constitutional guarantee.

In \textit{El Paso} the Court held that Texas’ “modification” of land contracts
so as to restrict purchasers’ rights to pay up overdue interest and thus
avoid forfeiture of their land did not affect the “primary consideration”
for the contract and thus did not violate the contract clause. Black dis-
sented, noting that the Court had set up yet one more “indefinable”
constitutional standard in that a state might, under the Court’s decision,

\textsuperscript{98} 376 U.S. 254 (1964).
\textsuperscript{96} 385 U.S. 374, 398 (1967).
\textsuperscript{97} \textit{Id.} at 399-400.
\textsuperscript{98} \textit{Id.} \textit{See also} Curtis Publishing Co. v. Butts, 35 U.S.L.W. 4636, 4648 (U.S. June 12,
1967) (dissenting opinion by Black, J.).
\textsuperscript{99} 379 U.S. 497 (1965).
restrict a party to those gains which are "reasonably to be expected" from the contract and yet would not violate the contract clause. Balancing away contractual rights, Black thought, was as objectionable as balancing away first amendment rights: "I most certainly cannot agree that constitutional law is simply a matter of what the Justices of the Court decide is not harmful for the country, and therefore is 'reasonable.' " Recalling that Madison had said that the contract clause was meant to protect people from the "fluctuating policy" of legislatures, Black concluded: "Today's majority holds that people are not protected from the fluctuating policy of the legislature, so long as the legislature acts in accordance with the fluctuating policy of this Court." \(^{100}\)

The Connecticut Birth-Control Case

It has been said that there are as many varieties of natural law as there are pies at the Leipzig Fair. I am sure that Mr. Justice Black would subscribe to that remark, especially if it were to be applied to the many guises in which he had detected the use of natural law in Supreme Court opinions. Of those many devices, probably the techniques used in *Griswold v. Connecticut*,\(^ {101}\) the birth-control case, represent the *ne plus ultra*. Appellants in that case operated a clinic in New Haven at which they gave information and medical advice to married persons concerning contraception. A Connecticut statute forbade the use of any device to prevent conception, and appellants were found guilty of violating the state statute which forbade assisting or counseling any offense.

The members of the Court obviously disliked what Mr. Justice Stewart (who dissented from striking it down) called "an uncommonly silly law." They managed to declare it invalid, but seldom have judges on any court had more trouble deciding into what conceptual pigeonhole a case fits. What gave the Justices who objected to the law special difficulties was that the interest which they sought to protect—call it marital privacy, if you will—was not expressly dealt with in any of the first eight amendments to the Constitution. Hence the kaleidoscope of theories.

Mr. Justice Douglas wrote the opinion for the Court. Since in countless cases he, like Justice Black, had hung the label of "unclean" on

\(^{100}\) *Id.* at 533.

\(^{101}\) 381 U.S. 479 (1965).
substantive due process, he took care not to rest the decision on the due process clause. To use due process would be to sit as a "super-legislature." But the case involved, said Douglas, not economic or social questions, but the "intimate relation between husband and wife." This right he found to be within a "zone of privacy" protected by a "penumbra" formed by "emanations" from the first, third, fourth, fifth, and ninth amendments. Justice Goldberg, concurring, argued that "liberty" as protected by the fourteenth amendment includes the right of marital privacy, even though that right is not mentioned explicitly in the Constitution. Goldberg drew on the ninth amendment—"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"—to show that "liberty" need not be limited to the explicit list of rights found in the first eight amendments. Justice Harlan and Justice White each wrote concurring opinions in which they rested their decisions on out-and-out due process grounds.

To Justice Black, who dissented, the talk about a "right of privacy" got him nowhere: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision." As for due process of law and the ninth amendment, they added up to the same thing: a claim by the Court to the power to invalidate legislation which it found to be "capricious, unreasonable or oppressive." And he took occasion once again to disassociate himself from those who thought that the Court's duty to "update" the Constitution gave it the power being claimed by his brethren under such concepts as due process of law:

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their

---

103 381 U.S. at 482, 484.
104 Id. at 488.
105 Id. at 499, 502.
selected agents for ratification. That method of change was good enough for our Fathers, and being somewhat old-fashioned I must add it is good enough for me.\textsuperscript{106}

\textit{Equal Protection of the Laws}

Earlier in this Article I quoted the passage from Charles Reich’s article in which he associates Justice Black with the view that the Constitution is to be construed “in the light of contemporary problems.” Professor Reich refers specially to the Court’s use of the equal protection clause to solve such contemporary problems as school segregation and malapportioned state legislatures. We come then to an interesting turn in the road. After all has been said about Black and the “vague contours” of due process, Black and the “absolute” commands of the first amendment, Black and the Court’s use of “natural law,” perhaps for him equal protection is different. Justice Black did, after all, join \textit{Brown v. Board of Education},\textsuperscript{107} in which the Court said that, in applying the fourteenth amendment, it could not turn the clock back to the time the amendment was written. And he joined the decisions in the reapportionment cases,\textsuperscript{108} where dissenters objected that the history of the fourteenth amendment gave no support to wrestling “one voter, one vote” from the equal protection clause.

To seek to unravel this mystery, we should look at \textit{Harper v. Virginia State Board of Elections},\textsuperscript{109} decided in 1966. There the Court struck down the poll tax imposed by Virginia in state elections,\textsuperscript{110} Justice Douglas holding for the majority that a state violates the equal protection clause whenever it makes wealth or payment of a fee a prerequisite to voting. Overturning a 1937 decision which had sustained a poll tax,\textsuperscript{111} and distinguishing a 1959 decision which had upheld literacy tests,\textsuperscript{112} Justice Douglas disposed of the case before him by simple fiat: “Wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.”\textsuperscript{113}

Justice Douglas referred here, as he had in \textit{Griswold}, to the now discredited doctrine of substantive due process. “We agree, of course,
with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics.'" Then Douglas turned that statement on its head to say in the very next sentence: "Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era." The inversion of Holmes' famous remark is almost too quick for the reader to catch. Douglas takes a statement in which Holmes was saying that the due process clause does not embody any particular political theory and uses it as if it supports Douglas' declaration that the equal protection clause can be used to enforce a particular (and changing) political theory. Douglas continued: "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.” And here Douglas cited, as did Professor Reich in his article, Brown v. Board of Education, as an instance of changing notions of equal protection.

To Black, who dissented, the Court was doing with the equal protection clause exactly what it had in an earlier generation done with the due process clause. It was the old “natural-law-due-process formula” in new garb. Citing his dissents in Adamson and Griswold, Black said:

I have heretofore had many occasions to express my strong belief that there is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of the Court at any given time believes are needed to meet present-day problems. Nor is there in my opinion any more constitutional support for this Court to use the Equal Protection Clause, as it has today, to write into the Constitution its notions of what it thinks is good governmental policy.

