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Review Essay: Unfrozen Caveman Justice Reviewing Hugo Black: A Biography. by Roger K. Newman.

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UNFROZEN CAVEMAN JUSTICE

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Hugo Black: A Biography. By Roger K. Newman.** Pantheon Books. 632 pp. 1994. $30.00.

Hugo Black was one of the most enigmatic of a notably enigmatic generation of New Deal Southern Democrats that rose to national power in the thick of this century. Lyndon Johnson had his towering contradictions, but even those did not surpass Black's. The same man who joined the Ku Klux Klan in his native Alabama later joined the Warren Court's rulings ordering an end to desegregation. The same man hailed as the Supreme Court's greatest civil libertarian wrote the Court's opinion upholding the confinement of Japanese-Americans during World War II, one of the greatest civil liberties disasters in our history. The same man who came to the Court to prevent the judiciary from frustrating the will of the majority became its most ardent defender of the rights of the minority. Oddest of all, perhaps, is that this least trained of Supreme Court Justices, who prior to his appointment had never held a legal post higher than that of Jefferson County (Ala.) solicitor, emerged as its dominant intellectual force and most avid student of constitutional history.

Raw ambition explains much of LBJ's incongruities.[1] Judicial biographies remind us that judges have ambitions, too, particularly judges who, like Black, come from a background in electoral politics. While Roger K. Newman's new biography[2] is not rich in legal philosophy or historiography, it tells us much about Black the man, and in the process much about Black the

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1. See generally, Robert A. Caro, *The Years of Lyndon Johnson: The Path to Power* (Alfred A. Knopf, 1982); Robert A. Caro, *The Years of Lyndon Johnson: Means of Ascent* (Alfred A. Knopf, 1990).

2. Roger K. Newman, *Hugo Black: A Biography* (Pantheon Books, 1994).

jurist. First captivated by the raw power of Black's opinions in 1967, Newman spent a good part of the next quarter-century at work on this biography, interviewing thousands of Black's relatives, former clerks, Alabama political associates and even, in 1969, Black himself. The result is a thoroughly informed and highly readable study, filled with illuminating detail yet also graced with a perspective that keeps attention focused on the truly significant aspects of Black's fascinating life.

Newman's biography is especially timely because, in many ways, Black is back in vogue. Though Black was a political liberal, he never shared the philosophical relativism and pragmatism that shaped the outlook of the great Northern-educated liberal judges such as Holmes, Hand, Cardozo, and Brandeis. Black's unusual commitment to the power of legal texts and belief in immutable principles make him seem an oak in a forest of rootless judicial pragmatists. He is frequently invoked in that spirit today by advocates of judicial restraint, mainly on the right, who believe that the American tradition of judicial pragmatism leaves too much discretion in the hands of judges.

Newman—who persuaded Congress to issue a stamp in 1986 commemorating the 100th anniversary of Black's birth[3]—does not disguise his admiration for Black. The quotation from Emerson with which Newman opens the book evinces his belief in Black's greatness: "If a single man plant himself on his convictions and then abide, the huge world will come round to him."[4] But despite his obvious affection for Black, Newman is also a skillful, honest and at times sardonic reporter of the facts of Black's life, which he often uses to undermine Black's claims of conviction, and which make the Emerson epitaph seem more than a little ironic. As a new generation debates the relative merits of judicial formalism and judicial pragmatism, it is worth considering the evolution of Black's jurisprudence and the strength and significance of his convictions outside the four corners of his opinions and in the light shed by his personality, life experiences, and aspirations.

I

"I'm just a Clay County hillbilly," Black liked to say, referring to his roots in the Alabama backcountry.[5] One is reminded of the character from "Unfrozen Caveman Lawyer," the Satur-

3. Newman, *Hugo Black* at 628 (cited in note 2).
4. Id. at ix.
5. Id. at 3.

day Night Live skit from a few years back, who, awakening after thousands of years, transforms into a wily and highly successful American trial lawyer. "I'm just a caveman," Unfrozen Caveman Lawyer told juries, affecting unsophisticated humility. In neither his case nor Black's was the self-effacement warranted.

Charming, cunning, combative, and full of energy, Black (like Unfrozen Caveman Lawyer) was a trial lawyer. Throughout his life he remained, Newman observes, "an advocate down to his bones."[6] His formal legal education consisted of a two-year program at the University of Alabama law school, to which he was "apparently admitted in violation of [the school's] regulations," not having attended an undergraduate institution or taken the necessary examinations.[7] Graduating at age 20, Black went on to become the leading personal injury lawyer in Birmingham, Alabama, mainly representing injured workers in suits against corporations. "The courtroom was his theater," writes Newman. "He bluffed and gambled. . . . He used facial expressions—a smirk, grimace or raised eyebrow, a tense or eager look. . . . He moved around confidently and purposely," striking "a pose of confident humility. . . . He tried to make jurors feel not that he was a great showman, but that he just had a great case."[8] Black likely was the only Supreme Court Justice who took an aptitude test that found him best suited to be an actor.[9]

Populism and racism made for a dangerous brew in the Birmingham of the 1920's, a working-class city known as "the Pittsburgh of the South."[10] At the same time Black was making his

