Notre Dame Law Review

Volume 31 | Issue 2 Article 10

3-1-1956

Book Reviews

Roger Paul Peters

Stanley J. Parry

George W. Hazlett

Charles E. Sheedy

BOOK REVIEWS

AMERICAN CONSTITUTIONAL LAW. By Bernard Schwartz.[1] New York: Cambridge University Press, 1955. Pp.xiv, 364. $5.00

Lawyers and law students in the United States will find Professor Schwartz's brief survey of American constitutional law of some value and considerable interest despite the fact that the author addresses himself to British readers.[2] As a professor of law in an American university the author undoubtedly had American readers in mind as well. From time to time throughout the book he seems to cast a backward glance in a westerly direction. In any case there are at least two features that should be of particular interest to the legal profession both here and abroad, namely, the use of the comparative method and acute observations concerning administrative law. That these are the Professor Schwartz's strong points is, of course, no accident. He is well known as the author of books on administrative law, not only in the American but also in the British and French systems, and he is the Director of the Institute of Comparative Law at New York University. He has studied and taught both here and abroad. From his rich experience he presents interesting and valuable insights concerning British constitutional practice which one would not usually find in discussions concerning our constitutional law.

The work as a whole, however, seems too slight to be of any substantial value to lawyers or law students. Perhaps events will verify the prediction of A. L. Goodhart, the Master of University College, Oxford, in his foreword, that the book ". . . will undoubtedly take a permanent place in the literature of political science."[3] Perhaps British readers will be satisfied with the scanty fare. They would get more nourishment, however, from the various writings of Corwin, Mason, Swisher, and Powell, and certainly more lively reading from Rodell, and if they have man-sized appetites both nourishment and delight from Crosskey.

Professor Schwartz divides his materials into two parts. The first ostensibly deals with the constitutional structure of the United States, the second with modern developments. This simple division together with the whole tenor of the book tends

---

[1] Professor of Law and Director of the Institute of Comparative Law, New York University.

[2] Text at xiii.

[3] *Id.* at xi.

to emphasize a widely held misconception concerning constitutional law, that is, the erroneous belief that a rigid constitutional structure, the foundations of which were laid down in the eighteenth century, was erected or completed in the course of the nineteenth century and the earlier years of the present century, largely, if not entirely, by sound judicial decisions, which were faithful to the provisions of the original Constitution and Amendments and that the course of recent decisions has had the effect of overturning large segments of this structure contrary to the plans and specifications of the original architects. There is no question about the great importance of the change in judical decisions which took place in 1937, but the fact is that the structural changes that have resulted since that time have been in the direction of more nearly approaching the original design than the structure erected in the late nineteenth century and early twentieth century. "Because laissez faire was constitutionalized it had to be deconstitutionalized,"[4] as Ralph F. Bischoff acutely observed.

Professor Schwartz, although a young man, seems to take an old-fogey stand on many highly controversial issues without warning his readers that there is a good deal to be said for the other side. He swallows whole the old canard that "the Constitution is what the judges say it is."[5] He adopts, it would seem, the theory that law is merely that which is enforced by courts. Surely he knows that such views of the law are subject to grave doubts, to say the very least. Surely he must know that courts are made up of judges and that judges are men, yet he blandly quotes from the Constitution of Massachusetts, 1780, the famous language about a "government of laws, and not of men."[6] Indeed, one gets the impression that the author has thrown his materials together rather hastily and uncritically. A truly acceptable book on American constitutional law requires, it would seem, years and years of patient reflexion on the matters barely hinted at in this work.

One trivial point may deserve mention as indicative of haste in preparation. The author states: "Unless the courts can intervene in cases where they are violated, the principle of supremacy of the fundamental law becomes but as 'sounding brass or a tinkling cymbal.' " Then a footnote reads: "The phrase used in *National Labor Relations Board v. Robbins Tire &*

---

[4] Bischoff, *The Role of Official Precedents,* in SUPREME COURT AND SUPREME LAW 80 (Cahn ed. 1954).