In light of Justice Douglas' having cited Brown v. Board of Education as an instance of the Court's use of the equal protection clause in the fashion in which Douglas was using it in Harper, Black's footnote 7, in which he explains his vote in Brown, is of special interest:

114 Id. at 669.
115 Id. at 669-70.
116 Id. at 675-76.
In Brown v. Board of Education . . . the Court today purports to find precedent for using the Equal Protection Clause to keep the Constitution up to date. I did not vote to hold segregation in public schools unconstitutional on any such theory. I thought when Brown was written, and I think now that Mr. Justice Harlan was correct in 1896 when he dissented from Plessy v. Ferguson . . . . I did not join the opinion of the Court in Brown on any theory that segregation where practiced in the public schools denied equal protection in 1954 but did not similarly deny it in 1868 when the Fourteenth Amendment was adopted. In my judgment the holding in Brown against racial discrimination was compelled by the purpose of the Framers of the Thirteenth, Fourteenth and Fifteenth Amendments completely to outlaw discrimination against people because of their race or color.\(^\text{117}\)

Whether Black, by recourse to the history of the fourteenth amendment and without reliance on changing philosophies since that time, could make out a persuasive case that segregated schools were meant to be within the ambit of the amendment would trouble some observers, and certainly those who have read Professor Bickel's article on the "original understanding" as regards the fourteenth amendment.\(^\text{118}\) But this point aside, Black's footnote sheds a great deal of light on his attitude toward judicial uses of the fourteenth amendment. At the very least, it throws no small doubt on the thesis that Black is to be identified with that school which sees the Court as reinterpreting the Constitution and redefining its terms in light of contemporary problems.

One problem remains. While Black in his dissent in Harper did explain his vote in Brown so as to suggest a consistency in his approach to the equal protection clause, he did not refer to the Court's decisions in the reapportionment cases. Yet if Black thought it necessary to explain his having joined Brown—which, because it involved state-imposed racial classifications, would seem close to the heart of the kind of state action the fourteenth amendment was aiming at—then one would think there to be all the more reason to explain joining the majority in the reapportionment cases. One has no problem in understanding Black's approach to the question of congressional districts in his own majority opinion in Wesberry v. Sanders.\(^\text{119}\) There he carefully avoided the

\(^{117}\) Id. at 677-78 n.7.
\(^{119}\) 376 U.S. 1 (1964) (Article I, § 2 of the Constitution means in congressional elections one man, one vote).
equal protection clause and rested squarely on his reading of article I, section 2 in its historical context. But the decisions dealing with apportionment of seats in state legislatures present quite another question.

Consider the reapportionment cases. For example, Reynolds v. Sims dealt with the vote, not with any question of race as such. Hence we are at some distance from the kind of question which historically was the chief concern of the fourteenth amendment. In the second place, history—crucial to Black in many opinions—was, if you consider it to be relevant, demonstrably on the side of the dissenters. Thirdly, Chief Justice Warren's majority opinion, with its declaration that "legislators represent people, not trees," has the same ring of fiat about it that characterizes the majority opinion in Harper to which Black so strongly objected. Finally, the thrust and tenor of Justice Stewart's dissent in Lucas v. Colorado, especially in his discussion of the place of the "rationality" test in an equal protection case, is remarkably like that of Black's dissent in Harper.

Whatever one may think of the reapportionment cases, it remains hard to mistake what Black is getting at in opinions like the one he wrote dissenting in Harper. His concern about the Court's willingness to innovate where the Constitution does not seem to do the job is clear, whether the Court's instrument be due process, equal protection, or whatever.

Contrast the style of Black and Goldberg in Bell v. Maryland, where Goldberg invokes the Marshall dictum "it is a constitution" and invites us to regard the "living" Constitution, while Black reminds that it is because it is a constitution that the Court construes, not amends. Contrast the style of Black and Douglas in Harper, where Douglas tells us that what constitutes equal protection is to be determined by the political theory of the present day, not some past era, while Black charges the Court with writing into the Constitution its notions of policy to keep the Constitution "abreast" of today's needs. Finally, to bring the comparison down to the 1966 Term, compare the style of Black and Fortas in Fortson v. Morris. There the Court had before it a challenge to

120 On Black's use of history, with reference to his opinion in Wesberry, see pp. 1068-69 infra.
122 Id. at 589 (Harlan, J., dissenting).
123 Id. at 562.
Georgia's system of having the legislature, where no candidate for Governor in the general election receives a majority of the votes, select a Governor from the two persons having the highest number of votes. In a five-to-four decision, the Court held that the Georgia plan did not violate the equal protection clause. Justice Fortas, in dissent, adopted the notion of an equal protection clause whose contents change with the times. Quoting Marshall's "it is a constitution" dictum and Douglas' Harper statement that notions of equal protection do change, Fortas said, "Our understanding and conception of the rights guaranteed to the people by the 'stately admonitions' of the Fourteenth Amendment have deepened, and have resulted in a series of decisions [citing the reapportionment cases and Harper], enriching the quality of our democracy,"126 which do not depend on earlier practices or interpretations.

Black, for the majority, wrote a brief, simple opinion. He would be surprised if, after a state had already held two primaries and a general election to try to elect a candidate by majority vote, the Federal Constitution compelled it to continue to hold elections "in a futile effort to obtain a majority for some particular candidate."127 For Black's disposition of the case it was not necessary to "enrich" the quality of Georgia democracy via the fourteenth amendment; it was enough that he could find "no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor."128 Black might have added that it would be surprising, too, if an American state, having failed to elect a chief executive by direct ballot, constitutionally could not fall back on what in effect is a parliamentary election of the kind well known in England and other countries, which can hardly be counted as less "democratic" than this one.

It is not the merits of how Georgia elects its Governor which is the point here; it is an impression of the attitude which Mr. Justice Black takes towards his role, and that of the Court, in dealing with constitutional questions. There is, it is submitted, a view of the judicial process—a kind of "rule of law" for the judges—which runs through Black opinions in due process, equal protection, and other areas alike.129

126 Id. at 247.
127 Id. at 234.
128 Id. Black recently renewed his opposition to a theory that the judges' duty is to keep the Constitution "up to date" in Berger v. New York, 35 U.S.L.W. 4649, 4675 (U.S. June 12, 1967) (dissenting opinion).
129 Since this Article was written, the U.C.L.A. Law Review has released a symposium issue on Justice Black. There Professor Paul A. Freund remarks on the irony
Mr. Justice Black's search for standards has carried with it a search for techniques. One has been his recourse to the "plain language" of the Constitution. Another has been Black's recourse to history.

Many of the Court's most important recent decisions—involving church and state, reapportionment, racial discrimination, and other questions of moment—are replete with deep draughts of the cup of history. The Court's efforts at historical scholarship have come in for some scorching criticism, both from lawyers and from historians. One historian, Alfred H. Kelly, has offered the thesis that the Court's increased use of the "historically oriented opinion" is a technique for justifying judicial activism. By this view, historical adjudication "supplies an apparent rationale for politically inspired activism that can be indulged in the name of constitutional continuity. The return to historically discovered 'original meaning' is, superficially considered, an almost perfect excuse for breaking precedent." Moreover, this same observer complains that the Court's brand of history too often is simply "law-office" history of the kind which one expects to find in the advocate's brief, and that it "fails to stand up under the most superficial scrutiny by a scholar possessing some knowledge of American constitutional development." To criticize the Court's use of history is, by all odds, to pass judgment on Justice Black. Few Justices have more often looked to the history of constitutional provisions to decide a case. And Black's essays in constitutional history not only are frequent, but also characteristically occur in some controversial context to prove some point which, likely as not, that Black, "whom many would wish to honor as preeminently creative, would repel any such tribute as a reproach, a total misunderstanding and repudiation of his conception of the judge's role." Freund, Mr. Justice Black and the Judicial Function, 14 U.C.L.A. L. Rev. 467, 473 (1967). In another piece which has appeared since the writing of this Article, Professor Louis L. Jaffe has observed that Justice Black "is sometimes accounted the leader of the activist wing of the court. Yet he explicitly expouses a concept of judicial power even more limited than that of Frankfurter." But Jaffe concludes that the various tests of judicial restraint respectively suggested by Cardozo, Frankfurter and Black "are either illusory or not in fact observed." Jaffe, Was Brandeis An Activist? The Search for Intermediate Premises, 80 Harv. L. Rev. 986, 995-97 (1967).

is highly debatable. The historical evidence used by Black to support his view that the fourteenth amendment applies the provisions of the Bill of Rights to the states has come in for a full measure of criticism, especially in Charles Fairman’s well-known article. Particularly sharp attacks have been made on Black’s historical arguments to support his holding in *Wesberry v. Sanders* that “construed in its historical context, the command of Art. I, § 2, that Representatives be chosen ‘by the People of the several States’ means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.” Justice Harlan’s answer in dissent was that the debates in the Philadelphia Convention, on which Black drew for support, had been concerned only with the issue of representation among the States, not representation within a State. Among observers off the bench, one has concluded: “To put the matter bluntly, Mr. Justice Black, in order to prove his point, mangled constitutional history.”

