struggle unfolded in the summer of 1968. Yes, Abe Fortas was some sort of liberal. But he was defeated not simply because he was a liberal (does anyone doubt that a Philip Hart would have been confirmed at that time?), but because he truly did lack "judicial temperament." And no one knew this better than Fortas himself.

MR. JUSTICE BLACK AND HIS CRITICS. By Tinsley E. Yarbrough.[1] Durham, North Carolina: Duke University Press. 1989. Pp. xii, 323. Cloth, $45.00.

James Magee[2]

Justice Hugo Black was Franklin Roosevelt's first appointee to the Supreme Court. His tenure coincided with the transformation of the judicial agenda from one preoccupied with property rights to the modern predominance of civil rights and liberties. Beyond doubt, he played a major role in fashioning the triumphs of the Warren Court, and by any measure he was one of the most influential jurists in our constitutional history.

The Nine Old Men were often assailed for protecting property interests in the guise of enforcing the Constitution. Senator Black, elected in 1926 and serving in the Senate until his appointment to the Court, was one of the most relentless of the Court's critics, and he knew very well that more than text, first principles, or original intent produced the judicial dogmas that were erected to invalidate progressive legislation.

As a Justice, Black in turn was criticized and even ridiculed when he insisted that the many novel judicial results that he reached in protecting civil rights and liberties were derived merely from fidelity to the law.

Black drew critics from across the spectrum: conservatives who challenged his liberalism as lawless; liberals disappointed that their erstwhile hero appeared to forsake the cause amidst the social turmoil of the 1960s; and legal scholars, some of whom found his jurisprudence simplistic. Alexander Bickel dismissed Black's jurisprudence as a fake, concluding that reliance on textualism was—as had been true of his disingenuous predecessors—a smokescreen to foster political convictions.[3] Black's "achievement," he observed,

1. Professor of Political Science, East Carolina University.
2. Associate Professor of Political Science, University of Delaware.
3. A. BICKEL, THE LEAST DANGEROUS BRANCH 84-113 (1962).

had been "to adapt the old style to a substance of his own."[4]

Scores of critics have discovered inconsistencies, unpersuasive interpretations, false history, and sometimes arbitrary choices in Black's judicial record. In thirty-four years of judging, one would expect some inconsistencies, but Black admitted to only one change of mind: his recantation in the Second Flag Salute Case. In his Carpentier lectures at Columbia and his extraordinary CBS television interview in 1968 he adamantly claimed that otherwise his jurisprudence had remained consistent.

In this book, Professor Tinsley Yarbrough analyzes the Justice's jurisprudence and addresses some (not all) of the charges of Black's critics. Surprisingly, for instance, Yarbrough offers nothing directly in reply to Bickel's devastating and sarcastic assault on Black's alleged discovery of literal absolutes in the Bill of Rights. Nevertheless, Professor Yarbrough does cover the major elements of Black's judicial philosophy: his incorporation thesis, his first amendment jurisprudence, and his treatment of what Yarbrough calls the "flexible clauses" such as the fourth amendment and the equal protection clause.

As one might anticipate from Yarbrough's earlier studies of Black, he is still "convinced that, early as well as late in his career, Justice Black was essentially consistent in both his approach to the judge's role and construction of specific constitutional provisions and that his interpretations are generally well grounded in the Constitution's text and history." Swimming against a tide of scholarship challenging the very possibility of constitutional interpretation, Yarbrough offers Black's career as a model of lawful judging—"a workable, if imperfect, alternative to noninterpretivist conceptions of the judicial role" that have proliferated in recent decades.

Yarbrough believes that, "Black's positivist tenets, rather than his policy preferences, furnish the key to an understanding of his approach to specific constitutional issues, giving coherence and consistency to his judicial career." Yarbrough's definition of "positivism" is somewhat idiosyncratic. Positivists, he explains, distinguish between law and morality; see lawmaking as a role for legislators, not judges; try to base their interpretations of statutes and constitutions on the intent of the framers as measured primarily by the literal language of the provisions construed; and insist upon clear and consistent standards, shunning amorphous doctrines. These are, indeed, concerns that preoccupied Black throughout his judicial ca-

4. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 19 (1970).

reer, leading Yarbrough to state that "the Justice would appear to have been the preeminent positivist jurist."

If there are no correct answers, positivism (in Yarbrough's sense) is an illusion. Yarbrough's burden, therefore, is to show that Black's answers were more constitutionally correct—*pace* Bickel—than those of, say, Justice Sutherland.

