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Reflections on Justice Black and Freedom of Speech

REFLECTIONS ON JUSTICE BLACK AND FREEDOM OF SPEECH

INTRODUCTION

During his long and colorful tenure on the Supreme Court, Justice Hugo L. Black did much to influence the development of the first amendment freedom of speech. Like Justices Brandeis and Holmes before him, Black, by means of his extensive opinions and outspoken lectures, has left his personal trademark in the area of the individual's constitutional right of expression.[1] Over the years, however, Black's approach to the problems and controversies of free speech has defied ready classification. The traditional understanding of Black's philosophy seems to be that speech is "absolutely" protected from abridgment. Truly, Justice Black always referred to the Bill of Rights as a code of "absolutes;"[2] more particularly, he continually stressed the propriety of a literal interpretation of the first amendment provision that "Congress shall make no law . . . abridging the freedom of speech."[3] Nevertheless, it should be pointed out that such an understanding of Black's philosophy of free speech, without more elaboration, is quite misleading and incomplete. This becomes evident when Black's frequently expressed view of the first amendment as a shield for free speech is contrasted with his readiness, during the last few years, to restrict freedom of expression in a desire to preserve peace and order in the community. Therefore, while there is an element of truth underlying the traditional understanding of

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1. As one writer has pointed out:
> It is . . . instructive to note how much easier [Justices Holmes and Brandeis] had it in that relatively short and relatively tranquil span from *Schenck v. United States* [249 U.S. 47 (1919)] to *Near v. Minnesota* [283 U.S. 697 (1931)] and *Stromberg v. California* [283 U.S. 359 (1931)]. They were not asked to test classic notions of freedom of speech against group defamation, labor picketing, obscenity, congressional committees, sound trucks, public issue picketing, sit-ins, or that large array of direct and indirect sanctions imposed upon the domestic Communist movement.

Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A.L. REV. 428, 429 (1967).

2. "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.'" Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 867 (1960).

3. U.S. CONST. amend. I. "I have to be honest about it. I confess not only that I think the Amendment means what it says but also that I may be slightly influenced by the fact that I do not think Congress *should* make any law with respect to these subjects." Black & Cahn, *Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549, 553 (1962).

Black's philosophy, many qualifications and limitations must be made apparent in an attempt to comprehend Black's theory of free speech in its entirety.

THE CONTENT OF EXPRESSION

The essence of Black's philosophy of "absolutes" is derived from his basic belief that no government should be allowed to regulate the *content* of expression. In his James Madison Lecture at the New York University School of Law, Black underscored this basic belief:

> Since the earliest days philosophers have dreamed of a country where the mind and spirit of man would be free; where there would be no limits to inquiry; where men would be free to explore the unknown and to challenge the most deeply rooted beliefs and principles. Our First Amendment was a bold effort to adopt this principle—to establish a country with no legal restriction of any kind upon the *subjects* people could investigate, discuss, and deny.[4]

It is quite clear from surveying his opinions of the last thirty-four years that Black remained dedicated to the belief that the content of expression should be granted absolute protection from censorship.

Radical and Subversive Ideologies

Legal history will show that in times of national crises Black became more adamant in his belief that no ban should be placed upon any new or radical idea. When the effects of the Cold War and the McCarthy "witch-hunt" began to spread throughout the nation after World War II, it was Black, a rather lonely dissenter in those days, who tried to pacify the fears and suspicions that plagued the majority of the Court. In *American Communications Association v. Douds*,[5] the Court held constitutional section 9(h) of the National Labor Relations Act[6] which required labor leaders to file affidavits with the National Labor Relations Board swearing their non-affiliation with subversive organizations. Black vigorously dissented, maintaining that such a requirement restricted freedom of speech by imposing penalties upon certain beliefs. Referring to the opinion of Chief Justice Hughes in *De Jonge v. Oregon*,[7] Black spoke of "time-honored" principles that should guide the Court in such decisions:

4. Black, *supra* note 2, at 880-81.
5. 339 U.S. 382 (1950).
6. Act of June 23, 1947, ch. 120, § 101, 61 Stat. 146.
7. 299 U.S. 353 (1937).

