2009

Hugo Black and Judicial Lawmaking: Forty Years in Retrospect

Paul R. Baier

Follow this and additional works at: http://digitalcommons.law.lsu.edu/faculty_scholarship

Part of the Law Commons

Repository Citation

http://digitalcommons.law.lsu.edu/faculty_scholarship/226

This Article is brought to you for free and open access by the Faculty Scholarship at LSU Law Digital Commons. It has been accepted for inclusion in Journal Articles by an authorized administrator of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.
Hugo Black and Judicial Lawmaking: Forty Years in Retrospect
Paul R. Baier*

I. Law and Media Converge

Forty years ago, law and media converged in spectacular fashion. I am referring to Hugo Black's 1968 television interview on the Court and the Constitution, "Justice Black and the Bill of Rights." This was the first television interview in history with a sitting Supreme Court Justice. The interview aired on December 3rd, 1968. The American people heard Justice Black's mellifluous Alabama voice decrying judges legislating from the bench. He recalled his New Deal days when the Court was turning its back on the Congress: "We had a Court that took out of this little word 'due process' a meaning that they could pass on the economic affairs of this Nation, what the policies should be." Hugo Black vividly recalled the dangers of due process, where the Old Court in *Jay Burns Baking Company v. Bryan* struck down a Nebraska law regulating the size of loaves of bread. Listen to him for yourself:

But the Court was holding that—it had actually held and struck down a law of the State of Nebraska, where the people out there found that the bakers were trimming the size of their loaves of bread and they dared to have an interest out there in seeing that consumers of bread were not cheated that way. And they passed a law regulating the size of a loaf of bread. Court comes along, says, "You can't do that!" "That violates due process!" "Contrary to the fundamental principles of human nature!" "Shocks my conscience!"


1. 264 U.S. 504 (1924).
“Violates the freedom of contract clause!”
And anything else.

As a Senator, Hugo Black supported President Franklin Roosevelt’s Courtpacking plan. “I was for changing the Court as the Constitution permits, anyway it permits, in order to get rid of a majority who would strike down such laws.”

Nobody could say it violated the Constitution, honestly. They might say, as they say about some of 'em, it violated “impalpable emanations from penumbras connected with certain [laughing], certain amendments.” But I don’t know anything about those penumbras and emanations. All I go by, is I’m foolish enough to look at the words.

In contrast to the vagary of due process used by the Court to strike down economic regulation, Justice Black championed the First Amendment as an absolute. For Justice Black, “Congress shall make no law” means, “Congress shall make no law.”2 That’s it. No ifs, ands, or buts. Listen to his mighty Alabama voice once more, from the sound recording of his television interview, by way of a final word of introduction to my remarks:

II. Forty Years in Retrospect

I first saw Hugo Black’s television interview while helping Elizabeth Black with her memoirs. We viewed a film copy together at the Library of Congress. I recommend this television interview to you. It adds life to our learning.3 In this article, I propose to look back forty years and see how Hugo Black’s views have held up. On the current Court, Justice Scalia is a worthy echo of Justice Black’s faith in the Bill of Rights. But on substantive due process and privacy rights, I’m obliged to tell you that the Court has gone way beyond Hugo Black and Antonin Scalia’s boundary lines.4

---

2. U.S. CONST. amend. I.
4. Of course, the California Supreme Court, 4-3, has also surpassed Hugo Black and Antonin Scalia’s boundary lines, while at the same time confirming Justice Scalia’s fear of judicial imposition of homosexual marriage. See In re Marriage Cases, 43 Cal. 4th 757, 183 P.3d 384 (2008); Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting). The Massachusetts Supreme Judicial Court, per Chief Justice Margaret Marshall, earlier held that the individual liberty and equality safeguards of the Massachusetts Constitution require the General Court to afford same-sex couples equal liberty of civil marriage, again by a vote of 4 to 3. Goodridge v. Dept. Pub. Health, 440 Mass. 309, 798 N.E.2d 941 (2003).

