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BOOK REVIEW

MR. JUSTICE BLACK AND HIS CRITICS, By Tinsley E. Yarbrough, Duke University Press, Durham, N.C. 1988 Pp. 323. Hardbound.

*Reviewed by Paul Brickner**

Justice Hugo Lafayette Black, one of the great American jurists of this century and in the history of the Supreme Court, has demonstrated a lasting power that few would have foreseen at the time of his appointment by President Roosevelt in 1937.¹ His brilliance and achievements in American constitutional law will earn him continuing recognition in the marketplace of ideas, long after many of his critics, both early and late, are forgotten.

Professor Tinsley E. Yarbrough of East Carolina University has written an important study of Justice Black's jurisprudence. His respect and admiration for the Justice seem to make the author a bit overly protective towards Justice Black. However, few authors come to a subject with total objectivity. Indeed, almost anyone writing about a Supreme Court Justice will be either an admirer or detractor. However, Profes-

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1. Hambleton, *The All-Time, All-Star, All-Era Supreme Court*, 69 A.B.A. J. 462, 464 (1983), lists Justice Black among the top nine Justices in the history of the Supreme Court; F. RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955* 264-65 (1955).

sor Yarbrough's hero worship is so transparent that it does not significantly diminish the value of this excellent undertaking.² The reader quickly gets used to the recurring pattern of the professor in reporting criticism and then rushing to the defense of Justice Black.

Other shortcomings of this study include the failure of the author to identify some of the authorities that he cites. They may be big names in legal education or in political science, but for many readers some identification of Sylvia Snowiss, John Hart Ely and others would have been helpful. The same is true of many of the terms commonly used by scholars of jurisprudence and legal philosophy. Ordinary readers may have a tough time recalling what they mean. An appendix with short definitions to explain the meanings of terms, schools of philosophy, and schools of interpretation would have been welcomed by many readers. In addition, a short biographical introduction would have been in order. While Professor Yarbrough has devoted much of his academic career to the study of Justice Black, he cannot assume that his readers will be well versed in the background of Black or any other justice, not even Justices Marshall, Holmes or Cardozo. Interpretivism, noninterpretivism, positivism, Van Alstyne, Perry and other personal names and jurisprudential designations need to be identified. Only a small group of academicians will recognize these names and phrases. Professor Yarbrough's undertaking deserves a broader audience and should not appear to limit itself to the restricted readership of the academic world.

The author first identifies Justice Black's critics, both judicial and scholastic. Noteworthy among his judicial critics were Justices Douglas, Frankfurter, and Robert H. Jackson. The academic critics were more numerous, ranging from Charles Fairman of Stanford Law School, in the early years of Justice Black's judicial career, to an increasing cadre of critics as Black became a more formidable figure on our High Court.

Justice Black's background in Alabama included service as a police court judge, undoubtedly an important experi-

2. In telling language, Yarbrough dedicates his book, "To my mother, Another strong-minded, granite-willed Alabamian." T. YARBROUGH, *MR. JUSTICE BLACK AND HIS CRITICS* (1988).

ence; twice elected county prosecuting attorney and elected as United States Senator.³ His previous Ku Klux Klan membership became a cause for concern at the time of his nomination for the high court.⁴

Professor Yarbrough tells us about Justice Black's "constitutional faith" by quoting from a major address that Black delivered at the Columbia University School of Law in 1968.⁵ By then, Black was an experienced and seasoned jurist. Yarbrough tells us, "[T]he Constitution was his 'legal bible,' its 'plan of our government' his plan, its 'destiny' his destiny. 'I cherish every word of it, from the first to the last,' . . . 'and I personally deplore even the slightest deviation from its least important commands.'"⁶ This statement of constitutional faith was supplemented by another fundamental belief of Black, a belief in what he called "our federalism."⁷ Justice Black has set forth that concept in an opinion which Justice Sandra Day O'Connor has described as both "memorable" and "important."⁸ This is important to understanding Justice Black's constitutional faith and concept of constitutional interpretation.

The concept [of our federalism] does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities

3. Frank, *Hugo L. Black, THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* 3, 2321, 2324, 2326-27 (L. Friedman & F. Israel eds. 1969); J. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA*, 73-74 (1989).

4. Frank, *supra* note 3, at 2326. See also J. SIMON, *supra* note 3, at 86-87, 97-99.

5. H. BLACK, *A CONSTITUTIONAL FAITH* (1968).

6. *Id.* at 66. See also T. YARBROUGH, *supra* note 2, at 20.