[5] Text at 130. (Quoting a speech by Chief Justice Charles Evans Hughes in HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT 11 (1951)).

[6] *Id.* at 5.

Rubber Co., 161 F.2d 798, 804 (5th Cir. 1947)."[7] Surely the author must know that the language used by the learned judge was from I *Corinthians*, Chapter 13, verse 1. It used to be standard practice to quote from *Holy Writ* without even using quotation marks. The current fever to "document" every statement has certainly led in this instance to a *gaffe*.

In short, while the book bears the traditional trappings of scholarship and undoubtedly great pains went into its preparation, it is far from a satisfactory treatment of American constitutional law. It would be unfortunate, indeed, if British readers were to use it as their one and only book on the subject.

*Roger Paul Peters**

THE FORGOTTEN NINTH AMENDMENT. By Bennett B. Patterson.[1] Indianapolis: Bobbs-Merrill Co., 1955. Pp. ix, 217. $4.00. The emergence of the administrative welfare state in the circumstances of modern mass society has stimulated an increasing number of books written in defense of individual liberty and private initiative. The present book belongs to this genre. The problem, as Patterson sees it, is to redress the excessive and thoughtless implementation of group rights by subjecting all legislation to the test of individual natural rights. The total argument of the book suggests two means of applying this test: (1) in "Part I," through judicial review of state and federal legislation on the basis of the Ninth Amendment, and (2) in "Part II," through the activation of the traditional American commitment to liberty and self-disciplined initiative. Presumably this means would reflect itself in the condition of legislation. The value of the book lies primarily in the mass of information it offers concerning the legislative and judicial history of the Ninth Amendment. Mr. Patterson has collected and analyzed the court decisions (state and federal) that touch this amendment.[2] And more importantly he has made readily available the debates on this amendment as they occurred in the Constitutional Convention and the early sessions of the Congress. With regard to the latter, this work contains the complete *Annals of Congress* for the period March 3, 1789 to March 3, 1791.

After noting this valuable feature of the book, however, one may doubt whether the over-arching argument which draws

---

[7] *Id.* at 11 n.2.

* Professor of Law, Notre Dame Law School.

[1] Member of the Texas Bar.

[2] Text at 27.

this information together possesses a like value. Unfortunately the argument of Mr. Patterson never jells into complete intelligibility. Where it does not exist as sheer assertion of political faith ("Part II"), it proceeds by way of a constitutional interpretation whose conclusion rests on a questionable minor premise ("Part I"). The reviewer is sympathetic to any argument that exposes the dangers of the collectivist legislation that is slowly eroding our traditional liberties. He is known, that is to say, as a conservative. Consequently it is with reluctance that he criticises a book devoted to the defense of those traditional liberties. But the fact remains that Mr. Patterson has only confused important issues and made his own position less tenable by dressing it in a political theory which however venerable is still quite ancient and outdated. De Tocqueville, the prophet of the "Mass Age," has warned us that "A new science of politics is indispensable to a new world."[3] Mr. Patterson has succeeded in giving us only a melange of nineteenth century laissez faire theory and eighteenth century contractarianism.

The basic position advanced in the book is that the Ninth Amendment exists as a statement of the basic philosophy of inherent natural rights and constitutes, within the Constitution, an assertion that the rights listed therein are not exhaustive. With this point one could hardly argue. More debatable, however, are certain sub-arguments within this basic one. Fundamental to Patterson's point is the argument that the Ninth Amendment has to do with individual rather than group rights. The only real evidence offered for this position is an assertion that the Ninth Amendment is the individual rights counterpart of the general welfare clause which asserts the government's obligation to protect group rights.[4] No argument is offered to prove this point. Moreover, other sections of the book raise the question of what Mr. Patterson means by individual as distinct from group rights, since under this rubric such disparate rights are subsumed as: privacy, right to strike, right to work, right to participate in government,[5] religious freedom and property.[6] He asserts that ". . . human rights are the product of the growth of civilization."[7] A second sub-argument basis to the fundamental point is contained in the position that from the beginning the Ninth Amendment applied to the states and gave the Federal Government authority to strike down state legislation contrary to in-