I have discoursed at length, with proof of claim, on this eternal theme of the proper boundaries of constitutional adjudication. See Paul R. Baier, The Supreme Court, Justinian, and Antonin Scalia: Twenty Years in Retrospect, 67 LA. L. REV. 489 (2007).
Paul R. Baier

The Supreme Court of the United States, before and since Hugo L. Black, has always legislated from the bench. "Bench legislation"—never mind Hugo Black or Antonin Scalia, never mind Plato or Aristotle, never mind Justinian or Napoleon—is inherent in saying what the law is. This is especially true in constitutional law. Over time the Court has always given meaning to the Constitution's spacious expressions—"liberty;" "due process;" "equal protection;" "freedom of speech, or of the press;" "unreasonable searches and seizures;" "cruel and unusual punishments." Significantly, the black ink of the Constitution says nothing about judicial review. John Marshall wrote it into our basic law in Marbury v. Madison, the year of the Louisiana Purchase, 1803. Come to think of it, the Constitution says nothing about remedies for violations of constitutional rights. It says nothing about the right to get married, to study the German language, to use condoms, to enjoy sexual relations in the privacy of the home. And, of course, as Justice Scalia insisted in his own television interview the other day on CBS's 60 Minutes with Lesley Stahl, the Constitution says nothing about abortion.

Surely law faculty and students alike have heard of Meyer v. Nebraska. So far as I know, it has not been overruled. The word "liberty" in the Fourteenth Amendment is not self-defining. The Court defines it. So it has been. So it will be. Roe v. Wade, Lawrence v. Texas, Roper v. Simmons—"Bench Legislation?" Sure.

---

5. 5 U.S. 137 (1803).
6. Interview with Justice Antonin Scalia, United States Supreme Court Justice, CBS 60 minutes, in New York, NY. (Sept, 14, 2008).
7. 262 U.S. 390 (1923).
11. "To label the court's role as usurping that of the Legislature is to misunderstand the nature and purpose of judicial review. We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues." Goodridge v. Dept. Pub. Health, 798 N.E.2d at 966 (Marshall, C.J.). Justice Spina, joined by Sosman and Cordy, JJ., disagrees: "Today, the court has transformed it role as protector of individual rights into the role of creator of rights." Id. at 974 (dissenting opinion). And more: "While the courageous efforts of many have resulted in increased dignity, rights, and respect for gay and lesbian members of our community, the issue presented here is a profound one, deeply rooted in social policy, that must, for now, be the subject of legislative not judicial action." Id. at 1005 (Cordy, J., joined by Spina and Sosman, JJ., dissenting).

You see the same competing judicial visions in the California Supreme Court's Marriage Cases, supra note 3, viz.:

We agree with the Attorney General and the Governor that the separation-of-powers doctrine precludes a court from "redefining" marriage on the basis of the court's view that public policy or the public interest would be better served by such a revision, [but] we disagree with the Attorney General and the Governor to the extent they suggest that the traditional or long-standing nature of the
NEXUS

I have no trepidation in saying so. Hugo Black, I’m sure, would welcome table talk about “bench legislation,” even from those who disagree with him. This is especially true on February 27th, which happens to be Hugo Black’s birthday. “Born February 27, 1886, in the middle of Grover Cleveland’s first term as President, I am today eighty-two years and three months old. I have now been an Associate Justice of the Supreme Court of the United States for thirty years and nine months.” This is how Hugo Black began writing his memoirs in May of 1968, the year of his television interview. The year of his birth, 1886, is the year the Statue of Liberty came into New York Harbor. Thank God it still stands. Thank God for Hugo L. Black.

Ever since I first heard his lyrical voice and saw him on film reading his immortal Chambers opinion—his aged hands clutching the United States Reports—I have admired him, without stint. But on penumbras and emanations, on privacy and due process, on the First Amendment as an absolute, I just don’t agree with him. That is my opinion. For the rest, I will explain why by taking a few examples.

