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It is truly a pleasure to be here with you all today in this wonderful Gateway City. Dean Hasl, your kind invitation to come here is much appreciated. For this is one of our nation's great cities, representing in many ways what America itself is all about.

From the earliest days as a trading outpost to the days of the great river boats that churned the Mississippi to New Orleans and back, to our own time as a commercial center, St. Louis has played a vital part in the development of our great nation. As your gleaming arch represents, this city has provided the door through which Americans moved to settle a continent. It's little wonder that one of the towering achievements of this century was accomplished under the simple but powerful and appropriate banner: The Spirit of St. Louis.

When I was planning my remarks for today I did so with the thought of returning to a theme on which I have spoken on several occasions during the past year or so. The topic I wish to address today is one in which I suspect you, like many other Americans, are more and more interested. It is the approaching bicentennial of our remarkable Constitution.

In thinking through what I wanted to say about our Constitution, it occurred to me that an appropriate topic might have been that great constitutional crisis, the Civil War. For it was the Missouri Compromise, after all, that played so prominent a role in that, our greatest political tragedy. Indeed, it was right here in St. Louis, along the banks of the Mississippi in the old Court House, that Dred Scott's case was first heard. Thus was laid the foundation for Chief Justice Taney's opinion in *Dred Scott* v. *Sandford,* perhaps hastening the clash between North and South.

But on reflection I decided upon another topic, one I think is equally appropriate and worthy of the attention of everyone interested in our Constitution. Today I wish to offer my thoughts on the jurisprudence of one of the great justices of the Supreme Court, the centenary of whose birth is this year. Indeed, I have chosen this justice precisely because he mirrors in many respects that other great American whose name figures so prominently here — Thomas Jefferson. For, like Jefferson, his jurisprudence had two main themes: the importance of our written Constitution and the sanctity of individual rights. I speak, of course, of the late Justice Hugo Lafayette Black.

Now, I want to confess at the outset that speaking about Hugo Black at this Law School may be an idea more patriotic than prudent. For one of Justice Black's preeminent biographers, Jerry Dunne, is in the audience, and so my remarks may be somewhat on the order of carrying coals to Newcastle. But with that risk in mind, I think Justice Black an appropriate topic for several reasons.

First, this year marks the 100th anniversary of his birth. Born in the tattered South of Reconstruction, he drew his constitutional faith and his political focus from a world quite different from the one he left in 1971. We celebrate his birth this year not because a certain requisite amount of time has passed that captures our attention, but because his was a truly remarkable life.

In many respects, Hugo Black lived the American dream, traveling as he did from parched dusty roads of the Reconstructed South to that Marble Palace of Justice in Washington, D.C.

But that is not the reason to celebrate his birth. For in America such a tale of success is not so rare. The real reason we should honor Hugo Black — the reason that prompts me to come before you today — is that he made a difference in the jurisprudence of our country. His name will never fade from our national memory. As long as men and women take the Constitution seriously, the name of Hugo Lafayette Black will shine. For above all else, Justice Black was a friend and defender of that great charter.

The second reason to think about Justice Black today is because we have been recently engaged in a great and robust public debate over the nature and extent of constitutional interpretation. This has been a debate that has gone beyond the scholarly confines and has appeared in newspapers and magazines throughout the country. Few people, I think, would appreciate this public discourse more than would Justice Black, were he still among us. For, like the President who appointed him, Justice Black thought of the Constitution as a "laymen's document," not a lawyer's "shriveled" contract. A more fitting bicentennial tribute I cannot imagine — nor a more fitting centennial tribute to one of our great justices — than to have the people of this nation renew their faith in our written Constitution.

Finally, the 100th anniversary of Justice Black's birth provides a special opportunity for the American public to discover anew that what I have called a jurisprudence of original intention is not some recent conservative ideological creation. For Justice Black was, if nothing else, a true political liberal in his personal outlook. But no one better exemplified the apolitical character of an original intent jurisprudence than did Justice Black. With simplicity, clarity and power, he persistently defended the importance of our written Constitution. And, following as he did his belief in the integrity of the Constitution — his Constitutional faith, as he put it — he often found himself voting against policies that, had he been a legislator, he may very well have embraced and vigorously supported. But he was not a legislator and he knew it; he was a judge — and he respected the essential difference.

In a way, it is perhaps a bit ironic that Hugo Black, a justice who considered himself above all else a constitutionalist, should have sprung from the New Deal era and the presidency of Franklin D. Roosevelt. I say "ironic" because in many ways it was during that time when the seeds of that ideology that called for a more fluid interpretation of the Constitution were planted. As Attorney General Homer Cummings put it in a letter of January 29, 1936 — fifty years ago — to President Roosevelt:

> The real difficulty is not with the Constitution but with judges who interpret it . . . If we had liberal judges, with a lively sense of the social problems which have now spilled over state lines, there would be no serious difficulty.