---

3 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 7 (1900).
4 Text at 57.
5 *Id.* at 55-56.
6 *Id.* at 69.
7 *Id.* at 53.

dividual inherent rights. Now if Mr. Patterson had argued that in virtue of the Fourteenth Amendment the Ninth applied to the states his position would be recognizable. But his argument is that the Ninth Amendment is unique in the Constitution in that by virtue of being a positive assertion of a philosophy rather than a restrictive clause after the manner of the first Eight Amendments, it must apply to all governments. The incomprehensive assertion is made that if the Ninth were to be interpreted as applying solely to the Federal Government, after *Barron v. Baltimore*, then we would have to admit that the state governments have no duty to respect individual rights.[8] There is deep confusion here concerning the function of a constitution.

After his essay on constitutional interpretation in "Part I," Mr. Patterson describes in "Part II" the political theory upon which he conceives the Ninth Amendment to be based. This philosophy, advanced by way of a profession of faith rather than an organized analytical theory, turns out to be nineteenth century individualism replete with the usual coercive theory of the origins of authority, the contractarian theory of the surrender of rights to government[9] and a clear suggestion of J. S. Mill's distinction between the private and public areas of life.[10] A review is not the place to engage in a discussion of such basic theoretical concepts. It is unfortunate, however, that Mr. Patterson's real insight into the evolving character of rights which led him to insist that we cannot restrict our constitutional rights to those known in 1789, should not have led him to see that a political theory evolved to solve the problems of a sparsely settled agricultural people can by no means handle the problems of a modern, integrated, complex mass society. Daniel Boorstin has observed in his *Genius of American Politics* that the habit of assuming that our political theory is a "given" concerning which there can be no real discussion can no longer serve as an excuse for not engaging in hard, laborious thought. Mr. Patterson has permitted himself to operate on the assumption that our Constitution contains within it a permanently true theory of political life.

As a final point, Mr. Patterson gets himself into difficulty by virtue of not paying sufficient attention to the consistency of his thought. In "Part I," to make his point, he proceeds largely on the basis of a mistrust of the people: they raise the danger of majority tyranny. This begets the call to government, particularly to the courts, to restrict this tendency by an aristocratic review

---

8 *Id.* at 36.
9 *Id.* at 72.
10 *Id.* at 57.

of the will of the people. In "Part II," in his praise of the traditional American individualism, he gets himself involved in an appeal to the American people to live up to their historic destiny. Presumably this will mean democracy with a government that has largely withered away under the onslaughts of virtue among the people. Now Mr. Patterson must make up his mind where our salvation lies: in the courts, *i.e.*, in aristocracy, or in a rejuvenated people, *i.e.*, in democracy. Whichever solution we choose will produce public policy of vastly different proportions and significance.

*Stanley J. Parry C.S.C.**

HANDBOOK OF OIL AND GAS LAW. By Robert E. Sullivan.[1] New York: Prentice-Hall, Inc., 1955. Pp. xix, 556. $8.50. Dean Sullivan has accomplished in remarkable degree the almost impossible task of writing a lawbook that is of interest to the practicing lawyer, and at the same time is understandable by laymen. As stated in his preface, this book is ". . . for oil and gas lawyers, for oil people who are not lawyers, for lawyers who are not oil people, and for persons interested in the legal aspects of the oil and gas industry."[2] With this objective in mind, the author has couched his text in relatively simple English, and has taken pains to avoid the kind of legal terminology that is apt to confuse those not versed in the law.

