Two Constructions of Liberty: Hugo Black's and Robert Jackson's stances on free speech

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The wording of the First Amendment, "Congress shall make no law…abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble," has come to represent America's undying commitment to liberty from tyranny. However, for the justices of the Supreme Court, the wording has become increasingly troubling for those who are trying to tie down the exact meaning. The ambiguity of the words has led to the creation of a number of interpretations and positions on the proper role of free speech in a constitutional democracy. Both Hugo Black and Robert Jackson held the freedom of speech to be tantamount to the maintenance of a constitutional democracy; however, they understood the phrase, "freedom of speech," to mean two different things and came to different conclusions on what constituted an "abridgement" of this freedom. This difference between the stances of the two justices on the freedom of speech stemmed from the way in which they conceived of liberty and the government's role in protecting it. Placed in the general context of liberty, the debate in which the justices were participating was and continues to be fundamental to understanding the type of liberties protected by the Constitution.

The ambiguity of the words themselves played an important role in helping to create the wide variety of stances that exist on the right to free speech, and history bears this out. There can be no doubt that the phrase, "Congress shall make no law," is quite clear and absolute, but what exactly does it do absolutely? What did the framers mean by "abridging," and would they not have used the word "restricting" if that is what they intended? Furthermore, what did the "freedom of speech

and press" entail? Does this freedom protect everything that can be construed as speech, as some absolutists would contend, or is it limited to protecting speech that does not infringe upon the rights of others? Could one go so far as to say that the framers only meant to protect against prior restraint when constructing the First Amendment? There may not exist definitive answers to these questions, for the reason that the text of the Constitution is far from being absolute, though Black would argue otherwise. There are no definitive absolutes on which speech is protected and which is not, nor are there absolutes on when certain kinds of speech are protected and when they are not. Due to the lack of absolutes, the discussion and history on the freedom of speech is extremely varied and checkered.

The time in which the two justices were participating in this debate over free speech was dominated by the Cold War, the fear of Communism, and the growth of extremists on both sides of the political spectrum. In this sense, the debate over free speech, a fundamental right in America, was extremely important. The title of Arthur Terminiello's speech, "Christ or Chaos—Christian Nationalism or World Communism?," is quite representative of the rift and polarization of society that were occurring. This debate over what the First Amendment entails was transitioning into a debate over how to best protect democracy… and this debate is ongoing. The ways in which Black and Jackson approached the debate were the antithesis to each other. This divide was greater than the fact that Black held a more idealistic view and Jackson a more pragmatic one. The two justices constructed liberty in two fundamentally different ways.

In order to maintain the focus of the paper, it is necessary to establish the questions that will be addressed. Initially, the paper will deal with this set of questions: What were Black's and Jackson's respective positions on free speech, how did they come to hold these positions, did either justice shift his position, and, if so, what caused the shift? After this set has been answered, a broader question can then be addressed. What do their positions on free speech tell us about their understandings of the type of liberty created by the Constitution?

With respect to Black, his reading behind the history of the First Amendment led him to take an approach of absolute protection of free speech, which is clear in both his own writings and the secondary literature on him. It will also be argued that supplementing (and perhaps

influencing) his reading of the history behind the First Amendment protection of free speech was Black's belief in the essential nature that free speech plays in a democracy. Regarding Black's later years on the Court, it has been argued that his position on free speech shifted (or at least waivered). This shift has been attributed to the conservative tendencies of the aged and some have even suggested that he was becoming senile; however, the contrary will be argued in this paper. Black maintained internal consistency in his later years on the Court; however, analysis of some of his positions in his early years on the Court indicates that his famous opinions in the years directly preceding WWII represent a shift from his earlier positions.

In opposition to the absolutist approach Black eventually developed, Jackson approached constitutional questions over free speech in a pragmatic manner by balancing the governmental interests at stake. Jackson held that the First Amendment's protection of free speech was one of many aims the government had an interest in attaining. His understanding of the role of the government that was created by the Constitution in protecting the liberties of the people led him to the conclusion that the right to free speech presupposed order within society. In this sense, it was the role of the government to regulate any speech that threatened order. His conclusion that the maintenance of order was required for any liberty, including free speech, to exist, led him to adopt his balancing approach. However, this balancing approach, at least to free speech, became far more evident after his participation in the Nuremburg trials.

In the following pages, there will be an attempt to draw out the stances of the justices on free speech and how their stances changed over time. This will be accomplished by first examining the opinions and speeches/interviews of both Black and Jackson from before WWII. After their initial positions have been established, there will be an investigation of the positions which they eventually held and how they came to hold these positions. In both sections, the existing literature and notes from the Library of Congress will be used to enhance understanding of their positions and the shifts, as well as to highlight the differences and similarities between the two. Finally, in drawing upon how each justice came to his position, there will be a discussion of the negative and positive approaches to liberty and the role of the government that is implied in each approach. This is probably the most significant aspect of the paper and it has been largely left untouched by

the secondary literature.