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly . . . .[8]

In *Dennis v. United States*,[9] decided in the midst of the Korean War, the defendant was convicted under the Smith Act[10] for conspiring to advocate the forcible overthrow of the government. Black and Douglas, the only dissenters, would have held the pertinent section of the statute unconstitutional as an unauthorized restraint of free speech.[11] In *Yates v. United States*,[12] leaders of the Communist Party of California were indicted under the same statute. Black again argued for acquittal of all defendants:

> Unless there is complete freedom of expression of all ideas, whether we like them or not, concerning the way the government should be run and who should run it, I doubt if any views in the long run can be secured against the censor. The First Amendment provides the only kind of security system that can preserve a free government—one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.[13]

In *Barenblatt v. United States*,[14] a psychology teacher refused, during an investigation by the House Committee on Un-American Activities, to answer questions concerning his alleged ties with the Communist Party, contending that the first amendment protected the privacy of his individual beliefs. Ruling that the teacher's constitutional rights were not infringed, the Court upheld a sentence of six months'

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8. 339 U.S. at 453 (dissenting opinion).
9. 341 U.S. 494 (1951).
10. 18 U.S.C. § 11 (1946), *as amended*, 18 U.S.C. § 2385 (1964).
11. Black made an open plea to his colleagues, urging them to interpret the first amendment without allowing their personal fears to affect their future decisions:

> Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.

341 U.S. at 581 (dissenting opinion).
12. 354 U.S. 298 (1957).
13. *Id.* at 344 (concurring in part and dissenting in part).
14. 360 U.S. 109 (1959).

imprisonment.[15] Black filed another lengthy dissent, claiming that the majority had misinterpreted the free speech provisions of the Constitution:

> History should teach us . . . that in times of high emotional excitement minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs and attempts will always be made to drive them out. It was knowledge of this fact, and of its great dangers, that caused the Founders of our land to enact the First Amendment as a guarantee that neither Congress nor the people would do anything to hinder or destroy the capacity of individuals and groups to seek converts . . . for any cause . . . .[16]

Defamation and Obscenity

Black's belief in the absolute protection of the content of expression concerned not only expression categorized as subversive, but applied to all subjects and ideas, even to expression which was regarded by most others as slanderous and obscene. In *New York Times v. Sullivan*,[17] the Court reversed a $500,000 Alabama libel judgment. Creating a new standard, the Court ruled that damages from allegedly libelous statements could not be recovered unless the statements were made with actual malice. Concurring with the reversal, Black added:

> I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power. . . . The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times . . . had an *absolute, unconditional* constitutional right to publish . . . their criticisms . . . .[18]

15. The majority opinion written by Justice Harlan explained that where first amendment rights are asserted to bar governmental interrogation, "resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." *Id.* at 126.

16. *Id.* at 151 (dissenting opinion) (footnote omitted).

17. 376 U.S. 254 (1964).

18. *Id.* at 293 (concurring opinion) (emphasis added).

In *Beauharnais v. Illinois,*[19] the defendant, president of an organization called the White Circle League, was convicted for distributing anti-Negro leaflets on the streets of Chicago in violation of an all-inclusive ordinance.[20] The majority of the Court affirmed the criminal libel conviction, holding that such utterances were not within the area of constitutionally protected speech. Black, to say the least, had a different opinion: "My own belief is that no legislature is charged with the duty or vested with the power to decide what public issues Americans can discuss. In a free country that is the individual's choice, not the state's."[21]

Black's position on obscenity was consistent with his protection of defamatory expression. When a special showing of *Lady Chatterley's Lover* was made available so that the Court could decide whether the movie was obscene, Black simply declined to view it.[22] Similarly, Black commonly refused to read allegedly obscene books and magazines which were presented to the Court because of his strong belief that the United States Supreme Court was without the constitutional power to censor such expression.[23] In *Ginzburg v. United States,*[24] Black made this belief apparent:

> I find it difficult to see how talk about sex can be placed under the kind of censorship the Court here approves without subjecting our society to more dangers than we can anticipate at the moment. It was to avoid exactly such dangers that the First Amendment was written and adopted. For myself I would follow the course which I believe is required by the First Amendment, that is, recognize that sex at least as much as any other aspect of life is so much a part of our society that its

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19. 343 U.S. 250 (1952).

20. The Illinois Criminal Code made it unlawful for any person to:

> manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which . . . portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes [them] to contempt, derision, or obloquy or which is productive of breach of the peace or riots.

ILL. REV. STAT. ch. 38, § 478 (1949).

21. 343 U.S. at 270 (dissenting opinion).

22. Kingsley International Pictures Corp. v. Regents of the Univ. of the State of N. Y., 360 U.S. 684, 690 (1959) (concurring opinion).