I

If a judge claims that his primary criterion in constitutional interpretation is the document's plain language, one might expect him to arrive at fairly conventional conclusions. Certainly it would be surprising for such a judge to reach results with which hardly anyone else agrees. In his dogmatic way Black frequently exaggerated the clarity of the bare text of the Constitution, and especially of the first amendment.

If a positivist's construction of constitutional language leads to incoherence, we have further reason to be doubtful. Concerning legislative reapportionment, the language of the fourteenth amendment, especially combined with the terms of the fifteenth amendment, literally refutes the proposition that the equal protection clause leads straight to equality of voting rights; yet the text, so he claimed, was decisive for Black. Section 2 of the fourteenth amendment acknowledges that a state may deny the right to vote altogether to some of its residents, if it is willing to incur a reduction of its representation in Congress. And what was the purpose of the fifteenth amendment (guaranteeing that the right to vote shall not be denied on account of race) if, as the reapportionment cases presume, the fourteenth—obviously addressed to racial discrimination—already had covered the subject of voting?

Yarbrough concludes that Black's allegiance to the "one person, one vote" standard "is compatible with his positivist reliance on language and historical intent." This is true, he says, "[w]hatever the accuracy of his interpretation" of the Constitution. But if we accept the notion that "accuracy" is immaterial in assessing a judge's position, the only issue is sincerity. On that issue, Justice Sutherland's credentials are at least as good as Justice Black's. We might as well conclude that if a positivist sincerely believes that the earth is flat, we must respect his sincerity as a positivist "whatever the accuracy" of his or her appraisal of the earth's physical structure. Black's sincerity—which there is little reason to doubt—is an inadequate defense to the charges of inconsistency and subjectivity.

Adding to the confusion, Yarbrough writes that as a good posi-

tivist "Black questioned the wisdom of judicial constructions which allowed the . . . [equal protection clause's] reach to extend beyond its historic racial roots." In light of this attitude, concedes Yarbrough, it was "ironic" that Black accepted the "one person, one vote" doctrine. "Ironic" is a mild appraisal of Black's posture, particularly since shortly thereafter he became one of the most caustic opponents of the Court's extensive use of the "new" equal protection doctrine to promote "fundamental" interests other than racial equality.

Yarbrough rightly observes that the one person, one vote standard has several virtues cherished by positivists. It is clear; it limits judicial discretion; and ordinary citizens can understand it. Granting all this, it remains true that Black's votes in reapportionment cases were inconsistent with his professed reliance on the constitutional text.

Admittedly, it is difficult to construe the indefinite domain of the equal protection clause. One of Yarbrough's most important contributions in this book reveals Black's frustration. In one of two interviews in 1970 and 1971 that he conducted with Black, the Justice confessed that it might have been "better" had the equal protection clause "never been adopted . . . , that the clause should perhaps have been left out of the constitution altogether."

Apparently for the sake of constitutional clarity, Black would have preferred to amend his legal bible, despite his public statements that he cherished every word of it. If not deleted altogether, the equal protection clause, he said, should have been worded more precisely, or judicially confined to race. Yet, as a Justice, Black did not seek to confine the clause to racial discrimination. In addition to his venture into legislative reapportionment, Black was in the majority in *Skinner v. Oklahoma* (1942) where the Court planted the seeds of the "new" equal protection doctrine (which an acerbic Black would later condemn as a distortion of the Constitution), reading that clause to reach and protect the "fundamental right" to procreate, a right with no textual roots. Yarbrough finds Black's equal protection positions "the least satisfying element of his jurisprudence" though he struggles to persuade us that "[i]n the main" Black's spotted equal protection record "was compatible with his broader jurisprudence."

Black's understandable aversion to the indeterminacy of the equal protection clause also presumably induced his bizarre treatment of the wide-open ninth amendment. In his "Bill of Rights" address in 1960, Black—without specifying the contents of the ninth amendment—stated that its language "strongly emphasizes

the desire of the Framers to protect individual liberty." But he dissented in *Griswold*, a case that provided an opportunity to exploit this apparently limitless reservoir of rights. Black's *Griswold* dissent insisted that the ninth amendment merely emphasized the limited power of the federal government, a theory that seems to make the tenth amendment redundant.

Yarbrough claims that Black's position was perfectly compatible with legal positivism; the ninth amendment, he argues, is "a threat to democratic principles." This is akin to wishing the equal protection clause had never been adopted. Yarbrough also maintains that Black's view does not make the tenth amendment redundant, for the tenth emphasizes the limits of the federal government vis-a-vis state power, while the ninth emphasizes those same limits vis-a-vis the liberty of the people. Yet literally the tenth touches both these matters: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*." The ninth seems at the very least to acknowledge that some additional rights (though undefined) are protected against federal power, and Black in 1960 alluded to the ninth as a circumscription also upon state power. Such confusion does not improve the batting average of a positivist.

