November 1987

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THE CONSTITUTIONAL FAITH OF MR. JUSTICE BLACK

Tinsley E. Yarbrough

Students of the judicial function in constitutional cases can be grouped into essentially two camps, with members of each firmly committed to the proposition that the Constitution is capable of governing, but with each also differing fundamentally over the document's role in the governing process. Proponents of interpretivism contend that the Constitution, rather than judges, can govern only if courts mirror, as faithfully as humanly possible, the intent of its framers. Non-interpretivists, on the other hand, recoil at the notion that the meaning of constitutional provisions should be determined primarily by reference to text or original intent. Instead, they claim that words are rarely self-evident in meaning, that historical records are ambiguous and incomplete, that the framers never intended that great constitutional generalities be given a meaning locked in time, and that historical intent is in any event largely irrelevant to contemporary needs. For them, the Constitution's meaning should, or inevitably must, be drawn essentially from current values rather than from language or history. The Constitution can and should govern, non-interpretivists conclude, but as a very general guide and admonition, not as a time-bound "strait-jacket" limiting society's ability to cope with modern problems.¹

During his thirty-four years on the Supreme Court, and in the Senate before that, Hugo Lafayette Black was a persistent critic of non-interpretivist thinking and the nation's most visible proponent of interpretivism. Black railed against judges who would substitute their policy judgments for the Constitution's language and the intent of its framers. For him, the Constitution was to govern, not as an admonition but as literal law; and any deficiencies in the document were to be remedied through the amendment process, not via the resourcefulness of "language-stretching" judges. Jurists who sought to enlarge or reduce the Constitution's meaning under the guise of interpretation were not merely ignoring the method of constitutional change provided by the founders; they were affronting the genius of the written Constitution, a Constitution intended to bind judges as well as other officials. At one point or another, all jurists cite language and historical intent in defending their interpretations of constitutional provisions. But arguably no other American judge has been as consistent, committed, and sincere an apostle of interpretivism as Justice Black was, even though that conception of the judicial function led him down liberal-activist paths in certain cases and in conservative-restraintist directions in others.

Among his brethren, Justice Black won few, if any, adherents to his judicial philosophy or approach to specific constitutional issues. Scholarly commentators, moreover, have subjected his jurisprudence to intense criticism — probably the most systematic and scathing attacks ever directed at the thinking of an American jurist.² It is, therefore, somewhat ironic that Justice Black is invariably included among the greatest judges ever to have occupied a seat on the high bench.³ Possible explanations for this irony abound. Persons who
consider his jurisprudence simplistic, naive, unachievable, or irrelevant may still admire the confidence and commitment with which Justice Black advanced his views, his lucid opinions, the general thrust — if not the precise doctrinal underpinnings — of his approach to many constitutional issues, and the enormous influence he exerted over the broad directions of Supreme Court decision-making during his lengthy tenure. I suspect, however, that preceptions of Hugo Black as one of the giants of American law lie largely, too, in a grudging respect for the very judicial philosophy many found so offensive, in the logically consistent approaches to specific constitutional issues Black's interpretivism generally yielded, and in a basic longing for judicial decision-making which transcends the policy preferences of sitting judges.

This brief article examines and evaluates the contours of Justice Black's interpretivist approach to constitutional interpretation and its application in the context of specific issues. The article's major thesis is that Black's interpretivist jurisprudence provided a workable, if imperfect, means for limiting the reach of judicial power without at the same time destroying the Constitution's character as higher law.

**JUDICIAL PHILOSOPHY**

Justice Black was an admirer of the English legal reformer Jeremy Bentham, and the basic tenets of Black's judicial philosophy are similar to those of John Austin and other legal positivists. Early in their Supreme Court years, Justice Frankfurter termed Black a "Benthamite," adding that Bentham, in "his rigorous and candid desire to rid the law of many far-reaching abuses introduced by judges... was not unnaturally propelled to the opposite extreme of wishing all law to be formulated by legislation, deeming most that judges do a usurpation by incompetent men as to matters concerning which he believed them guilty of 'judicial legislation.'" In a perceptive article published near the end of Black's career, moreover, Paul Freund wrote that "there is more than a touch of Jeremy Bentham in Justice Black."

