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Recommended Citation

Gerhard Casper, "Book Review (reviewing Charles L. Black, Structure and Relationship in Constitutional Law (1969))," 37 University of Chicago Law Review 196 (1969).

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REVIEW

Structure and Relationship in Constitutional Law. CHARLES L. BLACK, JR. Louisiana State University Press, Baton Rouge, 1969. Pp. xii, 98. \$3.95

Gerhard Casper†

The astute critic "is the one of whom one can say, with Péguy that 'he knew how to discern the evil that lurks beneath such a semblance of good'."¹ Kurland, reviewing another book by Black in the pages of this journal, opened with a list of the author's formal accomplishments which was as flattering as when it is emphasized that somebody is a colossus merely in order to suggest that he has feet of clay.² However this may be (and it may just be a joy in artistry shared by Professors Kurland and Black) to the stars then listed in this law review, Black has now added another one (incidentally, also possessed by Kurland³): the distinction of lecturing in a series known for its outstanding speakers. The above book is the publication of the Edward Douglass White Lectures which Professor Black delivered at Louisiana State University. Among his predecessors are MacIver, Hutchins, and Corwin. Black's lectures display the same unpretentious, but artful liveliness characteristic of the sculptures which a visitor sometimes finds on exhibition in his office at the Yale Law School and which I, for one, can appreciate more than Kurland seems to have appreciated Black's poetry.⁴

Among teachers of constitutional law at American law schools, Professor Black has perhaps shown most interest in systematic analysis and exposition of the role played by constitutional law in the American polity. Black wrote one of the most literate contributions to the lively debate on judicial epistemology which characterized

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¹ N. LEITES, *THE RULES OF THE GAME IN PARIS* 286 (1969).

² Kurland, *Book Review (C. BLACK, THE OCCASIONS OF JUSTICE: ESSAYS MOSTLY ON LAW (1963))*, 32 U. CHI. L. REV. 386 (1965).

³ Professor Kurland recently gave the Cooley Lectures at Michigan. Kurland and Black also share the prestige of each having written a *Harvard Law Review Foreword* (on essentially the same topic). Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143 (1964); Black, *Foreword: "State Action," Equal Protection and California's Proposition 14,* 81 HARV. L. REV. 69 (1967).

⁴ See Kurland, *supra* note 2, at 388.

the late fifties and early sixties in the United States.⁵ He is also the author of the most incisive short treatment of constitutional law presently available.⁶ As concerns the latter work, it is difficult to fully understand, as may be expected of a 118-page text on constitutional law. In particular, the reader all too easily overlooks the implications of an argument made in a very few sentences. Thus, I realized only now, when rereading the booklet on the occasion of this review, the importance for Black of a point on which *Structure and Relationship in Constitutional Law* elaborates:

Up to now we have considered constitutional limitations as rooting in particular textual provisions ("freedom of speech," "due process of law"). There is another possible source of such protection, as yet quite undeveloped in decision. Like congressional and presidential powers, limitations may sometimes arise by implication from the nature and structure of our polity. The slight development till now of this branch of the law may be due to a preference in our juristic style for the "interpretation" of indubitably authentic commands, rather than the discernment of implications. But this stylistic preference may change.⁷

At the end of his Louisiana lectures Professor Black said: "Still, I think it is right that the method of inference from structures, status, and relationship is relatively little attended to in our legal culture, and even if I buy a pocket book in the station in New Orleans and read on the way home almost everything I have said here, I shall not be sorry for having raised some of these problems in your minds."⁸ Such a pocket book exists. Its author is Professor Black.

Black's main point is this. In dealing with questions of constitutional law, purported explication of the particular textual passage which is considered as a directive for action has all too much dominated constitutional interpretation.⁹ Though the disadvantages of this method and the advantages of inference from structure are never systematically spelled out in the book, the disadvantages of mere textual exegesis include: it misses "the real question"¹⁰ and thus constitutes "poor rhetoric"¹¹; it avoids "policy" and "the discussion of practical

⁵ C. BLACK, *THE PEOPLE AND THE COURT* (1960).

⁶ C. BLACK, *PERSPECTIVES IN CONSTITUTIONAL LAW* (1963).

⁷ P. 83.

⁸ Pp. 93-94.

⁹ P. 7.

¹⁰ Pp. 13, 49.