Black's avoidance of the ninth amendment, while perfectly compatible with his positivist inclination toward precise standards, contradicted the positivist's obligation to interpret the text as written.

Certainly doctrinal consistency over time is an indispensable measure of the accomplishments of a successful positivist. In some areas, Black was indeed consistent. For example, once committed to his absolutist view of the first amendment, Black consistently protected pornography and libel. Yarbrough offers many illustrations of his claim that similar consistency was characteristic of Black's performance in other areas. On the whole, I am not persuaded.

Let two examples suffice. Article I, Section 10 stipulates, among other things, that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." This sounds as absolute as the first amendment's protection of freedom of speech. For Yarbrough, Black's dissent in *El Paso v. Simmons* (1965) was predictable, because the Court there upheld a state law modifying the terms of a contract involving public land sales. "Black considered this 'modification' a clear violation of the contract clause and ridiculed the majority's rationale for upholding the scheme." In his usual way, Black attacked the Court's balancing of interests to cir-

cumvent a "plain" constitutional prohibition. The *Simmons* Court was following *Home Building & Loan Assn. v. Blaisdell*, where Chief Justice Hughes had said that the contract clause was to be pragmatically interpreted, that it is "not an absolute one and is not to be read with literal exactness like a mathematical formula."[5]

This flexible construction of an absolute constitutional command was, as Yarbrough repeatedly reminds us, anathema to Black. Yarbrough ignores, however, an earlier decision from which Black dissented. In *Wood v. Lovett* the Court struck down an Arkansas law as violative of the contract clause. Black, as Yarbrough likes to say, "vigorously" dissented; he recounted the economic conditions of the Great Depression that gave rise to the state law and then condemned the Court's rigid application of the contract clause:

> [I]t would go far towards paralyzing the legislative arm of state governments to say that no legislative body could ever pass a law which would impair in any manner any contractual obligation of any kind. Upon a recognition of this basic truth rests the decision in the *Blaisdell* case.[6]

It is impossible to square this statement with Yarbrough's conclusion that Black did not "condone flexible interpretations of the Article I, Section 10, contract clause." Black expressly endorsed the *Blaisdell* reasoning that he would later repudiate in *Simmons*. He said: "The *Blaisdell* decision represented a realistic appreciation of the fact that ours is an evolving society and that the *general words* of the contract clause were not intended to reduce the legislative branch of government to helpless impotency."[7] Here, Black sounds like Frankfurter.

In another area, a similar inconsistency can be seen. Over Black's dissent, in *Williams v. North Carolina* II (1945) the Court allowed that state to reconsider the validity in North Carolina of a Nevada *ex parte* divorce decree despite the full faith and credit clause. Empowered to enforce this provision, Congress—as early as 1790—had required that the judgments of state courts, such as the Nevada divorce in this case, be given full effect in other states. "Justice Black vigorously dissented . . . [a]gain, for Black, the Constitution's text itself resolved the issue." Recognizing that short residency requirements of states like Nevada created the conditions of a divorce mill, Black nonetheless warned that the Court "should not attempt to solve the 'divorce problem' by constitutional interpretation" or in other words by holding that the full faith and credit

5. 290 U.S. 398, 428 (1934).
6. 313 U.S. 362, 382 (1941) (Black, J., dissenting).
7. *Id.* at 383 (emphasis added).

clause does not apply completely to state judgments of divorce.[8]

Three years later Black joined an opinion which Justice Jackson condemned as failing to accord full faith and credit to a different Nevada *ex parte* divorce decree. Here one Estin left his wife who thereupon successfully sued him in her home state of New York for separate maintenance. Several years later Mr. Estin obtained a divorce from his wife in Nevada. Under New York law, once a divorce had been issued, Mr. Estin would no longer have been required to pay alimony. The constitutional question was whether Estin's Nevada *ex parte* divorce was to be given full faith and credit as if it had been obtained in New York. The Court's answer was the doctrine of "divisible divorce," as pragmatic a compromise as the Justices have ever engineered. As applied in *Estin v. Estin*, the Nevada divorce was given full faith and credit "insofar as it affects marital status" but not with respect to property distribution.[9]