II. Hugo L. Black

Justice Hugo Black's eloquence when defending the "no law means no law" position has made him a champion of the absolutist approach to free speech. With regard to the history of free speech, Black asserted that "our Founding Fathers…knew what history was behind them and they wanted to ordain in this country that Congress…should not tell the people…what they should believe or say or publish".[1] However, with the passing of the Sedition Act of 1798, only a decade after the ratification of the Constitution, a Congress made up of these Founding Fathers made it illegal to publish "false, scandalous, and malicious writings against the government of the United States."[2] History was not always on Black's side, and neither was the precedent of clear and present danger. If the history which Black called upon for support was muddled at best, how then can his position be vindicated? For Black, just as important as the history behind the Bill of Rights, was the role of the First Amendment's protection of speech in a constitutional democracy. He "regarded the First Amendment as the foundation of the American democratic process," in that it was as "important to the life of our government as is the heart to the human body."[3]

II. A) Black's Initial Position

By 1962, Black admitted that "it is my belief that there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant and meant their prohibitions to be 'absolutes.'"[4]

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1. Dennis, Everette, and Donald Gillmor. "Hugo L. Black: 'no law' means no law," *Justice Hugo Black and the First Amendment.* Eds. Everette Dennis, Donald Gillmor, and David Grey. Ames, Iowa: Iowa State University Press, 1979, 3-10. Print.

2. Sunstein, Cass. *Democracy and the Problem of Free Speech*. New York: The Free Press, 1993. Print.

3. Dennis, Everette, and Donald Gillmor. "Hugo L. Black: 'no law' means no law," *Justice Hugo Black and the First Amendment.* Eds. Everette Dennis, Donald Gillmor, and David Grey. Ames, Iowa: Iowa State University Press, 1979, 3-10. Print.

4. Cahn, Edmond. "Dimensions of First Amendment 'absolutes': a public interview," *Justice Hugo Black and the First Amendment.* Eds. Everette Dennis, Donald Gillmor, and David Grey. Ames, Iowa: Iowa State University Press, 1979, 41-53. Print.

Black was confident that "'no law' mean[t] no law."[5] However, in his early years on the Court, Black did not speak of absolutes with respect to the First Amendment, but rather was focused on the role order played in maintaining liberty. In the second flag salute case, *West Virginia State Board of Ed. v. Barnette (*1943*)*, he set up the same sort of balancing approach he would later condemn. Black opined that

> The First Amendment does not…free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner (HLB Library of Congress (LC) Box 270).

Though the primary concern in *Barnette* was freedom of religion rather than freedom of speech, freedom of religion is subject to the same "no law" language and is therefore relevant to Black's interpretation of the protection afforded to both freedoms in the Constitution. The notion that "time, place or manner" could be subject to governmental regulation was a position that Black held throughout his time on the Court; however, the idea that "laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers" are valid restraints on First Amendment freedoms seems to run contrary to any notion of absolute protection.

Mark Silverstein tries to explain this anomaly in Black's approach by qualifying it with the fact that, like Jackson, Black acknowledged that order was necessary in order to maintain freedom. In his copy of *The Greek Way* by Edith Hamilton, Black underlined, "liberty depends on self-restraint…freedom is only freedom when controlled and limited."[6] The difference between Jackson and Black with respect to order and free speech is that Black "was not troubled by the divisive possibilities of free and unrestrained speech."[7] In Black's view, the marketplace

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5. Cahn, Edmond. "Dimensions of First Amendment 'absolutes': a public interview," *Justice Hugo Black and the First Amendment.* Eds. Everette Dennis, Donald Gillmor, and David Grey. Ames, Iowa: Iowa State University Press, 1979, 41-53. Print.

6. Silverstein, Mark. *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making*. Ithaca: Cornell University Press, 1984. Print.

7. Silverstein, Mark. *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making*. Ithaca: Cornell University Press, 1984. Print.

of ideas was the only way in which a democracy could sustain itself, as competition in the marketplace for the minds of the people made revolution as a means of social change redundant. For Black, both freedom and order demanded the inviolable right to free speech. The problem remains, though, that this was a balancing approach and, furthermore, that it was not an anomaly.

