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Book Review: Hugo Black and the Supreme Court

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LITERATURE

HUGO BLACK AND THE SUPREME COURT. A SYMPOSIUM EDITED BY STEPHEN STRICKLAND. New York: The Bobbs-Merrill Company, Inc. 1967. Pp. xxix, 364. $10.00.

Here is an excellent series of studies by nine distinguished lawyers, teachers and constitutional scholars appraising and evaluating the long years of service of Hugo Black as Associate Justice of the Supreme Court of the United States, his influence upon the decisions of that Court, and the impact of that influence upon the constitutional life of the nation. An historical, panoramic view of Justice Black's career is presented initially, followed by more specific studies analyzing the part he has played in shaping the Court. Commencing with the era of the New Deal, the Justice's stand on the racial issue, on the whole area of constitutional rights, as well as his concepts of antitrust law, federal taxation and the federal rules of civil procedure are examined. This symposium is a kaleidescopic review of the fascinating juridical life of Mr. Justice Black, another in the long line of eminent Southerners from Marshall to Marshall who have served on the Court. Of prime interest is the essay dealing with the philosophical views of the Justice on the living constitution and the role of the Supreme Court.

As the volume points out, Mr. Justice Black is a paradox and an anomaly. The fact that he is a Southerner and the fact that for a short period in his early career—long before he became a jurist—he was a member of the Ku Klux Klan, have haunted him and made him a target of continuing criticism. Despite this background he has consistently advanced the cause of racial equality and has sought to prevent racial discrimination by law or government.

Justice Black, an ardent federalist, has followed a constitutional course which has led to a broadened interpretation of the constitutional powers of the national government so as to permit greater and greater federal regulation under the aegis of the commerce clause and other constitutional provisions. At the same time he is a states-righter recognizing a broad power of the states to act in the economic and social fields in order to deal with state problems so long as their acts do not conflict with congressional legislation or violate express constitutional provisions.

When the latter occurs, when a constitutional negative—a "thou shalt not"—is applicable either to the states or to the federal government, Justice Black is firm that governmental power ceases; a zone of individual freedom is created into which government is absolutely forbidden to intrude. Thus, Justice Black contends that the rights guaranteed by the Bill of Rights are absolute. These restrictions not only pertain to the federal government, but are carried over to the states by the due process clause of the fourteenth amendment. Regarding these rights as basic to liberty, Justice Black has been consistent in his opposition to all attempts to dilute them. He is particularly opposed to any balancing of the competing govern-

mental or public interest against the individual right. By this balancing test, if a majority of the Justices consider that the former outweighs the latter, the right is subordinate and subject to governmental limitation. In his insistence on constitutional absolutism, Justice Black has sought to prevent judges from giving their predilictions the status of constitutional principles. Rather, he would curb their subjective judgments and insist that they adhere closely to the language of the constitution. If constitutional rights are only those *expressly* stated in the Bill of Rights and elsewhere in the Constitution, judges are prevented from creating additional rights according to their own political and social conceptions of due process of law in a broad context. The result of Black's theory would be judicial restraint as opposed to the judicial activism which ensues when judges are involved in a process of continuously defining and extending the meaning of due process of law and in weighing competing interests. From this side of the coin Justice Black can be said to be on the side of judicial restraint. But again, paradoxically, he has been called a judicial activist because of his espousal of a vigorous use of judicial power to advance and protect constitutional values which he sees in terms of rights protected. His stand on cases dealing with racial discrimination, legislative reapportionment, prayer and Bible reading, and the rights of an accused is illustrative. And despite Justice Black's distaste for the balancing of interests process where absolute rights are involved, instances where he resorted thereto are pointed out throughout the essays. For example, in the World War II case, *Korematsu v. United States*,[1] dealing with the exclusion and evacuation of Japanese-Americans from West Coast areas, Justice Black appears to have balanced the Bill of Rights with the war powers of the federal government. He called such compulsory exclusion inconsistent with "our basic governmental institutions," but went on to say that "when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."[2]

When the absolute right of free speech collides within the guarantee of the due process right of property it is said that Justice Black would also balance, for he has said:

> Nobody has ever said that the First Amendment gives people a right to go anywhere in the world they want to go or say anything in the world they want to say. . . . We have a system of property in this country which is also protected by the constitution. I realize the freedom of people to make a speech against the Supreme Court, but I do not want [them] to make it in my house.[3]

The balancing view is also said to have been later expressed by Justice Black in a dissent[4] in which he would have sustained the conviction of a civil rights demonstrator for violation of a state statute making it an offense to picket or parade near a courthouse, residence or other building used by a judge, juror, witness, or court officer with the intent of influenc-

[1] 323 U.S. 214 (1944).
[2] *Id.* at 220.
[3] As quoted in the volume at hand at 252.
[4] Cox v. Louisiana, 379 U.S. 536 (1965).

ing any of them. The absolute freedom of speech of the defendant was balanced with the public interest in maintaining a court system adequate to the effective administration of justice. Here the public interest, in Black's opinion, seemingly overweighs freedom of speech. This notion later became the majority theory in a case involving civil rights demonstrations at a jail.[5]

These contradictory aspects of Justice Black's judicial career and philosophy demonstrate that "he is not to be captured in any quick conceptualistic term [or] any rigid label . . . ."[6] However, an attempt to explain the anomaly is set forth on the ground that Justice Black is a Madisonian in the sense that Madison was a defender of every part of the Constitution.[7] Inasmuch as Justice Black is a believer in and defender of every part of the Constitution he "can be an absolutist, albeit 'modified' in applying the Bill of Rights; a 'states' righter' in supporting the regulatory power of the states; a 'liberal' as regards construction of the Congressional commerce power; and a 'libertarian' in applying the law in defense of free speech, free exercise of religion, and free exercise of belief."[8]

Over and above the wealth of information concerning the philosophy of Mr. Justice Black and his impact upon the Court and the Constitution, the volume traces much of the life and history of the United States during that long period of his judicial service. It has been a stormy time—a time of continual crises such as the depression, World War II, the "cold-war," the Korean conflict, the racial crisis, and the breakdown of law and order. Indeed, so many crucial situations have confronted the nation that a reader of this book and one who has lived through the era is inclined to look with some nostalgia upon the crises of a previous day as possibly not quite so bad as the ones currently in being. Or perhaps some feeling of optimism comes to the fore in that since the nation endured the others, perhaps it can survive the latest. With each and every crisis constitutional problems have arisen. This work examines the role of Justice Black and the reaction of the Supreme Court as it has attempted to meet and solve through the medium of lawsuits its confrontation with the fundamental problems of the twentieth century.

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[5] Adderley v. Florida, 385 U.S. 39 (1966).
[6] As set forth in the volume at hand at 271.
[7] As quoted *id.* at 272.
[8] *Id.*

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