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Mr. Justice Black: Some Passing Observations

Ronald K. L. Collins*

MR. JUSTICE BLACK: ABSOLUTIST ON THE COURT. By James Magee. University Press of Virginia, Charlottesville, Virginia: Pp. 214 (1980), \$22.50 (hardbound).

Black and I thought that all of the "balancing" had been done by those who wrote the Constitution and the Bill of Rights. They had set aside certain domains where all government regulation was banned. When it came to certain activities, the Constitution had taken government off the backs of men.

William O. Douglas¹

That is the sort of hard-hitting civil libertarian statement Americans have come to expect from a "Douglas" or a "Black." It is the sort of declaration that quickens the zeal of a generation of Warren Court sympathizers. But, as has been said before,² one cannot work with it alone as a proposition of constitutional law.

Unfortunately, Mr. Justice Black's philosophy is remembered mostly by the catchwords he employed to espouse his constitutional jurisprudence. Fervent admirers delight in the straightforward simplicity of what they perceive to be a homespun philosophy. Critics, raged by the catchwords, ridicule as absurd what they think is nothing more than a mere *ipse dixit*.

Fortunately, there is an ever growing corpus of legal literature dedicated to dispelling the popular misconceptions about the ju-

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1. W. DOUGLAS, *THE COURT YEARS* 48 (1980).

2. See Kipling, *A Talk with Justice Linde*, 1980 *WESTERN L.J.* 9, 20. See also Dworkin, *The Case Against William O. Douglas*, 29 *N.Y. REV. OF BOOKS* 3 (1981) (arguing that Douglas "had begun the long process of deciding first and finding reasons later, a process that exchanged philosophical skepticism for philosophical cynicism.").

ridical testament housed in the 969 judicial opinions³ of the Justice who served 34 terms on the Supreme Court. Chief among these contributions are the writings of Professor Tinsley E. Yarbrough.⁴ In the same general vein of careful case examination comes Professor James J. Magee's *Mr. Justice Black: Absolutist on the Court*.⁵

Magee is now an Associate Professor of Political Science at the University of Delaware. Although the book does not mention the fact, *Mr. Justice Black* is the product of a 1975 Ph.D. dissertation done at the University of Virginia under the tutelage of the renowned Professor Henry J. Abraham, who, incidentally, signed the book's foreword. Additionally, as with publications of most such dissertations by university presses, the research cutoff period is three or more years prior to the recorded publication date. Consequently, and perhaps through no fault of the author, there are no references to numerous and worthwhile post-1976 secondary sources concerning Justice Black.⁶

These observations are not, however, intended to be overly critical of the otherwise informative and at times penetrating work product contained in Magee's *Mr. Justice Black*. That is, Magee takes his readers beyond the catchwords and introduces the existence and ramifications of several of the more subtle and sophisticated jurisprudential aspects of certain important tenets of Black's "constitutional faith." Put another way, Magee acquaints his readers with some of those working principles and propositions that lie at the core of the Alabama Justice's philosophy.

In the premier pages of the book, Professor Magee maintains that Justice Black "was one of the very few members of the Court (past and present) who sought diligently and conscientiously to develop a constitutional jurisprudence which would serve to limit as well as to justify the exercise of judicial power."⁷ Magee sets

3. Haigh, *The Judicial Opinions of Mr. Justice Hugo L. Black*, 9 SW. U. L. REV. 1069 (1977).

The Justice's conference notes were destroyed at his request prior to his death. See H. BLACK, JR., *MY FATHER: A REMEMBRANCE* 250-51 (1975). However, other papers and correspondence of the Justice have been preserved and are available in the Library of Congress (Manuscript Division). Magee's research does not appear to have drawn upon these papers.

4. Partially listed in Collins, Book Review, 1977 DUKE L.J. 1087 n.2.

5. J. MAGEE, *MR. JUSTICE BLACK: ABSOLUTIST ON THE COURT* (1980) [hereinafter cited as MAGEE].

6. See, e.g., articles collected in *Justice Hugo L. Black: A Symposium*, 9 SW. U. L. REV. 845-1155 (1977); and Frank, *Hugo L. Black: Free Speech and the Declaration of Independence*, 1977 U. ILL. L. FORUM 577; Comment, *The Right of Privacy: A Black View of Griswold v. Connecticut*, 7 HASTINGS CONST. L.Q. 777 (1980); articles cited in notes 10-12 *infra*.