7. T. YARBROUGH, *supra* note 2, at 34. See also *Younger v. Harris*, 401 U.S. 37, 44 (1971).

8. O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. 1, 9 (1984-85).

of the States.⁹

With these two statements as something of a cornerstone of his beliefs, we can better understand Professor Yarbrough's analysis of Justice Black's jurisprudence and rejection of most of the opinions of Black's critics. Yarbrough observes that Justice Black, at one time of another, "was identified with each of the three main jurisprudential currents in the history of American law—natural law, positivism, and sociological jurisprudence."¹⁰ Yarbrough places Justice Black in the positivist camp, defining positivism as consisting of four tenets or values,¹¹ while noting that, "[p]ositivists and students of legal positivism are not of one mind as to what positivist jurisprudence entails."¹² Professor Yarbrough might have been just as well off to eliminate the jurisprudential classifications and write a more informal study of Justice Black and his critics. Dean James F. Simon of the New York Law School has produced a more popularly written study of both Justices Black and Frankfurter¹³ that has great merit and achieves the virtue of being easy to read. Had Dean James J. Simon conceptualized his study in terms of jurisprudence, he would have reduced the size of his potential readership and deprived many educated, but not technically oriented, readers of a valuable and interesting chapter in the lives of two giants of the law and in the history of the Supreme Court.

Hugo Black's judicial greatness was as much a product of his background in the deep South and his populist political outlook as it was a function of any jurisprudential suit into which he can be fitted. Justice Black acquired the values of Christian fundamentalism and a literal interpretation of the letter of the law as well as of scripture. Indeed, in *Griswold v. Connecticut*,¹⁴ his dissent from the concept of a Constitutional right to privacy in marriage concluded with words that must have been taken from a hymn long popular in the South, "The Old Time Religion."¹⁵ Black, noting that

9. *Younger*, 401 U.S. 37 (1971).

10. T. YARBROUGH, *supra* note 2, at 21.

11. T. YARBROUGH, *supra* note 2, at 23.

12. T. YARBROUGH, *supra* note 2, at 23.

13. J. Simon, *supra* note 3.

14. 381 U.S. 479 (1965).

15. Tillman, *The Old Time Religion*, WORLD RENOWNED HYMNS, No. 244 (R.

the Constitution provided for change by amendment, not by judicial legislation, observed "[t]hat method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me."¹⁶

One can almost hear a joyful Sunday school class of youngsters singing in the words of Justice Black's dissent, "Give me that old time religion . . . it was good for our mothers . . . and it's good enough for me . . . it was good for our fathers . . . it was good for the Hebrew children . . . and it's good enough for me."¹⁷ A back to the basics philosophy with literal interpretation rather than intellectualized analysis appealed to Black.

In a similar fashion, Hugo Lafayette Black populist outlook can be considered paramount in his thinking and more clearly understandable than any jurisprudential label. Chief Justice Rehnquist provides the following description of Hugo Black, dating back to 1952 when he served as a law clerk to Justice Robert H. Jackson, of Hugo Black the populist justice:

Hugo Lafayette Black was the senior associate justice on the Court. He had one of the most mellifluous voices and delightful accents that I, a northerner, had ever heard. Not for nothing had he been a renowned stump speaker in his two victorious campaigns to be elected United States Senator from Alabama. I can still remember him beginning his announcement of a dissenting opinion in a rather technical and uninteresting case involving administrative law by saying that the case involved a fight between "large corporate truckers" and "little independent truckers"; the correct result, in Justice Black's eyes, seemed foreordained by the description of the parties.¹⁸

Black's background, more than a particularized description of his philosophy, provides great insight into his judging process. In 1955, long before Black's retirement in 1971, professor Fred Rodell, of the Yale Law School, wrote an excellent sketch of Justice Black,

Torrey ed. 1909); WINONA HYMNS No. 168 (E. Excell ed.).

16. T. YARBROUGH, *supra* note 2, at 23 (quoting from *Griswald v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting)).

17. Tillman, *supra* note 15.

18. W. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 70 (1987).

Hugo Black—first FDR appointee, more-or-less acknowledged (or else resented) intellectual leader of the New Deal Court, and dean of today's Court—was born in a crossroads cabin in the small-farm cotton country of Alabama, eighth child of a onetime volunteer in the Confederate Army, and, despite some slight formal schooling, including less than two years of copy-book law, has been rigorously educating himself throughout most of the sixty-nine years since his birth. Like at least two great Justices of the past, John Marshall and Samuel Miller. . . , Black turned his meagerness of conventional training into a sec-things-straight boon rather than a confusion-ridden curse; unlike some of his recent predecessors who also rose from the bottom to the top under their own steam, Black continued to care about, and identify himself with, those less lucky or less gifted than he Black, a mellow and gentle-mannered man whose slight Southern drawl belies his tempered-steel mind, has the rare capacity of not transmitting his militant ideas and ideals into personal enmity toward those who disagree.¹⁹

Professor Yarbrough looks beyond Black's positivism and devotes two admirable chapters to his thesis of incorporation of the entire Bill of Rights through the fourteenth amendment, making them binding on the states and to his interpretation of the first amendment in absolute terms. Indeed, Yarbrough tells us that Black considered his 1947 dissent in *Adamson v. California*,²⁰ his most important opinion.²¹ In that dissent, he articulated his opinion that the Founding Fathers had incorporated the entire Bill of Rights through the fourteenth amendment. Professor Archibald Cox tells us that some historians support the outlook of Justice Black, but that a probable majority disagree with him.