¹¹ P. 57.

rightness"¹² (and thus impedes the development of constitutional law); it does not provide certainty and thus creates hazards for civil rights;¹³ and, most of all, mere textual interpretation fails to grasp the implications of national citizenship for American federalism, or, as Professor Black puts it rather awkwardly, "the intercommunicating polity that is the United States."¹⁴

It is apparent from Professor Black's opening paragraph, but even more so from the language he uses, that the author does not refuse Llewellyn's baton to which Kurland said he was entitled.¹⁵ Rather, he wields it lovingly, and certainly without an objection from me. The core of this relationship is not so much that Black seems to be issuing a call for using the *Grand Tradition* in the determination of constitutional issues. The affinity is more subtle. To draw inferences from the structures and relationships created by the Constitution is to emphasize the "type-situation" and make "the nature of things" the basis for legal argument. Llewellyn, in turn, was, of course, influenced, as he himself pointed out, by German legal theory, in particular Levin Goldschmidt.¹⁶ Since Black does not claim novelty of his ideas, these observations are, of course, not to be taken as criticism but rather as an attempt at understanding. As concerns novelty, a "civilian"—to use Black's own category¹⁷—will hardly be startled by any of the suggestions Black makes; he will, however, be more skeptical as concerns the value of the method advocated by Black. With great deference and all the respect I have for Professor Black, one criticism concerning the "novelty" point seems in order. Anybody familiar with American legal literature of the first third of this century cannot fail but be impressed by the interest displayed by Holmes, Cardozo, Llewellyn—to name but an arbitrary few—in legal writing and theory abroad. François Géný, for instance, was well known to the author of *The Nature of the Judicial Process*. Now, after his major work on interpretation has become available in an

¹² P. 23.

¹³ "I for one can sleep sounder if I do not have to force my conviction that the states are barred from interfering with political speech through the narrow verbal funnel of due process of law." Pp. 45-46.

¹⁴ P. 50 & *passim*.

¹⁵ Kurland, *supra* note 2, at 387.

¹⁶ K. LLEWELLYN, *THE COMMON LAW TRADITION* 122 (1960). On Llewellyn's rediscovery of the ancient doctrine of *natura rerum* and the context in which I would place it, see G. CASPER, *JURISTISCHER REALISMUS UND POLITISCHE THEORIE IM AMERIKANISCHEN RECHTS-DENKEN* 64-66 (1967). Llewellyn's rediscovery occurs simultaneously with a short-lived post-war emphasis on *Natur der Sache* in German legal philosophy. In the end the discussion did not prove very fruitful. Its beginning may be traced to an elegant small essay by G. RADBRUCH, *DIE NATUR DER SACHE ALS JURISTISCHE DENKFORM* (1948).

¹⁷ P. 4.

excellent English edition prepared under the auspices of the Louisiana Law Institute, what Gény has to say about "the postulate that social relations or, more generally, the fact elements of any legal system, carry in themselves their own conditions of equilibrium and so to speak indicate themselves the norms to govern them,"¹⁸ seems to be all but ignored.

Before I proceed any further I should like to make clear that I often find myself in agreement with Black's views on specific constitutional issues. In particular, I regret, as he does, the lack of emphasis on the status of citizenship and what this status may involve.¹⁹ Rather more critical than Black,²⁰ I think there is something affirmatively wrong with invoking the commerce clause as a contrived justification for Title 2 of the 1964 Civil Rights Act, instead of squarely facing the claims toward equality raised by black citizens. I support Gunther when he characterizes what Black calls "bad rhetoric"²¹ as "demeaning,"²² though I realize that my differences with Black on this point may be mostly and "merely" verbal. I, too, have been dissatisfied with the lack of structural considerations, for instance, in last term's Supreme Court decision in *Williams v. Rhodes*²³ where the status of political parties is dealt with by using the category of the right to vote and associate "effectively."²⁴ But when all this is said I remain rather unconvinced that, in this book (as distinguished from his *Harvard Law Review Foreword*²⁵), Professor Black has made a persuasive case for the method he advocates.

The first example Black provides of the difference between textual interpretation and inference from structure is the case of *Carrington v. Rash*²⁶ in which the Supreme Court ordered the admission of an enlisted serviceman, a bona fide resident, to the franchise in El Paso, Texas, contrary to a Texas constitutional provision barring

18 F. GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF 362 (1963) (English translation under this title).

19 See Casper, *Jones v. Mayer: Clío, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89, 122.

20 P. 55.

21 P. 57.

22 Letter to the Department of Justice, dated June 5, 1963, and reprinted in N. DOWLING & G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 307-8 (1965).

23 393 U.S. 23 (1968).

24 See my forthcoming article *Williams v. Rhodes and Public Financing of Political Parties under the American and German Constitutions*, 1969 SUP. CT. REV. —. This article also provides an example of a highly unsatisfactory use of structural and relational considerations by the German constitutional court in dealing with public financing of political parties.