Surely there was a bit of truth in Cummings' statement. The problem FDR faced was not with the Constitution but with the judges — judges whose personal opposition to New Deal programs was thought to affect their constitutional judgments. Yet the solution shouldn't have been liberal judges but good judges, that is, judges who would respect the Constitution and its limits on judicial power, who would seek to interpret that document, not legislate under it.

As you know, shortly after this letter from the attorney general, FDR attempted his plan to reorganize the judiciary by expanding the number of seats on the Supreme Court and, thereby, increase the number of justices he could appoint. His less charitable critics dubbed this his "court-packing plan." Congress refused to buy it.

But only a short time later, the President did have a chance to put his appointees on the Court and one of them was Hugo Black. Born in the red clay hills of rural Alabama, this new Justice, this former United States Senator and one-time Klansman, would, as a Justice, come to defy both the labels of conservative and liberal. For during his lengthy tenure on the Court, as I have said, Mr. Justice Black proved himself more a consistent constitutionalist than a political liberal. That was why, as Tinsley Yarbrough has pointed out, Justice Black could be "described as a judicial activist, an exponent of judicial restraint, a nationalist, a state's rightist, a civil libertarian, and a conservative." And all at the same time.

What informed and guided Mr. Justice Black's jurisprudence? Whence did he draw the power of his arguments and the strength of his juridical convictions? What was it about his jurisprudence that made it so difficult to fit it in any narrow political niche?

In a word, it was the Constitution.

In another sense, it may not be so ironic that Justice Black sprang from the presidency of Franklin Roosevelt. For in a way, FDR's battle was not as much for a liberally biased construction of the Constitution as it was against what he saw as a conservatively biased construction. The jurisprudential battle of his day was against the old judicially created doctrine of Substantive Due Process and its use by judges to thwart the decisions and policies of the more popular branches of our government.

By the time FDR became President a long line of cases had established the proposition that the Court could and should evaluate legislation (at both the national and the state levels) against the standards of whether it was "reasonable," "arbitrary" or against the so-called rule of reason. The idea was that the Court presumed the power to make what were, in essence and in effect, legislative judgments. To borrow Alexander Hamilton's terms from *The Federalist,* judges who embraced this notion of substantive Due Process were no longer exercising "merely judgment" — they were exerting their "will" as well.

Of all President Roosevelt's appointments to the High Court, Hugo Black was, from the beginning, a critic of this confidence in judicial power. His objection was not about policy. It was about principle. In his view the Constitution simply did not give judges such an unrestrained prerogative. It was precisely his dedication to the Constitution rather than to judicial musings that makes his jurisprudential approach so appropriate to our current debate. For today, there is a new version of the old Substantive Due Process logic at work in some of our courts and in many of the law schools. Indeed, such a jurisprudence has even made its appearance on occasion in the Supreme Court.

This new jurisprudence is characterized by the belief that good government depends less upon judicial fidelity to the Constitution than upon evolving notions of contemporary morality. What this means, in a nutshell, is that it is sufficient to hold a law unconstitutional if it strikes a majority of the justices as unreasonable, unfair, or arbitrary.

At the deepest level, this constitutional jurisprudence rests upon a radically new theoretical foundation. This new foundation is not the one originally posited by the Founders and subsequently respected by our legal tradition until only relatively recently. The older — and sturdier — foundation was the dedication to liberty and the concomitant belief that to ensure the preservation of that liberty, government must be constitutionally limited.

Today there are those who seek to overcome these limitations on government power — especially judicial power — by invoking something called "the dignity and worth of the individ-

ual." This new view also holds that it is the judiciary which serves as the "definer and enforcer" of this new supreme value. The problem, of course, is that "dignity" is a much more politically subjective and constitutionally elusive term than "liberty." Thus, with this new jurisprudence, we see an effort to return us to those long gone days of Substantive Due Process - only this time frequently in the guise of Substantive Equal Protection. The political effect in both instances is best characterized by Charles Evans Hughes' oft-quoted non-judicial quip. "We are under a Constitution," the gubernatorial candidate remarked, "but the Constitution is what the judges say it is." To put it simply, constitutional principle is reduced to judicial whim.

I venture to say Hugo Lafayette Black would scoff loudly at this new judicial pretension. In fact, he did scoff loudly at it. In one of his most memorable dissents, in a case quite typical of this new constitutional theory, *Griswold* v. *Connecticut (1965),* Justice Black (in league with Justice Potter Stewart) sought to pull back the imposing robes of the new judicial activism and to reveal such activism as the naked political power that it is.