7. MAGEE, *supra* note 5, at xi-xii.

out to identify and explain that constitutional jurisprudence.

Despite what is suggested by the book's title and the constant references to Justice Black's "jurisprudence," it is important to note what is *not* discussed in Magee's examination of Black's constitutional thought. Absent is any genuine consideration of Black's views on "absolutism" as applied to interpreting "absolute" provisions like the contract clause.⁸ Foreign to this study is any attempt to show how Black tackled "balancing" in the equal protection context.⁹ Conspicuously missing is any helpful discussion of the relationship between Black's first amendment views and those views he held concerning the meaning of the fourth amendment.¹⁰ Likewise, Magee does not seriously endeavor to go beyond the "incorporation" stratum of Black's understanding of due process,¹¹ nor does he venture upon any extended inquiry into the Justice's first amendment "absolutism" concerning the establishment and free exercise clauses.¹²

I highlight these omissions because it is difficult to understand how there can ever be a plenary and satisfactory exposition of Mr. Justice Black's constitutional jurisprudence absent some meaningful discussion of how the Justice's views concerning these subjects and others fit into the scheme of his overall philosophy. More importantly, I suspect that either Black's jurisprudence met its hardest test in those areas, or perhaps Black failed to hammer out a refined approach to resolving certain constitutional questions within the framework of his total jurisprudence.

These points call to attention perhaps the most tenuous assertion in Magee's book, the assertion made in the first chapter, namely that "[a]ll of the provisions of the Bill of Rights, not just the First Amendment, [Black] said, contain absolute

8. See, e.g., *El Paso v. Simmons*, 379 U.S. 497, 517 (1965) (Black, J., dissenting).

9. See Yarbrough, *Justice Black and Equal Protection*, 9 SW. U. L. REV. 899 (1977).

10. See Landynski, *In Search of Justice Black's Fourth Amendment*, 45 FORDHAM L. REV. 453 (1976).

11. See Haigh, *Defining Due Process of Law: The Case of Mr. Justice Hugo L. Black*, 17 S. DAKOTA L. REV. 1 (1972). For an illuminating expression of the Justice's constitutional jurisprudence, and specifically his views on due process, see his seldom read opinion in *International Shoe v. State of Washington*, 326 U.S. 310, 322 (1945) (separate opinion).

12. Compare MAGEE, *supra* note 5, at 184-87 with D. Meiklejohn, *Religion in the Burger Court: The Heritage of Mr. Justice Black*, 10 IND. L. REV. 645 (1977).

rights. . . ."¹³ What Black *did* say, in his 1968 news interview, was quite the contrary: "I did not say that our entire Bill of Rights is an absolute. I said there are absolutes in our Bill of Rights."¹⁴ (Mrs. Elizabeth Black also flags Magee's error in her Memorial Portrait of the Justice)¹⁵

Properly stated, Magee's focus is on Mr. Justice Black's "constitutional jurisprudence" concerning primarily the freedom of speech and press provisions of the first amendment. Within the book's six chapters, Magee acquaints the reader with how Black understood freedom of expression "absolutism,"¹⁶ how that understanding relied on historical considerations,¹⁷ how and in what respects that absolutism was antithetical to a "balancing" approach,¹⁸ how Black developed this theory of "absolutism,"¹⁹ and finally, what dilemmas an absolutist approach to freedom of expression issues posed for the Justice in his closing years on the Court.²⁰

Overall, the first two chapters are well presented, laying bare the fundamentals of Justice Black's absolutism concerning freedom of expression questions. Describing Justice Black's approach, Professor Magee notes:

Literalism involved a process of employing standards—the words of the Constitution—for determining constitutional rights. Absolutism and literalism . . . were intimately intertwined, for the foundation of Justice Black's belief that the First Amendment is an absolute was primarily the literal command "Congress shall make no law." But, whereas absolutism was only a standard of enforcement, literalism—besides being a justification for absolutism—also involved the complex task of ascertaining the meaning of the rights and freedoms outlined in the Bill of Rights.²¹

This was Black's methodology for arriving at standards of constitutional objectivity that would check unwarranted judicial discretion, while lending a healthy measure of predictability and certainty to the law.²²

Magee advances a worthwhile argument by redirecting attention to one thorny branch of this approach: "In Justice Black's literal construction the major task is set aside—that of defining words and phrases over which there is considerable dispute, even

13. MAGEE, *supra* note 5, at 8.

14. CBS news special interview with Eric Sevareid and Martin Agronsky, reprinted in *Justice Black and the Bill of Rights*, 9 SW. U. L. REV. 937, 938 (1977).