25 Black, *supra* note 3.

26 380 U.S. 89 (1965).

soldiers from voting anywhere but in the county where they resided previous to their service. The Court found the heart of the matter in a denial of equal protection guaranteed by the fourteenth amendment. Black considers this argument to be beside the point since the classification was reasonable. "The real question is whether we think Texas, reasonably or not, should be allowed to annex a disability solely to federal military service."²⁷ Black, thus, would prefer the following reasoning resulting in the same outcome:

Carrington, I should rather have said, was a federal soldier, recruited by the national government to perform a crucial national function. Conceding that in every other way he qualified to vote, Texas said that, solely upon the showing that he was in the performance of that function, he was not to vote. It makes little difference whether you call that a penalization of membership in the national Army. It is, in neutral terminology, the imposition, by a state, of a distinctive disadvantage based solely on membership in the Army. My thought would be that it ought to be held that no state may annex any disadvantage simply and solely to the performance of a federal duty.²⁸

The crux of the matter is in this last sentence. Texas did not annex the disadvantage "simply and solely" to the performance of a federal duty, but offered the reasons recited by Black: soldiers are subject to special pressures, they might take over small communities, they often are "transients." I think, even if we rely on the "logic of national structure" as the ground for decision, that "logic" calls for exactly the same weighing of "reasonableness" which the Court does under the fourteenth amendment. Thus we are hardly better off than we were before, except that we would have a ground for decision even if there were no fourteenth amendment—admittedly, an elegant didactic stipulation, and thus may have a somewhat more satisfactory rationale generally.

Black here and elsewhere in the book overemphasizes the difference between "textual exegesis" and derivation from structure and relation. Most of his arguments on the preponderance of national policies are indeed based on "textual" interpretation: the difference is that Professor Black looks at the Constitution in its entirety, rather than at isolated concepts or rules. In short, the difference is not so much one between textual and non-textual modes of interpretation, as between interpretation which is oriented toward single

²⁷ P. 13.

²⁸ Pp. 10-11.

rules on the one hand, and what I would call systematic interpretation, on the other (for which a much maligned example is provided by Douglas' opinion in *Griswold v. Connecticut*²⁹). As concerns the desirability of systematic interpretation (which must also take into account actual structural changes, as, for instance, those concerning the function of the electoral college), I would say "it is only a necessity." To this extent, I am in complete agreement with Professor Black, and rather grateful that he made the point. Black says: "I submit that the generalities and ambiguities are no greater when one applies the method of reasoning from structure and relation."³⁰ With this statement I equally agree, but then it must also be emphasized that there hardly will be any less ambiguities,³¹ except, perhaps, if one shares Black's rather unfailing preference for the "highest possible national interest" as a criterion for distinguishing between what is worthy and what is unworthy of constitutional protection.³²

This brings me to my last point. In the third of his lectures (the second is devoted to an intriguing analysis of the status of citizenship if there were no fourteenth amendment), Black discusses the impact of structural considerations on the practice of judicial review, more specifically he justifies the constitutional legitimacy (as distinguished from their wisdom) of the Supreme Court decisions in the area of criminal procedure. With the outcome of Professor Black's reasoning I shall not take issue. Nor do I disagree with his proposition that "the logic of *Marbury v. Madison* . . . cannot be relevant to the attitude one is to assume toward review of the actions of the states for their federal constitutionality. For the modes of legitimation are entirely different."³³ Finally, I think Professor Black is right in emphasizing the fact, "that virtually all intense political trouble about the Court's role in the last three decades concerns its functioning in the one of these roles whose legitimacy is not so much as fairly debatable."³⁴ Rather, I am somewhat troubled by what I would consider excessive formalism when he emphasizes that the Court ought to feel not the slightest embarrassment about its work of reviewing state acts for their federal constitutionality.³⁵ The author somewhat qualifies this rather sweeping statement when later he writes that though

²⁹ 381 U.S. 479 (1965).

³⁰ Pp. 30-31.

³¹ See the example I refer to in note 24 *supra*.

³² P. 47 in a discussion of *New York Times v. Sullivan*, 376 U.S. 254 (1964).

³³ P. 73. Black finds the legitimation for review of state actions in a rather textual analysis of article VI of the Constitution.

³⁴ P. 75.

³⁵ P. 75.

the state legislatures are not entitled to the same deference as Congress, "the fully formal action of a state legislature has a considerable weight; it represents the best and most authentic judgment of the state as a political body." "But," Black continues, "a great deal of the review performed by the Court . . . does not concern such acts at all, but rather places the Court in confrontation with minor state officialdom."³⁶

Let me first make a structural point. To the extent to which the states possess legislative competence, it could fairly be argued that they are entitled to the same "deference" which, Black admits, is Congress' due. The existence of a countervailing national policy is the very thing which has to be proven to the state constituency. As concerns the distinction between actions of state officials (without more) and practices of state officials authorized by state law, it most certainly is an important distinction as we know from rich experiences, yet that distinction is more difficult to make than Black seems to think. To point to legislative passivity can hardly be the full answer to the question whether, for example, police interrogation without counsel is authorized by state law. The very intensity of the political trouble which the Court has generated seems to be as good a measure as any of the ambiguity of the textual, structural, relational, and political data which need to be interpreted, and which Professor Black has approached with refreshing unorthodoxy. Alas, "it is easier to construct an imaginary figure of precision than it is to perform an act of precision."³⁷

³⁶ Pp. 87-88.

³⁷ N. LEITES, *supra* note 1, at 349.