I do not propose within the scope of this Article to explore the merits of these charges as they concern the historical evidence relied upon by Mr. Justice Black in individual cases such as *Adamson* or *Wesberry*; that would require a separate article, and there have been many. The question here is not whether Black is a good or bad, careful or slipshod historian, but rather what we are to make of the fact that Black thinks that to decide constitutional cases, he must be an historian.

Part of the answer lies in the education and habits of the man. Black attended and graduated from the Law School of the University of Alabama at age twenty without having had any other college education. When he was elected to the United States Senate in 1926, he was keenly aware of the gaps in his education and embarked on an intensive reading program. In his years in the Senate Black read hundreds of volumes—biographies and writings of the Founding Fathers, classics of Greek and Roman literature, works of economics and philosophy. These volumes, well thumbed and extensively annotated in Black’s handwriting, line the walls of his study in Alexandria. This reading, deeper in history than in any other field, has left its mark on Black the man and Black the

---

133 *See Adamson v. California, 332 U.S. 46, 71-72 (1947) (dissenting opinion).*
134 Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding,* 2 *STAN. L. REV. 5* (1949). Kelly agrees that Black’s argument proves too much but thinks his evidence “far more significant” than Fairman is willing to admit. Kelly, *Clio* at 132.
135 *376 U.S. at 7-8.*
136 *Id.* at 24.
137 Kelly, *Clio* at 135.
judge. In private conversation with a friend or in a public lecture he is apt to recommend reading Tacitus or some other historian. It is equally natural and characteristic that in writing opinions he should look to history.

The significance of Black's affinity for the historical opinion goes deeper than simply shedding some light on the manner of man he is. His historical method is closely connected with the previously described attitudes toward the judicial process. Professor Kelly, in surmising that the Court's increasing use of history in recent years has something to do with its judicial activism, makes a sound and telling point. But, at least insofar as concerns Justice Black, there is more to it. Kelly gives us Black's majority opinion in Wesberry and Goldberg's concurring opinion in Bell v. Maryland as examples of the use of history by activists. He should (but does not) also give us Black's dissenting opinion in Bell. There the "activist" of Wesberry used constitutional history as a bar to the Court's activism. In Bell Justice Goldberg explored congressional debates about the time of the fourteenth amendment to conclude that the amendment was intended to reach, of its own force, discrimination in privately owned restaurants. Black canvassed the same debates to arrive at the opposite conclusion.

There is good reason to agree that the modern Court finds in recourse to history a useful technique for making judicial activism and breaks with judicial precedents more palatable. But the story is but half told if one points to the activism of Black in Wesberry and ignores his use of history in cases like Bell. The simple fact, I submit, is that for Justice Black the appeal to historical evidence, to the intent of the framers, and to the historical meaning of constitutional provisions is part and parcel

138 See Address by Mr. Justice Black, Einstein Memorial Meeting at Town Hall, May 15, 1955, in which Black said of Tacitus, "I wish many more Americans would read the 'Annals' than do."

It is not without significance that the classical writers for whom Black has the greatest affinity are those with whom pre-revolutionary American thinkers and writers were best acquainted—classical writers who, like Tacitus, wrote during the times when values inherited from the Roman Republic were sorely tried. See 1B BAILYN, PAMPHLETS OF THE AMERICAN REVOLUTION 22 (1965).

139 Kelly, Clio at 134-37, 145-49. After he has gone to such lengths to use Black opinions, including Adamson and Wesberry, as examples of history's being used to support judicial activism, it is a mystery why Kelly, in discussing Bell, never mentions Black's dissent, in which Black uses history to oppose activism. Kelly's criticisms of the Court's "law office" history, which he documents effectively, would be more balanced had he made more mention of the uses of constitutional history as an arresting device.

140 378 U.S. at 290-304 (1964).

141 Id. at 335-41 (dissenting opinion).
of his philosophy of the role of the judge and the strict limits which the traditions of the judicial process under a written constitution impose upon him.

Obedience to Law and the Rights of Property

Black's search for standards of constitutional interpretation which will serve as a rule of law to bind judges has its counterpart in his belief in a rule of law for those who make the laws and those who live under them. It is about those who live under the laws that Black is concerned in the direct action cases. We see in Bell Black's wish that property owners and demonstrators alike put their trust in legal remedies for the airing and settlement of grievances. We see in Cox his belief that the streets are not the place to administer justice, and in Brown v. Louisiana his concern that those who most need the benefits of a government of equal laws were being encouraged to take the law in their own hands. In all these opinions the phrase, "rule of law," appears, and this is the key to understanding what Black means.

In Black's view, the "rule of law" is not an admonition for restive Negroes only; it is also an imperative for the white man, especially if he is part of the white power structure. If the Negro is expected to look to the "law of the land" for redress, then the "law of the land" must be honored by the white official as well. This is the spirit of Justice Black's opinion for the Court in Griffin v. County School Board where the Court had to deal, ten years after Brown v. Board of Education, with the efforts of Prince Edward County (one of the counties involved in the Brown case) to avoid the effects of Brown by closing its public schools and giving tuition grants for attendance at private schools. It is the spirit, too, of Black's majority opinion in United States v. Mississippi, an action by the Attorney General against Mississippi officials charged with interfering with Negroes' voting rights. In concluding that the action should not have been dismissed, Black observed that the allegations of the complaint were too serious, the right to vote is too precious, and "the necessity of settling grievances peacefully in the courts is too important" for relief to have been denied.

The belief on Black's part that force should yield to the rule of law, that disputes should be channeled into peaceful discussion and judicial settlement, is not an idea found only in cases involving racial disputes.

\[142\] 377 U.S. 218 (1964).
\[143\] 380 U.S. 128 (1965).
\[144\] Id. at 144.
It appears in *Dennis v. United States*, where Black, who was dissenting on first amendment grounds from convictions under the Smith Act, hoped for "calmer times, when present pressures, passions and fears subside" and the Court would restore the first amendment to its rightful place.\(^{146}\) It appears in Black's majority opinion in *Giboney v. Empire Storage & Ice Co.*,\(^{146}\) in which Black ruled that a state might, consistently with the first amendment, apply its laws against restraint of trade to enjoin a labor union's peaceful picketing which had as its object a violation of the restraint of trade laws. The "basic issue," thought Black, was whether "Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City, Missouri. Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way."\(^{147}\)

Thus, to Black, when a labor union exercised its economic power to compel an employer to abide by trade union, rather than state regulation of trade, this was not simply the exercise of free speech. With the question being posed—who should govern, trade union or state—the answer was clear. There is considerable similarity between Black's concept of the problem in *Giboney* and his approach in the sit-in cases. State law said that private property was not the place to air disputes. The demonstrators said that it was. For Black it followed that the proper forum to resolve the demonstrators' grievances was the legislative or judicial process—not direct action.

