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Review of “Justice and the Supreme Court,” By Rocco J. Tresolini

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BOOK REVIEW

JUSTICE AND THE SUPREME COURT. Rocco J. Tresolini. Philadelphia, Penn.: J. R. Lippincott Co. 1963. Pp. 205. \$1.45.

In this new paperback volume, Professor Tresolini¹ brings together eight studies of individual justices of the United States Supreme Court and important cases in which they participated. It is an attempt to provide the student of American government with materials on both judicial biography and civil liberties cases. In each study the author presents a brief biography of the Justice followed by a description and analysis of a leading civil liberties case in which that Justice participated, with particular attention to that man's written opinion in the case.

The volume, presented as "a beginning rather than the completion"² of Professor Tresolini's researches into the lives and times of Supreme Court justices, includes several studies, parts of which previously appeared in various periodicals as well as some presented for the first time in this collection.

The earliest judge chosen for discussion is Chief Justice Taney. It may be questioned whether *Ex Parte Merryman*³ is an appropriate case for this volume, in view of the fact that it was decided by Taney during his circuit duties rather than by the Supreme Court. Tresolini's justification for its inclusion is that it was "the first mighty blow in federal court history on behalf of individual liberties."⁴ That may be, but it seems somewhat out of place in a collection in which all the remaining selections deal with Supreme Court rulings.

After Taney, the author selects for examination Chief Justice Waite and his opinion for the Court in *Reynolds v. United States*,⁵ which involved the Mormon practice of plural marriage and the First Amendment. This study has a defect common in some degree to several of the others in this volume. The author provides a concise biography of Waite, but in doing so he does little or nothing to suggest what in Waite's background or pre-judicial experience might have led him to interpret the First Amendment as permitting the outlawing of polygamy when practiced as part of a religion. If judicial biography is going to be offered in connection with specific cases, it would seem almost a necessity to lay the groundwork for the cases at

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2. TRESOLINI, *JUSTICE AND THE SUPREME COURT* 5 (1963).

3. 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861).

4. TRESOLINI, *op. cit. supra* note 2, at 16.

5. 98 U.S. 145 (1878).

least in part in the accompanying biography. The author unfortunately does not do this consistently. He does better in this respect in his study of Taney, where he goes much further in suggesting what might have prompted Taney's action in the *Merryman* case. The same is true in his portrayal of the first Justice Harlan and his famous dissent in *Plessy v. Ferguson*.⁶

The other judges and cases included in the volume are Holmes and the *Schwimmer* case,⁷ Hughes and the *Macintosh* decision,⁸ Black and *Chambers v. Florida*,⁹ Murphy and the *Korematsu* decision,¹⁰ and Rutledge and *In Re Yamashita*.¹¹ It is to be regretted that Justice Black is the only living Supreme Court justice included. Certainly either Justice Douglas or Chief Justice Warren merit separate studies in a book on civil liberties, and *Brown v. Board of Education*¹² would have been a fitting companion-piece to *Plessy*.¹³ And what, for example, about Justice Tom Clark, generally conceded by many to be a conservative on civil liberties matters when he joined the Court, but who is now writing many of the stronger civil liberties decisions for the Court? In terms of present relevance, he might have been a better choice for inclusion than, let us say, Chief Justice Waite.

The author attempts, in several of the studies, to "follow through" by showing what occurs after the decision of the case he has been discussing. In view of the scarcity of materials on the aftermath of Supreme Court rulings, this is to be applauded. The pairing of the *Schwimmer* and *Macintosh* cases serves this purpose, and the study of the latter case concludes with an exposition of the Court's *Girouard* ruling,¹⁴ in which both *Schwimmer* and *Macintosh* were overruled. Professor Tresolini also follows General Yamashita from the Supreme Court's decision to his death, describing fully the actions of General MacArthur and his staff in pressing for Yamashita's death and their extreme closed-mindedness concerning the civil liberties issues raised by the captured enemy's trial. The discussion of MacArthur's role in this case is one of the high points of the volume, and neither he nor his assistants come off well in the analysis.

In general, the volume lacks organization. One does expect that any collection of separately prepared studies such as this will be at

6. 163 U.S. 537 (1896).

7. *United States v. Schwimmer*, 279 U.S. 644 (1929).

8. *United States v. Macintosh*, 283 U.S. 605 (1931).

9. 309 U.S. 227 (1946).

10. *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (dissenting opinion).

11. 327 U.S. 1, 41 (1946) (dissenting opinion).

12. 347 U.S. 483 (1954).

13. The author does, however, conclude his study of Harlan with a short treatment of both Warren and the *Brown* case.

14. *Girouard v. United States*, 328 U.S. 61, 69 (1946).

least somewhat uneven in quality; however, additional effort could have gone into structuring the individual studies and the volume as a whole. More attention should have been paid to explaining the criteria for inclusion of particular judges and cases and excluding others. The studies are interesting, but one wonders whether there is sufficient justification for some of them appearing in such a volume.

Professor Tresolini writes well, although he has a tendency to be overenthusiastic. His analytical power is great, and is shown at its best in his discussion of Holmes' social Darwinism and of the difference in orientation between Holmes and Brandeis toward life and their judicial roles. However, he presents each judge in a light so favorable as to leave a question in the mind of the reader as to the author's analytical objectivity. Certainly the public in general and high school students in particular have already been subjected to enough subjective material about the Court without being offered more. It therefore behooves those with as much experience in the field of constitutional law as Professor Tresolini to be particularly careful in this regard.

In addition to the individual studies, the author includes extensive bibliographical notes which will give the student beginning to explore the area of constitutional law a good grasp of the materials with which he can work. Also included is some material from the author's textbook, *AMERICAN CONSTITUTIONAL LAW*,¹⁵ on "How the Supreme Court Decides Cases." This selection, the list of justices of the Supreme Court with the years in which they served, and sections of the United States Constitution relating to civil liberties, are all provided as useful appendices.

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15. TRESOLINI, *AMERICAN CONSTITUTIONAL LAW* (1959).

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