DePaul Law Review

Volume 13
Issue 1 *Fall-Winter 1963*

Article 21

Schwartz: A Commentary on the Constitution of the United States

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A Commentary on the Constitution of the United States. By Bernard Schwartz. New York: The Macmillan Company, 1963. Volume I, Pp. xiv, 470. Volume II, Pp. viii, 497 (including notes and index). $25.00 (Combined).

The federal judiciary as the balance-wheel in our constitutional scheme ". . . is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty."[1] The jurist-statesmen comprising the Court determine the limits of power of the three branches of the government, how federalism shall function, and the scope of individual rights. Bernard Schwartz, as a commentator on the Constitution, expands on the generalties and makes them meaningful in what appears will be a multi-volume work on our basic document. To date only the first two volumes have been published. These deal with the powers of the nation and the state in certain of their relationships with each other, with Congress and certain of its major powers such as the investigatory, the fiscal, the taxing, and the commercial, with the powers of the judiciary and the executive, and with the authority in war and foreign affairs. These powers he characterizes as the "sails (the authority that enables the polity to function)." The portions still to be published "will discuss the anchor (the guarantees of the individual which serve as basic limitations on government power)."

The two volumes, which are the subject of this review, contain 263 numbered topics dealing with governmental capacity and its subsidiary aspects as, for example, under the heading of "Taxation and Other Fiscal Powers" are listed: "51. General Welfare. 52. Extent of Taxing Power. 53. Purpose of Taxation: Preservation. 54. Same: Destruction and Regulation. 55. Same: Public versus Private Purposes. 56. Spending Power. 57. Direct Taxes. 58. Indirect Taxes. 59. Taxes on Exports. 60. Fiscal Power." The coverage of subjects ranges from condensed textbook-like exposition of complicated material that in too summary fashion, in some instances (the exception), is almost misleading to comprehensive and informative analysis (the usual situation). The section entitled "Gross Receipts Taxes," under the chapter, "Commerce and the States," as an illustration, does not delineate the period from 1938 to 1946 when the Court blurred the difference between taxes levied directly on gross receipts, even when apportioned, and taxes levied on local activity with gross receipts measuring the value. We are not clearly informed that prior and subsequent to this period, taxes directly on gross receipts from interstate commerce are barred, although the gross income from the interstate transaction may be used where it measures the value of a taxed local activity or event or if the tax on gross receipts is in lieu of a property tax.[2] The balance of the chapter on the state's commercial power offers little new information or material for provocative thought, although it is valuable as a condensation of judicial pronouncement of state competency in this field.

Mr. Schwartz uses the chapter on federal power under the Commerce Clause to illustrate the full sweep and the ebb and flow of congressional power in one of its most important aspects. He states that Congress' authority to enact regulatory laws stems almost entirely from he Commerce Clause. While this would appear to be a rather broad generalization in view of legislative potentialities for regulation under, for example, its fiscal, spending, and war powers, it does in-

[1] Wilson, Constitutional Government in the United States, 1942 (1917 ed.).

[2] Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal,* 46 Va. L. Rev. 1051, 1105-11 (1960).

dicate the latent capacity of this important clause which, as interpreted by Marshall, gave Congress plenary control.[3] Various theories, such as "indirect effects," weakened congressional authority which sprang back after the Constitutional Revolution of 1937 with at least as much vigor as Marshall had envisioned. Along with legislative power under Marshall went Story's refusal to examine the legislature's motives. "No government on earth could rest for a moment on such a foundation. It would be a constitution of sand heaped up and dissolved by the flux and reflux of every tide of opinion."[4] Mr. Schwartz takes us from Story, through extensive inquiry into the motives of Congress, and then back to Story, paralleling his path with Marshall.

In the chapter on the American presidency we are impressed with the awesome power possessed by the executive comparable to that formerly possessed by the British monarchy. Yet the American people having rejected the "doctrine of inherent absolute prerogative in the executive," which characterized the British scheme, and having decided on a maximum of two four-year terms, the potentialities for unlimited power are diluted. Further, such prerogative as the president does have in the exercise of executive powers is limited, we are shown, since the principles of presidential prerogative are subordinate to statute law, do not include the lawmaking power, are subject to judicial review, and do not permit the denial to private individuals of their personal and property rights.