Jackson's acerbic dissent reads like one Black would have written had he been the consistent positivist that Yarbrough imagines. Said Jackson: "The Court reaches the Solomon-like conclusion that the Nevada decree is half good and half bad under the full faith and credit clause."[10] In fact, the Court, with Black's support, explicitly rejected any literal, absolutist construction of the constitutional text:

> An absolutist might quarrel with the result and demand a rule that once a divorce is granted, the whole of the marriage relation is dissolved, leaving no roots or tendrils of any kind. But there are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests. This is why most legal problems end as questions of degree. That is true of the present problem under the Full Faith and Credit Clause. The question involves important considerations both of law and of policy which it is essential to state.[11]

While it is certainly true, as Yarbrough reminds us, that Black did not always endorse every passage in an opinion in which he joined, he frequently, especially in his later years, wrote separate opinions disassociating himself from certain rhetoric in majority opinions which he otherwise supported. For example, Yarbrough writes that Black "proved equally alert to substantive due process rhetoric in opinions he was expected to join." Black despised substantive due process and "quickly reacted" to references to that doctrine in the opinion of the Court. Yet Justice Douglas in *Estin*

8. 325 U.S. 226, 268 (1945) (Black, J., dissenting).
9. 334 U.S. 541, 549 (1948).
10. *Id.* at 554 (Jackson, J., dissenting).
11. *Id.* at 545.

endorsed judicial balancing of conflicting interests, without provoking a dissent by Black.

Having sought to present Black as the preeminent positivist, Yarbrough then takes us through the major areas of Black's jurisprudence. He restates Black's position in each area and then confronts the critics.

II

The due process clauses of the fifth and fourteenth amendments were particularly vexatious matters in Black's futile quest for objectivity in constitutional law. As a senator he opposed the potentially limitless meaning the Old Court had assigned to those clauses, and so it is not surprising that Justice Black tried to confine their meaning. By 1947 he was prepared to state that the first section of the fourteenth amendment, treated "separately, and as a whole," was designed to incorporate the Bill of Rights. An apprentice positivist might be confused by such a statement, especially since Black would later treat each of the component clauses of section one as meaning something other than the Bill of Rights.

Since the amendment does not expressly incorporate the Bill of Rights, Black relied on his interpretation of the legislative history. Not only did the amendment embrace the Bill of Rights; its meaning was, he argued in his *Griswold* dissent, confined to those familiar guarantees. He could not discern a right of privacy within the Bill of Rights and so he dissented from the Court's protection of marital "privacy" in *Griswold* (though, as we have seen, he was prepared to recognize in 1942 a right to procreate amidst the mysterious vapors of the equal protection clause).

Criticism of his incorporation theory lasted throughout Black's judicial career, and ranged from direct, and often condescending, dismissals of his account of history to ironic arguments that the language of the fourteenth amendment could not bear Black's contorted construction. As Justice Frankfurter noted, the amendment's language was a "strange way of saying" that the Bill of Rights henceforth applies against the states.

Yet Yarbrough contends that Black never considered the due process or equal protection clauses as independent vehicles for incorporation. If this is true, it is unclear what Black meant by "separately." Black did argue in 1968, in response to criticism from Justice Harlan, that the privileges and immunities clause, in effect, says that the Bill of Rights applies against the states; "there is no doubt" writes Yarbrough, quoting Black, that this was an " 'eminently reasonable way of expressing' " incorporation of the Bill of

Rights. This approach, however, does not resolve the "separately, and as a whole" problem. It is also redundant, and thus not very reasonable, if the due process clause, which immediately follows the privileges and immunities clause, is read also to include, as Black wished, rights such as counsel, trial by jury, and other procedural rights contained in the first eight amendments which the privileges and immunities clause supposedly already embraces.

Moreover, the privileges and immunities clause refers only to rights of *citizens* of the United States. The prohibition against "cruel and unusual punishments," and the guarantee of an "impartial jury," for example, cannot fairly be read as applicable only to citizens, and this probably induced Black to retreat to his convoluted "separately, and as a whole" rationale, as the due process and equal protection clauses refer to "persons," not citizens.

On the problem of citizenship, Yarbrough merely says that the chief sponsors of the fourteenth amendment created an "anomaly" in not distinguishing between citizens and aliens, and Black simply accepted this anomaly. It is difficult to comprehend exactly what Yarbrough means, especially in the face of the preeminent place of the citizenship clause of the fourteenth amendment. Furthermore, Black derived from the privileges and immunities clause the right to travel interstate, but only for *citizens*. Yet Yarbrough argues that it was that same clause that, for Black, incorporated the Bill of Rights against the states, a set of rights that would not be granted only to citizens of the United States.