There were several essential elements to Justice Black's interpretivist/positivist judicial philosophy. First, as Justice Frankfurter noted of Bentham, Black took the position that lawmaking is a legislative, not a judicial, function. Unless the Constitution required a policy pronouncement of judges, they were to scrupulously avoid making such judgments, even in the face of what they considered to be inadequacies in the document's text. Second, according to Black, judges were to construe constitutional provisions and statutes in light of the intent of their framers, focusing of the "literal" meaning of the words used or other indicia of intent, not on moral or social considerations. The Justice agreed that the intent behind a legal provision can be elusive and that, in such situations, a judge can properly attach what he considers to be an ethical or socially desirable construction to the law or constitutional phrase at issue. But he insisted that such "penumbral" situations rarely arise, agreeing with modern positivist H.L.A. Hart that "to be occu-
pied with the penumbra is one thing; to be preoccupied with it is another."  

Black also conceded that certain constitutional provisions, most notably the Fourth Amendment’s ban on “unreasonable” searches and seizures, require policy judgments of judges. In his view, however, few portions of our basic law clothed judges with such discretion.

A third tenet of Justice Black’s judicial philosophy was his agreement with the legal positivists that, in a certain sense, law and morals are separate entities. He obviously had no doubts about the enormous influence moral considerations inevitably play in the development of law. Absent explicit constitutional or statutory authorization, however, he believed that the influence of such factors, like other policy predilections, should be confined to the legislative arena. Finally, in order to limit the range of judicial discretion and to assure that law was intelligible to the common man as well as the legal scholar, the Justice stressed the need for clarity, precision, and consistency in the law and in judicial opinions as well. He regularly urged his clerks to use simple, clear language in their legal writings, and his own opinions were almost invariably models of brevity and clarity, whatever their substantive merits in particular cases. More important, his interpretations of the First Amendment, due process, and other constitutional provisions rarely allowed for judicial determinations of reasonableness, fairness, or social utility.

**CONSTITUTIONAL APPLICATIONS**

Justice Black’s interpretivist/positivist judicial philosophy pervaded his approaches to all constitutional issues. His thirteen-paragraph opinion in the Steel Seizure Case, for example, is a classic statement of separation of powers doctrine positivist style. The Court’s decision in the case had the effect of halting the Truman Administration’s seizure of the nation’s steel mills, but the dissenters and all but two of the six-man majority either refused to take the position that the President had no “inherent” power to deal with “emergencies” or chose not to articulate a position on the issue. Justice Black had no such qualms. Since the President’s military powers did not reach seizure of domestic industry, Black asserted, his authority must flow either from an act of Congress or from the Constitution. Congress not only had not provided such power; it had specifically refused to authorize seizure in the manner in which President Truman had acted. Nor, significantly, did Black find any authority in the Constitution’s conferral of executive power on the President. The constitutional provisions vesting “executive” authority in the President, he contended, themselves refuted the notion that he was to be a “lawmaker.” Yet the seizure order “did not direct that a congressional policy be executed in a manner prescribed by Congress.” Instead, it ordered “that a presidential policy be executed in a manner prescribed by the President” — an action clearly not authorized by the Constitution or by the laws of Congress. In a paragraph appended to Black’s opinion, Justice Frankfurter deemed “the considerations relevant to
the legal enforcement of the principle of separation of powers . . . more complicated and flexible than may appear from what Mr. Justice Black has written.” 12 But the issue was simple enough to Black’s legal positivist mind: the President’s lawmaking powers were limited to recommending to Congress legislation he thought good and vetoing that he thought bad.