In *Palko v. Connecticut*,²² before Justice Black's arrival, the Supreme Court had rejected the incorporation doctrine. Despite Black's tenacity over the years, the incorporation doctrine has never been accepted by the court. However, Dean Simon has pointed out that,

The Court majority never fully accepted Black's theory,

19. F. Rodell, *supra* note 1, at 264-65.

20. 332 U.S. 46, 68 (1947).

21. T. YARBROUGH, *supra* note 2, at 79.

22. 302 U.S. 319 (1937).

but his strong advocacy did, in fact, push the Justices toward incorporating more and more of the Bill of Rights on a selective basis. With [Black's dissent in] *Adams*, Black's reputation as the intellectual leader of the liberal wing of the Court was further strengthened. His allegiance to the individual liberties of the Bill of Rights was now complete and a matter of impressive public record. At the same time, Frankfurter's opposition to the incorporation theory was seen as further evidence of his anti-libertarian sympathies.²³

In a brief few years, Black had overtaken Justice Frankfurter as the expected intellectual leader of the liberal block on the Court. The self-made scholar had garnered support among his brethren that the Harvard Law Professor seated beside him had been unable to claim. Frankfurter had faltered, particularly on the Jehovah's Witness flag salute cases.²⁴

But for Justice Holmes, Justice Black has been the most creative and original thinker on the Supreme Court in the twentieth century. He saw his way through layers of technical legal reasoning and analysis and reached different conclusions abounded fundamental issues. For example, as a newcomer to the Court, he did not hesitate to differ with established majorities by attacking the principle that the fourteenth amendment protected corporations. Black stated clearly that the post-Civil War amendment was designed to protect persons and not business entities.²⁵

Professor Yarbrough provides a thorough analysis of Black's incorporation doctrine and develops pros and cons with respect to the arguments of Black's critics. He then moves on to Justice Black's absolutist interpretation of the first amendment to the Constitution.

Justice Black took at face value the first amendment's decree that Congress shall make "no law." Black's absolutist approach was criticized by many, including Erwin Griswold, a distinguished Ohioan who served as Dean of Harvard Law School and U.S. Solicitor General. Yarbrough tells us that

23. J. SIMON, *supra* note 3, at 179.

24. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

25. T. YARBROUGH, *supra* note 2, at 28-29; *see also* *Connecticut General Life Insurance v. Johnson*, 303 U.S. 77 (1938).

Griswold preferred a balancing approach.²⁶ Philosopher Sidney Hook wondered whether the absolutist approach to freedom of religion would prevent Congress from outlawing polygamy and human sacrifice. Would Justice Black stick to his "no law means no law" approach in the face of claims of freedom of religion for those practices? Professor Yarbrough, who sometimes speaks for Justice Black, does not voice a response to Hook. Nevertheless, Black's outlook was important to him, so important that he voted to support individuals whose outlooks must have been abhorrent to him. He dissented from the Supreme Court's decision approving "non-communist" affidavits required of labor union officials in *American Communications Association v. Douds*,²⁷ and dissented from the conviction in *Dennis v. United States*²⁸ for conspiracy to advocate the overthrow of the government by force and violence. But in an area of current interest, Black supported the right of a state to prohibit flag burning. Conduct such as burning the American flag, even if accompanied by spoken words, was not, for Black, protected as speech.²⁹

Hugo Lafayette Black has earned a very special place for himself in the history of American law and in the history of our Supreme Court. He is the kind of liberal that conservatives can turn to and quote with approval. He was a brilliant man who, though self-educated in many ways, could win arguments against learned scholars. He understood what grass roots America was thinking, because he had been there seeking votes of the citizenry. His political experiences helped him understand those aspects of human nature that are of a baser type and from which the Constitution and the Bill of Rights protects us all. Professor Yarbrough has produced a superb study of a great American jurist who valued our Federal system of government and who cherished those fundamental rights and liberties that make us a free people and a great nation.

26. T. YARBROUGH, *supra* note 2, at 127-28.

27. 339 U.S. 382 (1950).

28. 341 U.S. 494 (1951).

29. T. YARBROUGH, *supra* note 2, at 136; *see also* *Street v. New York*, 394 U.S. 576, 610 (1969).