23. "I have continuously voted to strike down all laws dealing with so-called obscene materials since I believe such laws act to establish a system of censorship in violation of the First Amendment." H. BLACK, A CONSTITUTIONAL FAITH, 46-47 (1968) (footnote omitted) [hereinafter cited as A CONSTITUTIONAL FAITH].

24. 383 U.S. 463 (1966).

discussion should not be made a crime.[25]

It is this "absolute" protection of the *content* of expression for which Black is probably most remembered. Unhampered by a desire to impose ever-changing standards and vague limitations upon the subjects people discuss, Black professed a simple and consistent philosophy which could be understood by all.[26] To summarize, Black succinctly stated that "[m]y view is . . . that freedom of speech means that you shall not do something to people either for the views they have or the views they express or the words they speak or write."[27]

BLACK'S CONCEPTUAL ANALYSIS OF "SPEECH" AND "CONDUCT"

It is critical to Black's outlook on freedom of expression to distinguish "speech" and "conduct." While he would afford absolute protection to the kinds of expression he called "speech," Black would grant only "reasonable" protection to expression deemed "conduct."[28] Basic to Black's notion of the proper bounds of free speech, as pointed out in the previous section, was an appreciation for ideas and beliefs and a desire to protect the content of expression. In *American Communications Association v. Douds*,[29] as on numerous other occasions,[30] Black indicated that the freedom to think, according to his interpretation of the Constitution, should be absolute:

> Blackstone recalls that Dionysus is "recorded to have executed a subject, barely for dreaming that he had killed him . . . ." Such a result, while too barbaric to be tolerated in our nation, is not illogical if a government can tamper in the realm of thought and penalize "belief" on the ground that it might lead to illegal conduct. Individual freedom and governmental

25. *Id.* at 482 (dissenting opinion).

26. Unfortunately, however, the Supreme Court has refused to grant absolute protection to speech under the First Amendment . . . and instead has adopted various judicial tests which are applied on a case-by-case basis to determine if the speech in question is entitled to protection.

A CONSTITUTIONAL FAITH 49-50. Some possible inconsistencies in Black's own philosophy are presented in two decisions without dissent from Justice Black: *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), where the Court put a dampening effect upon an employer's attempt to express his views on unionization; *Valentine v. Chrestensen*, 316 U.S. 52 (1942), where the Court held constitutional a municipal ordinance forbidding distribution of *commercial* handbills.

27. Black & Cahn, *supra* note 3, at 559.

28. "In giving absolute protection to free speech, however, I have always been careful to draw a line between speech and conduct." A CONSTITUTIONAL FAITH 53.

29. 339 U.S. 382 (1950).

30. *See* A CONSTITUTIONAL FAITH 51.

> thought-probing cannot live together. [Under] the First Amendment "Beliefs are inviolate."[31]

Black's dissent in *Douds* also noted that "[the experiences of history] underline the wisdom of the basic constitutional precept that penalties should be imposed only for a person's own *conduct,* not for his *beliefs* . . . ."[32]

Justice Black's intense belief in the value of a free flow of ideas seems to have been based upon a philosophy somewhat akin to "social Darwinism."[33] Undoubtedly he had a great faith in the common man's ability to pick and choose the best way of life from the ideologies available and felt that such a trial-and-error process, though cumbersome, was healthy for the nation itself. In his 1960 James Madison Lecture, Black expounded upon this "constitutional faith:"

> [The Framers] knew that free speech might be the friend of change and revolution. But they also knew that it is always the deadliest enemy of tyranny. With this knowledge they still believed that the ultimate happiness and security of a nation lies in its ability to explore, to change, to grow and ceaselessly to adapt itself to new knowledge born of inquiry free from any kind of governmental control over the mind and spirit of man.[34]

Recognizing the fundamental importance of ideas in a democratic society, Black attempted to insure their effective communication by absolutely protecting certain modes of disseminating ideas and beliefs, but only those modes of expression which he deemed "essential" to the preservation of our individual liberties. Black referred to these "essential" means of disseminating ideas in *Carlson v. Landon*:[35] "I . . . believe that the First Amendment grants an *absolute right* to *believe* in any government system, *discuss* all governmental affairs, and *argue* for desired changes in the existing order."[36] In *Konigsberg v. State*

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31. 339 U.S. at 446 (dissenting opinion) (footnote omitted).

32. *Id.* at 452 (emphasis added).

