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Paul R. Baier

Louisiana State University Law Center, paul.baier@law.lsu.edu

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INTRODUCTION AND DEDICATION

MR. JUSTICE BLACK (1886-1971), A CENTENNIAL REFLECTION

*Paul R. Baier**

Fifteen years ago Justice Black died. He was a beloved friend of the Fifth Circuit and its Circuit Justice for over thirty years.¹ The *Loyola Law Review's* first *Fifth Circuit Symposium*, published in 1971, carries a plain, posthumous marker: "Dedicated to Mr. Justice Hugo LaFayette Black in respect for his profound judicial philosophy, in esteem for his unswerving sense of justice and in grateful recognition of a lifetime of dedicated judicial service."² The editors had hoped for a foreword from the Justice, but Hugo Black's voice had been silenced by the sweep of time. The yellow legal tablet on which the Judge wrote out his opinions in pencil lay empty.

A hundred years ago people in Clay County, Alabama, chopped wood for their own fires, cooked on wood stoves, wove their own clothes, and transported themselves on the backs of mules. "These were the conditions that prevailed when I first came screaming, I suppose, on what I have been told was a blustery,

*Professor of Law, Paul M. Hebert Law Center, Louisiana State University. Member of the Louisiana Bar and the Bar of the Fifth Circuit United States Court of Appeals. Editor, *MR. JUSTICE AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK* (Random House 1986).

1. 92 F.2d (succeeding Cardozo, J.) to 444 F.2d.

2. *Dedication* [to First] *Fifth Circuit Review*, 17 *LOY. L. REV.* No. 3 (1971).

rainy February night more than eighty-two years ago," Justice Black wrote in his memoirs.³ It was in Clay County that Hugo Black first became acquainted with the "short and simple annals of the poor," as he later described them, "among plain folks who learned most of their law and sound philosophies from country schools and churches."⁴

Looking back on eighty-two years and talking mainly to young people, Justice Black left us this epilogue in his Carpentier Lectures delivered at Columbia University and later published in 1968 as *A Constitutional Faith*:

It is a long journey from a frontier farmhouse in the hills of Clay County, Alabama, to the United States Supreme Court, a fact which no one knows better than I. But this nation, created by our Constitution, offers countless examples just like mine. My experiences with and for our government have filled my heart with gratitude and devotion to the Constitution which made my public life possible. That Constitution is my legal bible; its plan of government is my plan and its destiny my destiny.⁵

In the year Justice Black was born the Supreme Court reached out to protect Yick Wo, a Chinaman, against Sheriff Hopkins who wanted to put him in jail for violating a San Francisco ordinance outlawing operation of a laundry without a special permit, except in buildings of brick or stone.⁶ The ordinance left Yick Wo and other Chinese laundrymen without a livelihood, whereas all Caucasian applications were freely given. The Supreme Court put its own "independent construction"⁷ on the ordinance; its "real meaning"⁸ was to work an "individious discrimination"⁹ contrary to "the

3. H.L. BLACK & E. BLACK, MR. JUSTICE AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK 5 (P. Baier ed. 1986).

4. H.L. BLACK, A CONSTITUTIONAL FAITH 65 (1968).

5. *Id.* at 65-676 [Epilogue].

6. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

7. The question whether Yick Wo's imprisonment was illegal under the constitution and the law of California "is not open to us," said Justice Mathews for the Court. *Id.* at 365.

That however does not preclude this court from putting upon the ordinances of the supervisors of the county and city of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge.

Id. at 366.

8. "We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question." *Id.*

broad and benign provisions of the Fourteenth Amendment of the Constitution of the United States.”¹⁰ Moreover, “[t]hese provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”¹¹ To say that equal protection “is a pledge of the protection of equal laws” is to beg the norm of equality itself. But to its credit, the Court of a hundred years ago condemned the discrimination—without wincing and with open eyes:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.¹²

No good reason was shown for the ordinance, “except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified.”¹³

Doubtless the law and sound philosophy of *Yick Wo v. Hopkins* was a good birthright for a country boy, born February 27, 1886, miles from the Supreme Court.