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6. Id. at 354.
7. Id. at 18, n*.
8. Id. at 55.
9. Id.
10. See Paul Hemphill, *Leaving Birmingham: Notes of a Native Son* 15-26 (Viking Press, 1993) ("*Leaving Birmingham*"). Birmingham was bustling and prosperous in these days, the third-largest city in the South. World War I perked up factory production, and the boom continued after the war. But

> lurking deep below the surface, like a latent volcano smoldering and building its strength toward some cataclysmic day of reckoning, there was another Birmingham. Of [the] 310,000 people in the metropolitan area, 133,000 were black—the highest percentage of blacks in any North American city of 100,000 or more. They were the sons and daughters of slaves and sharecroppers, and even though they were one-half of the work force, they held the most menial jobs, as domestics, yardmen, simple laborers. They lived in a thoroughly segregated society, in scores of shaggy communities dismissed as "Niggertown," and shared not at all in the city's periods of good fortune. In 1910, when there were 19,000 white children in public schools and a like number of blacks, the white schools were valued at $1,374,000, the black schools at only $81,680. To be sure, life was anything but a dream for black people in the other large southern cities, such as Memphis, Atlanta, and New Orleans; but in Birmingham, a gritty town of muscle and very little gentility and grace, segregation was maintained with great vigor.

mark, a baseball radio broadcaster by the name of Theophilus Eugene Connor—nicknamed "Bull" for his ability to shoot the bull on the air—was also acquiring a reputation as a friend of the Birmingham workingman.[11] Black was a populist and, although Newman convincingly debunks any notion that he was a racist, Black was not above making blatantly racist appeals to all-white Protestant Birmingham juries. Defending a Protestant minister accused of murdering a Catholic priest who had married the minister's rebellious daughter off to a Puerto Rican laborer, Black paraded the bridegroom before the jury under Klieg lights designed to highlight his dark complexion. Black also read from the official KKK prayer in his summation. The jury found that the minister had acted in self-defense.[12] Black also successfully defended a white man who, taking justice into his own hands, avenged his brother's murder by killing a black tenant farmer named Luke Ware on the courthouse steps moments after Ware (astonishingly enough) was acquitted by a white jury. "[A] tear roll[ing] down his cheek," Black invoked the ancient tradition making it the duty of the oldest son to avenge the killing of another family member. After the verdict, Black was more prosaic. He told his client, who had thanked God for his victory: "Don't thank Him. Thank me. *God* knows you're guilty."[13]

Black's reputation, and income, grew rapidly. But his sights were set not on acquiring great wealth but on acquiring high political office. Accordingly, Black did what almost all politically ambitious Alabamans did in the 1920's: he joined the local "klavern" of the KKK, the Robert E. Lee Klan No. 1. The Invisible Empire was then very visible in Birmingham. The ceremony at which Black and 1,500 others were inducted in 1923, in front of "large flaming crosses," took place in a public park and was reported in the *Birmingham News*.[14] Later Black minimized his involvement, but Newman shows that Black, in fact, was an active Klansman, an officer who initiated new members, spoke at Klan meetings around the state in full Klan regalia, and marched

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Id. at 25-26.

11. Id. at 106-07.

12. Newman, *Hugo Black* at 81-85 (cited in note 2).

13. Id. at 118-21.

14. Id. at 91-92. KKK initiation ceremonies

> were gala family outings: whole lazy days filled with boating and picnicking and dancing at city parks, drawing crowds as large as 50,000, capped as darkness fell by the sight of as many as 1,750 men stepping forward in hooded white sheets to be publicly welcomed to the Klan in the eerie light of a burning cross. Forty years later, their distant heirs would dynamite a black church, killing four little girls, plunging Birmingham into a nightmare without end.

Hemphill, *Leaving Birmingham* at 26 (cited in note 10).

in parades.[15] Newman also demolishes Black's suggestions over the years that he joined the Klan casually, much like one would become a Rotarian, in order to enhance his law practice. It was, instead, a calculated decision to get ahead politically.[16] Black had, it seems, planted himself squarely—but on his ambitions, not his convictions.

Newman does argue, as did Black at times, that joining the KKK was simply an unavoidable fact of Alabama politics in the 1920's.[17] But not all Southern politicians made the same choice Black did. James F. Byrnes, for example, refused the invitation of the South Carolina Klan in 1924, and as a result lost his campaign for the Senate that year.[18] But Byrnes won election to the Senate six years later, after the Klan's popularity crested and the Depression began, and went on to become a major figure in the Roosevelt Administration and, briefly, a colleague of Black on the Supreme Court. Black's nearest rival in the 1926 primary, John H. Bankhead, did not join the Klan, but was elected Alabama's second senator in 1930, defeating the Klan's candidate, the virulently anti-Catholic J. Thomas Heflin.[19] A premise of Black's subsequent First Amendment jurisprudence was that politicians should not capitulate to the passions of the moment. Yet that was what Black did when he joined the Klan.