Black’s opposition to the Supreme Court’s reviews of state laws regulating interstate commerce also reflected his preference for lawmaking by legislative bodies. Contending that the Constitution grants Congress, not the federal courts, power over interstate commerce, he dissented from the philosophy of a long line of cases striking down state laws thought to impose “undue” or “unreasonable” burdens on interstate commerce. At times he challenged the majority’s judgement that a particular state regulation was “unreasonable.” But his disagreement with the Court’s position in such cases was much more fundamental. When a 1945 majority invalidated an Arizona statute limiting the length of trains, for example, he not only attacked the Court’s conclusion that the burdens the law created outweighed its safety features; he also questioned the majority’s authority to make such judgments, contending:

the Arizona County Court acted, and this Court today is acting, as a “super-legislature” . . . Representatives elected by the people to make their laws, rather than judges appointed to interpret those laws, can best determine the policies which govern the people. That at least is the basic principle on which our democratic society rests.13

The tenets of Black’s interpretivism — and the controversy their application so frequently aroused — are perhaps best seen, however, in his approach to the Constitution’s civil liberties provisions. We begin with the two aspects of his constitutional philosophy which have attracted the most extensive analysis — his First Amendment jurisprudence and his support for total incorporation of the Bill of Rights into the meaning of the Fourteenth Amendment. As is well known, Black took the position that “direct” governmental abridgment of First Amendment freedoms is absolutely forbidden. The Amendment begins with the command that “Congress shall make no law”; and, for Black, a self-described “backward country fellow,” “no law” meant “No Law.” 14 Not surprisingly, therefore, during oral argument in the Pentagon Papers Cases he took great delight in the efforts of Solicitor General Erwin Griswold, a persistent critic of Black’s absolutism, to convince the Court, in Griswold’s words, that “it is . . . obvious that ‘no law’ does not mean ‘no law.” 15 Rather than embrace such verbal gymnastics or the more insightful argument that there is a difference between “speech” and “freedom of speech,” or bog himself in the conflicting interpretations of the intentions of the First Amendment’s framers, Black held firmly to the position that speech, writings, and pictorial or electronic equivalents thereof were entitled to absolute protection from “direct” interference by government. He thus rejected all such attempts to control “libel,” “slander,” “obscenity,” “subversive advocacy,” and other forms of expression traditionally subjected to some degree of governmental control.16
At the same time, he opposed any enlargement of the Amendment's meaning beyond what he considered its "literal" terms. He emphasized that the Amendment protects "speech," not conduct, and rejected the "speech-plus," "symbolic speech," and related doctrines under which picketing, street marches, sit-ins, and the wearing of political symbols have been brought within the provision's scope. While the Amendment specifically protects the "free exercise" of religion, moreover, he construed that guarantee within the context of its speech and press companions, arguing that the free exercise clause, like the other guarantees, protected only thought and communication — religious "beliefs" and "speech," as he put it — not every action to which a person might attach a religious label. He also rejected the notion that the First Amendment entitles a person to exercise the rights guaranteed there wherever or whenever wished. Government, in his judgment, could control or forbid access to public property for purposes of expression, just as landlords generally can control access to their property. Justice Black did not reject all judicial scrutiny, however, over regulations of time, place, and manner or other "indirect" controls over speech and its speech-related counterparts. He took the position that such regulations were constitutional only if applied with an even hand (rather than selectively, with an eye toward censorship), if other means were not available to accomplish the regulation's purpose, and if the need to control the conduct in question was sufficient to justify the regulation's "indirect" effect on free speech.

Justice Black's First Amendment jurisprudence clearly reflects the strains of his judicial philosophy. His absolutist approach to most First Amendment issues largely eliminated the judicial discretion inherent in the clear and present danger standard, balancing, and other formulae generally applied in First Amendment cases. His refusal to exclude from First Amendment protection obscenity and other types of expression having the same form as protected expression further narrowed the range of judicial choice. And arguably his approach to most First Amendment issues offered more clear-cut guides than did his colleagues' more flexible alternatives. His distinction between direct and indirect infringements on First Amendment rights obviously had no basis in the Amendment's language; nor did his notion that indirect abridgments can be subjected to a balancing of competing interests, or his view that the Amendment's otherwise absolute provisions do not grant persons a right to access to public property for purposes of expression. But those elements of his philosophy did recognize the government's obvious power to control the use of public property while preserving a broad range of activities for the absolute protection he thought commanded by the Amendment's literal terms. Had Black accepted the contention that speech-related conduct and a right of access to public property are within the Amendment's direct ambit, he would have been forced to abandon absolutism for all First Amendment contexts. Given the Amendment's language, such an approach was for Black, unthinkable. The balancing approach which he advanced in such cases enabled him to give the Amendment a literal application in most contexts without at the same time endorsing the untenable notion that any activity somehow connected with the
Amendment’s expressly stated freedoms also had absolute protection from government interference.