In *Martin v. Struthers* (1942), a Jehovah's Witness challenged the constitutionality of a city ordinance that prohibited door-to-door distribution of literature. Originally, Black voted in a 5-4 majority to sustain the city ordinance. Black argued that in sustaining the ordinance, he was "weighing the conflicting interests of the appellant in the civil rights she claims and of the community in the protection of the interests of its citizens" (HLB LC Box 270). In this instance, the affront to the appellant right to free speech was discounted against the community's right to not be bothered by solicitations. Black would later change his vote, however, and write for a new majority that, in striking down the ordinance, he was now "weighing the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interests of the community which by this ordinance offers to protect the interests of all its citizens" (HLB LC Box 270). The shift is subtle, but Black was beginning to recognize the right of the population to hear the speech of others. Though this still represented a balancing approach, Black had added a great deal of weight to the side which called for a protection of free speech rights over any interests the government might have. In short, he was giving the right to free speech a *preferred position*.

In *Cox v. New Hampshire* (1941), Black voted with court to limit free speech to reasonable constrictions. The Court's opinion written by Chief Justice Hughes states that, "civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses" (HLB LC Box 262). This ruling was upholding a law which prohibited parading without a permit, which had been used to convict Jehovah's Witnesses. In his opinion, Hughes had highlighted the reasonableness of the law.[8] Black, in his turn, was concerned enough

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8. Silverstein, Mark. *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making*. Ithaca: Cornell University Press, 1984. Print.

by the use of the word "reasonable" to draft a concurrence, though he did not publish it.

> Fully realizing the difficulties involved in enforcing observance of these constitutional privileges in instances where they apparently clash with exertions of an admitted state power, I am still not persuaded that invocation of the word 'reasonable' offers a solution to the problem these difficulties present. Standards of reasonableness vary according to individual views. The broad and I might say limitless range within the area of differing concepts of the word 'reasonable' cause me to fear its use in relation to the cherished privileges intended to be guaranteed by the First Amendment…It is therefore sufficient to test the constitutionality of this statute by comparing it with the literal language of the First Amendment (HLB LC Box 262).

Silverstein points out that the need "to purge from the judicial process the vice of subjectivity caused Black, as early as the decision in Cox, to look to the literal language of the First Amendment."[9] Though Black is not yet proposing an absolutist approach or even a preferred position philosophy on the First Amendment, he is emphasizing his reliance upon the literal text of the Constitution.

It is in *Bridges v. California* (1941) that one can see Black begin to hold a preferred position philosophy with respect to the First Amendment protection of free speech. Black's majority opinion stated that,

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious, and the degree of imminence extremely high, before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow (HLB LC Box 266).

Bridges was a significant opinion for Black, but it must be placed

9. Silverstein, Mark. *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making*. Ithaca: Cornell University Press, 1984. Print.

within the context in which he drafted it. Before a court shuffle placed him in the majority, he wrote a dissent that set out the framework of his preferred position principle. In response to Frankfurter's circulating majority opinion, Black scribbled the question, "Must we in considering the comparative qualities and importance of right to exercise liberties guaranteed by the first amendment place courts and first amendment on parity?" (HLB LC Box 258). He followed this question with an emphatic answer: "I say no, Amendment ranks higher."

In his *Bridges* majority opinion, one can see the influence of his preferred position philosophy. He is still using the clear and present danger principle, which at heart is a balancing approach, but he is adding the preferred position of the First Amendment into the balance. Before the speech can be regulated, "the substantive evil must be *extremely* serious, and the degree of imminence *extremely* high." He has effectively set the scales of the balance where the interest in protecting free speech would nearly always outweigh any other interest, due to the fact that to an individual's interest in having free speech had been added society's interest in a free discussion.

II. B) Black's Shift to Absolutism

Black's jurisprudential approach to free speech expressed in his *Bridges* opinion was the position he held throughout the 1940s. The clear and present danger standard coupled with the preferred position philosophy allowed for the near-absolute protection of speech while permitting a limited amount of judicial flexibility. At that point in time, Black willingly admitted that "it may be true that there are no such things as absolute liberties" (HLB LC Box 258). However, once the Court dropped his formulation of the clear and present danger test, Black had a problem. In *American Communications Association v. Douds* (1950), the majority argued that, in adding the First Amendment "they [the Founders] sought to convey the philosophy that, under the First Amendment, the public has a right to every man's views and every man the right to speak them" (HLB LC Box 303). However, they quickly added that, "Government may cut him off only when his views are no longer merely views but threaten, clearly and imminently, to ripen into conduct against which the public has a right to protect itself" (HLB LC Box 303). It is in this sense that

> the probable effects of the statute upon the free exercise of the right of speech and assembly must be weighed against the

> congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by 9 (h) pose continuing threats to that public interest when in positions of union leadership"

Black's dissent in *Douds* was scathing. With respect to the ruling of the majority opinion, Black asserted that "such a result, while too barbaric to be tolerated in our nation, is not illogical if a government can tamper in the realm of thought and penalize 'belief' on the ground that it might lead to illegal conduct. Individual freedom and governmental thought-probing cannot live together" (HLB LC Box 303). The way in which Black constructed the issue in *Douds* suggests that Black was moving toward an absolute protection of speech. The majority of the Court assumed that a belief in communism, a political ideology that supports political strikes, necessarily led to the "evils of conduct" that Congress had a right to prevent. This, essentially, is prior restraint and a form of a test oath, which Black pointed out. Furthermore, the Court ruled that Congress' right to prevent political strikes outweighed individual's right to speech. Not only was the Court engaging in prior restraint, it has judged the evil associated with political strikes to be greater than the evil associated with infringing upon the right to free speech.