This has not impaired the value of the book to the lawyer who practices in the field of oil and gas. While he has chosen to use the modest title *Handbook,* Dean Sullivan has managed to condense into a single volume of 556 pages a truly comprehensive treatment of his subject. Even the more obscure legal problems that are rarely encountered in the petroleum operations are not ignored. With the exception of the more important or "landmark" cases, court opinions are not reviewed individually in any detail. However, statements contained in the text are supported by footnotes referring to the cases, and these references are quite adequate to serve as a basis for further research by the lawyer who is interested in pursuing a particular point of law.

In considering oil and gas law as a subject, it must be borne in mind that it is not a separate branch of the law, in the same sense as the law of contracts, the law of torts, or the principles

---

* Head, Political Science Department, University of Notre Dame.

[1] Dean, Montana State Law School. Former Associate Professor, Notre Dame Law School.

[2] Text at vii.

of equity constitute distinct subjects. Since oil and gas are fluid minerals that are found within land, they necessarily involve the law of real property. In the vast majority of instances, petroleum operations are conducted under leases obtained from landowners, and therefore the law of contracts is of vital concern. To a considerable extent, conflicts of interest that arise between landowners and lessees are resolved by the courts on principles of equity. Most of the major producing states have adopted statutes which entrust the regulation of oil and gas production to governmental agencies, thereby bringing administrative law into play. Hence, oil and gas law is composed of those portions of property law, contract law, equity, administrative law, etc., that are specifically applicable to oil and gas.

Recognizing that an understanding of the salient facts is a prerequisite to an understanding of legal principles, Dean Sullivan begins with a discussion of the geology of the petroleum reservoir and the engineering aspects of oil and gas production. Unfortunately, today's knowledge concerning the nature of oil and gas reservoirs was not available to the courts that were obliged to formulate rules of law applicable to these fluid minerals. For many years after the commercial production of oil began in 1859 with the drilling of Colonel Drake's well in Western Pennsylvania, courts were obliged to base their decisions on suppositions now known to be erroneous. Ignorance of the facts largely explains the many conflicts and apparent inconsistencies in the court decisions that developed the common law applicable to oil and gas.

In his discussion of the nature of the landowner's interest in oil and gas beneath his land, Dean Sullivan notes the variety of rules that have been devised by the courts of the producing states. Oddly enough, while widely different rules prevail in the various jurisdictions on the basic question of title to oil and gas existing beneath the surface of land, the courts of the producing states have been unanimous in their adoption of the "rule of capture," holding that the owner (or the lessee) of the land from which oil or gas is produced acquires title thereto, regardless of its source.[3]

As might be anticipated, the topic most extensively treated in the *Handbook* is the oil and gas lease. A great many, and perhaps most, of the court decisions concerning oil and gas involve the interpretation of provisions contained in leases. Despite the ever increasing number of special provisions that are incorporated in oil and gas leases, situations arise that are not specifically covered

---

[3] *Id.* at 45.

Therefore, over the years the courts have developed a very considerable body of "implied covenants" on the part of oil and gas lessees. Moreover, almost from the inception of the producing industry, courts have shown a marked tendency to construe the oil and gas lease strictly against the lessee and liberally in favor of the lessor, bearing in mind that the form of the lease is usually selected by the lessee. Here again, however, there is such lack of uniformity in the court decisions that a particular lease provision may be given quite different meanings in different jurisdictions. Dean Sullivan has taken care to note these variations in court decisions as a warning to the unwary.

The comprehensive nature of the *Handbook* is illustrated by its treatment of the "conservation statutes" that have been adopted in most of the major producing states. These statutes are a comparatively recent development, as few have been in force longer than twenty years, and their development even now is by no means complete. Expansion of the petroleum industry, coupled with more extensive knowledge, has brought realization that the court-made rules of common law are inadequate to prevent waste, and to regulate the "correlative rights" of landowners and their lessees in subsurface accumulations of oil and gas. Because the modern conservation statutes modify the common law rules in greater or less degree, they have become an integral part of the law of oil and gas. Hence, Dean Sullivan has included in his book an excellent discussion of the nature of the conservation statute and the means by which it is applied and enforced.[4]

Even the apparently unrelated topic of taxation is included in the *Handbook*.[5] Many of the producing states have imposed on producers special levies such as severance or production taxes. In addition, federal and state income tax laws contain provisions such as those relating to depletion, intangible drilling costs, and the like, that are of peculiar interest to the oil and gas operator. While it would be impossible to incorporate exhaustive treatment of taxation in a one volume work on oil and gas law, Dean Sullivan's discussion is quite sufficient to call attention to the special tax problems of the industry.