If Justice Black’s First Amendment jurisprudence most clearly reflects the Justice’s commitment to literalism, his interpretation of the Fourteenth Amendment’s first section, and of due process alone, clearly illustrates his commitment to historical intent. His Fourteenth Amendment and due process jurisprudence also further illustrate his penchant for clear legal standards and for limitations on the scope of judicial discretion. In the years following the Fourteenth Amendment’s adoption, the Supreme Court had consistently rejected the notion that the Fourteenth Amendment embodied the Bill of Rights, thus refusing to apply those guarantees to the state governments. Instead, the Court interpreted the Amendment’s due process clause and its Fifth Amendment counterpart to mean, in essence, that government may deprive a person of life, liberty, or property only through “fair” procedures and “reasonable” laws. The Court’s use of this construction of due process to write its own *laissez faire* notions into the Constitution and strike down “unreasonable” economic controls infuriated the populist Senator Black and, following his appointment to the bench, he took a major role in dismantling such precedents. He also made a detailed study of the history of due process and the Fourteenth Amendment’s adoption. From that research he concluded that the Amendment’s framers had intended its first section, taken separately and as a whole, to apply the Bill of Rights to the states. He further concluded that the original meaning of due process in English and American law was essentially that of the “law of the land” provision in the English Magna Carta — a guarantee that government may interfere with the individual’s life, liberty, or property only according to valid, pre-existing laws and procedures.

During his judicial career, Justice Black occasionally found unstated individual rights within the meaning of due process. He believed, for example, that due process forbids vague laws and convictions based on no evidence. At the end of his career, moreover, he refused to say that the Fourteenth Amendment’s privileges or immunities clause was limited in meaning to the guarantees of the Bill of Rights. But the prohibitions against vague laws and baseless convictions seem consistent with the notion that government should proceed according to law, and in only one case did Black join an opinion expanding the privileges or immunities clause beyond the Bill of Rights. Therefore in applying the Fourteenth Amendment’s first section, apart from its equal protection clause, Justice Black normally limited the Amendment’s scope to the Bill of Rights and to the requirement that states follow existing laws and procedures. He also consistently rejected any interpretation of due process — or related provisions and doctrines — which would empower judges to add rights to the Constitution or graft their conceptions of “fair” procedures or “reasonable” laws onto the document’s text.

Like certain earlier efforts, the most recent study to appear on the subject generally endorses Justice Black’s total incorporation position. Even so, many judicial and scholarly critics have vehemently attacked his stance, arguing, among other things, that state legislatures would never have ratified an amendment tying their governments to all the specifics of the Bill of Rights. Justice
Black rejected such contentions as a sort of "negative pregnant," placing his reliance instead on the proincorporation statements of the Fourteenth Amendment's sponsors — the usual method, as he was quick to point out, for determining the original intent underlying a legal provision. Whatever the substantive merits of his reading of history, his incorporation stance was compatible with his desire to limit judicial discretion and promote clear-cut interpretations of constitutional provisions — conditions he thought imperative if the Constitution, not the judge, was to govern. The words of the Bill of Rights are not self-interpreting. Arguably, however, they have a greater degree of specificity — and thus greater potential for limiting judicial choice — than do standards of "fairness" or "reasonableness."

Essentially the same observation can be made of Justice Black's "law of the land" interpretation of due process. Black's critics long contended that due process was an evolving concept not intended to be locked into the context of a particular era. They also argued that the Supreme Court had given due process such a flexible interpretation long before Black's elevation to the bench. Justice Frankfurter often expressed admiration, for example, for Justice Miller's interpretation of due process in *Twining v. New Jersey.* In Black's defense, on the other hand, a strong argument can be made that, despite the expansive language of *Twining* and certain other early cases, due process was for years given an interpretation closely paralleling Black's "law of the land" position. For example, Justice Miller in his *Twining* opinion employed seemingly expansive language in describing the content of due process, but then observed:

The essential elements of due process of law [as a procedural requirement] . . . are singularly few, though of wide application and deep significance . . . Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction . . . and that there shall be notice and opportunity for hearing given the parties . . . Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws . . . regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law. Again, moreover, whatever the historic basis for Black's stance, his "law of the land" conception of due process is obviously a more clear-cut standard for judges as well as the rest of us than one giving judges power to invalidate procedures and laws found to be "shocking to the conscience," "arbitrary," or "unreasonable."