The Court continued to move away from Black in *Breard v. City of Alexandria* (1951). Whereas in *Martin v. Struthers* the Court had ruled that the right to engage in door-to-door solicitation trumped the right of a community to prohibit solicitations, the Court in *Breard* upheld a law that prohibited solicitations. Black's dissent here was more of an attack than a disagreement.

> Today a new majority adopts the position of the former dissenters and sustains a city ordinance forbidding door-to-door solicitation of subscriptions to the Saturday Evening Post, Newsweek and other magazines. Since this decision cannot be reconciled with the Jones, Murdock and Martin v. Struthers cases, it seems to me that good judicial practice calls for their forthright overruling. But whether this is done or not, it should be plain that my disagreement with the majority of the Court as now constituted stems basically from a different concept of the reach of the constitutional liberty of the press rather than from any difference of opinion as to what former cases have held.

> Today's decision marks a revitalization of the judicial views which prevailed before this Court embraced the philosophy that the First Amendment gives a preferred status to the liberties it protects. I adhere to that preferred position philosophy. *It is my belief that the freedom of the people of this Nation cannot survive even a little governmental hobbling of religious or political ideas*, whether they be communicated orally or through the press."

In this dissent, Black was fully aware that the Court was moving away from the precedent he had worked to establish. And this fact, by the end of his dissent had pushed him to the point of adopting an absolute position, though he still professed to simply hold a preferred position philosophy.

In *Dennis v. United States* (1951), Black came to the conclusion that the way in which the Court was using clear and present danger was a far cry from the majority opinion he wrote in *Bridges*. Black argued that

> The only way to affirm these convictions is to repudiate directly or indirectly the established "clear and present danger" rule. This the Court does in a way which greatly restricts the protections afforded by the First Amendment. The opinions for affirmance indicate that the chief reason for jettisoning the rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the Republic. Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. They embodied this philosophy in the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom. At least as to speech in the realm of public matters, I believe that the "clear and present danger" test does not "mark the furthermost constitutional boundaries of protected expression" but does "no more than recognize a minimum compulsion of the Bill of Rights.
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> Public opinion being what it now is, few will protest the

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

Black was still arguing in the terms of his *Bridges* opinion, which he believed was controlling. In fact, "Black at conference voted to reverse on the simple grounds that clear and present danger was not satisfied."[10] However, there is a realization that, if this was the protection that would now be afforded by clear and present danger, than a new test would need to be fashioned. With the shift in the clear and present danger test, Black could no longer accept the result of the judicial balancing; therefore, he moved to take it out of the hands of judges. A year later in *Beauharnais v. Illinois*, Black asserted that "the First Amendment, with the Fourteenth, 'absolutely' forbids such laws [restricting free speech] without any 'ifs' or 'buts' or 'whereases.'" Gone were the days when Black would conduct balances to calculate if government regulation of speech was appropriate, for the reason that a balancing of interests no longer accurately reflected the proper weighing of constitutional rights.

II. C) Black's Absolutism in Full Flow

In *Konigsberg v. State Bar* (1961), Black attacked the Court's use of a balancing test. He declared that the position the Court had taken "permits constitutionally protected rights to be 'balanced' away whenever a majority of this Court thinks that a State might have interest sufficient to justify abridgment of those freedoms." Black further explained that:

> I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field. The history of the First Amendment is too well known to require repeating here except to say that it certainly cannot be denied that the very object of adopting the First Amendment, as well as the other provisions of the Bill of Rights, was to put the freedoms protected there completely out of the area of any congressional

10. Silverstein, Mark. *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making*. Ithaca: Cornell University Press, 1984. Print.

> control that may be attempted through the exercise of precisely those powers that are now being used to 'balance' the Bill of Rights out of existence.

Following this line of argument, the Court was powerless to consider the interests at stake in any case involving the rights enumerated in the Bill of Rights. The act of balancing all the interests had already been done by the Founders and the language in the Constitution was clear; the rights included in the Bill of Rights are "completely out of the area of any congressional control." By this time, Black had realized that the Court had usurped the clear and present danger test as a means to restrict free speech rather than expand it as he felt Holmes and Brandeis had intended.