Black seemed, in the sit-in cases, to be showing not only a concern for the rule of law, but also an unusual sensitivity to the rights of private property. In rejecting the argument in *Bell* that because a restaurant is licensed by the state its discrimination must be imputed to the state, Black claimed that so to hold would be "completely to negate all our private ownership concepts and practices." Black could not conclude that the fourteenth amendment had destroyed "what has until very recently been universally recognized in this country as the unchallenged right of a man who owns a business to run the business in his own way so long as some valid regulatory statute does not tell him to do otherwise."\(^{148}\)

In *Bell*, *Brown v. Louisiana*, and *Adderley* Black paid special tribute

---

145 341 U.S. 494, 581 (1951) (dissenting opinion).
146 336 U.S. 490 (1949).
147 Id. at 504.
148 378 U.S. at 343 (dissenting opinion).
to the importance of trespass statutes. In *Bell* Black pointed to trespass laws as "important features of any government dedicated, as this country is, to a rule of law." In *Brown* Black analogized the Louisiana breach-of-the-peace statute to a trespass law governing the use of government property and rejected the notion that the first amendment gives anyone the right to go "wherever they want, whenever they please, without regard to the rights of private or public property or to state law." And in *Adderley*, upholding the application of Florida's trespass statute, Black declared that a "State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."

Such concern for property owners, private and public, may seem out of character for one who has always been thought to place human rights above property rights. In these cases he seemed to be exalting property at the expense of those seeking one of the indicia of racial equality: equal service in places open to the white public. Black's sensitivity to the rights of property may seem especially puzzling if one turns to Black's 1946 opinion in *Marsh v. Alabama*. There the fact that a town—buildings, streets, and all—was completely owned by a shipbuilding company did not prevent Justice Black from holding that a Jehovah's Witness who wanted to distribute religious literature on the town's sidewalks could claim the protection of the first amendment and continue the distribution, even though the company owning the town wanted her off its property. On these facts Black preferred the Witness' first amendment claim to the interests of the property owner and made this observation, which is interesting in the light of his later position in the sit-in cases: "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

If *Marsh* could be read broadly, as did Justice Reed in dissent, to establish a principle "that one may remain on private property against the will of the owner and contrary to the law of the state so long as the only objection to his presence is that he is exercising an asserted right" under the first amendment, then the Black of *Marsh* would seem

---

149 Id. at 346.
150 383 U.S. at 166 (dissenting opinion).
151 385 U.S. at 47.
153 Id. at 506.
154 Id. at 511.
out of step with the Black of Bell and Brown. But the crucial factor in *Marsh* was, to put it simply, that a town is a town, no matter who owns it. The town in *Marsh* functioned just like any other town; driving through it one would not think it different from an adjoining town incorporated in the usual fashion. Hence *Marsh* belongs to that line of cases like *Terry v. Adams* and *Evans v. Newton* in which a private undertaking is to be subjected to constitutional requirements because the undertaking is a "public function." In *Terry* it was the holding of elections for public office, in *Evans* the operation of a public park, in *Marsh* the operation of a town.

In a sense Black anticipated the position he was to take in *Bell* twenty years before that case was decided. In 1943 he wrote the majority opinion in *Martin v. City of Struthers*. There the Court held that a municipal ordinance which forbade any person to knock on doors or ring doorbells for the purpose of distributing handbills was, as applied to a person distributing advertisements for a religious meeting, an unconstitutional denial of freedom of speech and press. The case offers an interesting parallel to the sit-in cases. One of the reasons Black advanced in *Martin* for preferring the first amendment claim to the city's interest in protecting householders from annoyance and crime was that the householder had ample protection in such "traditional" legal methods as trespass laws, which in at least twenty states punished persons who entered the property of another after having been warned by the owner to keep off.

The emphasis in Black’s opinion in *Martin*, as it was twenty years later in *Bell*, was on free choice on the part of the property owner. A willing householder should be at liberty to receive whom he pleases, just as, in Black’s view in *Bell*, a restaurateur should be free to receive whom he pleases. In a sense one might say that the city ordinance in *Martin* "preempted" private choice, just as the segregation ordinance in *Peterson v. City of Greenville* preempted private choice there (a case in which Black had no trouble joining the majority’s holding of invalid state action under the fourteenth amendment). Thus to leave the question of whom to receive and whom to turn away to be handled by the traditional trespass laws, rather than by bans on distribution of pamphlets or by segregation ordinances, is, on either the facts of *Martin*

157 319 U.S. 141 (1943).
158 373 U.S. 244 (1963).
or those of *Bell*, to leave it to the property owner to make the choice. In this there is a perfect consistency between Black's position in *Martin* and his views twenty years later in *Bell*.

If a hint was needed of how Black would vote in *Bell*, it might have been found in an interview which Professor Edmond Cahn conducted with Justice Black in 1962, two years before *Bell*. Cahn put to Black the grand old question about whether the first amendment might protect someone who falsely shouted "fire" in a crowded theatre. Black answered:

I went to a theater last night with you. I have an idea if you and I had gotten up and marched around that theater, whether we said anything or not, we would have been arrested. Nobody has ever said that the First Amendment gives people a right to go anywhere in the world they want to go or say anything in the world they want to say. Buying the theater tickets did not buy the opportunity to make a speech there. We have a system of property in this country, which means that a man does not have a right to do anything he wants anywhere he wants to do it. For instance, I would feel a little badly if somebody were to try to come into my house and tell me that he had a constitutional right to come in there because he wanted to make a speech against the Supreme Court. I realize the freedom of people to make a speech against the Supreme Court, but I do not want him to make it in my house.159

*Speech and Conduct*

For the Negro protest movement, direct action in the form of sit-ins and demonstrations is meant to be an expression of views—actions that speak louder than words. Since the expression of views is involved, one may well wonder how to go about squaring Justice Black's rejection of the first amendment arguments in *Bell* and the other direct action cases with his oft-expressed belief in the "absolute" commands of the first amendment. In case after case Black has expressed his distress that the Court should undertake to "balance" away the safeguards of the first amendment.160

The answer lies in the distinction which Justice Black draws between "pure speech" and "speech plus," or speech mixed with conduct. In his Cox dissent, for example, Black speaks of statutes "regulating conduct—patrolling and marching—as distinguished from speech." Indeed Justice Goldberg, for the majority, drew the same distinction: "We deal in this case not with free speech alone, but with expression mixed with particular conduct."

Justice Black’s willingness to treat street demonstrations as "conduct," and therefore subject to regulation which he would not allow if they were thought to be simply a form of "speech," brings to mind earlier opinions in which Black took strong stands in favor of the first amendment right of people to air views on the streets. One of those cases is Jamison v. Texas, a 1942 case in which Black wrote the majority opinion reversing, on first and fourteenth amendment grounds, the conviction of a Jehovah's Witness who had been charged with distributing handbills in violation of a city ordinance prohibiting this distribution. Rejecting the city's argument that its power to control the city went beyond simply regulating traffic flow and maintaining order, and that it had the power to prohibit the use of the streets for the communication of ideas, Black said: "But one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word."