What Justice Black considered to be the "literal" or historically intended meaning of specific procedural guarantees imposed equally clear-cut restrictions on governmental power. He saw in the power of judges to issue directed verdicts to juries, for example, a departure from the literal meaning of the Seventh Amendment, which commands that "no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the
rules of the common law.” In his view, “a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest differences of opinion over the factual issue in controversy.” 37 Nor could he see any room for flexible interpretations of the Fifth Amendment’s command that no person “be compelled in any criminal case to be a witness against himself.” He thus rejected the Court’s conclusion that only “testimonial,” not “physical,” evidence is protected from compulsory seizure by police.38 As in the First Amendment field, however, he refused to expand procedural rights beyond their literal or historic meaning. He opposed the notions, for example, that the death penalty — a widely accepted form of punishment at the time of the Constitution’s adoption — was now a per se violation of the guarantee against cruel and unusual punishment39 or that the right to trial by impartial jury requires twelve-member panels.40

Of course, Justice Black recognized that certain constitutional clauses do not readily lend themselves to precise interpretations which limit the range of judicial discretion, but that they instead call for the sort of case-to-case judicial balancing of competing interests which he abhorred.41 In applying such provisions, Black attempted to be as literal as the language at issue would permit or to confine the provision’s meaning to the historical context within which it was framed. But when a judgment on the reasonableness of governmental action was necessary, he generally deferred to government, thereby reflecting once again his reluctance to substitute judicial determinations of reasonableness for those of legislative and administrative authorities.

One such provision was the Fourth Amendment’s guarantee against “unreasonable” searches and seizures. Throughout his career, Justice Black refused to extend the Amendment’s meaning to police eavesdrop practices, emphasizing that its provisions referred only to the search and seizure of “persons, houses, papers, and effects,” not words, and that, in any event, it would be impossible to describe a conversation that had not yet taken place, indeed might never occur, with the particularity demanded by the Amendment’s warrant clause.42 In addition, he was generally deferential to police judgments regarding the reasonableness of searches and the need to proceed without a warrant — so much so, that Jacob Landynski, the principal critic of Black’s Fourth Amendment jurisprudence, has complained that adoption of the Justice’s position would effectively negate the strictures of the warrant provisions. Given the warrant clause, Landynski has argued, the Fourth Amendment’s ban on unreasonable searches and seizures should be construed to forbid warrantless searches, and presumable arrests, absent the most exigent circumstances. In failing to apply the reasonableness standard in that light, Black according to Landynski, had denied the Amendment its full meaning.43

With due respect, Landynski may have read more into the Amendment’s meaning than was originally intended by its framers. As he has acknowledged, the Fourth Amendment was principally directed at the hated writs of assistance, general warrants which, in Landynski’s words, amounted to “a lifetime hunting license.” 44 The framers’ intent to eliminate the general warrant is arguably a far cry from the notion that most searches must be accompanied by a warrant. Another aspect of Landynski’s concerns with the Black stance in Fourth Amend-
ment cases, however, has a firmer basis. Black obviously had great difficulty deciding whether the Constitution required the exclusion of illegally seized evidence from judicial proceedings. Over the course of his career, he rejected the exclusionary rule, then decided that the Fourth and Fifth Amendments combined required its application, later based it only on the Fifth Amendment, and, at the end of his career, again seemed to deny that the rule had any constitutional basis. Landynski's criticism of such inconsistency is well-taken. Given Black's judicial philosophy, though, the difficulty the rule caused him is not surprising. It is simply another reflection of his reluctance to read his own views into the Constitution's language.