When the Connecticut birth control law at issue in *Griswold* came before the Court, Justice Black agreed with Justice Stewart's political assessment of it. It was, Justice Stewart said, "an uncommonly silly law." As a matter of mere policy, neither Black nor Stewart, had they been in the Connecticut legislature, would have supported it. But they weren't in the legislature, they were on the Supreme Court. Therefore, they believed their only concern was the limited judicial one: Was such a law constitutional? Indeed it was constitutional, they agreed, however "silly" it otherwise might be.

What galled Justice Black the most was the disingenuous way in which Justice William 0. Douglas had contrived to create new grounds in order to hold the statute unconstitutional. What the Connecticut law offended, in Black's dissenting view, was not the Constitution but only Douglas's extraconstitutional contrivances. The creation of a general and textually unspecified "right to privacy" out of "penumbras" allegedly formed by "emanations" of specific constitutional rights, was an act of legislating — or worse, of Constitution-amending by judicial fiat. Such a broad presumption of power by the Court would, in effect, Black said, transform it into "a day-to-day constitutional convention."

To Justice Black, this was constitutionally intolerable. "The Constitution makers knew the need for change," he argued, "and provided for it." That provision was the process of formal amendment. As it stood, Douglas's opinion in *Griswold* allowed the Court to return to a most constitutionally pernicious doctrine, that of resting constitutional interpretation on the "mysterious and uncertain" ground of natural law. This is how Justice Black put it:

"[T]here is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious, or irrational." He concluded:

> The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country.

Black, like James Wilson in the Federal Convention in 1787, believed firmly that judicially perceived evil qualities of a law were not reasons sufficient to find it unconstitutional. As Wilson had argued, "laws may be unwise, dangerous, destructive . . . and yet still not be unconstitutional."

His dissent in *Griswold* was not a conclusion Black had only recently come to. He had espoused that position from his earliest days. In his famous dissent in *Adamson* v. *California (1947),* for instance, he blasted his brethren for asserting a theory that "this Court is endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what in a particular time constitutes 'civilized decency,' and 'fundamental liberty and justice'."

He took his support on this from earlier and, in his view, more prudent Courts. In particular, he embraced the reasoning of Justice Iredell in *Calder* v. *Bull (1798).* As Iredell had argued, the Court under the Constitution possessed no authority to pronounce a law void "merely because it is, in their judgment, contrary to the principles of natural justice." The reason, in Iredell's view (and thus in Black's) was simple: "The ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject."

To Justice Black's way of thinking, the role of the Court was not to recur to the standard of natural law and natural justice. It was far more limited, it was far simpler. He took his institutional bearings from the precept laid down in *Ex Parte Bain* (1887). There, that earlier Court had given the best description of the proper judicial role:

> It is never to be forgotten that, in the construction of the language of the Constitution . . . as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.

For Justice Black there was thus no question as to the proper — the constitutionally proper — method of judicial reasoning. "It is," he said, "language and history that are the crucial factors . . . in interpreting the Constitution - not reasonableness or desirability as determined by justices of the Supreme Court." The structural arrangements of the Constitution reflected the Framers' fear of government power, a fear, Black believed, that extended to "granting too much power to judges." The Founders' plan, if properly respected, demanded a more restricted role for judicial interpretation than some of his brethren assumed. For interpretation, Justice Black insisted, "means to explain and expound, not to alter, amend, or remake" either the Constitution or the laws made pursuant to it. In his typically pithy fashion, Black went right to the heart of the matter. "Judges," he said, "take an oath to support the Constitution as it is, not as they think it should be."

This view of the Constitution led Black to embrace what he deemed a strict textualist position. In what might be his most famous example, the First Amendment, Black was fond of saying that when the Amendment said "no law", it meant "no law" — period. He had no patience with his fellow justices and their willingness to create doctrinal tests that would enable them to bend the text of the Constitution and ignore its history. "All these so-called tests", such as the famous "shock-the-conscience test", wrote Black in his dissent in *Sniadach* v. *Family Finance Corp* (1968), "represent nothing more or less than an implicit adoption of a Natural Law concept which under our system leaves to judges alone the power to decide what the Natural Law means. These so-called standards do not bind judges within any boundaries that can be precisely marked or defined by words for holding laws unconstitutional. On the contrary, these tests leave them wholly free to decide what they are convinced is right and fair."

If the purpose of judicial power was to decide cases or controversies according to the consciences of the judges, why was it, Black asked, "that the Founders gave us a written Constitu-

tion at all?" To this query no satisfactory response was ever given. Justice Black's question echoes still in the great and solemn marble halls of the Supreme Court.

But if his judicial colleagues could not or would not answer, Black would. "Certainly," he said, "one purpose of a written Constitution is to define and therefore limit government powers." This extended to judicial power as well. The constitutional limits of judicial power, Black insisted, followed from this basic premise. The duty of the Court, he wrote, is "to carry out as nearly as possible the original intent of the Framers." In sum, he said:

> Our written Constitution means to me that where Power is not in terms granted or not necessary and proper to exercise a power that is granted, no such power exists in any branch of the government — executive, legislative, or judicial.