The other, probably better-known case is Feiner v. New York. Feiner made a speech to a mixed crowd of eighty Negroes and whites on a city street. As the Supreme Court read the record, he appeared to be arousing Negroes to rise up against whites. The crowd became "restless"; the police made three requests that he stop speaking, but he refused and was finally arrested. The Supreme Court affirmed Feiner's conviction, accepting the findings of the state courts that the arresting officers had been motivated by a concern for law and order, not by a dislike for the views Feiner had expressed. Black dissented, believing that disorder had not been imminent and, even if it had, the first duty

---

161 379 U.S. at 577.
162 Id. at 564. This was in the context of Goldberg's discussion of the courthouse picketing statute. He made a like statement in dealing with the obstructing public passages conviction. See id. at 555.
163 318 U.S. 413 (1943).
164 Id. at 416.
of the police was to protect the speaker, not to silence him. The Court, Black feared, was approving a "simple and readily available technique by which cities and states can with impunity subject all speeches, political or otherwise, on streets or elsewhere, to the supervision and censorship of the local police." 166

How does Black's attitude towards communication in the streets in these cases square with his views in the Negro direct action cases of the 1960's? Again, he draws the conduct-speech distinction. Black emphasized in Feiner that as he read the record, no conduct was involved; there was nothing in the record to suggest that Feiner "did" anything other than "(1) speak and (2) continue for a short time to invite people to a public meeting after a policeman had requested him to stop speaking." 167

The instances are legion of cases in which Black has thought speech directly involved and in which he has drawn the distinction between speech and conduct. For example, in Beauharnais v. Illinois168 Black dissented on the ground that Beauharnais' conviction rested on the contents of the anti-Negro leaflets he was distributing, not on the time, manner, or place of their distribution. Similarly, in a recent case involving the validity of an Alabama law forbidding election day editorials, Black observed that the case did not involve conduct in and around the polls nor any question as to the right of the state to maintain "peace, order and decorum." The only question was as to the publishing of editorials.169

The distinction which Black has drawn in the cases where he considered speech as such to be involved he has applied to cases where he believed such speech as there was to be mixed with conduct. In 1949 Black wrote the majority opinion in Giboney v. Empire Storage & Ice Co., perhaps the classic case on the power of the state to deal with speech which is part of a course of conduct. Black was unwilling to treat the speech (which was directed at compelling Empire to stop selling ice to nonunion peddlars) "in isolation" from the union's conduct—an effort to bring about a violation of Missouri's restraint of trade laws.170 Sim-

166 Id. at 321, 323.
167 Id. at 321 n.1.
168 343 U.S. 250, 267 (1952) (dissenting opinion).
170 336 U.S. 490, 497-98 (1949). Similarly, see Black's view that the defendants in Griswold v. Connecticut were engaged, not simply in the expression of views, but in a "planned course of conduct" in violation of state law. 381 U.S. at 508 (dissenting opinion).
ilarly, the view that picketing or patrolling, involving "standing or marching" on streets, sidewalks, private property, or elsewhere, is "conduct, not speech, and therefore is not directly protected by the First Amendment" \(^{171}\) is one which Black continues to assert in cases unrelated to Negro demonstrations as well as, of course, in cases like *Cox*.

Black's analysis in *Martin v. City of Struthers*,\(^ {172}\) already mentioned, should assist in placing cases like *Jamison* and *Feiner* in perspective. By holding in *Martin* that a municipality cannot forbid persons to go from door to door to distribute handbills, Black treated the case (obviously involving more than pure speech) as one in which the Court should weigh competing interests. On the one hand, Black saw the first amendment claim of those who wanted to use handbills to communicate ideas (as well as the interest of householders in deciding what to receive); on the other hand, he saw the city's interest in preventing crime and relieving householders of annoyances and interruptions to their rest. The first amendment interest was for Black of special significance to the "poorly financed causes of little people," who might have few means of communicating ideas save going from door to door. In contrast, however, the city's interests would be just as well served (and the ultimate decision put in the hands of the householder) by reliance on the normal trespass laws, rather than on a flat ban on distribution.\(^ {173}\)

Given this approach, the comparison can be drawn between Black's position in *Jamison* and in *Feiner* and his position in the protest and demonstration cases of the 1960's. The amount of conduct involved on the part of the Jehovah's Witness in *Jamison* was minimal; the mode of communication was simply the distribution by an individual of handbills. The chances of congestion or of a disruption of the normal use of streets and sidewalks were virtually nil. The presence on a sidewalk of a single Jehovah's Witness passing out leaflets, while it involves conduct of sorts, is a long way from even the most carefully controlled demonstration by large numbers of people. While mass demonstrations bring into play first amendment rights (knocking down, for example, breach-of-the-peace convictions obtained under vaguely drawn statutes), still the factual context is nothing at all like that of *Jamison*.

Moreover, the interests on the side of the state in *Jamison* were not only less significant than those involved in the demonstration cases, but also easier to protect by some alternative means not impinging on free

\(^{171}\) NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 77 (1964) (concurring opinion).
\(^{172}\) 319 U.S. 141 (1943).
\(^{173}\) Id. at 143-47.
speech. Prevention of litter is a worthy object of civic endeavor, but an antilittering ordinance will serve the purpose. Prevention of disorder and violence would seem a rather more serious matter, and one which seems to dictate regulations, properly and narrowly drawn, aimed at those who do the demonstrating.

The contrast between the demonstration cases and *Feiner* is not so great as between those cases and *Jamison*. Unquestionably, there are similarities, the most apparent, to those who care about the preservation of free speech, being the resemblance between the possibilities for suppression of unpopular views inherent in the *Feiner* decision, and the like possibilities for the use of the catchphrase "law and order" by local police and other officials to beat down efforts by Negroes to put their views before the community. Yet there are contrasts between the cases, too: numbers for one—a single person speaking in *Feiner* as against 2,000 people in *Cox*, and conduct for another—Feiner simply speaking (albeit, unsettling his listeners) and the crowd in *Cox* bringing their numbers to bear, so they hoped, on the court officials.

The problem is a very real one. Professor Harry Kalven, Jr., says that the protests in cases like *Cox* were "structured ceremonies of protest," not riots, and he offers a persuasive argument that the streets in a democratic society ought to be thought of as a "public forum." Professor Kalven is critical of the distinction, accepted by Black and Goldberg alike in *Cox*, between "pure speech" and "speech plus." For Kalven the appropriate model for the demonstration cases is found in leaflet cases like *Jamison*. Kalven's position is that "all speech is necessarily 'speech plus.' If it is oral, it is noise and may interrupt someone else; if it is written, it may be litter." 174

With respect, I submit that this proves too much. Of course, any form of communication involves conduct somewhere along the line. To hand out pamphlets, one must be physically present on the sidewalk, and his presence is conduct. If a passer-by to whom the pamphlet is handed throws it on the ground, there again is conduct—conduct resulting in litter. But there still is significance in the "pure speech" and "speech plus" distinction. In the first place, the emphasis in Black's analysis of such things as picketing and patrolling is not so much on the collateral effects such as the litter caused by the object of the communication, but rather on the conduct of the speaker—his patrolling, for example. But more basically, the insignificant "conduct" involved

when a single individual passes out leaflets seems to be of a quite different order than that involved when 2,000 people, be they of the best wills, gather before a courthouse. In either case someone wants his ideas heard, and in either case society has an interest, borne out by the first amendment, in having those ideas heard. But to blur the difference in the conduct involved and in the nonspeech interests at stake is to risk a disservice to the cause of freedom of expression.

A particular problem with Justice Black's speech-conduct distinction is that he seems to be prepared to allow a flat ban on street demonstrations. In *Cox*, for example, he states quite bluntly: "Standing, patrolling, or marching back and forth on streets is conduct, not speech, and as conduct can be regulated or prohibited." And at another point in this opinion he says: "Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment." There may, however, be significance in his reservation that statutes regulating conduct are subject to the "condition that if such a law had the effect of indirectly impinging on freedom of speech, press, or religion, it would be unconstitutional if under the circumstances it appeared that the State's interest in suppressing the conduct was not sufficient to outweigh the individual's interest in engaging in conduct closely involving his First Amendment freedoms." 175

Only with such a reservation can Black's willingness to allow outright bans on conduct be made palatable. The reservation would seem in line, after all, with Black's position in cases such as *Jamison* that even though a state's regulation is aimed at conduct, its validity must nevertheless be tested by its consequential effects on freedom of expression. This would seem an especially important approach in the street demonstration cases, not only because the streets have for centuries been a traditional place for the exchange of views, but more importantly because of the limited number of forums available to groups whose unpopularity is often matched only by their lack of resources.