The Fourteenth Amendment's Equal Protection Clause gave Justice Black similar difficulties. As noted previously, the early history of Due Process enabled Black to ascribe a relatively fixed, "law of the land" interpretation to the due process guarantee. But history afforded him no similar opportunity with the equal protection guarantee. Nor was its general language any comfort to a judge concerned with restricting the scope of judicial choice. Thus it was not surprising when shortly before his death he suggested that the guarantee might best have been left out of the Constitution or worded differently — not because he objected to the racial equality the clause was obviously intended to protect, but because of its nebulous, open-ended general character. Not surprisingly, too, he added that the Court probably should never have given the clause any semantic gloss or allowed its meaning to be extended beyond racial discrimination, although he believed such developments inevitable.

Confronted with the guarantee's indefinite language and a historical record which only partially revealed its framers' intent, Black subjected discriminations based on race, and on companion criteria of national origin and alienage, to strict judicial scrutiny. With few exceptions, however, he extended substantial, if not complete, deference to other forms of discrimination. He joined a number of Warren era and earlier opinions imposing strict review on discriminatory laws based on "suspect" classifications other than race and on regulations which interfered with "fundamental" rights not stated elsewhere in the Constitution. He even authored the Court's opinion in Korematsu v. United States, which provided the semantic basis for the "suspect" categories branch of this "two-tiered" equal protection standard; he also wrote for the Court in Williams v. Rhodes, a classic statement of the "fundamental rights" branch of modern equal protection philosophy. His original draft in both cases, however, omitted such semantics, suggesting that they may have been inserted at the request of a colleague rather than on Black's own initiative. In many other cases, moreover, he made clear his general opposition to the use of the vague equal protection concept as "a handy instrument to strike down state laws which the Court feels are based on bad governmental policy." Outside the field of racial discrimination, he argued, the Court had traditionally upheld discriminatory regulations so long as they were "not 'irrelevant,' 'unreasonable,' 'arbitrary,' or 'invidious.'" Those standards, like the clause itself, were admittedly "vague and indefinite." In Black's judgment, however, they meant that "under a proper interpretation of the Equal Protection Clause states are
to have the broadest kind of leeway in areas where they have a general constitutional competence to act." 51

Justice Black did not always appear faithful to his general equal protection philosophy. He joined the Court’s holding that the clause requires state and local apportionment schemes to adhere to the “one person, one vote” principle. 52 He also was willing to subject discriminatory criminal procedures to stricter review than his normal policy of deference in non-racial cases would seem to allow. 53 He authored the Court’s opinion, for example, in Griffin v. Illinois, 54 holding that indigent defendants must be furnished free trial transcripts in preparing their appeals where their more prosperous counterparts were permitted to purchase a transcript. On closer analysis, however, these apparent inconsistencies can be squared with the broader contours of his constitutional philosophy. In that apportionment field, Black contented that the people are sovereign and that, in such a system, any deviation from population equality in apportionment is “irrational.” 55 The “one person, one vote” rule also arguably provides a more precise and less flexible standard than one allowing judges to rule on the reasonableness of particular apportionment systems. Black believed, too, that both due process and equal protection required strict review of discriminatory criminal procedures; and his belief that due process demands that government proceed according to even-handed, pre-existing laws and procedures would appear compatible with the strict review he believed necessary in such cases. In the main, moreover, Black was consistent in his position that equal protection requires strict scrutiny of racial discrimination, but extreme deference to government in other fields. Such a view arguably provided a more clear-cut approach for judges than one in which courts may vary the standard of review according to the basis for a challenged discrimination or the “fundamental right or interest” affected.