The chapter dealing with judicial power furnishes the most rewarding reading showing, as it does, that despite control of jurisdiction, the purse, the sword, procedural rules, and membership being lodged outside of the Court, despite the Court's self-imposed limitations, and despite the antipathy and abuse heaped upon the Court when it decides certain explosive issues that call for decision, it still remains the vital third wheel in the government and the most powerful and highly respected court on the face of the earth. In this chapter the author advances cogent reasons why Congress may not abolish the Court's appellate jurisdiction and why federal diversity jurisdiction should be abolished. One may disagree with the reasons, but it cannot be said that the Court should be subject to extraordinary pressures resulting in loss of appellate jurisdiction and consequent equality of power. Further, were diversity abolished, the entire federal court system could devote itself to the immeasurably more important business of deciding federal questions.

The author's two volumes are useful as a penetrating analysis, by means of the Court's own decisions of the Court's position in our society relative to the states, to the individual, and to the other branches of the government. The positions of the Congress and the President relative to each other and to the Court, to the states, and to the individual are explained in terms of divisions of power. It is a useful text for lawyer, student, and political scientist, showing the 1962 status of constitutional doctrine. With shifts in personnel and with important social, economic, and political issues being decided each year, there is a need for a responsible work, such as this, that will bring interpretation of constitutional doctrine up to date showing its development, its changes, and the reasons.

"Government by law suit," as the author puts it, is a means of working out many of the difficult pressing problems of the individual and the nation that concern large segments of the nation and demand solution from an authoritative source. By analyzing the decrees issued in proceedings before the Court, we see

[3] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[4] STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, #1086 (1833).

the ever expanding power that enters into their determination limited and guided, however, as Schwartz explains, by the rule of law--the absence of arbitrary power, the subjection of the state and its officers to the ordinary law, and the recognition of principles superior to the State itself.

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The First Freedom. Edited by ROBERT B. DOWNS. Chicago: American Library Association, 1960. Pp. 469. $8.50.

Among the booked people, censorship is frequently like the weather--everybody complains about it but nobody does anything about it. The American Library Association, therefore, has kudos coming for putting together a first-rate (and readable!) compilation entitled *The First Freedom.*

The bias of the book is clear and admitted, and book burners will find no solace in the work. As said in the Introduction, "No attempt has been made to prepare a debater's manual, with the pros and cons nicely balanced. In any case, such a balance would be difficult to strike, for the weight of the evidence is on the other side. . . . With rare exceptions, the banners and burners of books have not been highly literate folk." For one who agrees with that premise, and everyone should, the book is reassuring in the distinguished parade of contributors who cross its pages. Judges, both in their robes and wearing their citizens' hats, take healthy whacks at every form of censorship that has been propounded both in this country and abroad. The opinions of such judges as Curtis Bok, Augustus Hand, Jerome Frank and William O. Douglas in some of the landmark cases in the field are reprinted almost verbatim. In that respect the book is a most helpful research tool for the small bar that engages in the field of censorship.

This is not the paramount usefulness of the book, however. It is rather the breadth of opinion. Joining the judges are some of the best known names in literature and the arts, each with a different way of expressing their hostility to and the danger of censorship. Aldous Huxley describes the impossibility of a writer living within the fetters of the censorious. Ring Lardner's son, John, demolishes the Detroit Keystone Cops who are willing to purify literature for the whole country. George Bernard Shaw and John Galsworthy try to mesh the desires of the author and his readers in their relationship to censorship.

Throughout all of it, however, is the constant theme that censorship is not compatible with a free society. It is on this theme that the evidence is damning. Henry Steele Commager testifies in terms of "political censorship": "In every case it is society that is the loser. Our society can doubtless afford to lose the benefits of ideas or character in any one instance, but the cumulative costs of the intimidation of thoughtful and critical men and women is something no society can afford. . . . A society that discourages experiment will find that without experiment there can be no progress, and that without progress, there is regress."

To comment on Commager, it is easy to rationalize that a particular movie, a particular book, a particular magazine cannot spell the difference between