15. Black, *Hugo Black: A Memorial Portrait*, YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY (1982).

16. MAGEE, *supra* note 5, at 29-63.

17. *Id.* at 32-48.

18. *Id.* at 11-15, 98, 128-33, 138.

19. *Id.* at 99-143.

20. *Id.* at 144-81.

21. *Id.* at 15.

22. *See id.* at 119, 145, 194.

among absolutists."²³ One example is Alexander Meiklejohn's distinction between "speech" and "freedom of speech" as worded in the first amendment.²⁴ That shade of difference proved to be of little or no moment to the "literalist" Alabaman. Nor did Black ever craft any truly convincing definitional guidelines to explain why expression like symbolic speech should not be entitled to absolute, or even near absolute protection.²⁵ Is this perhaps a case of Black logomachy?

Equally proficuous is Magee's sketch of the role of history in Black's science of law. History, contended Franklin Roosevelt's first appointee, provided yet another justification for resort to an absolutist approach to constitutional decision-making. On this matter Magee tracks the various historical arguments of Chafee, Corwin, Leonard Levy, and others concerning the Framers' original intent regarding freedom of expression.²⁶ The author offers ample evidence that Black's first amendment historical arguments were, at best, problematic.²⁷

More damaging still, as far as fourteenth amendment incorporation is concerned, is the evidence Magee tenders suggesting that "the First Amendment was in fact jurisdictional, and thus aimed specifically at the federal government's authority over the matter of freedom of expression."²⁸ Quite correctly, then, Magee inquires: "As a restriction on federal power vis-à-vis the power of the states, how can the First Amendment apply to the states at all?"²⁹

Chapters three through five provide perhaps the most engrossing sections of the book. Essentially, Magee opines that the development of Black's absolutist interpretation of the first amendment's restraints on government may be divided into the following three periods: (1) 1937-49, during which Justice Black adhered to a "preferred position" approach to free expression questions; (2) 1949-62, characterized by the announcement of absolutism and its liberal application; and (3) 1962-71, marked by a period of retreat in applying absolutist arguments to "symbolic

23. *Id.* at 24.

24. *Id.* at 23.

25. *Cf.* Yarbrough, *Justice Black & His Critics on Speech-Plus & Symbolic Speech*, 52 TEX. L. REV. 257 (1974).

26. MAGEE, *supra* note 5, at 50-63.

27. *See id.*

28. *See id.* at 57-60.

29. *Id.* at 60.

speech" and what is referred to as "speech plus."³⁰

Magee's conclusions do not mark the final word on this particular subject. Even so, it cannot be gainsaid that he has made anything less than "clear and convincing" arguments in defense of his general position. For example, Magee offers intellectually seductive support for the contention that the Black of the first period was not hostile to all types of balancing nor even to that variation of balancing known as the "clear and present danger" test.³¹ Likewise, the Black of the formative years was willing to exclude certain kinds of pure speech (e.g. commercial speech) from the ambit of absolute protection.³² The dissenting rhetoric of the later years covered these and other early opinions much like newly fallen snow conceals rugged brush.

The issue, of course, is not whether the Justice was adroit or lofty, for certainly he was both. Rather the focal concern is with the intellectual design which the maturing Black selected to construct the edifice of his constitutional thought. Serious study of the myriad of Black opinions alerts us to several constitutional signposts that lie at the crossroads of his thought. Thus understood, there is a real intellectual temptation to concur with Professor Magee that slight as it was, Black's juristic turn to absolutism in this penultimate period came following the deaths of Justices Murphy and Rutledge and upon the arrival of the *Dennis*³³ decision. A decade later in his celebrated *Konigsberg v. State Bar* dissent,³⁴ Black lamented what he viewed as the "sudden transformation of the 'clear and present danger test' in *Dennis v. United States*."³⁵ Accordingly, and as Magee accurately emphasizes, Black's *Dennis* dissent stressed that his "basic disagreement with the Court . . . [sprang] from a fundamental difference in constitutional approach."³⁶ That fundamental difference, it seems, marked the initial phase of Black's open adoption of absolutism.³⁷

According to Magee, the last period (1962-71) commenced with Arthur Goldberg assuming the Frankfurter seat. It was during the 1960s—the heyday of the Warren Court—urges Magee, that

30. *Id.* at 64-67.