The lack of alternative methods by which a group can express its views is a factor which Black has often taken into account in other free speech cases. For example, in dissenting in *Kovacs v. Cooper* 176 from what seemed to him to be the Court's allowing an outright ban on sound trucks, Black argued that to permit a city to impose a flat ban was to favor competing forms of speech (such as press and radio), and this worked a discrimination against people who had views to express but

175 379 U.S. at 577-78, 581 (dissenting opinion).
176 336 U.S. 77 (1949).
were too poor to afford newspaper plants, radio facilities, or the like. Reasonable regulation of the volume of loud speakers or the hours of their operation Black thought was one thing; a total ban he believed incompatible with the first amendment. 177 Similarly, in writing the Court's opinion in Martin knocking down a flat prohibition on distribution of leaflets from door to door, Black emphasized that such distribution was "essential to the poorly financed causes of little people." 178

Possibly it might be argued that the strong position Black has taken on not preventing distribution of leaflets, either on the street or from door to door, and on not allowing flat bans on the use of sound trucks suggests that these might in fact be some of the permissible alternatives to the street demonstration type of direct action. But it seems important, both as a matter of achieving the ends served by the first amendment and as a matter of giving effective outlet to grievances which might otherwise take violent turns, not to cut off modes of communication which for a minority group may represent a much more effective way of laying its views before the public.

One can, I submit, preserve the notion of the "public forum" and at the same time give meaning to the concern expressed by Justice Black in the direct action cases that recourse to the streets should not become a substitute for the more traditional, if less glamorous, processes of the law. The effectiveness of an attempt to put limits on direct action and keep it within bounds of what may be called the "rule of law" may well depend on the extent to which Black's hopes for the purity of political and legal processes are achieved—the question to which the next section is devoted.

A Rule of Law for the Body Politic

A corollary of Black's concern that people look to the law for the settlement of their grievances is his belief that the law must live up to high standards. Since minority groups are expected to obey the law, it is important that the political process be open and pure. In Black opinions one can detect, among other things, the expectation that minority groups shall have (1) a voice in the political process, (2) a vote, (3) the ability to have legislatures, if a majority of the legislators so determine, enact legislation protecting them and advancing their interests, and (4) protection in the courts. In effect, what Black can be seen

177 Id. at 99, 102-04.
178 319 U.S. at 146.
to be advocating is a rule of law for the political and judicial process so that his expectations that minorities will be law-abiding will not be asking more than human nature can bear.

A number of relevant principles can be gleaned from the cases. Among them I would include those which follow.

The Purity of the Electoral Process

Access to the machinery of government—the process whereby laws are made—is essential if we are to avoid the sense of frustration and alienation which so often gives rise to direct action. That Justice Black would adopt this view seems especially likely from his decisions in cases involving the right to vote. A belief that if one expects people to be law-abiding citizens, they must have a full and equal part in the electoral system may be inferred from his opinion in Wesberry v. Sanders.\(^\text{170}\) "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."\(^\text{180}\)

The Purity of the Political Process

Access to the ballot is not enough. An unfettered right to express one's views is essential as well. If Justice Black is known for anything, it is for his views on free speech. Central to his first amendment beliefs is the importance of protecting the right and ability of unpopular groups to have their say. His philosophy is well expressed by his statement that the first amendment ensures people "the fullest possible freedom

\(^{179}\) 376 U.S. 1 (1964). Black's opinion for the Court in Afroyim v. Rusk, 35 U.S.L.W. 4502 (U.S. May 30, 1967), shows that he places a like premium on the right to citizenship itself. There, in holding that the fourteenth amendment prevents Congress from taking away one's citizenship save by the citizen's voluntary relinquishment of it, Black said, "The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship." Id. at 4506. The theme here, as in so many Black opinions, is the avoidance of alienation of any group from full and complete participation in the body politic.

\(^{180}\) 376 U.S. at 17. Black's strong views about the sanctity of the right to vote may have some relevance to the fact that, of all his resorts to constitutional history, it is a voting case, Wesberry v. Sanders, which represents probably his most vulnerable use of history. There may be relevance, too, to the question whether Black's having joined Reynolds v. Simms does not seem something of an aberration from his dislike of an expansive use of the equal protection clause. But his attitude to the right to vote did not carry him to joining the Court in striking down the poll tax in Harper.
to praise, criticize or discuss, as they see fit, all governmental policies and to suggest, if they desire, that even its most fundamental postulates are bad . . . .” 181

That unpopular groups and minorities are the ones who stand to lose the most if rights of free speech are not fully protected is suggested by Justice Black's dissent in *Beauharnais v. Illinois*, 182 where the Court upheld an Illinois statute which made it a crime to publish disparagements of any racial group, and which had been applied to one who had distributed anti-Negro leaflets in Chicago. Black warned that the same law which in that case was being used to punish Beauharnais for his segregationist views could well be used to jail those advocating integration. 183

*The Clarity of the Law*

Mention has already been made of Black's belief that a judicial opinion should make its point in simple and clear language so that the law will not be a mystery to the layman. It is not surprising that Black takes a strong stand on the doctrine that laws passed by legislatures must, if they are to make conduct criminal, clearly set out what is proscribed, so that fair warning will be given to those who live under the laws. This adherence to the “void-for-vagueness” doctrine is especially strong where speech may be inhibited by a statute's operation. An illustration is furnished in the direct action cases. In *Cox*, where Black objected in such strong terms to the Court's encouraging lawlessness, and where he would have sustained Cox's conviction of having picketed near a courthouse, Black concurred in the reversal of the other convictions. His dislike of direct action, especially that which puts pressure on the courts of law, would not bring him to sustain a conviction under an overly broad statute affecting free speech. He therefore agreed with the Court that the Louisiana statute, being too broad and vague and leaving too much discretion in the hands of officers, could not support the breach-of-the-peace conviction. 184 In other words, in *Cox* Black was displaying two complementary propositions: on the one hand, aggrieved groups must live within the rule of law, and on the other hand the law must avoid the vice of vagueness, especially if its generality would restrict the rights of the aggrieved to express their views.

182 343 U.S. 250 (1952).
183 Id. at 274-75.
184 379 U.S. at 576-80.
Wide Scope for Reform Legislation

Since Black wants those with grievances to resort to lawful processes, one would expect him to make the prospect of resorting to these processes a prospect which holds out at least fair promise of success—that if the minority is able to convince a majority of a legislative body that their cause is a worthy one, the legislature will have the power to act. Black's views on the power of legislative bodies to enact reform legislation touching racial and other matters holds out just such a promise.

In the first place, his longstanding views on the due process clause, as laid down in such opinions as Ferguson v. Skrupa, shows that of all the Justices, Black is the least willing to have the Court sit in judgment on the wisdom and expediency of economic or social legislation. The Negro group which persuades a state legislature or Congress of the merits of its cause will assuredly not have to fear that a court following Black's views will use the due process clause to strike down the legislative result. Moreover, Black's opinion in Colorado Anti-Discrimination Comm'n v. Continental Air Lines showed that he is not likely to find, either in the doctrine of undue burden on commerce or in the theory of preemption by operation of federal statutes, reasons to strike down state efforts to deal with problems of racial discrimination.