Justice Black's approach to constitutional interpretation was aimed at limiting judicial discretion without merely becoming mechanistic. His legal philosophy argued for reducing judicial discretion by focusing attention on the actual words of the Constitution. Judges and justices, in Black's opinion, should not look beyond the Constitution for the meaning of the Constitution, for to do so, as Judge Robert Bork has more recently said, leads them to look only within themselves.

The obligation imposed on the judiciary under the terms of a written and ratified Constitution of clear and common language is to look to the words and phrases which were chosen so carefully by the Constitution's framers. "Language-stretching judges" as Black thought of them, only serve to undermine the Constitution and thereby our commitment to the ideals of constitutionalism. The Constitution as it was written was intended to survive the eroding effects of the "successive political winds" that would inevitably blow through subsequent generations. The best way to assure that survival would be to maintain a strict adherence to text and intention.

Ultimately Black's jurisprudence was rooted in a Jeffersonian commitment to individual liberty under the rule of law. As Jefferson put it:

> It is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power . . . In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.

Justice Black's philosophy of original meaning and literal interpretation was, he believed, superior to the doctrine of stare decisis. The true source of stability in the law was the written law itself. Blind deference to precedent, in and of itself, was not a necessary part of the rule of law. When judicial precedent conflicted with the Framers' intentions, Black believed, precedent had to be made to yield. He knew that adherence to precedent alone could in no way obviate the inconveniences of what Professor Philip Kurland of the University of Chicago has called the "derelicts of Constitutional law" — cases such as *Dred Scott, Plessy* v. *Ferguson,* and *Lochner* v. *New York.* Like Thomas Hobbes centuries before, Black understood that precedents only show what was done, not that it was done well. Constitutional principle, in Mr. Justice Black's jurisprudence, took precedence over mere judicial precedent.

This is not to say that there is not room for disagreement among those of us who, like Justice Black, endeavor to root constitutional interpretation in the solid ground of text as illuminated by intention. One need only look at Justice Black's absolutist position on the incorpo-

ration of the Bill of Rights into the 14th Amendment. In his dissent in *Adamson,* Black went to great pains to append a lengthy and detailed historical analysis to support his claim that the 14th Amendment incorporated the first eight amendments in toto. In fact, his dissent prompted a now-classic article in the Stanford Law Review by Charles Fairman in response. Years later, Black insisted his history was still superior to that of Fairman. The debate continues.

What is most important, though, as this famous debate shows, is that one need not agree with Black's conclusions in order to respect his approach. For he sought the support for his decision in the history and the text of the document. His theory of incorporation possessed an integrity that some commentators have found missing in such cases as *Gitlow* v. *New York (1925),* wherein the Court merely assumed and asserted the applicability of certain parts of the Bill of Rights to the states. Black began his inquiries from the only position that is compatible with the Constitution itself: By asking what did the Framers intend by the language they chose and the arguments they made? Here as elsewhere Hugo Black taught the importance of judges looking into the Constitution rather than themselves in order to interpret the document.

These, then, are the reasons we should remember and rethink Hugo Black's contributions during the cententary of his birth. The world he departed in 1971, as I said, was a world quite different from the one he entered in 1886. In part, that difference sprang from the fact of his having lived. Professor Henry Abraham has, I believe, captured this greatness as well as anyone. He has said:

> Few jurists have had the impact on law and society of Mr. Justice Hugo Lafayette Black. A constitutional literalist to whom every word in the document represented a command, he nonetheless, used the language of the Constitution to propound a jurisprudence that has had a lasting effect on the development of American constitutional law. His contributions were towering. They stand as jurisprudential and intellectual landmarks in the evolving history of the land he loved so well.

As we proceed to our bicentennial celebrations, we could do well to reflect upon Mr. Justice Black's constitutionalism. For it provides great light for those who seek safe passage for our great ship of state. Justice Black's contribution was never more eloguently expressed than in the first sentence of his slim book, *A Constitutional Faith.* "It is of paramount importance to me," he said, "that our country has a written Constitution."

In light of this belief, let me close by suggesting that it is incumbent upon us, the American people, during our bicentennial year to take our bearings from the example of Justice Black. We should not listen to those who would seek to silence debate by dismissing those who raise questions. We must free ourselves from the debilitating shackles of too great a self-confidence in our own opinions. We should, as Benjamin Franklin in the Constitutional Convention urged his fellow delegates, "doubt a little of [our] own infallibility" in these weighty questions of our constitutional affairs.

It is, I believe, especially important in 1987 to have as great a debate as did those patriots of 1787 over the nature and extent of constitutional government. There is no greater testimony to political freedom than free and unfettered debate over the most important issues.

Thank you.