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Hugo Black and the Supreme Court: A Symposium edited by Stephen Parks Strickland

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Book Reviews

HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM. Edited by Stephen Parks Strickland. Indianapolis: The Bobbs-Merrill Company, Inc., 1967. Pp. 340. \$10.00.

No one should be surprised that Hugo Lafayette Black has inspired this able symposium. After all, Black was the first of the new breed of Justices who came to the Supreme Court of the United States after 1937; thirty years later, he is not only still on the bench but is generally recognized as the intellectual leader of the majority faction of the "Warren Court." Therefore, a study of Black and his jurisprudence is not a mere exercise in eulogistic scholarship, but an eminently practical method for coming to grips with a mode of thought which is a continuing vital influence in American law.

This volume was written for the knowledgeable layman. Any lawyer, no matter how far removed from his last encounter with constitutional law, can read it with pleasure and profit. Its emphasis is on Black the Judge; its greatest weakness is that Black, the tennis-playing octogenarian from Birmingham, Alabama, never comes clearly into view. In other words, there is much of the intellect but too little of the man. Contrary to popular opinion, Justices are people, and an understanding of the judge is ultimately dependent on an understanding of the human beneath the robe.

Justice Black emerges from these essays as an independent intellect, a man whom others may follow, but a man who sets his own course with but little regard for friend or foe. He came to the bench as a New Deal Senator, committed to the political philosophy which underlay the major reform legislation of the 1930's. However, Black has proven to be much more than a partisan politician, as exemplified by his drive to see things as a whole and to define the nature and scope of American government in terms which any inexperienced policeman or literate citizen could understand.

Unlike Felix Frankfurter and Oliver Wendell Holmes, for whom most questions were ultimately matters of degree, Black did not make a fetish of avoiding formal limitations upon the power of government. He does not fear government, in fact, Black thinks that it is a positive good. He believes in federalism, and would allow the states more latitude in the regulation of commerce than most of his fellow justices. He believes in the people and is loath to override their opinions

whether expressed by legislatures or by a petit jury. Yet, Black also believes that government is limited, not by indefinite rules formulated by judges to meet the exigencies of a particular situation, but by guidelines set by the founding fathers and the framers of the Bill of Rights. The duty of judges is not to strike a new balance, but to apply the principles underlying these constitutional standards to the ever changing problems of modern society.

From the Foreword by Charles Black, Jr., to the conclusion by Stephen Strickland, most of the essays are sympathetic to Justice Black and his approach to the major problems confronting the Supreme Court during his tenure on the bench. But this is no unrelieved panegyric. Carl Brent Swisher's initial essay, which sets Black's career in its historical context, is definitely hostile to the course followed by Black and a majority of the Court since 1952.

[D]ecisions . . . sometimes read like fiat determinations made without reference either to documented history or to clearly expressed principle.¹

[B]oth the Court and its critics are apt to find it expedient sometimes to pretend to a certainty they do not feel, and thus occasionally to sound forth with unbecoming shrillness.²

More and more the Court seemed to be struggling toward the position of a positive agency of government, an agency defining rights and duties in advance of individual clashes under the adversary system by which our courts have traditionally operated.³

Swisher tactfully, but firmly, carries the main burden of the negative, but is joined in the penultimate article by George Kaufmann who, after giving a sympathetic analysis of Black's hostility to the Federal Civil Rules, concludes, somewhat reluctantly, that the Justice's cure may be worse than the disease.

This volume also includes an historical essay by John P. Frank on *The New Court and the New Deal*, a brief but revealing comment by Daniel Berman on *The Persistent Race Issue*, and a rather shrill piece of scholarly polemic by Irving Dilliard, *The Individual and the Bill of Absolute Rights*. These are followed by three articles which have appeared elsewhere. That portion of Charles A. Reich's seminal article *Mr. Justice Black and the Living Constitution*⁴ which proposes a rational synthesis of Black's judicial philosophy is reprinted along with

¹ C. B. Swisher, *History's Panorama and Justice Black's Career*, in HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM 23 (S. Strickland ed. 1967). [Hereinafter cited as Strickland.]

² Strickland 24.

³ Strickland 27.

⁴ Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963).

an ably edited version of one of Randolph Paul's last articles, *Mr. Justice Black and Federal Taxation*,⁵ and finally an essay based on W. Wallace Kirkpatrick's *Crossroads of Antitrust and Union Power*,⁶ and *Mr. Justice Black and Antitrust*.⁷ Paul's article includes an excellent concise analysis of the relationship between the Supreme Court and partisan politics.

As Strickland points out in a brilliant concluding essay, Black as a judge is too big to be contained either by the labels he has fixed upon himself or those which have been fastened on him by others. He is, after some fashion, a liberal, an absolutist, a judicial activist, a libertarian, and a radical. But none of these labels really fit. Strickland contends that Black is a Madisonian and ultimately a conservative. This is a judgment which, unless Black confounds us all by radically revising his philosophy during yet another decade on the bench, I believe will stand the test of time.

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LABOR IN THE SOUTH. By F. Ray Marshall. Cambridge: Harvard University Press, 1967. Pp. 406. \$8.00.

A non-writing law teacher once asked J. Allen Smith "But why should I write a book review?" and Allen answered, "To show that you've read a book." In light of repeated claims that law schools need more social science courses, a brief look at a recent product of one such social science might be of some relevance.

Perhaps Professor Marshall¹ will forgive me for using his book to focus a criticism which involves not only history, but also those other social sciences traditionally called humanities—including law. Professor Marshall, after all, works in a distinguished tradition and has inherited, not invented, its vices. He has produced a history of labor in the South that is both scholarly and disinterested and these are the book's primary flaws. Filled with facts and figures which are the

⁵ Paul, *Mr. Justice Black and Federal Taxation*, 65 YALE L.J. 449 (1956).

⁶ Kirkpatrick, *Crossroads of Antitrust and Union Power*, 34 GEO. WASH. L. REV. 288 (1965).

⁷ Kirkpatrick, *Mr. Justice Black and Antitrust*, 14 U.C.L.A. L. REV. 475 (1967).

¹ Alumni Professor and Chairman, Department of Economics, University of Kentucky, Lexington.