Three months after Hugo Black’s birth, in May of 1886, the Court reached out to protect corporations from the control of state governments.¹⁴ Chief Justice Waite, without waiting for oral argument on the point, announced that the Court was unanimously of the view that corporations are “persons” within the meaning of the fourteenth amendment and that the equal protection clause protects business corporations as well as human beings.¹⁵

9. *Id.* at 367.

10. *Id.* at 373.

11. *Id.* at 369.

12. *Id.* at 373-74. This is the passage, of course, which is usually quoted out of *Yick Wo*, an opinion worth rereading in full for the comparative light it casts on *Cleburne Living Center, Inc. v. City of Cleburne, Tex.*, 105 S. Ct. 3249 (1985), *aff’g in part, vacating in part*, 726 F.2d 191 (5th Cir. 1984). Despite the century that separates these cases, they are strikingly close in their decisional ways.

13. 118 U.S. at 374.

14. *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886).

15. *Id.* at 396. In stating the facts of the case, J.C. Bancroft Davis, then Reporter of Decisions, remarked that before argument, Mr. Chief Justice Waite announced:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corpo-

Now here was a view from which Justice Black vigorously dissented, all alone, a half century later during his first term of court: "The history of the [Fourteenth] Amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments."¹⁶

This early dissent reveals a drive on Hugo Black's part to protect the weak and helpless against unequal laws. The same generative idea also appears at the end of Justice Black's opinion for the Court in *Chambers v. Florida*,¹⁷ a due process case with broad implication: "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."¹⁸ These are moving words and forceful metaphors to all who believe in highmindedness on the bench.

Hugo Black wrote plain English. He regarded the closing part of *Chambers*, which he wrote out in longhand on one of his legal pads, as his best writing: "No higher duty, no more solemn responsibility, rests upon this Court, than that of 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."¹⁹

It may surprise some to learn that a law clerk suggested that Justice Black omit this passage from the final opinion.²⁰ Perhaps

rations. We are all of the opinion that it does.
Id.

16. *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938) (Black, J., dissenting). Justice Black was nominated to be Associate Justice by President Roosevelt on August 12, 1937, and the nomination was confirmed by the Senate on August 17, 1937. He was commissioned August 18th, took the constitutional and judicial oaths August 19th, and took his seat October 4, 1937. 302 U.S. III n.3 (1937).

17. 309 U.S. 227 (1940).

18. *Id.* at 241.

19. *Id.* The *Chambers* draft opinion, in Justice Black's bold handwriting—and in pencil as was his habit—is preserved in the Hugo Black Papers, Library of Congress (Box 268). The "no higher duty" passage is on page 17 of the original draft. All of which is mentioned in the hope that students or lawyers who read these pages might one day see this draft opinion with their own eyes. The *Chambers* file is open to the public, in the James Madison Reading Room, Library of Congress. There is inspiration and excitement in these old files.

20. In the margin of a typescript draft of the *Chambers* opinion the word "omit" is written in, next to the "no higher duty" passage, presumably by a law clerk going over the draft. Hugo Black Papers, Library of Congress (Box 268) (*Chambers v. Florida*, typescript

the clerk thought that these words were mere rhetoric. But the Judge held firm. He had learned early in life that "*what* was said can often be far more important than *how* it is said."²¹ As a judge, Hugo Black maintained a modest view reflected in his comment that "my own words, poor though they might be, are good enough for me."²²

As we shall see, Hugo Black's idea of the shielding role of courts and his unswerving sense of justice are reflected in the current work of the Fifth Circuit and of the Supreme Court. The reflection, coming in his centennial year, is a fitting tribute to Mr. Justice Black, Clay County pitcher of horseshoes.

draft, p.9).

21. H.L. BLACK AND E. BLACK, MR. JUSTICE AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK 13 (P.R. Baier ed. 1986).

22. *Id.* at 19.