III. Of Penumbras and Privacy

Hugo Black scoffed at the idea of “penumbras” and “impalpable emanations.” When he made his television statement, he undoubtedly had Justice Douglas’s opinion of the Court in Griswold v. Connecticut in mind. During the oral argument, Hugo Black vigorously pressed Thomas Emerson, a Yale Law School professor, on his due process claim:

Justice Black: It seems to me what someone has done here deliberately is to

current statutory definition of marriage exempts the statutory provisions embodying that definition from the constraints imposed by the California Constitution, or that the separation-of-powers doctrine precludes a court from determining that constitutional question. On the contrary, under “the constitutional theory of ‘checks and balances’ that the separation-of-powers doctrine is intended to serve,” a court has an obligation to enforce the limitations that the California Constitution imposes upon legislative measures, and a court would shirk the responsibility it owes to each member of the public were it to consider such statutory provisions to be insulated from judicial review.

This from Chief Justice Ronald George, joined by Kennard, Werdegar, and Moreno, JJ., 183 P.3d at 448 (emphasis in original; citation omitted).

Not so at all, according to the dissenting justices: “[A] bare majority of this court, not satisfied with the pace of democratic change, now abruptly forestalls that process and substitutes, by judicial fiat, its own social policy views for those expressed by the People themselves.” Id. at 457 (Baxter, J., joined by Chin, J., dissenting). “If such a profound change in this ancient social institution is to occur, the People and their representatives, who represent the public conscience, should have the right, and the responsibility, to control the pace of that change through the democratic process. . . . The majority’s decision erroneously usurps it.” Id. at 468. “Four votes on this court should not disturb the balance reached by the democratic process, a balance that is still being tested in the political arena.” Corrigan, J., Id. at 471. “If there is to be a new understanding of the meaning of marriage in California, it should develop among the people of our state and find its expression at the ballot box.” Id.

Paul R. Baier

try to force a decision on the broadest possible meaning of due process, speaking as a matter of substance, and to have us weigh facts and circumstances as to the advisability of a law like this, rather than leaving it up to the legislature. . . .

You pitch it wholly on due process, with the broad idea that we can look to see how reasonable or unreasonable the decision of the people of Connecticut has been in connection with this statute.

Mr. Emerson: We pitch it on due process in the basic sense, yes, that it is arbitrary and unreasonable, and in the special sense that it constitutes a deprivation of right against invasion of privacy. The privacy argument is a substantially narrower one than the general argument.

Justice Black: That's a due process argument?

Mr. Emerson: That's correct. They're both due process; they're both due process.15

Trying to escape Hugo Black's clutches, Mr. Emerson hurriedly distinguishes *Lochner v. New York* and reminds the Court of *Meyer v. Nebraska*:

Mr. Emerson: But it is not broad due process in the sense in which the issue was raised in the 1930s. In the first place, this is not a regulation that deals with economic or commercial matters. It is a regulation that touches upon individual rights: the right to protect life and health, the right of advancing scientific knowledge, the right to have children voluntarily. And therefore, we say we are not asking this Court to revive *Lochner* against *New York*, or to overrule *Nebbia* or *West Coast Hotel*.

Justice Black: It sounds to me like you're asking us to follow the constitutional philosophy of that case.

Mr. Emerson: No, Your Honor, we are not. We are asking you to follow the philosophy of *Meyer* against *Nebraska* and *Pierce* against the *Society of Sisters*, which dealt with—*Meyer* against *Nebraska*—

Justice Black: That's the one that held it was unconstitutional, as I recall it, for a state to try to regulate the size of loaves of bread—

Mr. Emerson: No, no, no—

Justice Black: —because people were being defrauded; was that it?

Mr. Emerson: That was the *Lochner* case, Your Honor. . . .16

The Nebraska case Justice Black has in mind is not *Lochner v. New York*,17 not at all. Both the Justice and the Professor are all mixed up. The case is our old friend *Jay Burns Baking Company v. Bryan*.18 Be that as it may, Elizabeth Black was in the wives' box when her husband announced his dissent in *Griswold v. Connecticut*19 from the bench, taking the Court to task for its errant ways. Elizabeth recorded in her diaries, "Hugo was eloquent. Wish everybody could have heard him. I think it will be one of his great dissents!"20 She was right. Judge for yourself:

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not.