33. "Social Darwinism" was a nineteenth century philosophy based upon Darwin's theory of natural selection. It was not Darwin, however, but Herbert Spencer who applied the survival-of-the-fittest doctrine to the social sciences. *See* R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (1944).

34. Black, *supra* note 2, at 881.

35. 342 U.S. 524 (1952). In *Carlson,* alien members of the Communist Party were detained without bail pending determination of their deportability. The Court held that there was no denial of due process in such a detention since there was a reasonable cause to believe that release of the aliens would endanger the safety and welfare of the nation.

36. *Id.* at 555 (dissenting opinion) (emphasis added).

Bar,[37] Black indicated that "a person *rightfully* walking or riding along the streets and *talking* in a *normal* way could [not] have his views controlled . . . for that would be a direct abridgment of speech itself."[38] On another occasion Black pointed out that "[t]he First and Fourteenth Amendments take away from government, state and federal, all power to restrict freedom of speech . . . *where people have a right to be for such purposes*."[39]

From these sources and others,[40] it seems that *peaceful, orderly* and almost *academic discussion* is the only mode of communication which Black would absolutely protect. It should become increasingly apparent, therefore, that Black's concept of freedom of "speech" is limited solely to the absolute protection of ideas and beliefs and the corresponding opportunity to *peacefully* discuss them. All other means of expression and communication, in Black's opinion, would be deemed "conduct," and would therefore be given only "reasonable" protection.

THE REGULATION OF CONDUCT

Although Black realized that conduct often, if not always, includes an element of expression, he did not feel that such a mode of expression was "essential" to the preservation of our individual liberties;[41] he therefore believed that conduct could be regulated when confronted by substantial countervailing government interests.[42] In determining whether the regulation was reasonable, Black concluded that "a law which primarily regulates conduct but which might also indirectly affect speech can be upheld if the effect on speech is minor in relation to the need for control of the conduct."[43] When broken down into its component parts, such a

37. 366 U.S. 36 (1961). In the heart of McCarthyism in 1953, Konigsberg, a veteran of World War II, passed the California bar exam but was precluded from joining the legal profession because of his refusal to answer questions concerning his political affiliations.

38. *Id.* at 69 (dissenting opinion) (emphasis added).

39. A CONSTITUTIONAL FAITH 53.

40. *See also* Yates v. United States, 354 U.S. 298, 340 (1957) (concurring in part and dissenting in part); Wieman v. Updegraff, 344 U.S. 183, 194 (1952) (concurring opinion); Dennis v. United States, 341 U.S. 494, 579 (1951) (dissenting opinion).

41. "Marching back and forth, though utilized to communicate ideas, is not speech and therefore is not protected by the First Amendment." A CONSTITUTIONAL FAITH 54.

42. I think the Founders of our Nation . . . meant precisely that the Federal Government should pass "no law" regulating speech and press but should confine its legislation to the regulation of conduct. So too [the First Amendment] leaves the States vast power to regulate conduct . . . .

Mishkin v. New York, 383 U.S. 502, 517-18 (1966) (dissenting opinion).

43. Barenblatt v. United States, 360 U.S. 139, 141 (1959) (dissenting opinion).

statement reveals the two basic tenets of Black's philosophy of expression in the form of conduct.[44]

First, it is clear that Black would not tolerate any regulation of conduct which "directly" abridged "speech;" that is, he would never uphold an ordinance or injunction which was aimed at the content of the expression. As Black indicated in *Konigsberg*, he would not uphold as constitutional "an ordinance which purported to rest upon the power of a city to regulate traffic but which was aimed at speech or attempted to regulate the content of speech . . . for that would be a direct abridgment of speech itself."[45] Another example of a law which, in Black's opinion, "directly" affected content is found in his opinion in *Cox v. Louisiana*.[46] There, Black held unconstitutional a breach-of-the-peace statute regulating crowds and marchers on the ground that the statute arbitrarily exempted labor unions from its provisions:

> Standing, patrolling, or marching back and forth on streets is conduct, not speech, and as conduct can be regulated or prohibited. But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. . . . This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments.[47]

When considering laws which regulated conduct, Black remained steadfast in his hatred for censorship of views and ideas. Throughout his term on the Court, Black never condoned laws which discriminated against unpopular beliefs or which arbitrarily preferred one cause over another; nor did he allow selective enforcement of laws which validly regulated conduct.[48] In cases in which views were expressed through conduct, Black demanded equal protection for all views:

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44. However, one writer has seen fit to observe that
> the categories which Black has set up seem more complex than the direct-indirect classification would indicate. There are factors of the purposiveness of the measure in relation to the control of expression, the generality or selectivity of its impact in the realm of ideas, and its focus on the content of utterance or on its time, place, or manner.