With the Klan's strong backing—Black's friend, the Grand Dragon of Alabama, was "campaign manager in everything but name"[20]—Black won a tight Democratic Senate primary in 1926. At a Klan victory celebration, he acknowledged his debt, thanking the Grand Dragon and his fellow members "from the bottom of a heart that is yours."[21] Two terms in the Senate proved him an ardent and loyal New Dealer, who advanced economic reform proposals more radical than the Roosevelt Administration's, strongly supported Roosevelt's Court-packing plan, and led an investigation into corporate lobbying practices that drew harsh criticism, not all of it from conservatives, for its partiality and strong-arm tactics.[22]

Black hardly cut a Solomonic figure. His only prior judicial experience was an eighteen-month stint as a municipal police

15. Newman, *Hugo Black* at 94 (cited in note 2).
16. Id. at 96-100.
17. Id. at 99-100.
18. David Robertson, *Sly and Able: A Political Biography of James F. Byrnes* 91-94 (Norton, 1994).
19. Newman, *Hugo Black* at 102, 139-40 (cited in note 2).
20. Id. at 104.
21. Id. at 116.
22. Id. at 154-61, 175-94, 209-14.

court judge when he was in his mid-20s. But then Franklin Roosevelt was not looking for moderation and judiciousness in his first appointment to the Supreme Court. The President was looking for revenge, against a Senate that had unexpectedly rebelled at his Court-packing plan. In Black, Roosevelt found "the perfect vehicle for retaliation"[23]: an ideologically pure, often extreme, liberal whose membership in the Senate nonetheless assured a swift and easy confirmation by his colleagues (so swift and easy, in fact, that Black's prior membership in the Klan did not come up at all in the confirmation proceedings and only became a national controversy after Black was confirmed).

II

The Supreme Court was never Black's goal. The White House was. One of Newman's most interesting revelations is that it was a goal Black continued to pursue even after his appointment to the Court. "He never lost his desire to be president," Newman writes.[24] "There was no way you could tell him he wasn't going to be president," a journalist friend said. "He just had it in his head."[25] According to Alabama political associates, Black agreed to go on the Court hoping it would be a steppingstone to the Presidency.[26]

According to Newman, Black twice nearly succeeded. Not in 1940—memories of the KKK controversy were still too fresh for Roosevelt seriously to consider running with Black, though the idea was discussed and Black even told Roosevelt he was prepared to resign from the Court.[27] (Newman also reports, mysteriously and without elaboration, that Black considered running against Roosevelt for President in 1940.[28]) In 1944, however, as Henry Wallace was being dumped from the Democratic ticket, New Deal power-broker Tommy Corcoran told Black that "[w]e've got labor and the liberals lined up for you" and that the vice-presidential nomination "is yours if you want it." Black declined because of his wife's poor health at the time.[29] Had he decided differently and been elected Vice President, of course, the buck would have stopped with him, not with Harry S Truman, after Roosevelt's death the following year.

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23. Id. at 236.
24. Id. at 306.
25. Id. at 309, n*.
26. Id. at 235, n*.
27. Id. at 306-07.
28. Id.
29. Id. at 309.

In 1948, at age 62, Black took one last shot. He went back home to Alabama to discuss a possible Presidential bid with longtime political allies. With conservatives in control of the state party and dissatisfaction growing among Southern Democrats over the national party's emerging commitment to civil rights, the response was uniformly negative. Black took the advice, again, Newman says, missing a golden opportunity. For according to Truman intimate Clark Clifford, Truman was having second thoughts about running at the time and, had he known of Black's interest, would have stepped aside.[30]

Newman's account seems vastly to overstate Black's chances in both 1944 and 1948. Roosevelt and his closest advisors (Corcoran, by that time, was not among them) did not want a Southerner on the ticket in 1944. Jimmy Byrnes, who had not joined the Klan, was vetoed as a possible candidate because of feared opposition from liberals and blacks.[31] It hardly seems likely that Black, given his past, would have merited greater consideration. Black is not mentioned in David McCullough's account of the 1944 vice-presidential machinations in his recent biography of Truman. Nor does McCullough mention Black as a possible Presidential contender in 1948, and in fact he argues that by the beginning of 1948 Truman was determined to run.[32] (Truman did, however, offer the vice-presidential nomination in 1948 to Black's colleague, Justice William O. Douglas, who turned it down.[33])

Nevertheless, Black's Presidential aspirations during his first 11 years on the Court do raise an obvious and important question: Did they exert any influence on his behavior as a Justice? Unfortunately, it is a question that Newman does not explore. Moreover, it is impossible from Newman's account to gauge the seriousness of Black's ambition for national office, whether it was a constant passion, part of his daily mental life, or a passing fancy that struck every four years only to fade with the election season. Some tentative observations seem fitting.

If a part of Black, during this time, was running for national office from the Court, logically one would expect him to have had at least three goals in mind. He ought to have wanted to defuse any concerns among liberals about his membership in the Klan; to compile a strong voting record in favor of labor, a pow-

30. Id. at 383-84.
31. David McCullough, *Truman* 297, 311-12 (Simon & Schuster, 1992).
32. Id. at 584-86.
33. Id. at 635, 637.

erful Democratic constituency; and to avoid alienating the incumbent Democratic Presidents, who were best situated to offer him a vice presidential nomination. In fact, all three tendencies may be observed in Black's voting record and opinions during his early years on the Court. (One also would have expected him to keep up his political contacts, and there is evidence of this, too: Black continued to see Roosevelt and socialize with other members of the Administration, he gave political advice, he lunched occasionally with the Alabama congressional delegation, he was honored by a liberal group at a huge dinner featuring much of political and official Washington and, as World War II came to a close, he spoke publicly about foreign policy.[34] In these extrajudicial activities Black was not much different from the other Roosevelt appointees.[35])

