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Book Reviews

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BOOK REVIEWS

THE SUPREME COURT. By Bernard Schwartz.[1] New York: Ronald Press, 1957. Pp. v, 429. $6.50. That precocious professor of constitutional and administrative law, the youthful Bernard Schwartz, of the New York University Law School, has provided an orderly, articulate and meritorious book in this, the most recent of his prolific writings in the field of American public law. His careful, comprehensive, but never technical nor tedious analysis of the workings of the Supreme Court is entitled to be regarded as the most significant contribution toward public understanding of our high tribunal since Robert Jackson's, *The Struggle for Judicial Supremacy*, was published in 1941. Indeed, Schwartz, more lucidly than any of the recent commentators who have taken up the subject of the Supreme Court as an organ of our government, has spelled out for his lay readers what the more sophisticated members of the bar and of the political science fraternity know to be the fact. The Supreme Court of the United States, though it may function as a court of law, with all the familiar procedural and jurisdictional trappings which are the delight of the legalist but the bane of the inquisitive layman, is primarily an instrument of political government. Though the determinations of public policy which it must make are presented to it through the medium of a law suit, they are, for the most part, questions which in other countries would be the stuff of political controversy and, in the less mature, even of revolution. The Court's role in American Government, as De Tocqueville observed early but accurately, is primordial. Accordingly, Schwartz is correct in pointing out that, while American political history may not be written exclusively in the terms of leading Supreme Court decisions, it cannot really be understood unless those decisions are comprehended.

The lesson which Schwartz draws from his review of the Court's work since 1937 is accurately deduced and fairly presented to his audience. It is the author's prime thesis that, beginning in the spring of 1937, even before the first New Deal judge, Hugo Black, had taken his place on the high bench, the Supreme Court has been exercising an attitude of judicial deference or restraint in passing upon the actions of the Congress, the state legislatures, and those of the federal and state administrative agencies. The effect of this adherence to judicial self-restraint on the part of the Supreme Court has been to produce a veritable revolution in our public law jurisprudence. Unlike the Nine Old Men, the Court since 1937 has understood and properly carried out its duties as the keeper of the Constitution. The people speak, and democracy, in the main, must work or fail, through the elected representatives of the body politic. The Supreme Court, on the other hand, has a more conservative function to fulfill. Non-elective, not immediately responsive to public sentiment, and never really a contemporaneous institution of government, the Court is entrusted with interpreting a Constitution which in itself is essentially a conservative check on the present by the past. Still, the Court must construe that document so as to permit the nation and the states to deal with problems of the present and not those of the past. It can only carry out

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that function effectively if it concedes the pithy observation of Justice Holmes that judges are "not God Almighty" and bases its decisions not on its view of the wisdom or desirability of legislation or administrative action but only upon reasonableness of such action. The pages of Professor Schwartz's book establish that the Supreme Court agrees with that proposition and has applied it consistently since 1937.

However, having congratulated the Court for its espousal of judicial self-restraint, Professor Schwartz proceeds to take several of its members apart for their refusal to be properly deferent to legislative or executive action in the field of civil liberties. Justices Black and Douglas and the late Justices Murphy and Rutledge are the favorite targets of the author's criticism. In his view, these justices, by refusing to defer to legislative mandate in the areas of free speech, free assembly, free exercise of religion, loyalty and security, have indulged in an "absolutist" interpretation of the first amendment. Schwartz contends that the Black-Douglas faction, by rejecting judicial restraint in favor of judicial activism in their review of legislative action in the areas enumerated above, are guilty of the same misapplication of the judicial function as the conservative justices who promiscuously struck down state and federal laws from 1920 through the middle 30's. The author agrees with his favorite justice, for whom he never is at a loss for an encomium, Justice Frankfurter, that there are no "preferred" Constitutional rights. As the late Justice Jackson, with characteristic cleverness, but less than fair analysis put it, you can not establish firsts "without thereby establishing seconds" among constitutional rights. Schwartz believes that the Constitution is not based "upon a hierarchy but upon an equality of values." Consequently, he claims that if self-restraint before the legislator is the proper posture for the Court to take in cases involving property rights or economic regulation, there is no reason why this should not also be true in cases involving personal rights.