In *New York Times Co. v. United States* (1971), while advancing his absolutist stance, Black nearly went full circle back to his two opinions in *Bridges*. In *New York Times*, Black asserted that:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

The language he used in his original dissenting opinion in *Bridges* and parts of his majority opinion is identical to his language in *New York Times*. The difference being that instead of the clear and present danger test coupled with the preferred position philosophy being used to protect the vital freedom of speech, Black used an absolutist approach, which he felt compelled to take in response to willingness of the Court to balance away, in the name of security, the very rights that ensured the security of the Republic.

II. D) Black's Final Shift?

It has been argued that Black abandoned not only his absolutist approach in some cases near the end of his time on the Court but also his view that the First Amendment held a preferred position in any balance between interests. In *Brown v. Louisiana* (1965) in particular,

it has been argued that Black betrayed his own cause. However, one can see the roots of his position in *Brown*, where he voted to uphold the convictions of a group of black students who failed to leave a public library when asked to do so, in his opinion in *Barenblatt v. United States* (1959). In *Barenblatt*, Black acknowledged that laws that regulated conduct in a way which indirectly affect speech could be upheld "if the effect on speech is minor in relation to the need for control of the conduct." Conduct such as sit-ins and picketing were not protected by the Constitution and could therefore be regulated just as the time, place, and manner could be regulated, as well.

III. Robert Jackson

Black not only believed that the purpose of the First Amendment "was to withdraw from the Government all power to act"[11] in the area of speech, but he stated that "I do not think Congress *should* make any law with respect"[12] to speech. For Black, any sort of balancing act between the freedom of speech and some other government interest reduced the absolute protection of speech to a suggestion; however, Robert Jackson did not accept Black's adoption of a negative construction of liberty. Whereas Black believed the Constitution withdrew power from the government in order to protect the people's liberty, Jackson believed this liberty could not exist without order. Jackson espoused a positive construction of liberty, in that it was not the case that natural rights existed inherently and simply needed to be safeguarded from government encroachment, but rather it was the role of the government to guarantee these liberties. Liberty, for Jackson, could only exist under law; the alternative, lawlessness, stripped the people of their freedoms.

Jackson's stance destroyed any assumptions of the "firstness" of the First Amendment. Jackson's positivist construction of the liberties *guaranteed* by the Bill of Rights called for a pragmatic balancing of societal interests in cases involving the freedom of speech. It is here where it is important to note the shift that occurred in Jackson's opinions from before the Nuremburg Trials to after them. Before the trials, in civil

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11. Frank, John. "Hugo L. Black: Free Speech and the Declaration of Independence," *Six Justices on Civil Rights.* Ed. Ronald Rotunda. New York: Oceana Publications, Inc., 1983, 11-54. Print.

12. Cahn, Edmond. "Dimensions of First Amendment 'absolutes': a public interview," *Justice Hugo Black and the First Amendment.* Eds. Everette Dennis, Donald Gillmor, and David Grey. Ames, Iowa: Iowa State University Press, 1979, 41-53. Print.

liberties cases, Jackson would often use the high-principled language he would later condemn as impractical. For Jackson, something had deeply changed him, and caused him to move away from expanding liberties, in cases such as *Bridges, Barnette,* and *Thomas v. Collins* (1945) and instead stimulated him an intense examination of the role of order in a free society and, importantly, the role of the judiciary within the government of maintaining this order.

III. A) Jackson's Initial Position

It was difficult to read the cases included in this section without a sense of impending doom for what waited around the corner; however, once one can get past one's own value judgments, Jackson's opinions both before and after his experience in Nuremberg are intellectually stirring and deserve to be analyzed in the context in which he wrote them. It is important to note that, like Black, Jackson consistently held a primary goal of expanding liberty as far as possible. It is also important that, like Black, Jackson changed his judicial approach in order to attain his intended result, i.e. ensuring liberty. It is altogether fascinating that two justices, who aimed to achieve the same goal, came to completely opposite conclusions. And, if for nothing else, this needs to be explored.

In the *Bridges* case, it has been pointed out that Black was originally in the minority but that after a court shuffle, he emerged in the majority. A part of this shuffle involved Robert Jackson joining the Court. One of his first acts on the Court was to join Black's opinion that "the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." His joining of this opinion may have simply been a result of him judging the case on the merits and joining the opinion that seemed to support the correct outcome. However, the case was reheard after he had joined and, significantly, the draft opinions had already been circulated. He had the chance to read Frankfurter's and Black's original opinions and then work with one of them to form an opinion that he could join. In joining Black's opinion, he was essentially endorsing a preferred position reading of the First Amendment and moving to protect free speech as broadly as society would allow. Of course, this opinion created a great deal of flexibility for the Court, in that, though it did commit them to a preferred position stance, it allowed for them to determine just how far a "liberty-loving society" should go.