Soon after Black was appointed, Chief Justice Charles Evan Hughes, to allay the public's suspicions over Black's racial views, assigned him several cases overturning the convictions of black defendants in the South.[36] Black became the Court's "Southern civil rights expert."[37] In 1940, he wrote for a unanimous Court in *Chambers v. Florida*,[38] reversing the convictions and death sentences of four blacks who were coerced into confessing to a crime. Although Black at first resisted the assignment, he then poured his heart into it—"There's been no case which I put more work in"—and produced a masterpiece.[39] The protections of due process, he declared, were "deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."[40] The opinion drew the highest praise from editorial writers across the country, even from papers that had blasted Black for his KKK ties less than three years before. "Any doubts about Black's commitment to the Constitution and civil liberties were quickly stilled."[41]

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34. Newman, *Hugo Black* at 303, 305-08, 333, 377-78 (cited in note 2).

35. See generally, Bruce Allen Murphy, *The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices* (Oxford U. Press, 1982).

36. Merlo J. Pusey, 2 *Charles Evans Hughes* 773-74 (MacMillian, 1951). See *Pierre v. Louisiana*, 306 U.S. 354 (1939) (systematic exclusion of blacks from jury pools violates equal protection clause); *Chambers v. Florida*, 309 U.S. 227 (1940) (coercing confession of murder violates due process); *White v. Texas*, 310 U.S. 530 (1939) (reversing conviction of black farmhand who confessed to rape charges after being whipped by "Texas Rangers").

37. Edwin McElwain, *The Business of the Supreme Court As Conducted by Chief Justice Hughes*, 63 Harv. L. Rev. 5, 18, n.21 (1949).

38. *Chambers*, 309 U.S. at 227.

39. Newman, *Hugo Black* at 281-82 (cited in note 2).

40. *Chambers*, 309 U.S. at 241.

41. Newman, *Hugo Black* at 283 (cited in note 2).

The Flag Salute cases of the early 1940's, in which the Court did an about-face in just three years, gave Black another opportunity to distance himself from the Klan's intolerance. Black joined the Court's initial 8-1 decision, issued shortly before its 1940 Summer recess, which held that Jehovah's Witnesses could be forced to salute the flag and recite the Pledge of Allegiance in public schools.[42] The decision was met with a firestorm of criticism by liberal commentators and 171 leading newspapers across the country.[43] According to a scrapbook kept by Justice Felix Frankfurter, who authored the Court's initial decision, Justice Douglas returned after the recess and told Frankfurter that Black had changed his mind, because "he has been reading the papers."[44] Newman charges that Frankfurter "invented" this conversation; the charge is not inherently implausible, but Newman inexcusably provides no citation or explanation for it.[45] (The Douglas conversation is reported as a fact in last year's biography by Gerald Gunther of Judge Learned Hand.[46]) Whether or not he was tailoring his views to the prevailing winds of public opinion, Black, as well as Douglas and Justice Frank Murphy, soon announced, in an "extraordinary public statement" in a case that did not raise the same question, that they had changed their position.[47] The next year the Court overruled the 1940 decision, leaving a bitter Frankfurter in dissent.[48]

Labor could have found no fault with Black during this time. He consistently voted for expansive interpretations of the newly enacted federal labor laws.[49] He dissented in cases limiting the authority of the National Labor Relations Board, not alone, but notwithstanding the disagreement of other liberal Justices.[50] In a celebrated 1945 case that came up in the midst of a national coal strike, Black and Douglas apparently asked Murphy, who was writing the majority opinion adopting the miners' interpretation of the Fair Labor Standards Act, to rush preparation of the opin-

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42. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

43. H.N. Hirsch, *The Enigma of Felix Frankfurter* 152-53 (Basic Books, 1981).

44. Id. at 152.

45. Newman, *Hugo Black* at 298 (cited in note 2).

46. Gerald Gunther, *Learned Hand: The Man and the Judge* 564 (Alfred A. Knopf, 1994).

47. Id. See *Jones v. Opelika*, 316 U.S. 584, 623-24 (1942) (Black, J., dissenting).

48. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 646 (1943).

49. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *NLRB v. Bradford Dyeing Ass'n*, 310 U.S. 318 (1940); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

50. See *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 265-68 (1939) (Black, J., dissenting); *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 346 (1939) (Black, J., dissenting); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 200-08 (1941) (Black, J., dissenting).

ion so that it might influence ongoing negotiations between the Government and the miners' union.[51]

Union picketing frequently appeared on the Court's docket in the 1940's. Black voted in each of five cases in the early '40s to find such picketing protected by the First Amendment.[52] At least at the level of generality, this record does not seem consistent with Black's later refusal to extend protections to picketing, sit-ins and other forms of protest by civil rights demonstrators in the 1960's. "Picketing," Black wrote in one such case in 1965, "though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment."[53] Discussing the civil rights cases, Newman explains that Black "abhorred violence above all and would do anything in his power to prevent even the merest possibility of its occurrence."[54] Yet that was the same objective of a Frankfurter opinion in a 1941 decision, sustaining an injunction against union picketing "set in a background of violence" during a labor dispute.[55] Black nonetheless dissented, finding the connection between the picketing and the violence too tenuous, and adopting as the polestar of decision the imperative of protecting free speech, "as important to the life of our government as is the heart to the human body."[56]

The early Black was exceedingly deferential to the authority of the Federal Government. In 1938 he was the sole dissenter from a decision holding that the Agriculture Department failed to accord procedural due process before fixing maximum commission rates for the sale of livestock.[57] (Justices Louis D. Brandeis and Harlan F. Stone joined the majority opinion.) In 1942 he concurred specially to emphasize that judicial review of rate-fixing orders issued by the Federal Power Commission be "the

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51. Newman, *Hugo Black* at 333-35 (cited in note 2). The case was *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161 (1945).