Well arranged and well indexed, Dean Sullivan's *Handbook* should prove extremely useful to the practicing lawyer. To those not trained in the law but who are interested in oil and gas, the book will be understandable and informative.

*George W. Hazlett**

---

[4] *Id.* at 251.

[5] *Id.* at 485.

* Member of the Ohio Bar. General Counsel, The Sohio Petroleum Corp.

THE MORAL DECISION. By Edmond Cahn.[1] Bloomington: Indiana University Press, 1955. Pp. ix, 342. $5.00. This is a book about moral implications that can be found in certain American legal decisions. Both law and morals, from their differing points of view, are frequently concerned in the same transaction. For example, murder, theft, and arson are crimes in law, and they are also thought to be immoral acts. Fraud and misrepresentation are valid defenses to an action on contract, and they are also blamed as lies against conscience. Professor Cahn's purpose in writing this book was to analyze moral thinking and tendencies that appear, either expressly or by implication, in the decisions of American judges, and to see to what extent the judges provide leadership for sound moral theory and practice, and to what extent they lag behind.[2]

The second and principal section of the book consists of a set of reported cases. Professor Cahn's procedure is first to brief the case, giving the facts, decision, and reasons, and then to discuss the case from the viewpoint of Professor Cahn's own thinking about morals. Some of the cases are very famous, for example the *Wagner*[3] rescue case, and *Shelley v. Kraemer*,[4] some not well known at all. But all of them were chosen, the author says, for their "prismatic" value, in that they throw light not only on themselves, but on a whole cluster of moral situations and problems connected with them.[5]

The order of the cases follows the chronology of a person's life. First, problems connected with life itself, and with childhood ("the right to be young," the turntable cases); then various social relationships, sex, and the family, and business and government; then a section on "the enlargement of personality"; and finally the question of death.

No attempt will be made here to record all of the author's moral principles and convictions, but only some of the more interesting. He believes that sexual intercourse outside of marriage is morally good (he describes it as "love" without qualification), and he favors the growing tendency of American law to allow the "morality statutes" (*e.g.*, fornication) to become dead letters on the books.[6] Contraception is "one of the important benefactions" of science to the modern world, because it has helped

---

[1] Author of THE SENSE OF INJUSTICE (1949), THE SUPREME COURT AND SUPREME LAW (1954) and others.

[2] Text at 3.

[3] Wagner v. International Ry., 232 N. Y. 176, 133 N.E. 437 (1921).

[4] 334 U.S. 1 (1948).

[5] Text at 4.

[6] *Id.* at 89.

". . . to liberate society from an age-old incubus: the doctrine. . . that love is primarily a reproductive activity. . . ."[7]

Professor Cahn favors easy divorce, freed from the "adversary" situation in which legal tradition and procedure have fixed it. The idea of the "guilty" party and the "innocent" party should vanish from the law. More and more in the United States marriages do not break up in an atmosphere of recrimination and hostility, but out of a motive of optimism: the parties want to marry somebody else and try it again.[8] The bad legalism that surrounds marriage and divorce is attributed to the "mercantilist" view of marriage and to the fact that domestic relations law has mostly been made by men with their sentimentality combined with an ownership attitude. In the whole matter of domestic relations, Professor Cahn thinks the law has lagged behind the evolving morals of the people.[9]