In expounding the above view, the author argues that it had its genesis with Holmes and that its true prophet is Frankfurter. In this reviewer's opinion, he is right only in his designation of Frankfurter as the most consistent current expounder of this conception of the Court's function. However, the view he states is neither Holmesian in origin nor correct in content. There is an interesting paradox in the Holmes tradition. When resolved, the paradox reveals that Frankfurter, Schwartz, and the others who dispute a "preferred position" for the personal liberties protected by the Bill of Rights are off the mark in their understanding of the proper role to be observed by the Court in passing upon legislative and executive action which has an impact in that area of Constitutional guarantees. Justice Holmes, the patron saint of judicial self-restraint, showed time and again that his deference toward legislative action did not deter him from objecting to legislative or executive action which interferred with or impeded the "free competition of ideas" which constituted the essence of his powerful, pragmatic philosophy. The author of the "clear and present" danger test never gave any evidence, either in his opinions or his other writings, that he believed that judicial self-restraint was the proper position for a judge to assume in the face of legislative action

which attempted to restrict the right of any minority group or faction, or individual, to think, speak, assemble, and petition freely.

We ask, then, was Holmes, the only "philosopher king" of American Constitutional history, with the possible exceptions of Jefferson and Wilson, inconsistent in repudiating judicial deference in the area of civil liberties? Not at all. Few liberals would dispute that Holmes grasped the essence of our democratic society. That essence inheres in the free interplay of competing ideas, with those approved by the majority entitled to prevail, providing that these temporarily triumphant principles are not put to such use as to curtail or restrict the basic democratic rights of the minority to dissent from them and to agitate peacefully for their elimination or their replacement by their own points of view. In short, the *sine qua non* of our democracy is the protection of the right to dissent and the free competition of differing ideas. If we are less than vigilant in protecting that, we repudiate what we are — a free and democratic nation.

Holmes saw that. Justices Black and Douglas, and now it appears Chief Justice Warren and Justice Brennan also comprehend this quiddity of our democracy. In this philosophy, the drawing of a distinction under which the Court protects property rights only within the bounds of judicial self-restraint, while it guards the civil liberties and personal rights guaranteed by the first amendment with a more active eye, is not only the proper function of the Court but really, in view of the nature of our government, its mandatory function. It is true, as the eminent poet Peter Viereck has observed, that this special protection of personal and political rights enumerated in the Bill of Rights is an aristocratic or conservative function of the Court. Still, it is a function that the Court as guardian of the Constitution has a duty to perform. The founders of this country did not intend the Bill of Rights to limit the Congress only in so far as the Congress saw fit to abide by its prohibitions.

To answer Professor Schwartz's charge of inconsistency on the part of the judicial "activists" one must remind him that when judges refuse to substitute their concepts of public policy for those of the people by deferring to the judgment or command of the duly elected representatives of the states and the nation, they are acting on the basis of an assumption, which, though unstated, supplies the only real justification for judicial deference. That predicate, which alone supports judicial self-restraint in any area of the Court's jurisdiction, is that the representatives of the people have earned the right to speak for their constituents as a result of having been elected to office following a free contest of competing ideas, political parties and groups, and in a free election. However, when these successfully elected representatives proceed to enact legislation which attempts to restrict minority groups in the exercise of their right to dissent or to assert their own views, whether in the realms of ideas, speech, religion, assembly, elections or public education, they are cutting at the root of democratic government which is nothing else than the right to dissent. Courts should defer to legislative supremacy only on the condition that such supremacy has been achieved by victory in the market place of contesting political and social theories, parties and groups. When our elected representatives attempt to curtail the competitive nature of

the arena of the political struggle by laying restraints or placing impairments upon free speech, a free press, assembly, religion and the right to the equality of educational opportunities in the public schools, they repudiate the major premise of our democratic system. Acknowledgement of a broad power to govern does not include sanction of the power to oppress.

