

Revisiting *The People and the Court*

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I.

Charles Lund Black at 70 has earned his reputation: He is unquestionably among a handful whose scholarship occupies prominence in the library of the law's queen subject. During the past three decades, there have been few constitutional lawyers who have written as provocatively—and none as poetically—as Charles. To attend to his writing is to see public law afresh. No one can read him, for example, on the death penalty,¹ impeachment,² segregation³ or state action⁴ without gaining new perspectives on our political morality. And, after a few hours with *Structure and Relationship in Constitutional Law*,⁵ one is bound to understand better the essence of our system of government.

Yet, it is my impression that Charles's book on judicial review (the queen topic of the queen subject) is sometimes cited primarily because it was written by an important scholar, with little reference to, or understanding of, its central insights. The book's teaching, about the well established practice of subjecting governmental action to constitutional examination in the courts, often is neglected. I have just discovered that this is a terrible oversight. *The People and the Court*⁶ would be an important book no matter what its pedigree—the artistic worth of *The Man With the Golden Helmet* does not depend on its attribution to Rembrandt. Still, it is true that no one but Charles Black could have written his book on judicial review.

II.

I read *The People and the Court* when it was published, but I did not pay much attention to it. I was a new teacher trying to learn enough labor law and contracts to keep a day or two ahead of my students. I had come to Yale from a clerkship with Felix Frankfurter. There were many new

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1. C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed., augmented) (1974).

2. C. BLACK, IMPEACHMENT: A HANDBOOK (1974).

3. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

4. Black, *The Supreme Court, 1966 Term—Forward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

5. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

6. C. BLACK, THE PEOPLE AND THE COURT (1960).

teachers in New Haven that year. Charles, too, was new to Yale; he had come from Columbia as the Henry R. Luce Professor of Jurisprudence. The book he was working on and published shortly thereafter struck me then as a wrong-headed attack on my judge. This, plus my desire to keep afloat, predisposed me to maintain a closed mind. Parenthetically, that is a useful trick for anyone who wants to make intellectual progress along a different front.

This closed-minded approach of mine, however, was not easily maintained. My wife and I had become friends of Charles and Barbara Black, and Sheila Wellington had read the book for its author in its penultimate draft. She liked it, thought it important, and so advised me. Moreover, Charles was a natural at the craft I hoped to master. He was then—and, of course, still is—a fine teacher, a gorgeous writer, and a lawyer who was centrally involved in fighting race discrimination, that enduring issue of our time. Charles also had a young family; he shared the many problems of a large junior faculty that is now small and very senior. Accordingly, it was difficult indeed for me to slight *The People and the Court*, but I managed.

III.

When I revisited the book in December 1985, I was struck with an insight in it that has been insufficiently remembered by today's scholars, and by the contemporary relevance of arguments that Charles deploys in his defense of judicial review. The insight and the arguments pull together, making a powerful case for the practice established in *Marbury v. Madison*.⁷

Once observed, the insight is almost obvious. It is a strong justification for judicial review:

[T]he prime and most necessary function of the Court has been that of *validation*, not that of *invalidation*. What a government of limited powers needs, at the beginning and forever, is some means of satisfying the people that it has taken all steps humanly possible to stay within its powers. That is the condition of its legitimacy, and its legitimacy, in the long run, is the condition of its life. And the Court, through its history, has acted as the legitimator of the government.⁸

Moreover,

[t]he power to validate is the power to invalidate. If the Court were

7. 5 U.S. (1 Cranch) 137 (1803).

8. C. BLACK, *supra* note 6, at 52.

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deprived, by any means, of its real and practical power to set bounds to governmental action, or even of public confidence that the Court itself regards this as its duty and will discharge it in a proper case, then it must certainly cease to perform its central function of unlocking the energies of government by stamping governmental actions as legitimate.⁹

Charles's vision of judicial review, his emphasis on its affirmative aspect, should have more significantly influenced the conceptions of American democracy that inform contemporary discussions of constitutional adjudication. What a complex system ours is! Because Congress and the President often test the limits of their constitutional power, and because the minority that questions the legitimacy of such governmental action may be a large fraction of the total population, our democracy requires the use of a disinterested umpire if it is to enjoy tranquility.