I get nowhere in this case by talk about a constitutional "right to privacy" as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that the government has a

---

16. *Id*.
17. 198 U.S. 45 (1905).
18. 264 U.S. 504 (1924).
right to invade it unless prohibited by some specific constitutional provision.21

Having dispatched the Court's reliance on the First, Third, Fourth, Fifth, and Ninth Amendments—all the hodgepodge of Justice Douglas's majority opinion—Justice Black put his dagger into Justice Harlan's due process nonsense:

I do not believe we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not the power to interpret them.22

Measured by Hugo Black's ruler, Griswold v. Connecticut23 is pure "bench legislation." Measured by my lights, it is sound constitutional law. Why? Because I believe the Court is right to say that the Fourth Amendment is aimed by its black letter—and, beyond, by its spirit—at protecting "the sanctity of a man's home and the privacies of life."24 The Court said exactly this the very month, the very year Hugo Black came into this world—February, 1886. I mean Boyd v. United States—"a case that will be remembered as long as civil liberty lives in the United States."25 This is what Justice Brandeis said about it. Boyd is a short answer to Justice Black's book of Substantive Due Process, as I teach them both in class.

There is nothing ironic, however, in Justice Black's following the Boyd doctrine himself, in his concurring opinion in Mapp v. Ohio,26 which found a constitutional basis for the exclusionary rule. "[W]hen the Fourth Amendment's ban on unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule," said Justice Black.27

[I]t seems to me that the Boyd doctrine, though perhaps not required by the express language of the Constitution strictly construed, is amply justified from an historical standpoint soundly based in reason, and entirely consistent with what I regard to be the proper approach to interpretation of our Bill of Rights—an approach well set out by Mr. Justice Bradley in the Boyd case:

"[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to a gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."28

22. Id. at 513.
23. Id.
24. Id. at 485.
25. 116 U.S. 616 (1886) (per Justice Joseph P. Bradley, a forgotten, but vital, figure of Nineteenth Century Jurisprudence).
27. Id.
Justice Bradley’s Boyd doctrine, announced in 1886, the year of Hugo Black’s birth, is a constitutional birthright of all Americans. The exclusionary rule, I submit, is not the Warren Court legislating from the bench. Not at all.

Justice Holmes, say it softly, had trouble making up his mind on this “penumbra” business. Recall Olmstead v. United States, where the Court held that eavesdropping by wire-tapping a bootlegger’s telephone line did not amount to a search or seizure within the meaning of the Fourth Amendment. Chief Justice Taft wrote the opinion of the Court. In his dissent, Holmes deferred to Justice Brandeis’s “exhaustive... examination [of the case],” desiring only “to add but a few words.” Today, the Justices write tomes. I prefer Holmes’s crisp legal prose. Justice Black’s prose style is pure gold. Here are Holmes’s few words:

“While I do not deny it I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them.”

Justice Brandeis’s dissent in Olmstead, like Boyd, is a living oracle of civil liberties. It soars beyond the text of the Fourth and Fifth Amendments, to the aims of the makers of our Constitution and our Bill of Rights:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead, of course, has been overruled. The Court came to its senses in Katz v. United States, departing from Olmstead’s “narrow view.” This was 1967, a year before Justice Black’s television interview. “Once it is recognized that the Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure,” said Justice Potter Stewart for the Court.

I have always admired Justice Stewart’s constitutional sensibility. True, he joined Justice Black’s dissent in Griswold

---

29. 277 U.S. 438, 466 (1928).
30. Id. at 469 (Holmes J., dissenting).
31. Id.
32. Id. at 478 (Brandeis, J., dissenting).
34. Id. at 353.
v. Connecticut. But later, he voted with the majority in Roe v. Wade, explaining his change of mind on due process grounds: “Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.”