This understanding of the nature of our government seems to have escaped Professor Schwartz and explains his unrelenting criticism of those justices who refuse to be "judicially restrained" in the face of legislative invasions of civil liberties. However, it must be said in fairness to the author, that on occasion he also suppresses his affinity for judicial self-restraint and calls for "careful" judicial review in certain free speech cases and in situations presenting question of equal protection of the laws, such as the school segregation decisions.

On the whole, this is an excellent book. However, its appearance in print at a time when the Court is under severe attack in many quarters for some of its recent decisions in the civil liberties field is an unfortunate circumstance. Apart from the uproar which greeted the Court's historic opinions striking down the "separate but equal" principle in public school education, there have been even more violent reaction to a group of decisions which the Court handed down in the closing days of the last term.[2] Indeed, they might be grouped under three categories of the law, all well-known to the legal profession, that is, (1) questions asked a witness must be relevant, (2) a criminal statute is to be strictly construed, and (3) fair procedure must be observed in administrative proceedings. That these decisions should have produced the frenetic reaction which they have created in many places indicates that a large segment of the American public is misinformed not only as to what the Court actually decided in these cases, but of the proper function of the Court in passing upon questions involving rights guaranteed under the Bill of Rights. In the cases discussed, the Court was acting in accordance with the Holmesian tradition and properly executing its duty to be vigilant, not deferent, to legislative or administrative action which impinges on rights preserved by the specific and sweeping provisions of the Bill of Rights. It is a pity that the American public is so misinformed as to the proper role of the Court in civil liberty matters. If they were not, the cries for the scalp of the Court which are now heard, including the shocking proposal of Senator Jenner to take away its appellate jurisdiction in loyalty-security cases, never would have arisen. It is on this score that Professor Schwartz's work is most distressing. Schwartz's book serves to add plausibility and respectability to the current attacks on the Court. Therefore, Professor Schwartz's work should be read with caution, if not skepticism. Despite the author's contention to the contrary, there are indeed firsts and seconds in a proper scheme of Constitutional values and the Supreme Court is justified in varying the degree of deference shown in passing upon ques-

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2 Jencks v. United States, 353 U.S. 657 (1957); Watkins v. United States, 354 U.S. 178 (1957); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Yates v. United States, 354 U.S. 298 (1957); Service v. Dulles, 354 U.S. 363 (1957).

tions involving personal liberties, as opposed to those affecting property rights. If this book is read with that admonition in mind, then the author's carefully labored and skillfully presented attempt to reincarnate the philosophy of Justice Holmes through the decisions of Justice Frankfurter will remain a resurrection that does not occur.

*Alfred L. Scanlan**

PRIVATE FOREIGN INVESTMENT: LEGAL AND ECONOMIC REALITIES. By Seymour J. Rubin.[1] Baltimore: Johns Hopkins Press, 1956. Pp. x, 108. $3.50. The traditional hornbook form of presentation is of little utility in the international law field. Black letter statements of the "True Rule" are often wanting in reality. Much writing on international law is devoted to elaboration of metaphysical subtleties which, while entertaining as intellectual exercise, contribute little to the solution of the day to day problems generated by the facts of international life. In reaction, it is sometimes voiced that there is no such thing as international law and that international affairs would be conducted more effectively if lawyers and statesmen would stop talking law and morality and would instead come to grips with matters realistically.

This volume consists of a series of lectures delivered in Washington in 1955 under the auspices of the School of Advanced International Studies of the Johns Hopkins University. The thesis of the lectures is the relationship of international law to contemporaneous political, economic and social realities. The means of attack is to apply common law methods to some of the problems of private foreign investment, thus bridging between the view that abstract concepts of law and justice are irrelevant in the management of world affairs and the view that a comprehensive code of international justice would be sufficient, in itself, to provide the answer to all disputes among nations.