52. *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*, 315 U.S. 769, 775 (1942) (Black joining Douglas' concurrence); *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U.S. 722, 729 (1942) (Black, J., dissenting); *Milk Wagon Drivers Union of Chicago Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 299 (1941) (Black, J., dissenting); *American Fed'n of Labor v. Swing*, 312 U.S. 321 (1941); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

53. *Cox v. Louisiana*, 379 U.S. 559, 578 (1965) (Black, J., concurring in part and dissenting in part).

54. Newman, *Hugo Black* at 550 (cited in note 2).

55. *Milk Wagon Drivers Union*, 312 U.S. at 294.

56. Id. at 302 (Black, J., dissenting). It was not until 1949 that Black sustained an injunction against labor picketing. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

57. *Morgan v. United States*, 304 U.S. 1, 22 (1938) (Black, J., dissenting).

barest minimum" consistent with Congress' instruction to the courts to review such orders.[58] In 1944 he agreed that Congress could validly restrict the right of a meat dealer to challenge the constitutionality of regulations issued by the Office of Price Administration for enforcing compliance with wartime price controls.[59] (Liberals Frank Murphy and Wiley B. Rutledge dissented.) If there was a case of major importance in which Black disagreed with the Roosevelt Administration, Newman does not discuss it.[60] Black did not, however, typically bow to exercises of Presidential authority throughout his career. He wrote the Court's opinion holding that President Truman went too far in ordering, without congressional authorization, the 1952 seizure of the nation's steel mills to prevent an industry strike from interfering with prosecution of the Korean War.[61]

Moreover, in the most important civil liberties case during Black's first few years on the Court, Black sided not with civil rights but with the Roosevelt Administration. By a 6-3 vote, the Court in *Korematsu v. United States*[62] refused to find unconstitutional the uprooting of more than 100,000 persons of Japanese descent living on the West Coast—the vast majority loyal American citizens—and their internment behind barbed wires for more than two years. In the *Chambers* case Black wrote: "Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement."[63] But that conviction did not extend to the Japanese minority blown from their homes and their lives by the winds of wartime hyste-

58. *Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 608 (1942) (Black, J., concurring).

59. *Yakus v. United States*, 321 U.S. 414 (1944).

60. The closest is *United States v. Bethlehem Steel Corp.*, 315 U.S. 289 (1942), in which Black, writing for the Court, held that the Government could not recover allegedly unconscionable profits earned by a shipbuilding contractor during World War I. (The Government's suit, though pressed by the Roosevelt Administration, actually was initiated in the 1920's.) Though refusing to adopt the Government's creative theories for avoiding its contractual obligations, Black's opinion nonetheless expressed "indignation" at war profits and declared that the opportunities war presents for profiteering "have been too often scandalously seized." Id. at 308, 309. The opinion concluded by suggesting various ways for Congress to "meet this recurrent evil." Id. at 309. In fact, Black said that he voted in the contractor's favor because that was "the best way to stop" the Government from continuing with the contract system that had produced this result. "[Black's] opinion was a letter to Congress to take action," says Newman, which Congress subsequently did. Newman, *Hugo Black* at 289 (cited in note 2).

61. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

62. *Korematsu v. United States*, 323 U.S. 214 (1944).

63. *Chambers*, 309 U.S. at 241.

ria. Indeed, Newman writes that "Black wanted to immunize the military completely from judicial review during wartime" (although Black's opinion for the Court did not go so far).[64] Black had already begun groping toward the absolutist, no-exceptions interpretation of the Bill of Rights which would become his trademark and its accompanying skepticism about governmental predictions that disaster would result unless liberty was curtailed.[65] But in *Korematsu*, he wrote that, although legal restrictions which curtail the civil rights of a single racial group are immediately suspect, "[p]ressing public necessity" may nonetheless justify them[66]; and he accepted at face value the military's claim that there was no alternative to this odious discrimination.

Had Black and Douglas, the Court's most reliable civil libertarians, voted differently in *Korematsu*, they would have changed the outcome. *Korematsu* would not "lie[ ] about," as Justice Robert Jackson feared in his dissent, "like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[67] (Thankfully, *Korematsu* does not look as potent a weapon today as it did then, having been subjected to withering attack over the years, though from outside rather than inside the Court. A Presidential Commission concluded in 1983 that the decision "lies overruled in the court of history."[68]) Douglas in fact initially planned to dissent, but was talked into joining the majority by Black.[69] Although the position Black and Douglas took no doubt diminished their standing in the liberal community, it seems reasonably clear that taking the opposite position would have had worse consequences for any future political career. A condemnation by the Court of the Japanese-American internment program would have been a slap in the face to President Roosevelt, who personally approved the program; and it would have been immensely unpopular in California, an important part of the Democrats' national electoral coalition. It is impossible not to speculate that Black's and

64. Newman, *Hugo Black* at 316 (cited in note 2).

65. "Narrow abridgments have a way of broadening themselves," Black wrote in a draft opinion in 1941. Newman, *Hugo Black* at 290, n* (cited in note 2). Courts must "scrutinize legislation with zealous eyes whenever it is challenged as an infringement of the rights constitutionally declared to be inviolable," he had commented on a colleague's draft opinion. Id. at 283.