The line from Olmstead to Katz, from Griswold to Roe, is not “bench legislation” as I understand the duty of the Court. Others are of the same view. You may have heard of Justice Anthony Kennedy. His opinion in Lawrence v. Texas is the latest chapter in the Court’s book of privacy rights. Neither Hugo Black nor Antonin Scalia subscribes to such judicial lawmaking. They would say Roe v. Wade is a prodigy of Lochner v. New York. Ironically, after the Roe decision, our protagonist Hugo Black, was accused of “murdering babies” in ignorant letters addressed to him after his death, mind you, dutifully carried by the Marshal of the Court to Justice Harry A. Blackmun’s chambers.

Justice Black, take note, adamantly dissented in Katz. He was all alone, 8 to 1, in this eavesdropping case. He wound up his dissent in Katz in a tight paragraph that is pure Hugo Black:

In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to “keep the Constitution up to date” or “to bring it into harmony with the times.” It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.

After Katz, the Court has continued to build upon Boyd’s cornerstone, never mind Hugo Black’s dissent. For example, Justice Scalia, building upon Boyd, has held that thermal imaging by the government of a man’s home where marijuana plants are growing in the attic invades a

37. Id. at 170 (Stewart, J., concurring). “[I]t was clear to me then, and it is equally clear to me now, that the Griswold decision can be rationally understood only as a holding that the Connecticut statute substantially invaded the “liberty” that is protected by the Due Process Clause of the Fourteenth Amendment.” Id. at 167-68.
39. Both share the restraining philosophy of Plato: “It is the Laws which govern—not the philosophical Artists of King-Craft.” George Grote, 3 PLATO AND OTHER COMPANIONS OF SOCRATES 310 (1865). I am quoting from Hugo Black’s personal copy of Grote’s Plato, which includes Justice Black’s hand-written index, his notes, and his undercrościings on the end papers of the book, e.g.: “LAWS—Not MEN provided for Government in DeLegibus .. .. ‘Fixed laws’-Judges and Magistrates must be servants of the law 310.” Accord, Stanford v. Kentucky, 492 U.S. 361, 379 (1989) (Scalia, J.) (“To say and mean that, is to replace judges of the law with a committee of philosopher-kings.”). “The courts are given power to interpret the Constitution and laws, which means to explain and expound, not to alter, amend, or remake. Judges take an oath to support the Constitution as it is, not as they think it should be.” Hugo L. Black, A CONSTITUTIONAL FAITH 20-21 (1968) (revised version of three lectures delivered at Columbia University Law School by Justice Black in the James D. Carpenter Series, March 1968).
reasonable expectation of privacy and constitutes a search within the meaning of the Fourth Amendment. As I said, Justice Scalia is an echo of Hugo Black, and more.

IV. "Beyond A Reasonable Doubt"

In re Winship holds that the Constitution requires proof "beyond a reasonable doubt" of all the elements of a criminal offense. This was the work of Justice Brennan, who wrote the foreword to Hugo Black's memoirs. What did Justice Black say about proof beyond a reasonable doubt in the dissent? I quote him precisely:

[Nowhere in [the Constitution] is there any statement that conviction of crime requires proof of guilt beyond a reasonable doubt. I believe the Court has no power to add to or subtract from procedures set forth by the Founders. I realize that it is far easier to substitute individual judges' ideas of "fairness" for the fairness prescribed by the Constitution, but I shall not at any time surrender my belief that that document itself should be our guide, not our own concept of what is fair, decent, and right. As I have said time and time again, I prefer to put my faith in the words of the written Constitution itself rather than to rely on the shifting, day-to-day standards of fairness of individual judges.]

As much as I admire Hugo Black, let me say it plainly: I subscribe to Justice Brennan's view, not to Hugo Black's. And as far as I am concerned, such constitutional construction is not to be outlawed as "bench legislation."

V. Freedom of Speech

Justice Black drew hard lines between "speech" and "conduct." Flag burning comes to mind. The American people know that the Court reversed a criminal conviction for dousing an American flag with kerosene, setting it afire, while fellow protestors chanted, "America, the red, white, and blue, we spit on you." Congress passed the Flag Protection Act, but it was promptly struck down, 5 to 4, in another of Justice Brennan's First Amendment benchmarks.