It is generally accepted in the Western World that private property cannot be expropriated except for a public purpose and upon payment of compensation. Early in the volume, the author examines reasons why this rule and its corollaries so consistently give rise to serious controversy. The author points out that the time has come to face the problem of defining the concept of "taking." Heretofore, the lack of definition has not been felt acutely because most takings, such as those incident to the Russian Revolution, have been plainly labelled as such. But the technique of "creeping expropriation" — regulating the owner out of business without affecting his legal title — must be recognized and dealt with effectively in order that our statements of policy and treaty provisions for the protection of investments may not become wholly illusory. That the author does not offer an answer to the problem is hardly a fault. A sense of the practical elicits recognition that foreign nations are not likely to give up

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their right to subject business to regulation simply because American or other alien ownership is involved.

A chapter devoted to consideration of the status of enemy private property critically assays the arguments advanced by both sides in the current controversy over the fate of German and Japanese property seized by the Alien Property Custodian. Not a special pleader for any faction, Mr. Rubin asks only that the debate be carried on, free from irrelevant abstractions such as "confiscation," in terms of the real questions. Should we subsidize the governments of these former enemy nations? Would we by doing so derive dividends in the form of closer political and business relations? Regardless of the individual reaction to these questions, it is apparent that private foreign investment is no longer a matter of concern only to investors. Governments on both sides inevitably become embroiled in controversies that such investments engender.

The author confirms the reviewer's impression that existing treaty commitments provide little real security for the investor. The reasons for this conclusion are clearly articulated: (1) the emphasis in the treaties on "declared" as distinguished from "creeping" expropriation and the vagueness of the few provisions directed toward the latter; (2) the lack of assurance that hard currency will be available for repatriation of earnings or for payment of compensation; and (3) the total absence of treaties with many of the countries as to which assurances are most needed. Perhaps we should recognize that treaty protection is likely to be more theoretical than real, at least in the case of those nations which do not subscribe to our economic views. Concentration of effort should be toward development of techniques which protect in fact as well as in theory, for the prospective investor is not interested in doctrines of international law but in the safety of his investment from undue interference. Regrettably, Mr. Rubin makes only passing reference to the guarantee program, which is surely the most constructive step taken in recent years. The shortcomings of this program beg suggestions as to how the terms could be rewritten so as to provide the prospective investor with real assurance that his investment would be subject only to the normal risks inherent in any new venture. It is not too much to hope that language can be devised which, to a large extent, would protect against those additional risks which private business does not face at home. If private foreign investment is as desirable as most persons appear to think, the government of the United States should be willing to expand the coverage without increasing the already considerable premium to the point where insurance becomes prohibitive.

The subject of these lectures is important and the complexities manifold. To those individuals, bar associations and other groups seeking to improve the climate for foreign investment the present work represents a dispassionate exposition of the underlying problems in their political and economic context, and should be helpful in the development of techniques consistent with international realities. *Alexis Coudert**

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THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE. By Catherine Drinker Bowen.[1] Boston: Little-Brown and Company, 1957. Pp. xii, 652. $6.00. The major themes of the recent American Bar Association convention in London could have been inspired by Sir Edward Coke. Lord High Chancellor Kilmuir spoke of "the doctrine of the law of nature" which he said United States and England shared with a wider community "even than that of the common law. . . . It is superior to all other law because it belongs to mankind as mankind, and is the expression of the purpose of the Deity or of the highest reason of man." United States Attorney General Herbert Brownell set the other theme: "We must establish an era where nations as well as individuals are subject to justice under the law."[2]

Lord Kilmuir was declaring for a larger audience the doctrine which Lord Coke applied in *Doctor Bonham's Case* almost three hundred fifty years earlier, that Acts of Parliament against "common right and reason" may be declared void. And Mr. Brownell was extending to nations the famous Coke dictum that King James was "under God and the law."

An aim of the author in writing *The Lion and the Throne* was to "recall a great man long forgotten." It is apparent from the report of the ABA Convention proceedings that Coke has not been forgotten. It is unlikely that any lawyer who reads this book will fail to remember Coke. Most lawyers have read his famous statements arising from the *Calvin Case* and *Bonham Case*. They have read the words but unless they understand what went before and what came after they can never appreciate the fullness of the meanings of his views.