Though his vote in *Bridges* is revealing, many read Jackson's opinion in *Barnette*, the second flag-salute case, as a great triumph for liberty in America. The language Jackson assumed in his opinion was as noteworthy for its principled nature. If one visits any website created in honor of Jackson, it is this opinion one will find plastered on every page. In short, it is highly quotable and seems to even have had the purpose of espousing patriotic pride in all those who read it. Though an examination of this opinion could serve as the basis for its own paper, it is only necessary to highlight a few aspects of it. For instance, Jackson argued that:

> To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

And then, quite prophetically, he concluded that, "If there are any circumstances which permit an exception [to the absolute protection of First Amendment rights], they do not now occur to us." Jackson would come to encounter this exception in Nuremberg.

Before he learned of this exception that would sway the balance in favor of censorship, he wrote in *Thomas v. Collins*.

> The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. The forefathers did not trust any government to separate the true from the false for us. This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy.

It is probably this *Thomas* opinion that is most difficult to reconcile with his later opinions in cases such as *Terminiello* and *Dennis*, for the reason that he did not give himself an escape clause as he did in *Barnette*. If this excerpt had been put in the section on Black, it would not have appeared to be out of place.

III. B) Jackson's Experience at Nuremberg

Jackson believed that the political extremes of fascism and communism had "embroiled Europe generation after generation, crushing its manhood, destroying its homes, and impoverishing its life."[13] Jackson believed that "any tenderness to them is a victory and an encouragement to all the evils which are attached to their names."[14] Jackson came to the conclusion that, "Civilization can afford no compromise with the social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces now precariously survive."[15]

Though Jackson was making direct reference to the Nazis awaiting trial for war crimes, he was speaking in much broader terms…he spoke of "civilization" and "social forces." Considering the broad scope that he had adopted, his caution that "any tenderness to them is a victory and an encouragement to all the evils which they represent" is a bit startling. It is one thing to assume that he was speaking of tenderness in the trials that were about to take place, but it seems as though he was speaking about the broad "social forces" of communism and fascism. And, if that was the case, what did he mean by "tenderness"? Had freedom of speech become "tenderness" that civilization could ill afford to distribute to communists and fascists?

III. C) The Shift in Jackson's Approach to the First Amendment as a Result of his Experience in Nuremberg

If one looks outside the opinions of Jackson to get at the effect of Nuremberg on his thinking, one can examine the various speeches he gave after the trials. In these speeches, there are an incredible amount of references to the "rule of law." For Jackson, the law was the force that would stabilize society. His mindset could be compressed to the thought

13. Jackson, speech at Nuremberg

14. Jackson, speech at Nuremberg

15. Jackson, speech at Nuremberg

that society must be able to rely upon the law to save it from the wills of those who sought authoritarian power. Communists and fascists had become the exception. They did not contribute to the advancement of civilization, they did not contribute to the distribution of ideas (in Jackson's mind), and protecting their liberty only endangered the liberty of society at large.

Patrick Schmidt, in his essay "'The Dilemma to a Free People'": Justice Robert Jackson, Walter Bagehot, and the Creation of a Conservative Jurisprudence," analyzes the effect of the outside forces of the Nuremberg experience and the writings of Walter Bagehot on Jackson's jurisprudence evidenced in his dissent in *Terminiello*. Schmidt seeks to show how Jackson reconciled his experience in Nuremberg with his pragmatic jurisprudential approach. From Nuremberg, Jackson learned how devoted extremists group were to their cause and "how well-organized extremist groups can manipulate politics and public opinion to secure power."[16] Furthermore, Jackson came to the conclusion that "nations must fight to maintain the conditions essential for freedom," rather than passively tolerate those who seek its demise (Schmidt 524). The situation in *Terminiello*, in Jackson's view, "was a local manifestation of a world-wide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which their kind has devastated Europe" (RHJ LC Box 155). Jackson had seen this struggle, he had seen its effects, and he knew they could bring it to America…IT COULD HAPPEN HERE! And if it did, the title of Terminiello's speech would become a reality: Christian Nationalism or World Communism—Which? In contrast to his assertion he made in *Barnette* that our free institutions appealed to the minds of the American public, Jackson now "stressed the evolution of a democratic state and the forces that could transform it from an open, tolerant, community of exchange into an intolerant, savage, narrowly focused society."[17]

Jackson began to see the same position he had previously subscribed to as "a dogma of absolute freedom for irresponsible" people to advocate

16. Schmidt, Patrick. "'The Dilemma to a Free People': Justice Robert Jackson, Walter Bagehot, and the Creation of a Conservative Jurisprudence." *Law and History Review* 20.3 (2002): 517-539. Web.