As Congress has gradually become more active in the passage of civil rights legislation, questions have arisen about the scope of its power under the fourteenth and fifteenth amendments to deal with racial problems. Even as he sought in Bell to limit the scope which might be given to the fourteenth amendment when used by courts to bring about racial reforms, Black expressly reserved—three times in the course of his opinion, in fact—the question of what might be Congress' powers under section 5 of the fourteenth amendment. More recently, while denying that state poll taxes fall under the ax of the equal protection clause itself, Black has gone on record as having "no doubt" of the power of Congress under section 5 to pass legislation abolishing the poll tax if Congress believed that the poll tax was being used to deny voters the equal

---

187 378 U.S. at 331, 343, 345. One of these reservations might be read as containing a hint of how Black would vote if an act of Congress, rather than the fourteenth amendment itself, had been at issue in Bell. In text Black said that § 1 of the amendment, "unlike other sections," is a prohibition against certain conduct only when done by a state. In the accompanying footnote, he cited § 5 as an example of such "other sections." Id. at 326.
protection of the laws.\textsuperscript{188} And in another case Black has joined an opinion in which Justice Clark, by way of dictum, suggested that Congress under section 5 could enact laws punishing conspiracies, with or without elements of "state action," that interfere with fourteenth amendment rights.\textsuperscript{189}

Thus Justice Black's position on what the Court legitimately can do under the fourteenth amendment itself is a quite different thing from the power which he believes is granted to Congress by that amendment or which is reserved to the states free of restrictions imposed by the due process or commerce clauses. In short he would, to a considerable extent, take the problem out of the hands of the judges, whose exercise of power and discretion he mistrusts, and put it into the hands of legislators. To the degree that this approach limits the power of judges, it is consistent with Black's views in a number of constitutional areas. Yet limiting the judges does not, by this approach, prevent necessary reforms if they can get through the normal political process. The policy is made and decisions are taken as a part of the democratic process, with the give-and-take which that entails, and not by the courts.

**Accessibility of Courts**

I have suggested that even as Mr. Justice Black commends aggrieved minorities to the processes of the law, he seeks in other cases to ensure that the arenas of public discourse and political action are, insofar as the Constitution touches them, accessible to those minorities. Equally, I submit that he has taken special care to see that as he remits minorities to the courts instead of to the streets, the courts are meaningful places to which grievances may be taken.

To begin with, Black has always been characterized by a willingness to take important cases and to decide important questions. He has never been known for an unusual degree of shyness or reticence about bringing difficult questions before the Court and seeing them decided. It seems fair to say that Black's belief is that if people are to be expected to live under a "rule of law," then the Court owes them the duty to decide important questions which are properly before the Court. Of course, the Court may, as it is famous for doing in the obscenity cases and some others, write six opinions among nine Justices and thereby leave the


law in as confused a state as ever; but we can hardly blame Justice Black alone for that.

Bell furnishes an apt example. There Justice Black objected to the Court's vacating and remanding the case for the Court of Appeals of Maryland to reconsider in light of a supervening Maryland public accommodations statute. Black pointed out that Bell and its companion cases had been selected out of a "large and growing group of pending cases" to present for decision the constitutional question which the majority by its remand was avoiding. Black could not overlook the fact that the conditions and feelings which had given rise to sit-ins by Negroes still existed. With everyone still in doubt as to whether state trespass laws constitutionally could be applied to sit-in demonstrators, Black thought it "wholly unfair to demonstrators and property owners alike" not to decide that question.\textsuperscript{190}

Another relevant Black principle is that courts should be open and accessible for the settlement of disputes. His opinion in United States \textit{v. Mississippi}\textsuperscript{191} is of interest here because it underlines the importance of having courts open for "settling grievances peacefully." Black has fought his battle, often a losing one, for accessible courts in a number of situations, and especially where a private party stands to lose his day in court because he has been overreached by someone else.\textsuperscript{192}

Finally, one returns to an early Black opinion, Chambers \textit{v. Florida},\textsuperscript{193} where Black spoke of the courts in criminal cases as refuges for those who are "non-conforming victims of prejudice and public excitement."\textsuperscript{194}

In sum, there appears in the seemingly unrelated aspects of Mr. Justice Black's judicial pronouncements a distinct philosophy of the "rule of law." One might almost say "rules of law" since there are in Black's constitutional philosophy three such rules of law. The first is for the judges: the standards by which they are to decide constitutional cases,