Hugo Black announced a contrary view twenty years before:

It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense. It is immaterial to me that words are spoken in connection with the burning. It is the burning of the flag that the State has set its face against. . . . The talking that was done took place "as an integral part of conduct in violation of a valid criminal statute" against burning the American flag in public. I would therefore affirm this conviction.

The same year, 1969, Justice Black blasted the Court for holding that school boards could not ban students in school from wearing black arm bands to protest the Vietnam War. Elizabeth Black was in the wives' box and heard her husband

43. Id. at 377-378 (Black, J., dissenting).
announce his dissent. She recorded in her diaries that Hugo’s blistering opinion was about twenty-five minutes long: “I was on the edge of my chair, hands and feet like ice, and the brethren in various stages of shock.” The following connected passages indicate what it was like at Court:—

The Court’s holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected “officials of state supported public schools . . .” in the United States is in ultimate effect transferred to the Supreme Court. The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. Change has been said to be truly the law of life but sometimes the old and the tried and true are worth holding. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.

It may please you to hear that the Robert’s Court has come around to Hugo Black’s view. The First Amendment is no warrant for the Supreme Court to run the public schools of this country. I have in mind the “BONG HITS 4 JESUS” case. Chief Justice Roberts’s majority opinion sided with high school Principal Deborah Morse. The Court rejected the First Amendment claim of Joseph Frederick, who testified he unfurled his banner because he wanted to get on television. Justice Black, if I may speak for him, would say, “Amen.”

VI. Chambers v. Florida

On his television interview, Hugo Black read from his opinion in Chambers v. Florida. It came early in Justice Black’s tenure on the Court, February 12, 1940, Lincoln’s birthday. According to Justice Black’s meaning, the Due Process Clause of the Fourteenth Amendment guarantees that before the doors of a prison close shut on a man, the government must follow the law—“clear laws, as written, not a natural law.” In criminal cases, Hugo Black’s Bible is the Bill of Rights. His unanimous opinion for the Court in Chambers came before his extended analysis of the Fourteenth Amendment’s history in his landmark dissent in Adamson v. California. Thereafter, the Bill of Rights guided his judgment and he followed its procedural protections to the letter, without any weighing and balancing away of its absolutes.

But in Chambers, the Fifth Amendment had not yet been held applicable to the States. All Hugo Black had to fall back on was the Due Process Clause of

48. Tinker, 393 U.S. at 525.
50. Id. at 2623.
51. 309 U.S. 227 (1940).
52. 332 U.S. 46 (1947).
the Fourteenth Amendment. Justice Black’s Chambers opinion, therefore, shows how history shapes the law of the Constitution. Text alone is never enough, not even for Hugo Black. Chambers v. Florida is a good example.

Hugo Black loved to read legal history—Greek, Roman, English, American. He knew Plato’s Laws53 and Aristotle’s Rhetoric.54 He spoke of Tacitus, John Lilburne, and James Madison as though they were his neighbors in Old Town Alexandria, Virginia, where he lived happily with Elizabeth, played tennis, and wrote out his opinions in long-hand.

The Chambers draft is a treasure of the Hugo Black Papers at the Library of Congress. A printed copy of the draft circulated to members of the Court at the time carries Chief Justice Hughes’s handwritten annotation on his return to Justice Black, “Clear as a bell.”