17. Schmidt, Patrick. "'The Dilemma to a Free People': Justice Robert Jackson, Walter Bagehot, and the Creation of a Conservative Jurisprudence." *Law and History Review* 20.3 (2002): 517-539. Web.

the demise of the government (RHJ LC Box 155). Jackson's dissents in *Terminiello* and *Dennis* sound similar to the more recent dissents by Antonin Scalia. One can almost hear Jackson shouting, "Don't listen them [the other justices] who believe they are advancing freedom! They think they are advancing liberty, when all they are doing is ensuring its demise!" Jackson, in fact, argued that the "invocation of constitutional liberties as part of the strategy for overthrowing them presents a dilemma to a free people which *may not be soluble by constitutional logic alone*" (RHJ LC Box 155). In order to achieve the result that best advanced liberty, Black had turned to the express language of the Constitution, while Jackson had been forced to admit that the Constitution was not sufficient to meet threat that communism and fascism posed.

In Jackson's defense, his belief that the Constitution alone could not solve the present problem did not mean he abandoned his pragmatic, balancing approach to constitutional questions that involve competing interests. He had simply found the exception that tipped the scales in the balance in favor of censorship. In Europe, he had learned that "the crowd mind is never tolerant of any idea which does not conform to its herd opinion. It does not want a tolerant effort at meeting of minds."[18] It is Schmidt's conclusion that, "given the reality of intolerance and the threat this posed to democracy, Jackson was prepared to allow government power to create and maintain the conditions of future progress."[19] It is in this sense that Jackson created his pragmatic approach to the problem of extremism that did not rely solely on constitutional logic; the only way to ensure tolerance of ideas is to be intolerant of ideas that are intolerant of alternative ideas. Intolerant extremists did not allow for alternative ideas…there was no chance for a response in this sort of environment. It was no longer a free exchange of ideas, and, worst of all, totalitarianism is very persuasive. From Jackson's perspective, society could not allow this speech to be uttered with the hope that it would be corrected by more speech, for the reason that totalitarian speech would win the day and then prohibit any corrective speech.

18. Schmidt, Patrick. "'The Dilemma to a Free People': Justice Robert Jackson, Walter Bagehot, and the Creation of a Conservative Jurisprudence." *Law and History Review* 20.3 (2002): 517-539. Web.

19. Schmidt, Patrick. "'The Dilemma to a Free People': Justice Robert Jackson, Walter Bagehot, and the Creation of a Conservative Jurisprudence." *Law and History Review* 20.3 (2002): 517-539. Web.

IV. Government's Role in Guaranteeing the Liberty of Free Speech

There are many instances where a justice will be accused of being inconsistent on certain principles, such as Black abandoning absolute protection of speech or Jackson trying to stifle the liberty he once supported; however, these accusations usually stem from an incomplete understanding of the principles from which the justices are working. It was not Black's goal to absolutely protect forms of speech he did not believe were protected by the Constitution and he did believe were vital to a democracy, nor was it ever Jackson's goal to espouse a form of liberty that was left unchecked by order or escape his pragmatic approach to society's issues. The shared goal of both justices, to maximize liberty, was the overarching principle for both justices; however, they adopted two contrasting ways of thinking of liberty in order to attain this goal. While both men believed in what they saw as the importance of liberty, their understanding of what liberty entails is very different. Black, in his belief that the balancing of interests had already been done by the Founders, adopted a stance that precluded any government participation in the regulation of ideas; his approach implied a negative construction of the liberty of free speech. Jackson, on the other hand, believed that the government played a vital role in ensuring liberty. Any liberty, including free speech, depended upon the maintenance of order within society, and it was the role of the government to positively protect order. The kind of order that ensured liberty, in Jackson's mind, could only be attained by government regulation when met with the threat of extremism and intolerance.

Black would not argue with the fact that liberty presupposed order, in fact he noted in his copy of Hamilton's *The Greek Way*. This order, however, was created by the Constitution, and the Constitution proscribed any sort of government interference in the realm of speech and ideas. Alexander Meiklejohn best puts into context Black's view of the liberties ensured by the Constitution. He stated that the "Constitution…recognizes and protects two different sets of freedoms. One of these is open to restriction by the government. The other is not open to such restriction."[20] The Bill of Rights was meant to withdraw

20. Meiklejohn, Alexander. *Free Speech and its Relation to Self-Government*. New York: Harper & Brothers Publishers, 1948. Print.