66. *Korematsu*, 323 U.S. at 216.

67. Id. at 246 (Jackson, J., dissenting).

68. Peter Irons, *Justice at War: The Story of the Japanese American Internment Cases* 372 (U. of California Press, 1983).

69. Newman, *Hugo Black* at 317 (cited in note 2).

Douglas's seemingly uncharacteristic votes in *Korematsu* may have been influenced by these considerations.

I do not mean to suggest by any of this that Black made calculated decisions during his early years on the bench to jettison his personal beliefs in favor of positions that would better serve his political ambitions. There is no evidence to sustain that suggestion. It also bears great emphasis that Black's positions in these cases accorded with his basic ideological and political outlook. He was a liberal; he was sincerely committed to civil liberties; he had always fought, as a private lawyer and a Senator, on behalf of labor; he genuinely revered Roosevelt and believed in his policies. In the *Korematsu* case, there was an additional factor: Black was personal friends with General John L. DeWitt, the West Coast Commander who had ordered and overseen the evacuation program.[70] No doubt Black's faith in DeWitt's judgment, if not a sense of personal loyalty, colored his decisionmaking in *Korematsu*.

But the influence of ambition on reason is usually more subtle. It can be the puff of wind that imperceptibly pushes analysis in one direction rather than another, the unseen pebble that tilts the scales this way or that. It is by no means clear that Black's presidential aspirations influenced his actions as a Supreme Court Justice even in this limited sense. But the topic seems worthy of further inquiry in any complete assessment of his life and legacy. Of all the many factors that tug at a judge's conscience in deciding cases, personal political advantage should not be among them. The Framers tried to create the most independent judiciary, one in which there would be neither "unwillingness to hazard the displeasure" of the political branches nor "too great a disposition to consult popularity."[71] Black himself reacted with disdain to the frequent rumors identifying Douglas as a potential presidential or vice-presidential candidate. "That Douglas then would even think of leaving the Court to run for office upset Black," writes Newman.[72] "Once someone is appointed to this court," Black said, "he should stay here."[73] Yet these "noble thoughts," Newman notes, "never stilled Hugo's own political ambitions"; the rule was one he found easier to apply to others than to himself.[74] It would be ironic indeed if the Justice who

70. Id. at 235, 313-14.

71. Federalist 78 (Hamilton) in Clinton Rossiter, ed., *The Federalist Papers* 464, 471 (Mentor, 1961).

72. Newman, *Hugo Black* at 329 (cited in note 2).

73. Id.

74. Id. at 329, 383.

urged unyielding obedience to the intentions of the Framers departed from this most basic of their teachings in his own life on the bench.

III

Black was appointed primarily to help stop the Court's use of substantive due process to block implementation of the Roosevelt Administration's economic reforms. Substantive due process was "why I came on the Court," Black later said. "I was against using due process to force the views of judges on the country."[75] Even before Black arrived at the Court in the Fall of 1937, however, this battle was basically over. That spring Justice Owen Roberts, in the famous "switch in time that saved nine," began voting to sustain New Deal legislation.

But a new battleground soon emerged: the scope of the Constitution's protections of personal freedoms against Government interference. As more Roosevelt appointees replaced departing conservative justices, it was a battle pitting New Dealers against New Dealers, chiefly Black against Felix Frankfurter, ex-FDR Braintruster and Harvard law school professor. And Black, ironically enough, became a champion of an expansive interpretation of the Bill of Rights to prevent the democratically elected branches from infringing upon individual liberties in the name of society's interests. After a mere four years on the Court, Black's "initial doubts about the legitimacy of judicial review had almost completely evaporated."[76]

Many other liberals underwent a similar transformation. What is peculiarly interesting about Black is the jurisprudential position he advanced, and articulated so passionately, in support of his views. Black was fully aware of the Court's significance in American life. "You and I," he wrote Douglas in 1941, "know that the Court has the last word on questions of law which are determinative of questions of public policy upon which the course of our Republic depends."[77] Yet Black's exercise of this power was rooted in a judicial philosophy that sought to deny its existence. To Black the Constitution spoke in absolutes. He abhorred judicial "balancing," in which the interests of society are weighed against the interests of the individual under the circumstances of a given dispute. He read legal texts literally. When the Framers wrote that "Congress shall make no law . . . abridg-

75. Id. at 277.
76. Id. at 286.
77. Id.

ing the freedom of speech, or of the press," to Black that meant *no* law.[78] For years Black carried on his person a "dog-eared, almost frazzled and all-marked-up copy" of the Constitution, which he would invariably reach for in the midst of debate. ("Of course," Newman wryly notes, "it was a prop, just for show, completely unnecessary, since he had memorized the Constitution."[79]) Black also decorated his textual analyses with copious historical references to the circumstances leading to the Constitution's adoption and to the intent of the Framers.