For the Court to perform this function, the Constitution must be seen as law and the Court as engaged in adjudication. While constitutional adjudication may require statesmanship, it also requires the training and skill necessary for the interpretation of contracts and statutes. The job of the Court is, then, similar to what courts do at common law and in statutory adjudication. But the legal realists—whatever else they accomplished—have taught all of us who do law in the United States that new law is produced in adjudication. Nor, as Charles tells us, was it ever different; it was merely perceived differently.

This means that when the Court invalidates governmental action—the negative or checking function of judicial review—it makes new law in the way that law is made in adjudication. In hard cases the Constitution is bound to be “open textured,” its history ambiguous, and all other sources relevant to its elaboration problematic (and what is relevant is, itself, far from clear).

Nor does this reality, which we have learned from the legal realists, mean that the Court should accept the legislative judgment because Congress is electorally accountable. Not only would such deference destroy the affirmative, validating, legitimating work of judicial review (work that is structurally valuable in a government of limited powers), it would misunderstand the relative institutional competence of Court and Congress. For, as Charles sees it, Congress can no more be a fair judge of prohibitions on its power, such as those contained in the First Amendment, than a defendant can be a fair judge in his own case. Moreover, one who advocates acceptance of the Congressional judgment without serious review by the Court on the ground that Congress is electorally accountable and Supreme

9. *Id.* at 53.

Court justices are not, may have forgotten that our democracy vests the power of the sword in a second term President who is no more electorally accountable than the Chief Justice of the United States. This third term prohibition on presidential office may rest on good reason: Perhaps we must protect ourselves from charismatic leaders. Good as that reason may be, however, it is not as compelling as the functional explanations for giving less dangerous power to the Chief Justice and his several associates. What seems clear is that as long as good reasons do exist, Americans cheerfully delegate enormous power to officials who are not electorally accountable; that is a feature of our democracy that anybody who bothers to look will see.¹⁰

IV.

The People and the Court predates the argument, found in contemporary constitutional scholarship, that insists upon a distinction between "interpretive" and "noninterpretive" judicial review.¹¹ Michael Perry puts the distinction this way:

The Supreme Court engages in *interpretive* review when it ascertains the constitutionality of a given policy choice by reference to one of the value judgments of which the Constitution consists The effort is to ascertain, as accurately as available historical materials will permit, the character of a value judgment the framers constitutionalized at some point in the past.

The Court engages in *noninterpretive* review when it makes the determination of constitutionality by reference to a value judgment other than one constitutionalized by the framers.¹²

The point of the interpretive/noninterpretive distinction is to explain the profession's anxiety over the negative aspect of judicial review. Most (all?) declarations of unconstitutionality are the result of noninterpretive review. Accordingly, the Court is making law without any demonstrable support from those great men who produced or who ratified our fundamental Charter two centuries ago.

I have argued that this distinction derives from a particular and incorrect conception of adjudication which "cuts across the grain of our professional training" and "rests upon a flawed understanding . . . of the inter-

10. See Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 488-497 (1982).

11. "Originalist" and "nonoriginalist" are sometimes substituted for "interpretive" and "noninterpretive."

12. M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 10-11 (1982). *But see* Perry, *The Authority of the Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985) (drops use of "interpretive/noninterpretive" vocabulary).

relationship of governmental institutions.”¹³ The Court in constitutional adjudication, I have argued, does what courts must do when they decide hard cases. Earlier constitutional scholarship did not use, and contemporary scholarship does not need, a distinction that questions the legitimacy of lawmaking through adjudication.

One of the things I had in mind was simply this: *Whenever* courts adjudicate they are elaborating a text. At common law that text is prior decisional law, read in its contemporary context; in statutory adjudication it is the legislative enactment, read in the light of a contemporary and particular case; and in constitutional adjudication, it is the Constitution itself, read in the light of the structure and relationship of the governing forms prescribed by the document, and the contemporary problem raised by a case or controversy. As far as I know, the universal practice of courts, when engaged in adjudication, is to acknowledge the power of the relevant text.¹⁴

Most of us who study or practice law in the United States, however, recognize that textual elaboration in hard cases involves making law, for in hard cases texts do not reveal themselves easily. Lawyers disagree profoundly, of course, on the question of how a court should perform this lawmaking function. This much seems clear, however: In hard cases courts make law whether they look only to language (whatever that means); to language and the intention of the founders, legislators or draftsmen (whatever that means); or to other sources as well (whatever they are). The problematic nature of language, history, structure, and morals is what *makes* hard cases hard.