In narrative form, the author has recreated the times, the scenes, and the characters which furnish the environment in which Coke's famous words were spoken. The reader will understand the knowledge and courage needed by Coke to tell the king that he was not above the law, and to challenge Parliament's right to legislate against "common right and reason." Coke was truly the Lion guarding the English Throne, though neither King James nor King Charles so understood. James and Francis Bacon wanted Coke to be as one of the "twelve lions under Solomon's Throne," circumspect of the King's sovereignty. They could not get what they wanted: "When the time shall come I shall do that which should become a Judge."

John Wu, in his *Fountain of Justice*, states that Maitland thought Lord Coke was "the common law incarnate." There is ample basis for that figure of speech in this book. Coke's father was a barrister who died, leaving eight children, when Edward was but nine years old. The son went through local primary and secondary schools, to Cambridge University and then became a member of the Inner Temple for the study of law. He practiced and taught the common law for several years before Queen Elizabeth called him to public service as her solicitor. The story of Coke's service as Solicitor and Attorney General is the story of the early common law in action. Coke was a "hard prosecutor and a just judge." His relent-

1 Author of *Yankee From Olympus* and other well known works.
2 70 Time Magazine, August 5, 1957, p. 8.

less and cruel prosecution of Catholic "recusants" and Puritans represented the harshness of early common law applied with all its rigor. Coke's extreme animosity toward these religious groups seems utterly foreign to the idea of a great man. His attitude and actions cannot be condoned but can be understood. He was a product of a hard Protestant environment and was convinced that these dissidents were of grave danger to England. Coke's demand for "reason" in law was a great influence in the development of a just legal order, though in retrospect the Star Chamber proceedings and the horrible punishments are hard to reconcile with reason.

The pictures in this book of Coke's work as Chief Justice of the Common Pleas Court come closest to uncovering his heart. His work as a jurist was work he loved; for lawyers, the part of the book telling of this work should be particularly interesting and informative. As he rode from place to place within his jurisdiction to supervise the work of justices of the peace and to settle "clothes-line" disputes, he seemed more human than at any other stage of his career. Here the reader sees the common law in action in the countryside and here can be seen glimpses of the roots of western legal culture.

As Mr. Common Law (the Maitland figure modernized), Coke fought against encroachments on common law jurisdiction by Chancery and Parliament. All the while he had to keep an eye on Francis Bacon, his able, ambitious, corrupt and jealous competitor. Bacon brought about Coke's dismissal as Chief Justice of England, but poetic justice eventually saw Coke, as leader of Parliament, preside over Bacon's political demise. It may surprise readers who think of Coke only as a jurist to learn that Coke was a political match for Francis Bacon. The triumphs of Bacon were due, not to his superior knowledge or skill, but to his place at the King's ear. Coke was a good campaigner and a vigorous, fierce and able debater. As Speaker of the House of Commons, early and late in his career, he knew and used all the parliamentary tricks we find employed today. He knew when to have bills called up for consideration and how to solicit votes necessary for passage. He was a leader not only because of his knowledge, skill and ability, but also because he was fearless in his defense of English institutions against the powerful men he thought were destroying them.

Proof that Coke deserves the praise of Maitland is found in the legal literature that common law countries have inherited from his hand. His *Institutes and Commentaries on Littleton* were for "nearly three centuries the backlog of legal studies in England and America."[3] This tremendous literary output of forty years suggests an ivory-tower existence instead of the thoroughly vigorous legal and political life during which they were written. The capacity for scholarship and hurly-burly political and legal activity is a mark of Coke's greatness.

Adherents to the natural law, since Coke's time, have always claimed him as a leading authority for their cause. This book does not dwell in

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3 Text at ix.

detail upon his philosophy of law and does not purport to interpret his famous statements about the supreme authority of law and reason. Enough has been written elsewhere of his natural law views and the meanings of his statements to warrant the claim that the natural law men profess. In a letter to Justice Holmes, Fredrick Pollock wrote ". . . law of nature (= natural justice = reason as understood in the Common Law) . . . ."[4] This explains what Coke meant by "law of nature" and "reason."