**CONCLUSION**

Justice Black’s critics have difficulty accepting his insistence that his interpretations of constitutional provisions largely flowed from a commitment to text and historical intent. In the 1960’s, Wallace Mendelson, Black’s most persistent scholarly critic, began to accuse the Justice of liberal activism, complaining that he “leans one way when ‘liberal’ values are at stake and another way in the face of ‘conservative’ values.” 56 By 1970, on the other hand, Glendon Schubert was asserting that “biological aging” or “cultural dissonance” had converted Black into a defender of “orthodox conservative dogma.” 57 Jacob Landynski sees Black’s narrow interpretation of the Fourth Amendment as a reflection of the Justice’s distaste for criminals; 58 and Sylvia Snowiss attributes his opposition to direct constitutional protection for the political protests of the 1960’s to his concerns about the “permissiveness” of that era and its rejection, in his view, “of the virtues of ‘character, morality, hard work, and self-denial.” 59 Nor have such policy-oriented assessments been confined to his critics. In her admiring 1950 profile, Charlotte Williams placed Black in “that school of thought which holds that every judge . . . writes into his opinions
his own economic, social, and political ideas and that the notion of judicial impartiality is little more than a myth." 60 Moreover Black's law clerk John Frank early depicted the Justice, as a jurist able "to devise ways — new ways if need be — of serving what in his conception is the largest good," 61 while Charles Reich, another clerk, once wrote that Black's conception of the judicial function permits "doctrine to keep pace with the times." 62

It is difficult, however, to accept such value-based interpretations of Justice Black's judicial and constitutional philosophy, especially in view of the conflicting policy directions in which his approach to constitutional issues carried him. Glendon Schubert's image of an increasingly conservative aging jurist fails to adequately explain, for example, why Black's "conservatism" was so selective and why the same judge, if in fact motivated by policy preferences, could oppose constitutional status for civil rights protests yet continue to support absolute protection for pornography, libel, and slander. Professor Snowiss' assertions regarding the relationship between Black's concerns about contemporary social trends and his reaction to certain civil liberties claims raise similar questions. And Jacob Landynski really should have attempted to explain why Black's distaste for criminals prompted extreme deference to police in Fourth Amendment cases, yet never in cases involving application of the Fifth Amendment's guarantee against compulsory self-incrimination. The conflicting patterns of Black's votes suggest not a policy-oriented jurisprudence, but a technical conception of the judicial function which largely transcended individual policy preferences.

Such a position, as noted at the beginning of this article, is anathema to those who favor a policy-based approach to judicial decision-making, including most of Justice Black's critics. Professor Snowiss, for example, found Black's opposition to "qualitative" judgments by judges perhaps the "one underlying problem in all of Justice Black's work," adding: "If not related to meaningful conceptions of justice, judgments of constitutionality will not be able to survive." 63 For one who accepts interpretivism as the only approach to judging compatible with the notion of a written Constitution, however, Justice Black's jurisprudence offers a workable alternative to value-laden decision-making. His reading of the Constitution's "literal" terms and his conclusions regarding the intent of its framers were obviously imperfect, as he himself no doubt recognized. Arguably, however, they provide clearer legal standards than more policy-oriented approaches as well as a jurisprudence which substantially limits the scope of judicial choice without sacrificing the Constitution's essential character as higher law.
NOTES


3 See, for example, the ranking reprinted in Henry J. Abraham, *Justices and Presidents*, 2d ed. (New York: Oxford University Press, 1985).


11 Ibid, p. 588.


18 Black, p. 45.


20 See, for example, Black, pp. 59-61; Cox v. Louisiana, 379 U.S. at 577-79.


22 In, for example, Lochner v. New York, 198 U.S. 45 (1905).

23 See, for example, U.S., *Congressional Record* 81: 1294 (1937).

24 Black first fully developed this position in a judicial opinion in a dissent filed for Adamson v. California, 332 U.S. 46, 68 (1947).


28 Black interviews.


30 See, for example, his dissent in Griswold v. Connecticut, 381 U.S. 479, 507 (1965).


33 Duncan v. Louisiana, 391 U.S. at 165.

34 Ibid, p. 59.


36 Ibid, 110.
39See, for example, an unfiled draft concurrence which he wrote for Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947), Wiley B. Rutledge Papers, Library of Congress.
41Black, pp. 35-36.
44Ibid, p. 463.
45Professor Landynski traces the development of Justice Black's position in ibid, pp. 463-79.
46Black interviews.
48323 U.S. 214 (1944).
49393 U.S. 23 (1968).
50The drafts are on file in the Hugo L. Black Papers, Library of Congress.
54351 U.S. 12 (1956).
55Black interviews.
58Landynski, p. 472.
59Snowiss, p. 244.
63Snowiss, pp. 248-49.