31. *See id.* at 86-93. *See generally* Linde, *Clear & Present Danger Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1174-82 (1970) (arguing that the first amendment is correctly understood *first* as a direction to legislators rather than to judges deciding cases upon subsequent review).

32. *See* MAGEE, *supra* note 5, at 96-97.

33. 341 U.S. 494 (1951).

34. 366 U.S. 36, 56 (1961).

35. *Id.* at 64.

36. MAGEE, *supra* note 5, at 105 quoting 341 U.S. at 579 (Black, J., dissenting).

37. *See* MAGEE, *supra* note 5, at 101, 111-19.

"[a] change in Justice's Black's attitude toward dissent and protest no doubt occurred."³⁸ What is commonly viewed as Black's conservative years came during this period, primarily in response to symbolic speech questions and demonstration cases. In his 1968 book, *A Constitutional Faith*,³⁹ Black offered the following reply to his critics: "In giving absolute protection to free speech, . . . I have always been careful to draw a line between speech and conduct."⁴⁰

Professor Magee submits challenging arguments refuting much of Black's position regarding his alleged fidelity to these distinctions.⁴¹ One of Magee's more telling arguments is his cautious critique of Black's opinion in *Giboney v. Empire Storage & Ice Co.*,⁴² an oft-cited case presented as evidence that Black early along subscribed to a clear speech-conduct distinction. Not without merit, Professor Magee's study of the case concludes: (1) the opinion does not in fact articulate any lucid distinction between constitutionally protected speech and conduct; (2) the opinion may be understood to afford constitutional protection on the basis of the *content* of the message delivered; and (3) the *Giboney* rationale is difficult to square with Black's absolutist treatment of libel laws affecting freedom of speech.⁴³

A number of the preceding arguments differ from those advanced by Professor Yarbrough.⁴⁴ With the publication of this book, I believe, Professor Magee has shifted the burden of proof to Professor Yarbrough to demonstrate the consistency of Mr. Justice Black's views concerning freedom of expression. This undertaking would be salutary, at least in perpetuating the kind of discussion Black most assuredly thought the first amendment protected absolutely.

Before shelving Magee's *Mr. Justice Black*, I think it well to register a few comments about several of the book's shortcomings. First, the author's treatment of *Korematsu v. United States*⁴⁵ holds the case up against the backdrop of Black's absolutism,

38. *Id.* at 152.

39. H. BLACK, *A CONSTITUTIONAL FAITH* (1969).

40. *Id.* at 53.

41. MAGEE, *supra* note 5, at 160-73.

42. 336 U.S. 490 (1949).

43. MAGEE, *supra* note 5, at 164-66.

44. See note 25 *supra*. See also Yarbrough, *Justice Black, The First Amendment, & the Burger Court*, 46 Miss. L.J. 203 (1975).

45. 323 U.S. 214 (1944).

when the opinion is more clearly explainable as being cut from the cloth of Black's equal protection jurisprudence.⁴⁶

Second, *Dunne v. United States*⁴⁷ is offered as evidence that Black's initial views on the first amendment and the Smith Act were different than his later ones expressed in *Dennis*. Magee hinges this argument on the assumption that Black joined the 1943 majority in denying certiorari in *Dunne*, and "thereby upheld the provisions of the Smith Act."⁴⁸ Against Magee's assumption stands the bold statement of Justice Douglas: "Black voted to grant the petition."⁴⁹

Still other oversights warrant mention. The Justice's 1947 *Adamson v. California* dissent⁵⁰ is wedged into the absolutist period of Black's jurisprudence, the period which according to Magee did not begin until two years later in 1949. Chronologically, Black's *Adamson* dissent is a child of what Magee labels as the first period. Ironically then, the *Adamson* dissent may lend some support for the contrary position, namely, that Black's absolutism traced back beyond *Dennis* in 1951.

Additionally, the author contends that Justice Black "devoted much of the remainder of his judicial life to condemning, as inconsistent with the idea of a written constitution, the very reasoning employed to reach the result in *Korematsu*."⁵¹ That is a questionable proposition, particularly in light of the Justice's reaffirmation of *Korematsu* a few years prior to his death.⁵²

Finally, it is rather curious that Magee altogether sets aside Black's 1957 *due process* grounded opinion in *Konigsberg v. State Bar*.⁵³ Regrettably, Magee does not even hint at the remarkable 1971 trilogy of Bar admission cases.⁵⁴ Similarly, Black's somewhat surprising dissent in *Amalgamated Food Employees Union v. Logan Plaza*⁵⁵ does not win so much as a single line of footnote space.