During the last decade, some legal theorists have invented a vocabulary that is at odds with the universal judicial practice of paying deference to text. These theorists claim that in constitutional adjudication of human rights questions the Court is not involved in interpretation. Although the use of the word “noninterpretive” in this context is not wrong—one can define “textual elaboration” in a variety of ways—intellectual honesty does not require this new vocabulary. Charles Black’s discussion of legal realism should reassure us that the contemporary American lawyer has a realistic and, therefore, generous conception of textual elaboration. Moreover, the new vocabulary misleads the layperson: It invites her to believe that the judicial protection of human rights is a task different in kind from

13. Wellington, *History and Morals in Constitutional Adjudication* (Book Review), 97 HARV. L. REV. 326, 327 (1983).

14. Charles Black has said: “The question is not whether the text shall be respected, but rather how one goes about respecting a text of that high generality and consequent ambiguity which marks so many crucial constitutional texts.” C. BLACK, *supra* note 5, at 30.

what courts do when they decide other types of hard cases.¹⁵ It most emphatically is not.

Furthermore, while a realistic view of adjudication recognizes the fact that judges make law in hard cases, it need not accept the notion that, when making law, judges are to promote their *own* beliefs and ideals rather than *ours*.¹⁶ Courts do, after all, perform a public, not a private, function. There is therefore no reason why judicial law-making should be seen as subjective in any strong sense. One should—but many do not—distinguish between a generous and a subjective conception of textual elaboration.

In my earlier writings, I would have had more to say on these points if I had better understood *The People and the Court*. Charles's description of realist teaching helps explain the mistake of embracing an interpretive/noninterpretive vocabulary in adjudication, while his conception of the legitimating work of judicial review is profoundly important in understanding the interrelationship of governmental institutions in our democracy.

V.

The People and the Court clears away the underbrush. It tells constitutional theorists what direction they should take if they are to make progress. Because judicial review is structurally desirable in a democracy where the federal legislature has limited power, and because judges make law, we need to understand better what should count as sources of law in adjudication.¹⁷ Charles Black has made it unnecessary for theorists to worry further about the legitimacy of judicial review. If he had done noth-

15. *But see* Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 4-5 (1984) (argues that failure to use new vocabulary "itself is bound to mislead").

16. *See* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 244 (1973) (court is required to assert "our" moral views, not its own).

17. Many contemporary writers of constitutional theory address questions about sources of law by developing conceptions of interpretation. Often these conceptions pay little attention to the rich context in which constitutional adjudication takes place. *See, e.g.*, Perry, *supra* note 12. How lawyers argue cases, for example, may influence the way judges interpret texts, and generally lawyers are more interested in winning than in establishing a correct moral principle. Lawyers and law professors, of course, know about this context (and they know too about standing, the case/controversy requirement, etc.); moral philosophers and literary critics may not. They may not even know that in order to obtain a majority, a judge may have to modify the language and scope of her opinion. Indeed, moral philosophers and literary critics may not know that majority opinions are sometimes desperately negotiated documents. *See* D. O'BRIEN, STORM CENTER 240-62 (1986) ("In order to accommodate the views of others, the author of an opinion for the Court must negotiate language and bargain over substance," *id.* at 257-58). How wonderful it must feel to be so free.

While I doubt that an acontextual approach will help us in our quest to understand better constitutional adjudication, I appreciate the urge to break problems down into seemingly more manageable parts. I assume, however, that the next phase of the new scholarship will be to apply (and inescapably to modify) freshly minted conceptions in the disorderly context of constitutional adjudication, a context well understood by Charles Black.

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ing else—and, of course, he has done so much more—this would have been a remarkable achievement.

Those of us who work in the territory that Charles has cleared and who worry about the tyranny of the majority may find in Charles more than a natural; if we look, we may discover an intellectual leader.

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