Moreover, on the matter of redundancy generated by using the due process clause as a vehicle for incorporation, Yarbrough assails Frankfurter and Harlan for making such a criticism while themselves willing to find coincidental overlaps between the due process clause and some of the provisions of the Bill of Rights. Accusing antagonists of the same sin is, of course, no defense of the sin itself. And, even so, he says: "Justice Black never contended that the Fourteenth Amendment's due process clause incorporated the Bill of Rights." Instead, Black rested his case on the first section of the amendment, "separately, and as a whole." But how did the due process clause "separately" affect incorporation, and what did the citizenship and equal protection clauses each "separately" do? Yarbrough's only answer apparently is that the due process clause was to mean only what its counterpart in the fifth amendment meant. Aside from the fact that Yarbrough has to concede that Black "never actually embraced in so many words" such a position, this position does not eliminate the tautology built into Black's enigmatic posture.

The troubles multiply when we remember that Black equated the due process clause of the fifth amendment with the equal protection clause of the fourteenth in discrimination cases involving the federal government, such as *Korematsu v. United States* (1944), where Black spoke for the six to three majority. Due process presumably is a barrier against racial discrimination which the equal protection clause, which immediately follows the due process clause of the fourteenth amendment, was written to address. The juridical circularity is painfully obvious and undermines Black's alleged positivism.

Justice Black's reading of constitutional history has been attacked by many scholars, notably Charles Fairman and Stanley Morrison, whose influential essays in the *Stanford Law Review* in 1949 became almost the final word on the subject for many students of the incorporation debate, including Frankfurter and Harlan. In the strongest part of this book, Yarbrough once more confronts Black's critics, this time armed with evidence from a recent book by Michael Kent Curtis, who argues that Black's historical arguments on the incorporation of the Bill of Rights are stronger than most scholars have supposed.[12]

Yarbrough does not argue that Black's incorporation position is correct; indeed, Curtis asserts (and Yarbrough acknowledges), that many of the framers of the fourteenth amendment wanted it to include more than the specific rights of the Bill of Rights—a kind of incorporation-"plus" posture which Black very much opposed. Yarbrough recognizes, however, as mentioned above, that in *Edwards v. California* (1941) Black did go beyond the Bill of Rights in discovering in the privileges and immunities clause a right of *citizens* to travel interstate. But this right to travel was the only right, beyond the Bill of Rights, that Black was prepared to draw from that clause. In *Skinner*, as we know, he found a place for the right to procreate in the equal protection clause. This metatextual reasoning, however, he discarded in *Griswold*, where his dissent reflects his mature jurisprudence, contradicting some of his earlier constitutional positions.

Nevertheless, Yarbrough concludes that Curtis's historical evidence "demolishes the anti-incorporationists' position . . . [and] shifts the burden of proof decidedly away from" Black and his supporters. At a minimum, the historical evidence is more ambiguous than critics such as Frankfurter and Harlan supposed. That same evidence, however, equally calls into question Black's belief that the

12. NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1987).

Court should confine itself to the text of the Constitution in its search for "fundamental rights."

III

Yarbrough naturally devotes considerable attention to Black's first amendment views, particularly his absolutist interpretation. I argued in my book on Black that a commitment to an absolutist construction of the first amendment did not emerge in his jurisprudence until 1951 or 1952. Yarbrough rejects this, claiming that Black was an absolutist throughout his tenure on the Court.

Black did not publicly endorse an absolutist approach to the first amendment until 1952, in his dissent in *Carlson v. Landon*. Yarbrough is impressed by an unpublished opinion that an angry Black composed in *Bridges v. California* (1941) originally as a dissent; Black's side ultimately prevailed, and he emerged as spokesman for the Court, writing an opinion relying on the clear and present danger test. In interpreting that original dissent as an indication of early absolutism, Yarbrough enlists the support of Mark Silverstein who, in his book on Black and Frankfurter, writes: "Although Black did not characterize the First Amendment as an absolute in his *Bridges* dissent, that conclusion pervades the entire opinion."[13]

Yarbrough ignores, however, the principal conclusion that Silverstein draws concerning the evolution of Black's first amendment position. "[W]ithin a year of *Dennis* [*v. United States* (1951)], Black began to move toward an absolute reading of the First Amendment . . . [and] the move to absolutism was, in many ways, a response to Frankfurter."[14] Silverstein is familiar with the recurrent antagonism between Black and Frankfurter. The former Harvard law professor tended to lecture Black, a populist politician from Alabama, on the ways of the law, and Black did not accept such condescension. But in the 1940s, on free speech issues, Black could almost always depend on a solid libertarian plurality with his vote and those of Justices Douglas, Murphy, and Rutledge. Adhering to a demanding clear and present danger test, and the "preferred position" doctrine, this "Axis," as Frankfurter described the four liberals, seemed almost always able to attract at least the necessary fifth vote.