Mr. Justice Black is surely the kind of book that should be pondered by anyone genuinely interested in freedom of expres-

46. See Yarbrough, *supra* note 9.

47. 138 F.2d 137 (8th Cir. 1943), *cert. denied*, 320 U.S. 790 (1943).

48. MAGEE, *supra* note 5, at 105-06 (footnote omitted).

49. Douglas, *supra* note 1, at 94 (emphasis added).

50. 332 U.S. 46 (1947) (Black, J., dissenting).

51. MAGEE, *supra* note 5, at 71.

52. See N.Y. Times, Sept. 26, 1971, at 76, col. 8.

53. 353 U.S. 252 (1957).

54. See *Baird v. Arizona*, 401 U.S. 1 (1971); *In re Stolar*, 401 U.S. 23 (1971); *Law Students Research Council v. Wadmond*, 401 U.S. 154 (1971). On the earlier Bar admission cases, see Kalven & Steffen, *The Bar Admission Cases*, 21 LAW IN TRANSITION 155 (1961); Dilliard, *Mr. Justice Black and In re Anastaplo*, 9 Sw. U. L. Rev. 953 (1977).

55. 391 U.S. 308, 327 (1968).

sion issues specifically, or in judicial constitutional decision-making generally. It is perhaps one kind of book that Mr. Justice Powell, the "balancer" and successor to Black, might do well to peruse. For that matter, it is a book that appellate judges should be introduced to, if only to call attention to the significance of a principled and thoughtful approach to decision-making—an approach intellectually unequaled by many of the now fashionable, so-called "ad hoc" weighing of interests formulae.⁵⁶

I have made the argument before:⁵⁷ One can learn a great deal about a judge by reading through the published reports⁵⁸ with care and attention. This is true in part because a truly great appellate judge, from the federal or state court bench, devotes much care and attention to crafting published opinions. Magee's study, whatever its failures may be, unquestionably fosters respect for Black's judicial legacy by setting out to examine the Justice's published opinions with some care and attention. Hopefully, future studies will be the product of nothing less than an equal measure of this kind of scholarship.

Charles Reich put it best: "The Supreme Court was designed for giants."⁵⁹ However one assesses Mr. Justice Black, he was indeed a "giant."⁶⁰ Even as strong a critic as the late Alexander Bickel admitted, "[He was] without a doubt a figure of the first importance in the history of the Court."⁶¹ James Magee's book, though flawed in places, certainly can assist future generations in

56. Cf. Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565, 609-17 (1980); Shiffrin, *Defamatory Non-Media Speech & First Amendment Methodology*, 25 U.C.L.A. L. REV. 915, 955-63 (1978). For a trenchant and pragmatic general reply to such arguments, see *State v. Tourtillott*, 289 Or. 835, 869-72, 618 P.2d 423, 440-42 (1980) (Linde, J., dissenting). See also Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 736-44 (1963).

57. Collins, Book Review, 15 *Stan. Law.* 39 (Winter/Spring, 1979-80).

58. This is not to be understood, however, as suggesting that cases are the *only* places where a scholar, as distinguished from "reporters" of the Woodward and Armstrong variety, may search. That is, "[t]here is a clear need for scholars to expand their conception of the role of Supreme Court Justices. . . . Thus, studies that concentrate only on formal judicial behavior risk missing some of the most revealing actions of members of the Court." See Murphy, *Elements of Extrajudicial Strategy: A Look at the Political Roles of Justices Brandeis and Frankfurter*, 69 GEO. L.J. 101, 128 (1980); Levy & Murphy, *Preserving The Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Felix Frankfurter, 1916-1933*, 78 MICH. L. REV. 1252 (1981).

59. Collins, *The Next Reich*, 2 NAT'L L.J. 1, 25 (1980) (interview with Charles Reich).

60. See Frank, *Hugo L. Black: He Has Joined the Giants*, 58 A.B.A. J. 21 (1972).

61. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 85 (1962).

appreciating—even in a constitutionally changing world—something of the great stature of one of the last “giants” to hold the title “Mr. Justice.”