Black's philosophy remains of special interest today because the current Supreme Court finds itself in a similar debate between text-bound, rule-oriented formalists and advocates of a more freewheeling judicial pragmatism. But Black's methodology has now been appropriated by more conservative judges and scholars. In the 1980's it was Edwin Meese and Robert Bork that proclaimed fidelity to the "original intent" of the Framers as the only legitimate method of constitutional interpretation. If one were to pick a jurisprudential (as opposed to an ideological) disciple of Black on the current Court, it would be Justice Antonin Scalia. Scalia, joined by other conservative jurists, insists that the text be the determinative guide in both constitutional and statutory interpretation. He opposes balancing with a fervor equal to Black's and urges the Court to fashion clear and definite rules whose application is not highly sensitive to varying factual circumstances.[80] Other Justices favor indeterminate standards over bright-line rules and seek to interpret statutes and the Constitution in accordance with their perceived purpose instead of their literal meaning. The clash between the two positions has figured prominently in several recent decisions and excited widespread scholarly attention.[81]

At the core of both Black's absolutism and Scalia's textualism is a belief that judges need to be constrained in exercising their judgment in deciding legal issues. To permit balancing is to invite judges to impose their own personal views about how the balance should be struck between competing societal values. It is to cede too much control to unelected and unaccountable officials over the content of public policy and individual freedom. The job of judges in a constitutional democracy should be to en-

78. U.S. Const., Amend. I.

79. Newman, *Hugo Black* at 568 (cited in note 2).

80. See generally, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179-85 (1989).

81. See generally, Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22 (1992).

force the will of others. Of course, for Black this most often meant enforcing what he perceived as the will of the Constitution's Framers to limit governmental action, whereas for Scalia it usually means deferring to the decisions of the democratically elected branches of government. But the basic principle remains the same: depriving judges of the ability to shape the contours of our law on the basis of their personal preferences.

When people as strong-willed as Hugo Black—or, for that matter, Antonin Scalia—present themselves as passive enforcers of the will of others, mere conduits through which flow the currents of constitutional democracy, a hard-headed realism ought to take hold. Scalia's biography hasn't yet been written, but there is plenty of evidence in Black's that factors of personality and strategy played as great a role in determining Black's philosophy as any desire to avoid imposing the will of judges, including his own, on our law.

Absolutism came naturally to Black because he was a man of absolutes—it was, if you will, his personal preference. Great trial lawyers know how to project 100% certainty in the rightness of their cause. Black was a great trial lawyer and never ceased being one. "Try as he did," observes Newman, "he could not get advocacy out of him—just as no one, despite every best attempt in the world, can remove one's past."[82] The constitutional history he brought to bear "was an advocate's history: he proved too much and ignored or swept away all doubtful evidence."[83] Throughout his career, Black lived in a world of black and white—of heartless employers and maimed employees, of rapacious utilities and defrauded consumers. He relished a good fight; "crusading was in his bones."[84] Before going on the Court, Black feared that life there "would be dull."[85] From his first Term, in which he filed lone dissents a record eight times, to his later years, when he found himself increasingly in dissent from the Warren Court's expansive interpretations of the Constitution, Black made sure he would not be bored. "In dissent his creative urge found an outlet."[86] That Black developed the provocative philosophy he did is one of the least surprising things about him.

On a psychological level, Black's denial of the judge's role in constitutional interpretation may have served an important function. Judges were Black's antagonists as a trial lawyer and a New

82. Newman, *Hugo Black* at 354 (cited in note 2).
83. Id.
84. Id. at 275.
85. Id. at 235.
86. Id. at 275.

Deal senator. Time and again Black saw the verdicts he won before Alabama juries thrown out or cut down by the Alabama appellate courts.[87] The District of Columbia Supreme Court stopped his Senate committee from subpoenaing telegrams that passed between business interests Black was attacking and a prominent Chicago corporate law firm, a ruling Black denounced as "malicious."[88] And of course, like every liberal of his generation, Black experienced first-hand the Supreme Court's excesses in blocking economic reform. Every bone in his body rebelled against the notion of judicial power. His textualism and absolutism allowed him to eat his judicial activism and have it too: he could lead a Court that fundamentally changed American society while denying that judges were doing anything but the Framers' bidding. Thus when asked, in a 1968 television interview, about criticism of the Warren Court's decisions restricting police methods, Black could reply, with great sincerity if little realism: "Well, the Court didn't do it. . . . The Constitution-makers did it."[89]

Nor can Black's philosophy be isolated from the internal struggle among the Roosevelt appointees for control of the Court. In Felix Frankfurter Black found a worthy combatant. Frankfurter came to the Court believing he would become its intellectual leader. He underestimated both his colleagues' own intellectual powers and their determination—especially Black's—to leave their own mark on the Court's history. Gradually over the years, Black's absolutism emerged as the antithesis of Frankfurter's thesis that judges must balance the needs of society against individual liberties and, in all but exceptional circumstances, find the former controlling. "To no small degree," Newman notes, the two "helped to define each other and the history of the Court during the time they served together."[90] Absolutism was a way for Black to fight Frankfurter on Black's own terms. Frankfurter's jurisprudence depended on careful ball control and intricate zone defenses that used principles of federalism, institutional competence, and concern for the Court's credibility as a shield against judicial activism. Black countered with a kind of jurisprudence by slam dunk. *WHAM!* The authors of the Civil War Amendments intended to make all the protections of the Bill of Rights applicable to the states, so there was no use debating which ones were more fundamental and less

87. Id. at 59-60.
88. Id. at 187-88.
89. Id. at 585.
90. Id. at 483.

suited to state control than others. *WHAM!* The First Amendment protected speech absolutely and without exception, so there was no use debating the strength of the state's reasons for limiting speech in any particular instance.