With my students I have compiled a little book of digests of Supreme Court opinions called The Pocket Constitutionalist,55 named after Justice Black’s practice of always carrying a copy of the Constitution in his pocket. The book is dedicated to the memory of Hugo L. Black and Elizabeth Black—friends of the Constitution.” Chambers v. Florida is the first digest in the book. It gives you the essentials of the case, in Hugo Black’s own words, quoted precisely in tight paragraphs without the distraction of ellipses. Here is his opening:

The grave question presented by the petition for certiorari, granted in forma pauperis, is whether proceedings in which confessions were utilized, and which culminated in sentences of death upon four young negro men in the State of Florida, failed to afford the safeguard of that due process of law guaranteed by the Fourteenth Amendment.56

Chambers and the others had been rounded up by a police dragnet on suspicion alone, subjected to protracted questioning in a fourth floor jail room, “under circumstances calculated to break the strongest nerves and stoutest resistance.”57

“Sunrise confessions,” as Hugo Black called them, were used to convict and sentence Chambers and his fellows to death. Reversing, Justice Black recited the history of the constitutional requirement of due process:

Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. Thus, as assurance against ancient evils, our country, in order to preserve “the blessings of liberty,” wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedu-
ral safeguards of due process have been obeyed. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman’s noose.58

Hugo Black’s Chambers opinion is cold steel. Here is the closing part. Justice Black read it with great emotion on his television interview:

Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solid responsibility, rests upon this Court, than translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed, or persuasion.59

After forty years Justice Black’s faith still rings true. The current Supreme Court’s rejection of the Executive’s claim of authority to detain enemy combatants at Guantanamo without judicial oversight echoes the spirit of Hugo Black. His Chambers opinion will also be remembered as long as civil liberty lives in the United States.

VII. No Law Means No Law

Let me conclude this retrospective with two letters that passed between Harvard Law School Dean Erwin N. Griswold and Hugo Black. Dean Griswold wrote to Justice Black enclosing a lecture he was about to deliver criticizing Justice Black’s views. The lecture is entitled, “Absolute Is In the Dark.”60 He wrote to Hugo Black: “With trepidation, and with great respect, I am sending you herewith a copy of the Leary Lecture which I am giving in Salt Lake City on Wednesday evening, February 27th.”

What was Hugo Black’s response?

There was no reason at all for you to feel “trepidation” in sending me a copy of the lecture which you gave in Salt Lake City on February 27th. Perhaps that was a very appropriate time for you to give a lecture about my philosophy since it happened to be my birthday. As you can guess, I disagree with most of the constitutional principles you advocated in your lecture. As a matter of fact, I am of the opinion that you could not possibly think my constitutional philosophy is any more dangerous than I think is the constitutional philosophy you expressed in your lecture. Nevertheless, as I wrote to John Frank today, my admiration for you—and my respect for your sturdy integrity—are such that I am compelled to admit that your championship of your views causes me to hope that maybe they are not as dangerous as I still believe they are. Sometime, however, when we have time to talk, I would like to discuss with you some of the things you said because

58. Id. at 236.
59. Id. at 241.
60. Erwin N. Griswold, Absolute Is in the Dark—A Discussion of the Approach of the Supreme Court of the Supreme Court to Constitutional Questions, 8 Utah L. Rev. 167 (1963).
they indicated that you are not wholly familiar with the views I think I entertain. This does not mean that I have departed one iota from what I said in New York to the effect that I believe “no law” means “no law.”

With my very kindest regards to both you and Mrs. Griswold, I am

Sincerely,

Hugo L. Black

Justice Black and Solicitor General Griswold met face to face in the Pentagon Papers case. The sound effects of the oral argument are spectacular. Their voices, their competing faiths, are preserved for untold future generations. But I must take my leave and close the book on this hurried retrospective of forty years.

Happy birthday, Justice Black.

61. New York Times Co. v. United States, 403 U.S. 713 (1971). Justice Black’s separate concurring opinion was his last. He emphatically rejected Solicitor General Griswold’s argument that “no law does not mean ‘no law.’” Justice Black quoted Dean Griswold’s argument in his opinion, but he answered it by saying: “Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.” Id. at 717 (emphasis added). What was Elizabeth Black’s reaction? “Hugo’s line ‘foreign fevers and foreign shot and shell’ was quoted on television. I went to his Hugo’s office and told him, ‘Honey, if this is your swan song it’s a good one!’ He agreed he could be proud of this one.” MR. JUSTICE AND MRS. BLACK, supra note 5 at 266. It is to Elizabeth Black’s memory that this little retrospective is dedicated. God bless her.