It was nearly, as Justice Douglas in his autobiography proudly remembered, a "Golden Age" for liberalism.[15] Black was very

13. M. SILVERSTEIN, CONSTITUTIONAL FAITHS 183 (1984).
14. *Id.* at 202.
15. W.O. DOUGLAS, THE COURT YEARS 290 (1980).

much in charge, and he did not need the shield of literal absolutes to fight on the free speech front: he had the votes and the rationale of the preferred position doctrine. Brother Frankfurter did his pontificating primarily in dissent. But when Murphy and Rutledge suddenly died in 1949, the Golden Age abruptly came to an end. As the Court then confronted Cold War free speech cases, Black now found himself in the minority, and a timid Court, led intellectually by Frankfurter, succumbed to the paranoia sweeping the political scene during the bleak era of McCarthyism. The preferred position doctrine disappeared into history. It was at this point that Black "moved," as Silverstein carefully explains, to his absolutism. Reference to the "no law" provision of the first amendment now became his sword in his confrontation with Frankfurter.

For a while, Black's absolutist rhetoric was a powerful rebuttal to a Court majority that was frequently deciding cases by admitting that freedom of speech was being violated but reasoning that the government had the authority to do so if, on balance, the government's interest was great enough. But once the free speech issues shifted from subversion to protest movements in the 1960s, Black's absolutism became impractical and irrelevant as a means to implement the first amendment guarantees. As Silverstein concludes, the Justice would find it necessary to create "seemingly arbitrary exceptions which served to undermine doctrinal consistency,"[16] a conclusion Yarbrough strongly rejects. Under the preferred position doctrine, on the other hand, flexibility (that is, practicality) was at Black's disposal in unusual cases of governmental need.

This explanation far more convincingly accounts for Black's judicial behavior than Yarbrough's laboriously developed and completely unpersuasive argument that Black was always an absolutist. In the 1940s Black balanced interests in free speech cases, though of course he usually read the scales in favor of freedom of speech. That he hardly ever voted in favor of suppression of expression is beside the point; Murphy and Rutledge were also devout proponents of free speech but, as Yarbrough agrees, they defended libertarian results without relying on absolutism.

Yarbrough rests his thesis of Black's consistent absolutism on the undelivered *Bridges* dissent, which he regards as "conclusive evidence." Black's ultimate use of the clear and present danger test in *Bridges* itself and in a string of other cases in the 1940s is, claims Yarbrough, of "dubious value." That it took Black almost fifteen years openly to admit an allegiance to absolutism is, in Yarbrough's account, evidence of Black's "tactical decision to postpone a public

16. SILVERSTEIN, *supra* note 13, at 189-90 n.35.

avowal of his absolutist philosophy." Black, in other words, only pretended to be following the clear and present danger test because absolutism was "such a controversial position . . . unacceptable to any colleague."

We are asked to believe that Black for a decade and a half engaged in a pragmatic pretense only to emerge later with the totally unpragmatic but dogmatic claim that "plain language, easily understood," resolves free speech cases. The absolutist Black would repeatedly assail his Court for nullifying free speech rights. In *Wilkinson v. United States* (1961), for example, he blasted away: "Their ineffectiveness . . . stems, not from any lack of precision in the statement of those principles, but from the refusal to apply those principles precisely stated." Yet in *Marsh v. Alabama* (1946), speaking for the Court, Justice Black was presumably a closet absolutist, tactfully ignoring the text to avoid controversy when he wrote: "As we have stated before, the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases 'weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulation . . . of the rights.' "

Yarbrough admits that history contradicts, rather than reinforces, Black's version of the first amendment, but he jumps that hurdle by reminding us that "his absolutism was based ultimately on the amendment's words." Presumably that excuses Black's defiance of historical intent. But when he interpreted the "free exercise" of religion clause, where literalist absolutism is patently impractical, even though "no law" still means no law, Black concluded that that clause meant only religious "speech" and "beliefs" (thus making the guarantee redundant, in view of the free speech provision). Yarbrough explains:

> [T]hat construction was, after all, compatible with the First Amendment's general emphasis and based on the logical assumption that the amendment's framers surely did not intend to insulate all religiously motivated conduct from governmental regulations.