Freund, *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A.L. REV. 467, 472 (1967).

45. 366 U.S. at 69 (dissenting opinion).

46. 379 U.S. 536 (1965).

47. *Id.* at 581 (concurring in part and dissenting in part).

48. "The United States Constitution does not forbid a State to control the use of its own property for its own lawful *nondiscriminatory* purpose." Adderly v. Florida, 385 U.S. 39, 48 (1966) (emphasis added).

> It is critical . . . that state regulatory laws in this area be applied to all groups alike, and these laws must never be used as a guise to suppress particular views which the government dislikes.[49]

Secondly, Black would uphold laws which regulated conduct and only "indirectly" affected the content of the expression if the effect on expression was minor in relation to the reasons advanced in support of the regulation. It was in this realm of expression that Black would adhere to a "balancing test"—a weighing of the circumstances in each case—to decide whether the government's interest in regulating the conduct was legitimate and compelling:

> [S]uch laws governing conduct . . . must be tested, though only by a balancing process, if they indirectly affect ideas. On the one side of the balance . . . is the interest of the United States in seeing that its fundamental law protecting freedom of communication is not abridged; on the other the obvious interest of the state to regulate conduct within its boundaries.[50]

In applying this balancing test, Black demanded certain minimum requirements from the statutes and ordinances which attempted to regulate conduct. Initially, Black demanded that all such regulations be narrowly drawn and narrowly construed, since an over-broad or vague law might produce a chilling effect upon lawful means of expression.[51] In *Milkwagon Drivers Union v. Meadowmoor Dairies*,[52] the Supreme Court affirmed a decision which enjoined Illinois dairy union employees from

> walking up and down in front of [certain milk] stores . . . ; discouraging . . . persons . . . contemplating purchasing . . . ; interfering, hindering, or . . . divert[ing] . . . persons desirous of . . . purchasing . . . .[53]

In response to the broad nature of the injunction, Black's dissent stressed that:

> [T]he Supreme Court of Illinois . . . has not marked the

49. A CONSTITUTIONAL FAITH 59.

50. Barenblatt v. United States, 360 U.S. 109, 142 (1959) (dissenting opinion).

51. "[S]tatutes which, in regulating conduct, may indirectly touch the areas of freedom of expression should be construed narrowly where necessary to protect that freedom." Bell v. Maryland, 378 U.S. 226, 325 (1964) (dissenting opinion).

52. 312 U.S. 287 (1941).

53. *Id.* at 309 (dissenting opinion).

> limits of the rule with that clarity which should be a prerequisite to an abridgment of free speech. Nor do I believe that this Court . . . has supplied that essential definiteness. What we are here dealing with is an injunction, and not a "statute narrowly drawn" . . . . Speaking of a similar abridgment of constitutional rights where there was no guiding legislative act, we said in *Cantwell v. Connecticut*: "Violation of an Act . . . narrowly drawn to prevent the supposed evil, would pose a [different] question. . . . Such a declaration of the state's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. . . . Here [however] we have a situation analogous to a conviction under a statute sweeping in a variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application."[54]

In addition to his refusal to accept vague and overly broad regulations of conduct, Black would not allow the state to regulate conduct in a certain way if there were other means available to accomplish the desired result without so burdening the means of expression. A good example of this is provided in the case of *Schneider v. Town of Irvington*,[55] where, in order to prevent littering, the town council passed ordinances prohibiting the distribution of handbills. As Black recounted,

> [t]he Supreme Court forbade application of such ordinances when they affected the distribution of literature designed to spread ideas. There were other ways, we said, to protect the city from littering which would not sacrifice the right of the people to be informed.[56]

In essence, then, Black would allow the state to regulate conduct if the state had a legitimate and non-discriminatory interest in regulating that conduct and if the ordinance provided the "least drastic means" of regulating that conduct.[57]

THE LIMITS OF FREEDOM OF EXPRESSION IN AN ORDERLY SOCIETY

Behind the distinction Black drew between speech and conduct lay

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54. *Id.* at 306-07 (footnotes omitted).
55. 308 U.S. 147 (1939).
56. A CONSTITUTIONAL FAITH 61.
57. Applying the "least drastic means" test in *Schneider*, the Court held that "the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of the information and opinion secured by the Constitution." 308 U.S. at 163.