Coke went to his judicial doom like a classic tragic hero. Each stand he took for "reason and the common law" was an episode in the drama and the reader can see the eventual fall well in advance. But as King James said, "Throw this man where you will and he falls upon his legs." Kicked upstairs from Common Pleas to King's Bench and finally dismissed as Chief Justice of England, he was sent to Parliament. Banished from Parliament once, he later became its leader and was called "Pater Patriae." He was jailed in the Tower for seven months for "treason," but imprisonment enhanced his reputation rather than hurt it. Only in his family life did he not land on his feet. The story of his second marriage with its meanness and quarrels and of trouble with his children is not a pretty story. But the author has withheld nothing relevant, whether favorable or unfavorable, in writing an objective, complete biography of Coke.

The Lion and the Throne is a fit companion to the author's biographies of John Adams and Justice Holmes. This "last of three" books is a distinctive addition in the tracing of American legal and political heritage to its English sources.

Roger J. Kiley *

4 1 HOLMES - POLLOCK LETTERS 274 (Howe ed. 1941).

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BOOKS RECEIVED

BIOGRAPHY

*THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE. By Catherine Drinker Bowen, Boston: Little-Brown and Co., 1957. Pp. xii, 652. $6.00.

CONSTITUTIONAL LAW

DESEGREGATION AND THE LAW. By Albert P. Blanstein and Clarence Clyde Ferguson, Jr. New Brunswick: Rutgers University Press, 1957. Pp. xii, 333. $5.00. Considering the recent Supreme Court decisions as to segregation issues, this book does not attempt to explain the philosophy or sociology behind segregation, but devotes treatment to how the courts have resolved basic human problems into concrete legal questions.

FUNDAMENTAL LIBERTIES OF A FREE PEOPLE: RELIGION, SPEECH, PRESS, ASSEMBLY. By Milton R. Kennetz. Ithaca: Cornell University Press, 1957. Pp. xiii, 420. $5.00. A critical analysis of the problems affecting fundamental liberties, designed to acquaint the reader with a more thorough understanding of constitutional rights.

COURTS

*THE SUPREME COURT. By Bernard Schwartz. New York: Ronald Press, 1957. Pp. v, 429. $6.50.

CRIMINAL LAW

NOT GUILTY. By Judge Jerome Frank and Barbara Frank. Garden City: Doubleday and Co., 1957. Pp. 249. $3.75. The late Jerome Frank and his daughter have set forth highly interesting and dramatic case studies involving conviction of innocent men, and in a sensitive but sensible manner, show how such injustice in criminal cases may be avoided.

INTERNATIONAL LAW

*PRIVATE FOREIGN INVESTMENT: LEGAL AND ECONOMIC REALITIES. By Seymour J. Rubin. Baltimore: Johns Hopkins Press, 1956. Pp. x, 108. $3.50.

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* Reviewed in this issue

JURISDICTION

JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES. A report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States. Washington: U.S. Government Printing Office, 1957. Pp. ix, 351. $1.25. This volume presents a survey of the jurisdictional status of all federally owned real property, and makes recommendations for the change in existing state and federal laws for the purpose of eliminating problems arising out of legislative jurisdiction.

JURISPRUDENCE

THE ADMINISTRATION OF JUSTICE IN RETROSPECT. Edited by Arthur L. Harding. Dallas: Southern Methodist University Press, 1957. Pp. ix, 99. $3.00. A compilation of praiseworthy essays presenting a history of law reform in America, and portending its future development.

SCHOOLS

THE LAW AND THE SCHOOL BUSINESS MANAGER. Edited by Leo O. Garber. Danville: Interstate Printers and Publishers, Inc., 1957. Pp. viii, 331. In recognition of the legal implications of the functions and acts of the school business manager, this book is written to familiarize him with the law governing taxation, contracts, parliamentary procedure, and other fields as it affects his activities.

TAXATION

THE JOINT VENTURE AND TAX CLASSIFICATION. By Joseph T. Aubman. New York: Federal Legal Publications, 1957. Pp. vii, 493. $15.00. The author points out the impact of the joint venture in the various fields of business activity, with detailed observations of tax consequences and classifications of the joint venture.

INTENTIONAL BLANK