Just four pages later, he describes Black as "a Justice whose First Amendment jurisprudence turned on language rather than on an evaluation of the interests a particular construction of the Constitution might serve."

What of "the right of the people peaceably to assemble"? That guarantee also falls under the absolutist umbrella of the first amendment, but, like religious liberty, assembly cannot realistically be understood as having absolute constitutional immunity. Black's positivist solution to this problem was to insist that the right,

though absolute, was not exercisable on either private or public property! Confronted with the obvious criticism that such an "absolute" right is meaningless, if not laughable, Yarbrough responds that, in one of his interviews with Black just before his death, the Justice agreed that government could, indeed, shut off access to public places for general purposes of assembly; but since everybody loves a parade now and then, the government would never do such a thing. Thus if the American Legion were allowed to march, "equal protection" would demand no less access for other groups. In other words, an expansive interpretation of the equal protection clause would rescue the right of assembly from the eclipse of Black's pathetic (but absolute) construction.

Probably the most controversial dimension of Black's absolutist reading of the first amendment was his claim that the speech clause did not protect conduct such as the symbolic expression of protesters in the 1960s. Inasmuch as all speech involves some conduct, this distinction was uncertain and frequently arbitrary. Yet it was Black's principal means of escape from the implications of his absolutism. For example, in the 1940s, when he was not yet cornered by absolutism, Black recognized picketing as a form of expression usually entitled to first amendment protection; but in the 1960s he asserted that protest marches were not "speech" and thus not covered by his absolute first amendment. Also, in his last year on the Court Black, in *Cohen v. California* (1971), voted to uphold an "offensive conduct" conviction of a man who walked into a Los Angeles County courtroom with the message "Fuck the Draft" inscribed on the back of his jacket. To Black and his fellow dissenters, this behavior was "mainly conduct and little speech." Yet it was this little speech which induced Cohen's arrest and brought about his conviction, for surely this man would not have been noticed, much less arrested, had these words not been emblazoned upon his jacket. And Justice Black absolutely and routinely protected four-letter words in obscenity cases.

In *Tinker v. Des Moines School District* (1969) Black dissented when the Court ruled that, under the facts of this case, children could not constitutionally be prohibited from wearing black armbands in school as a means of protesting against the Vietnam War. The Court interpreted the armbands as conduct "closely akin to pure speech." Moreover, school authorities had apparently allowed other symbolic expression, such as the Iron Cross. Even in the field of expressive conduct Black at least thought that the first amendment could not tolerate discriminatory regulations, but, as Yarbrough explains, Black believed that the first amendment did not

apply to schools, courtrooms, or other places dedicated to special purposes (what places are not?). Yarbrough states that Black's withdrawal of first amendment protection extended to "all levels of state-supported education."

How does a simple reading of the text lead to this unbelievably narrow application of the first amendment? If the text justified Black's withdrawal of first amendment protection from schools, then it was only by fiat that Black rigorously applied the first amendment to proscribe prayer in the public schools or to prohibit compulsory flag salutes or to protect teachers from dismissal because of their political beliefs or associations. By its terms the first amendment does not distinguish between schools and streets, courtrooms and Congress, and then only for some of its guarantees.

Similarly, the text fails to justify Black's answer to the question whether a witness can be held in contempt for failure to answer a judge's inquisitions about his political beliefs. The "courtroom," Professor Yarbrough astonishingly states, was an "area to which Justice Black's absolute First Amendment most assuredly did not extend."

Whenever Black in the 1940s protected certain conduct, such as picketing, Yarbrough explains that it was only because the regulation in question was unconstitutionally vague or overbroad, and not because such conduct was covered by the terms of the first amendment. But Black repeatedly acknowledged that picketing was a form of expression covered by the first amendment up to the point of creating a clear and present danger. His later attempts to draw a line between speech and conduct and then to reconcile them with his jurisprudence of the 1940s are as unsatisfactory as Yarbrough's defense of those attempts.

In fact, in 1947 Black seems to have rejected the possibility of drawing that line consistently with the meaning of the first amendment. In *United Public Workers v. Mitchell* he dissented from a decision upholding a provision of federal law prohibiting a certain class of federal employees from taking "any active part in political management or in political campaigns." These employees, however, could vote and "express their opinions on all political subjects and candidates." Black found a "hopeless contradiction" in that the act allowed people to speak but not act in political campaigns. He said: "Popular government, to be effective, must permit and encourage much wider political activity by all the people." Denying the people the right to "take political action would be inconsistent with the First Amendment's guaranty of freedom of speech, press, assembly, and petition." Common sense tells us that political

action cannot be protected absolutely, but once Black embraced absolutism he severely limited the meaning of that action; he could not protect certain actions at all because he could not protect them absolutely.