a deep concern for the preservation of peaceful and orderly methods of disseminating ideas and beliefs, *i.e.*, a deep concern for the preservation of the freedom of speech. It is vital to note that Black granted absolute protection to speech because he considered such peaceful modes of expression "essential" to the preservation of our basic constitutional liberties.[58] At the same time, Black granted the state vast power to regulate expression in the form of conduct because he felt that such expression actually posed a serious threat to these same liberties.[59] To be more clear, it seems that Black sought to regulate conduct because he believed that such means of expression naturally tended to infringe the rights of others. Black has said that

> [t]he regulation of picketing and marching is essential since this conduct by its very nature tends to infringe the rights of others. For example, no matter how urgently a person may wish to exercise his First Amendment guarantees to speak freely, he has no constitutional right to appropriate someone else's property to do so. Our Constitution recognizes and supports the concept of private ownership of property and in the Fifth Amendment provides that "no person . . . shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." The long and short of the problem is that while the First Amendment does guarantee freedom to speak and write, it does not at the same time provide for a speaker or writer to use other people's private property to do so. This means that there is no First Amendment right for people to picket on the private premises of another to try to convert the owner or others to the views of the pickets.[60]

Black wholeheartedly believed that, by allowing conduct to be regulated by valid, narrowly drawn laws, he was not restricting freedom but was securing the basic constitutional rights of property, privacy and peaceful expression. Black's opinions of the last decade consistently bear out this belief. In *Bell v. Maryland*,[61] twelve black students were convicted of criminal trespass as a result of their participation in a sit-in demonstration at a Baltimore restaurant. The demonstrators appealed on the ground that the conviction violated their first amendment freedom of

58. *See* note 39 *supra*.
59. *See* A CONSTITUTIONAL FAITH 55.
60. *Id.* at 57-58.
61. 378 U.S. 226 (1964).

expression. Supporting the conviction, Black noted:

> 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* . . . . 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.[62]

In *Cox v. Louisiana*,[63] demonstrators protesting an alleged illegal arrest were charged with the statutory offenses of disturbing the peace, obstructing public passages and picketing before a courthouse. Black held for a reversal of the breach-of-the-peace conviction for vagueness[64] and of the obstruction charge on equal protection grounds,[65] but voted to uphold the conviction for picketing near the courthouse:

> Justice cannot be rightly administered . . . where throngs of people clamor against the processes of justice right outside the courthouse or jailhouse doors. 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.[66]

Black also stressed his belief that the first amendment granted no constitutional right to picket or patrol on publicly or privately owned streets: "[w]ere the law otherwise, people on the streets, in their homes and

62. *Id.* at 346 (dissenting opinion) (emphasis added).
63. 379 U.S. 536 (1965).
64. *Id.* at 577 (concurring in part and dissenting in part).
65. *Id.* at 581.
66. *Id.* at 583 (emphasis added).

anywhere else could be compelled to listen against their will to speakers they did not want to hear."[67]

In *Brown v. Louisiana*,[68] five black defendants were charged with disrupting the peace by congregating in a public library and refusing to disperse when so ordered. After emphasizing that the statute in question was narrowly drawn[69] and that there was no evidence of racial discrimination in the record,[70] Black voted to uphold the conviction:

> The First Amendment, I think, protects speech, writings, and expression of views in any manner in which they can be *legitimately* and *validly* communicated. *But I have never believed that it gives any person or group of persons the constitutional right to go wherever they want, whenever they please, without regard to the rights of private or public property* . . . . [It] does not guarantee to any person the right to use someone else's property, *even that owned by the government and dedicated to other purposes,* as a stage to express dissident ideas.[71]

In *Tinker v. Des Moines Independent School District*,[72] three public school pupils were suspended from classes for wearing black armbands as a symbol of protest against the Vietnam war. These pupils sought an injunction against their principal's prohibition of such conduct. While the majority of the Court voted to protect the wearing of the armbands under the circumstances as an act "closely akin to pure speech," Black dissented. Upon the premise that public schools were set up to teach a selected curriculum to young children who needed to learn, Black held that such acts of protest in the classroom distracted from that "singleness of purpose."[73] Again Black emphasized the need for regulation of expression in the form of conduct when such means of expression infringe the rights of others:

> The truth is that a teacher . . . no more carries into a school with him a complete right to freedom of speech and expression

67. *Id.* at 578.
68. 383 U.S. 131 (1966).
69. *Id.* at 158 (dissenting opinion).
70. *Id.* at 160.
71. *Id.* at 166 (emphasis added). *See also* Amalgamated Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308, 327 (1968) (dissenting opinion).
72. 393 U.S. 503 (1969).
73. *Id.* at 524 (dissenting opinion).