\textsuperscript{190} 378 U.S. at 323.
\textsuperscript{191} 380 U.S. 128, 144 (1965).
\textsuperscript{193} 309 U.S. 227 (1940).
\textsuperscript{194} Id. at 241.
standards by which one seeks to find in the Constitution something other than the preferences of judges. There is a rule of law for the people at large: an appeal to channel grievances into lawful processes and not to take the law into their own hands, lest the undermining of order be the undoing of liberty. There is, finally, a rule of law for the body politic: an open, free society in which people speak their mind, vote their preference, seek legislative reforms, and have access to the courts to air grievances. As those who see great social injustices to remedy become increasingly impatient with accepted legal channels, the legislators, judges, and people alike have good reason to ponder Mr. Justice Black's grand design.\footnote{On June 12, 1967, the closing day of the 1966 Term, the Supreme Court split sharply on the lawfulness of the very conduct chosen to set the stage for this Article—the decision by King and others to defy the Alabama court injunction in April 1963. By a vote of five to four the Court sustained the contempt citation against the leaders of the march. Walker v. City of Birmingham, 35 U.S.L.W. 4584 (U.S. June 12, 1967). Justice Stewart, for the majority (joined by Justice Black), thought the central fact to be the leaders' failure to make any effort whatever, prior to the marching, to have the injunction modified or dissolved. Thus they were barred from now making first amendment attacks on the Birmingham parade ordinance or on the injunction. The dissenting Justices believed that the issuance of the injunction made the case no different from that in which one violated a permit or licensing ordinance and then defended on first amendment grounds against a charge based on that violation. In either case, thought the dissenters, one should be able to speak first and challenge later. Id. at 4591 (dissenting opinion by Brennan, J.).}
<table>
<thead>
<tr>
<th>CASE NAME AND CITATION</th>
<th>Date</th>
<th>Facts</th>
<th>Basis for Decision</th>
<th>Disposition</th>
<th>Opinion</th>
<th>Vote</th>
<th>Reason for Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Garner v. Louisiana,</td>
<td>Dec. 11,</td>
<td>lunch counter sit-in</td>
<td>state breach of</td>
<td>reversed</td>
<td>Warren</td>
<td>9-0</td>
<td></td>
</tr>
<tr>
<td>368 U.S. 157</td>
<td>1961</td>
<td></td>
<td>peace statute</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Taylor v. Louisiana,</td>
<td>June 4,</td>
<td>bus station sit-in</td>
<td>state breach of</td>
<td>reversed</td>
<td>per</td>
<td>7-0</td>
<td></td>
</tr>
<tr>
<td>370 U.S. 154</td>
<td>1962</td>
<td></td>
<td>peace statute</td>
<td>per_</td>
<td>curiam</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Edwards v. South</td>
<td>Feb. 25,</td>
<td>demonstrations on state</td>
<td>common-law breach</td>
<td>reversed</td>
<td>Stewart</td>
<td>8-1</td>
<td></td>
</tr>
<tr>
<td>Carolina, 372 U.S. 229</td>
<td>1963</td>
<td>capital grounds</td>
<td>of peace</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Johnson v. Virginia,</td>
<td>April 20,</td>
<td>refusal to sit in Negro</td>
<td>contempt</td>
<td>reversed</td>
<td>per</td>
<td>9-0</td>
<td></td>
</tr>
<tr>
<td>373 U.S. 61</td>
<td>1963</td>
<td>section of court room</td>
<td>of court</td>
<td>and</td>
<td>curiam</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Peterson v. City of</td>
<td>May 20,</td>
<td>lunch counter sit-in</td>
<td>state trespass</td>
<td>reversed</td>
<td>Warren</td>
<td>9-0</td>
<td></td>
</tr>
<tr>
<td>Greenville, 373 U.S. 244</td>
<td>1963</td>
<td></td>
<td>statute</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Shuttlesworth v. City</td>
<td>May 20,</td>
<td>aided in lunch counter</td>
<td>inciting, aiding,</td>
<td>reversed</td>
<td>Warren</td>
<td>8-1</td>
<td></td>
</tr>
<tr>
<td>of Birmingham, 373 U.S.</td>
<td>1963</td>
<td>sit-in</td>
<td>and abetting a</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>262</td>
<td></td>
<td></td>
<td>crime</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lombard v. Louisiana,</td>
<td>May 20,</td>
<td>lunch counter sit-in</td>
<td>state criminal</td>
<td>reversed</td>
<td>Warren</td>
<td>8-1</td>
<td></td>
</tr>
<tr>
<td>373 U.S. 267</td>
<td>1963</td>
<td></td>
<td>violation</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CASE NAME AND CITATION</td>
<td>Date</td>
<td>Facts</td>
<td>Basis for Conviction</td>
<td>Disposition</td>
<td>Opinion</td>
<td>Vote</td>
<td>Reason for Result</td>
</tr>
<tr>
<td>------------------------</td>
<td>------------</td>
<td>-------------------------------</td>
<td>----------------------</td>
<td>-------------</td>
<td>---------</td>
<td>------</td>
<td>-------------------</td>
</tr>
<tr>
<td>Wright v. Georgia,</td>
<td>May 20,</td>
<td>playing basketball in</td>
<td>state breach</td>
<td>reversed</td>
<td>Warren</td>
<td>9-0</td>
<td></td>
</tr>
<tr>
<td>373 U.S. 284</td>
<td>1963</td>
<td>public park</td>
<td>of peace statute</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gober v. City of</td>
<td>May 20,</td>
<td>lunch</td>
<td>state trespass</td>
<td>reversed</td>
<td>per</td>
<td>8-1</td>
<td></td>
</tr>
<tr>
<td>Birmingham, 373 U.S. 374</td>
<td>1963</td>
<td>counter sit-in</td>
<td>statute</td>
<td>per curiam</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Avent v. North</td>
<td>May 20,</td>
<td>lunch</td>
<td>state trespass</td>
<td>vacated</td>
<td>per</td>
<td>8-1</td>
<td></td>
</tr>
<tr>
<td>Carolina, 373 U.S. 375</td>
<td>1963</td>
<td>counter sit-in</td>
<td>statute</td>
<td>and</td>
<td>curiam</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Randolph v. Virginia,</td>
<td>June 10,</td>
<td>lunch</td>
<td>state trespass</td>
<td>vacated</td>
<td>per</td>
<td>9-0</td>
<td></td>
</tr>
<tr>
<td>371 U.S. 974</td>
<td>1963</td>
<td>counter sit-in</td>
<td>statute</td>
<td>and</td>
<td>curiam</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fields v. South</td>
<td>Oct. 21,</td>
<td>street demonstration</td>
<td>common law breach</td>
<td>reversed</td>
<td>per</td>
<td>9-0</td>
<td></td>
</tr>
<tr>
<td>Carolina, 375 U.S. 44</td>
<td>1963</td>
<td></td>
<td>of peace</td>
<td>curiam</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Diamond v. Louisiana,</td>
<td>Feb. 24,</td>
<td>campus demonstration</td>
<td>breach of</td>
<td>cert.</td>
<td>per curiam</td>
<td>9-0</td>
<td></td>
</tr>
<tr>
<td>376 U.S. 201</td>
<td>1964</td>
<td></td>
<td>peace statute</td>
<td>dismissed</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Henry v. City of Rock</td>
<td>April 6,</td>
<td>demonstration at City Hall</td>
<td>common law breach</td>
<td>reversed</td>
<td>per</td>
<td>9-0</td>
<td></td>
</tr>
<tr>
<td>Hill, 376 U.S. 776</td>
<td>1964</td>
<td></td>
<td>of peace</td>
<td>curiam</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Case</td>
<td>Date</td>
<td>Type</td>
<td>Statute</td>
<td>Decision</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>----------</td>
<td>-----------------------</td>
<td>----------------------------------------------</td>
<td>-------------------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bell v. Maryland, 378 U.S. 226</td>
<td>June 22, 1964</td>
<td>restaurant sit-in</td>
<td>trespass statute</td>
<td>reversed Brennan 5-1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dresner v. City of Tallahassee, 378 U.S. 559</td>
<td>June 22, 1964</td>
<td>demonstration at city airport</td>
<td>unlawful assembly ordinance</td>
<td>per curiam 9-0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Drews v. Maryland, 378 U.S. 547</td>
<td>June 22, 1964</td>
<td>refusal to leave private amusement park</td>
<td>state disturbing the peace statute</td>
<td>vacated per curiam 6-3</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cox v. Louisiana (No. 49), 379 U.S. 559</td>
<td>Jan. 18, 1965</td>
<td>demonstration near courthouse</td>
<td>statute prohibiting picketing near courthouse</td>
<td>reversed Goldberg 5-4</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CASE NAME AND CITATION</td>
<td>Date</td>
<td>Facts</td>
<td>Basis for Conviction</td>
<td>Disposition</td>
<td>Opinion</td>
<td>Vote</td>
<td>First Amendment—Overbreadth</td>
</tr>
<tr>
<td>------------------------</td>
<td>------------</td>
<td>------------------------</td>
<td>----------------------</td>
<td>-------------</td>
<td>---------</td>
<td>------</td>
<td>-----------------------------</td>
</tr>
<tr>
<td>McKinnie v. Tennessee, 380 U.S. 449</td>
<td>Apr 5, 1965</td>
<td>lunch counter sit-in</td>
<td>state statute</td>
<td>reversed</td>
<td>per curiam</td>
<td>6-3</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>forbidding acts injurious to trade</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Parrot v. City of Tallahassee, 381 U.S. 120</td>
<td>May 3, 1965</td>
<td>lunch counter sit-in</td>
<td>city ordinance</td>
<td>reversed</td>
<td>per curiam</td>
<td>9-0</td>
<td></td>
</tr>
<tr>
<td>Walker v. Georgia, 381 U.S. 355</td>
<td>May 24, 1965</td>
<td>lunch counter sit-in</td>
<td>state trespass statute</td>
<td>reversed</td>
<td>per curiam</td>
<td>6-3</td>
<td></td>
</tr>
<tr>
<td>Cameron v. Johnson, 381 U.S. 741</td>
<td>June 7, 1965</td>
<td>motion to enjoin enforcement of statute</td>
<td>state anti-picketing statute</td>
<td>vacated &amp; remanded</td>
<td>per curiam</td>
<td>5-4</td>
<td></td>
</tr>
<tr>
<td>NAACCP v. Overstreet, 384 U.S. 118</td>
<td>April 27, 1966</td>
<td>NAACCP picketing of grocery store</td>
<td>civil suit against NAACCP for damages</td>
<td>cert. dismissed as improvidently granted</td>
<td>per curiam</td>
<td>5-4</td>
<td></td>
</tr>
</tbody>
</table>

HeinOnline - 53 Va. L. Rev. 1090 1967