Newman also observes that Black's absolutism was a "rhetorical tactic."[91] He quotes a story Black told of a Senatorial colleague who would introduce two bills—"the one he wanted passed, and another that made the first one seem conservative."[92] Black did not apply his absolutism absolutely. He read the Constitution literally, Newman concludes, "[w]hen it served his end."[93] Black never, for example, held that the Contracts Clause, prohibiting states from "pass[ing] any . . . . Law impairing the Obligation of Contracts," meant *any* law.[94] Nor was he keen on enforcing, or even studying the origins of, the protections of the Fourth Amendment against unreasonable searches and seizures.[95] Nor, for that matter, did the fact that the First Amendment specifies only that "*Congress* shall make no law" stop him from applying it to acts of the executive or judicial branches infringing upon free speech. Moreover, even in those areas Black believed to be governed by absolutes, the judicial judgments he suppressed at one spot in the legal analysis reappeared in others. The First Amendment gives citizens an absolute right of free speech. But what is "speech"? Is wearing a jacket inscribed with the words "Fuck the Draft," as a form of political protest? (Black said no.[96]) Is showing a pornographic movie, as a means of profit? (Black said yes.[97]) Is picketing? (Black said yes,[98] sort of,[99] and no.[100]) Black drew a line between protected speech and unprotected conduct, but differentiating between the two inevitably requires an exercise of judgment.

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91. Id. at 497.

92. Id.

93. Id.

94. See *Wood v. Lovett*, 313 U.S. 362, 372 (1941) (Black, J., dissenting); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 109 (1938) (Black, J., dissenting). But cf. *El Paso v. Simmons*, 379 U.S. 497, 517 (1965) (Black, J., dissenting).

95. Newman, *Hugo Black* at 371-72, 554-55 (cited in note 2).

96. *Cohen v. California*, 403 U.S. 15, 27 (1971) (Black, J., dissenting).

97. *Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964) (Black joining Douglas' concurrence).

98. *Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 302 (1941) (Black, J., dissenting).

99. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (Black, J., writing for the Court).

100. *Cox v. Louisiana*, 379 U.S. 559, 578 (1965) (Black, J., concurring and dissenting).

Attributing the grounds for judicial decisions to the will of others is a way of divesting the judiciary of responsibility for those decisions. If judges merely enforce the written commands laid down by the Framers of the Constitution and the democratically elected branches of Government, they can hardly be blamed when the outcome seems unjust, or illogical, or even contrary to the purpose of the legal text itself. They have a ready response: "I'm just doing what those fellows there told me to do." But that is no more accurate a description of what judges do—what they have always done, what Black himself did, and what they are supposed to do in our system—than Black's diffident description of himself as a hillbilly.

Indeed, the confining textualism that Black sought then and Scalia seeks now to impose rests on an internal contradiction. Any decision to so narrow the judge's role—to make of her a mechanical linguist with a law degree—would itself be a very significant exercise of judgment, by judges, to change our law. It is not supported by the texts before which the theory commands the judge to bow. Neither the Constitution nor any statute contains what drafters of contracts call an "integration" clause, instructing the interpreter to limit herself to the words of the document in determining its meaning. Nor is such a change supported by our legal traditions. They, in fact, point in the opposite direction. Judges have always occupied a central role, in our common law system, in declaring what the law is. Legislators customarily enact vaguely worded statutes in the expectation that the courts will put meat on their bones. The "great generalities of the [C]onstitution," in Cardozo's phrase,[101] likewise presuppose reasoned elaboration by the judiciary.

Similarly, although Black urged strict adherence to the will of the Framers as expressed in the Constitution and their contemperaneous writings, he never made any historical showing that the Framers themselves agreed with this jurisprudential approach. In fact, the Framers were steeped in the tradition of English common law, which, in sharp contrast to the civil law system, tends to treat legal problems just as Black said they should not be treated: as "questions of reasonableness, proximity and degree."[102] This same defect inheres in the "original intent" school of constitutional interpretation: There is no good evidence that the original intent of the Framers was to bind fu-

101. Benjamin N. Cardozo, *The Nature of the Judicial Process* 17 (Yale U. Press, 1921).

102. Newman, *Hugo Black* at 492 (cited in note 2).

ture generations to interpret the Constitution in accordance with the Framers' original intent.[103]

So when an American judge says he cannot go beyond the words in front of him, he is really saying that he *will* not, and he is in this sense imposing his will to shape the law. Certainly this was true of Hugo Black. One supposes it is equally true of his more conservative jurisprudential disciples. There is no real escape, in our legal system, from the judgment of judges declaring, modifying, and making sense of the legal principles by which we are governed. Our democratic traditions dictate that we recognize that reality, not obscure it in the mist of a misleading formalism.

103. See generally, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985).