But the situation is different in business and political morality. In these areas the judges have shown genuine leadership and a concern to elevate standards of public conduct. This concern is seen, for example, in the tendency of courts to make more stringent the relations of trusteeship, and to grant legal relief in situations which in an earlier day would have been regretfully described as "mere moral obligations" and therefore unenforceable. The "moral" obligation and the "legal" obligation are tending more and more to coincide. Again, the courts will not put themselves at the service of lesser bodies to give legal force to agreements and arrangements that lag behind the moral implications of the Constitution. Thus the federal court refused to enforce restrictive covenants in *Shelley v. Kraemer*,[10] and the discriminatory practices of the Brotherhood of Railroad Firemen.[11] Professor Cahn thinks our judges are still overly lenient in their attitude towards tax evaders. It is still not quite clear that cheating the government is an offense "involving moral turpitude." The opinion of the author is that payment of taxes is an obligation of conscience, and that fraud on the government is as morally blameworthy as fraud on an individual.[12]

The author's own moral discussion of the "principal cases" is often rather circuitous, and not always clear; but nearly always he does return to the point. In fact the moral discussions are really highly personal essays, employing the author's own logic,

---

7 *Id.* at 92-93.
8 *Id.* at 121.
9 *Id.* at 109.
10 *Id.* at 162.
11 *Id.* at 158.
12 *Id.* at 173.

his own terminology and distinctions, and illustrating his own personal moral opinions. In the first section of the book he explicitly repudiates "authorites" of any sort, particularly "ecclesiastical." There are scattered references, to the Bible, particularly the Old Testament, to Aristotle and Plato and others, but the references are always illustrative of opinions held by the author on grounds of his own personal insights. Thus Professor Cahn is a personal essayist in this matter, not a professional moralist in any usual sense of that term; he does not belong to any school nor follow any system. He analyzes his selected problems in the light of his own moral thinking.

Yet there is some theorizing in the first section of the book, where he discusses questions of the nature and origin of morality and of the distinction between law and morals. And much of this theoretical material reflects study and thinking familiar to every student of ethics. He rejects the idea that morals are equivalent to mores. He rejects positivism and traditionalism as origins of morality. The "external policing" of precepts and commandments must give way to the "internal policing" of "conscience." The important act in the moral order is the act of "decision," and "good habits" are of great value in helping to make one's moral decisions stable and trustworthy.

If mores, traditions, precepts, do not provide a standard for good conduct, then where is that standard to be found? Professor Cahn finds it in "the moral constitution." "Without the moral constitution it is difficult to see how there could be any moral legislation or any specific moral decisions."[13] But what is "the moral constitution"?—The moral constitution of *what*?—The author does not define it or describe it with clarity. Seemingly, the moral constitution must be within the man himself, the moral agent, the portion of his total make-up that has reference to the good. Thus the moral constitution would include the native tendencies and inclinations of the man towards the good, and the judgments he makes about the good in particular, and the decision to act in accordance with his judgment.

If this brief analysis of the moral constitution hits at all close to Professor Cahn's understanding of it, then it would seem that his norm of the "moral constitution" is not far removed from the norm of the scholastic moralists, based on "human nature."

However, as so often in moral discussions, disagreement may arise concerning the application of the norm. No reader could take exception to Professor Cahn's high standards and ideals for commercial and political morality. Rightly, he praises the

[13] *Id.* at 16.

courts for strengthening the idea of trust in business relationships, for refusing to enforce prejudice, for elevating standards of good citizenship. And with equal right he blames the courts where they seem to be guilty of perpetuating vestiges of an "arm's length" morality.

But the entirety of Professor Cahn's section on sexual and family morality seems completely wrong from the viewpoint of the moral constitution itself. This criticism is directed not so much towards the legal questions raised—whether divorce should be "adversary" or not, hard to get or easy to get, whether judges should enforce morality statutes or not—but to the center of the auhor's understanding of sex and marriage.