IV

Tinsley Yarbrough emerges from this book as Black's apologist. He finds little to criticize in Black's long tenure on the Court, except that he is unhappy with the Justice's waffling in the field of equal protection and on the exclusionary rule. Otherwise, he merely echoes Black's own defenses, including the unpersuasive and inconsistent rationales.

For instance, in explaining Black's refusal in *Bartkus v. Illinois* (1959) to condition the rule against double jeopardy "on considerations of federalism," he supports Black's dissent, arguing that such considerations are "stated nowhere in the Constitution's text." On another matter, rejecting Frankfurter's federalism arguments for refusing to apply the Bill of Rights against the states, Yarbrough notes that "[p]ure considerations of federalism, like the desire to clothe judges with authority to do 'justice,' would carry no weight, of course, with one of Justice Black's jurisprudential persuasion . . . . [It] would have been unthinkable for Black to yield to such concerns." But in *Younger v. Harris* (1971), where Black wrote the Court's opinion curbing federal judicial intervention in state court proceedings, Yarbrough writes that a "consideration underlying the Court's position was the doctrine of comity implicit in 'Our Federalism' " which Black advanced. The same "philosophy of federalism," according to Yarbrough, explains Black's position regarding the constitutionality of the preclearance provision of the 1965 Voting Rights Act. What Yarbrough elsewhere emphatically characterizes as an "unthinkable" ground for positivist judicial decision-making, the positivist Black not only thought about but openly utilized, according to Yarbrough's own analysis.

Black undoubtedly tried to limit judicial discretion, especially the discretion that he found in Frankfurter's judicial philosophy. But Black also fiercely adhered to his ideological convictions, which doubtless found their way into the interstices of his judicial legacy; the tension between his jurisprudence and his personal values accounts, perhaps, for most of the inconsistencies.

If Justice Douglas is to be believed, Black's unfriendly response to mass demonstrations in the 1960s derived from the fact that "Black's house was picketed en masse" after it had become known, soon after his appointment to the Court, that he had been a member

of the Ku Klux Klan.[17] Douglas often told the famous story that when he was appointed to the Court Chief Justice Hughes explained that a Justice's decisions were based ninety percent on emotions. In his autobiography Douglas continued:

> Frankfurter was indeed the most obvious example in my time of the truth of Hughes's observation. Black was a close second. Each went at a problem with great feeling and charged with powerful emotions. Black was more frank about the process; he never took the Frankfurter stance that he was following "the law" and putting aside his own feelings and desires in reaching a decision.[18]

Yarbrough believes that Black's critics are the ones guilty of being result-oriented; they criticize Black's jurisprudence because it failed to support the causes that they think the Constitution *should* protect. This is "the essence, I believe, of much of the scholarly criticism directed at his judicial and constitutional philosophy." Of course, the same could be said of the critics of every other Justice; from Sutherland to Rehnquist, the Justices' critics have commonly been "result-oriented." Indeed, Black may have had more than his share of *friendly* critics. Some critics are, of course, driven by disdain for the decisions Black reached, and they sometimes do not pretend otherwise, as when Glendon Schubert unabashedly claimed that Black's decisions were not in line with the times and that he was too old for the job. It is simply not accurate, however, to characterize Black's critics as having no more reason to question his jurisprudence than those who angrily wrote him "crank mail" when he handed down unpopular decisions.

Much criticism of Black arose in the context of the antagonism between Black and Frankfurter. For example, much of Wallace Mendelson's relentless, and frequently baseless, attack on Black derived from his mystical admiration for Frankfurter; his hero (for whom Mendelson served as law clerk) was the model judge, immune from criticism. Mendelson was too fond of Frankfurter to see the shortcomings in Frankfurter's jurisprudence that more detached commentators could readily perceive.

Professor Yarbrough, it seems, has a similar problem; he too is excessively fond of his hero. It is unlikely that scholars who have discovered discrepancies or disarray in Black's jurisprudence will need to reconsider their assessments as a result of this book. Black was a giant with glaring weaknesses as well as admirable strengths. Professor Yarbrough seems to be impressed by one dimension and predisposed to ignore most of the other.

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17. DOUGLAS, *supra* note 15, at 19-20.
18. *Id.* at 33-34.