from any governmental power to regulate speech.[21] The government was "unqualifiedly forbidden to restrict that freedom."[22] There are other rights, though, that the government can regulate and infringe upon, such as the right to property. Meiklejohn states that, though these two different kinds of liberty exist in the Constitution, "no such accurate use of words has been established" to differentiate between them.[23] However, in *Two Concepts of Liberty*, Isaiah Berlin speaks of two separate constructions of liberty, which accurately portrays the difference between the right to free speech and the right to property. Negative liberty is "the area within which a man can act unobstructed by others."[24] Berlin then constructs positive liberty as the idea that evolves from the notion that negative liberty, left unfettered, limits or destroys the very liberty it claims to protect. Positive liberty, then, causes society to think of itself as a whole rather than a composite of individuals, for the reason that the freedom of the group is far more important than the freedom of the individual. It is in this sense that the government may "coerce others for their own sake," for if the individual properly could conceive of itself as a part of the whole, then it would realize that it is in its interest to curtail some of its liberty for the advancement of a common goal.[25] The common goal for Jackson would be the type of order that ensures liberty. Therefore, if some liberty must be abridged to sustain the order that protects all liberty, then it is rational and pragmatic to do so.

Inherent in Jackson's willingness to curtail some speech is the assumption that some is dangerous to the liberty of the whole. This is where Jackson and Black diverge in their quest for maximized liberty. In *Terminiello*, Jackson argued that "if we maintain a general policy of free speaking, we must recognize that its inevitable consequence will be sporadic local outbreaks of violence, for it is the nature of men to be intolerant of attacks upon institutions, personalities and ideas for which they really care." And as he witnessed in Europe, these outbreaks

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21. Frank, John. "Hugo L. Black: Free Speech and the Declaration of Independence," *Six Justices on Civil Rights.* Ed. Ronald Rotunda. New York: Oceana Publications, Inc., 1983, 11-54. Print.

22. Meiklejohn, Alexander. *Free Speech and its Relation to Self-Government*. New York: Harper & Brothers Publishers, 1948. Print.

23. Meiklejohn, Alexander. *Free Speech and its Relation to Self-Government*. New York: Harper & Brothers Publishers, 1948. Print.

24. Berlin, Isiah. "Two Concepts of Liberty." (1958): <wiso.uni-hamburg.de> Web.

25. Berlin, Isiah. "Two Concepts of Liberty." (1958): <wiso.uni-hamburg.de> Web.

of violence led to the polarization of society and the destruction of moderation. In a polarized society, the democratic process is destroyed… as well as the liberties protected by it. For Black, however, as long as the marketplace of ideas was maintained and unrestricted, speech could not be damaging. Black appealed to his reading of history for proof of this belief. James Madison declared the liberties protected in the First Amendment to be "beyond the reach of this government."[26] Thomas Jefferson, in words that could be directly applied to the problem of communists and fascists, declared that, "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[27] In *Douds* Black proudly echoed the Founders when he asserted that "the postulate of the First Amendment is that our free institutions can be maintained without proscribing or penalizing political belief, speech, press, assembly, or party affiliation."

When one considers the statements of the two justices, it becomes evident that they have largely contrasting views of the people and their ability to maintain the democratic process. Jackson believed that the only way to sustain the democratic process was by protecting the moderate masses and proscribing the participation of the extremes. It was a rational and pragmatic response to what he had observed in Europe, the birthplace of the very ideas of liberty America now championed. Black also agreed that government must preserve itself; however, the method he adopted was the antithesis to Jackson's. The government can be "preserved only by leaving people with the utmost freedom to think and to hop and to talk and to dream if they want to dream. I do not think this government must look to force, stifling the minds and aspirations of the people. Yes, I believe in self-preservation, but I would preserve it as the Founders said, by leaving people free."[28]

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26. Frank, John. "Hugo L. Black: Free Speech and the Declaration of Independence," *Six Justices on Civil Rights.* Ed. Ronald Rotunda. New York: Oceana Publications, Inc., 1983, 11-54. Print.

27. Frank, John. "Hugo L. Black: Free Speech and the Declaration of Independence," *Six Justices on Civil Rights.* Ed. Ronald Rotunda. New York: Oceana Publications, Inc., 1983, 11-54. Print.

28. Cahn, Edmond. "Dimensions of First Amendment 'absolutes': a public interview," *Justice Hugo Black and the First Amendment.* Eds. Everette Dennis, Donald Gillmor, and David Grey. Ames, Iowa: Iowa State University Press, 1979, 41-53. Print.

V. Conclusion

Both Black and Jackson shifted their stances on the First Amendment protection of speech. Black felt forced to adopt an absolutist stance on its protection due to his perception that the Court had abandoned the true interpretation of the clear and present danger test. Black, in effect, constructed free speech as a negative liberty. Jackson, though, influenced by his experience in Nuremberg considered the freedom of speech in a much wider context. Speech, with its purpose of the advancement of civilization, was only free when order was maintained, and order could only be sustained by the government's regulation of speech that called for the destruction of the democratic process. Jackson constructed the right to free speech as a positive liberty that was meant to be created and preserved by the government in the interests of the moderate masses.

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