For example, it is really difficult to believe that his attitude towards "love" can actually be what he says it is. He makes no distinction between love and lust, between what he describes as "flaring and flickering affairs" and a lifetime of devotion. The most he will say for the permanence of love is that "most Americans" prefer a union that is "lifelong" and "monopolistic," or at least "provisionally so."[14] His attitude towards sexual morality indicates a surprising lack of understanding of the psychological and spiritual depth and profundity of the sexual act, of its significance in the human constitution, and of its corresponding importance in the moral constitution.

Similar criticisms could be made of his ideas regarding marriage and the family. He holds that contraception has done away with the old idea that "love" is primarily a reproductive activity. This seems an example of reasoning in reverse—like arguing that airplane crashes prove that the purpose of air transport is not to get passengers where they are going. It is perfectly obvious that sexual union is intended for reproduction—for much else besides, of course, but certainly for that primarily. Then contraception comes along afterwards and prevents the process from achieving its result.

Thus deep questions are raised by the author's opinions: questions of the nature of man, of the soul of a child, of parenthood, all of the old verities. That is why the total effect of the book is disquieting, combining as it does a thoroughly meritorious and enlightened view of man in his secondary relationships, with more fundamental considerations where the opinions of the author seem almost corrupt.

*Charles E. Sheedy, C.S.C.**

---

[14] *Id.* at 93.

* Dean of the College of Arts & Letters, University of Notre Dame.

NINE MEN. By Fred Rodell.[1] New York: Random House, 1955. Pp. xii, 338. $5.00. We live in an age in which the public at large is being invited to explore and share in what were once the hidden mysteries of the specialized professions. It is no longer enough to hope that our scientists will tame the atom; we must be able to understand the general operation of a nuclear reactor and know something of the effect of radioactivity upon the mutation of our genes. The theory of games is not only an abstruse branch of higher mathematics; it is also a proper subject for an article in a popular magazine. In recommending or selecting a psychiatrist we are supposed to be able to report whether his orientation, is freudian or whether he leans to the school of interpersonal relations and how he feels about the use of the new tranquillizers. And it is not only permitted but expected that we can contribute to a dinner conversation about the relative merits and dangers of live and killed virus vaccines. In *Nine Men,* Professor Rodell has attempted to supply for the hitherto uninformed but reasonably intelligent layman an understanding of the basic function that is served by the Supreme Court in our constitutional democracy.[2] That Rodell has the necessary familiarity with the Court's history, sufficient insight and the capacity to do such a job is convincingly demonstrated by this book. Whether he will in fact succeed in persuading any but a tiny minority of his readers of his central thesis, other than those who come to him already convinced, is quite another matter.

Rodell, in his highly readable and thoroughly exasperating fashion, develops as his central theme the proposition that in deciding the great constitutional cases, the Justices have not in the past, and will not in the future, " '. . . lay the article of the Constitution which is invoked beside the statute which is challenged and . . . decide whether the latter squares with the former,' "[3] but rather have reached and will reach their conclusions on the basis of essentially political considerations. Few lawyers today will disagree. Too few non-lawyers, at least so my limited experience indicates, recognize that this is the case and why it cannot be otherwise. There is, therefore, room and need for a book such as the one that Rodell tells us he has set out to write. But since his average reader, for reasons that need not now be explored, will find these truths startling and, indeed, unpalatable, it is a crucial condition, for an author who wishes to succeed, to

---

[1] Professor of Law at Yale University Law School. Author of WOE UNTO YOU, LAWYERS (1939), FIFTY-FIVE MEN (1936) and numerous articles.

[2] Text, Introduction at x.

[3] *Id.* at 137, quoting from United States v. Butler, 297 U.S. 1, 62 (1935).

win his reader's confidence and respect. It is here, I fear, that Rodell has gone astray.

Rodell, for all his repeated castigation of those of us who see everything only in terms of black and white, is himself incapable of any but the most intemperate and intolerant opinions of those who hold views that differ in the slightest respect from those he knows are unalterably the only correct ones.