> than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue. . . . *It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases.*[74]

In purposefully placing definite limitations on expression in the form of conduct, Black was merely interpreting the constitutional protection of expression in the context of an orderly society governed by a rule of law.[75] By regulating conduct, Black attempted to preserve the individual's constitutional rights of property and privacy. However, Black's deepest concern in regulating conduct was the preservation of the freedom of speech—the preservation of peaceful modes of expression. It is not surprising, then, that Black's greatest worry over the years was a fear that mob-type demonstrations would create a climate of anarchy in which the right to peacefully express all ideas and all beliefs would be swept away by a rule of force. This concern, which can not easily be assuaged, is evident in Black's impassioned warning in *Cox*:

> And minority groups, I venture to suggest, are the ones who always have suffered and always will suffer most when street multitudes are allowed to substitute their pressures for the less glamorous but more dependable and temperate processes of the law. Experience demonstrates that it is not a far step from what seems the earnest, honest, patriotic, kind-spirited multitude of today, to the fanatical, threatening, lawless mob of tomorrow. And the crowds that press in the streets for noble goals today can be supplanted by street mobs pressuring . . . for precisely opposite ends.[76]

EPILOGUE

Justice Black's philosophy of freedom of speech has been criticized from many points of view. It is obvious that his position concerning the proper protection for obscenity, slander and radical ideas has never enjoyed much favor with the Supreme Court.[77] Some critics have

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74. *Id.* at 521-22 (emphasis added).

75. What we have in this country is a government of laws, designed to achieve justice to all, in the most orderly fashion possible, and without leaving behind a deluge of hate-breeding divisions and dangerous riots.
A CONSTITUTIONAL FAITH 63.

76. 379 U.S. 559, 583-84 (1959) (concurring in part and dissenting in part).

77. Upon surveying Black's opinions which grant absolute protection to all ideas and beliefs, it is clear that Black's position is a minority one. In consistently protecting the content of speech, Black developed an open-minded but dissenting philosophy.

labeled his opinions in the demonstration cases of the last few years a dramatic reversal of a champion of free speech.[78] Still others have theorized that such opinions are a product of a conservatism brought on by the changing times and effect of the years upon an already aged jurist.[79] Perhaps some of this is true; however, any such change should not be exaggerated. Notions of Black's belief in a rule of law and the desirability of peaceful expression of ideas and beliefs in an orderly society can historically be traced to his first years on the bench.[80] It seems that the recent demonstration cases merely provided Black a golden opportunity to clarify and illustrate his philosophy of free speech in its entirety.[81]

Over the many years he served on the Supreme Court, Black went to great lengths to develop and profess his fundamental theory of the first amendment freedom of speech. Rather than balancing the precious freedom of expression on a case-to-case basis, Black did most of his balancing within a definitional framework, thus offering helpful guidelines and predictability in an area of essential constitutional liberties. In retrospect, one may say that Justice Black has been admirably consistent in his treatment of the problems of free speech and tireless in his efforts to secure the peaceful dissemination of ideas and beliefs in an orderly society.

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78. Indicative of such criticism is Justice Fortas' biting statement in *Tinker*: "[We] do not confine the permissible exercise of the First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in the school classroom." 393 U.S. 503, 513 (1969).

79. *See Justice Black Dissents—Turning "Conservative"?*, 60 U.S. NEWS AND WORLD REP., March 21, 1966, at 26.

80. *See* Kovacs v. Cooper, 336 U.S. 77 (1949) (dissenting opinion); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. Town of Irvington, 308 U.S. 146 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

81. Black was eager to deliver the Carpentier Lectures at the Columbia University School of Law in 1968 so that he could answer the critics who accused him of reversing his stand on the freedom of expression in light of his opinions concerning sit-ins and picketing: "[T]his view that I am now expressing is not a new one with me, but one I have held for a long time. I have never doubted the power of government over its streets and public places." A CONSTITUTIONAL FAITH 58-59.