This passion for extremes results too often in statements that the lay reader may justly consider contradictory and pushes him also into making pat and unconvincing explorations in order to avoid further contradictions. Thus, the book opens with what seems to be a vitriolic attack upon the whole concept of judicial review, upon the irresponsible and autocratic nature of the Court ("not even the bosses of the Kremlin . . . wield such loose and long-ranging and accountable-to-no-one power. . . .")[4] and upon its inability to take affirmative action (you sometimes wonder whether he wouldn't like the Court to pass some laws during the off season). But later on, in what is indubitably the best part of the book, when he traces the history of the Court by examining its great decisions against the personality and backgrounds of the Justices who made them, he points to several instances where the Court, for good and sufficient political reasons, has accepted its inability to cope with the superior power of the executive branch or of the states. The reader might justly ask for some help in understanding the problem that the Court faces today in enforcing its order in the segregation cases over the determined opposition of many of the southern states but he gets none. And the reader's confusion is bound to be compounded when having finished the book he realizes that Rodell doesn't object to the power of judicial review at all — he wants only that it be exercised to invalidate the laws he considers objectionable.

To cite another example, Rodell's layman might be bewildered when the explanation that what "state police power" means is ". . . the use of state laws to do things that a majority of the Justices, at any given time, do not strongly disapprove of the state's doing — nothing more, nothing less,"[5] is followed shortly thereafter by Rodell's obvious approval of Justice Holmes' battle to prevent the invalidation of laws that seemed "futile or even noxious" to him.[6] And while the close, discerning reader may gather that Holmes' views in this regard have been accepted today, he is repeatedly faced with contemptuous references to

---

[4] *Id.* at 4.

[5] *Id.* at 124.

[6] *Id.* at 182.

"judicial passivists" and to those who "talk of pious self-denial."

So, too, when one has had decision after decision explained solely on the basis of the fact that this judge represented that corporation before joining the Court or was born in one section of the country rather than another, he is likely not to be satisfied with the claim that when this method does not work it is because ". . . the Justices sometimes seem to change their more *lightly* or *expediently* held political opinions after they have achieved the security of the Court."[7] (Emphasis added.) Rodell assures us that his own "slant toward people," and presumably issues, is based on his ideas and his ideals, not on petty, personal things.[8] He seems, however, to find it incredible that the same might be said of any but a tiny handful of our Supreme Court Justices. To give examples of how far he goes, he explains Justice Reed's fine record in consistently voting to uphold the rights of negroes as due to the desire of a southerner ". . . not to *seem* guilty . . . of racial prejudice."[9] (Emphasis added.) And Justice Frankfurter's concern with procedural matters is ascribed to ". . . his earliest environment, for Continental education and scholarship are commonly more concerned with abstract ideas and patterns of logic than with down-to-the-dirty-earth problems of living people. . . ."[10] Rodell does not appear the least bit bothered by the fact that he has told us, only two pages earlier, that Frankfurter came to this country at the age of twelve.[11]

Much of this is simply captious criticism. It reflects, however, the more serious nature of Rodell's failure. He knows perfectly well that to demonstrate that judges make political decisions is only the beginning of analysis. He knows also that the term is so broad that it covers a host of matters of widely different character and that the best of our judges have been those who thought deeply and seriously about the nature of their role in our system of government and have attempted to act in accordance with the judicial philosophies that they have fashioned. Unless the views of these men are fairly presented the reader is not being informed, he is being tricked. How, for example, can a thoughtful reader learn that there may be different conclusions about the value of judicial review as a method of controlling national legislation and its importance as a restraint on state action when Rodell twice quotes his principal hero, Holmes, to the effect that our system of

---

7 *Id.* at 9.

8 *Id.*, Introduction at xi.

9 *Id.* at 268.

10 *Id.* at 271.

11 *Id.* at 269.

government would survive if the Court lost its power to declare an Act of Congress void, without either time completing the quotation?[12] How, for example, can the layman for whom this book is written be expected to decide for himself whether it may not be proper precisely because judges are appointed for life and legislators elected periodically, for judges to avoid certain cases because they present "political questions" when Rodell is interested only in showing how foolish this is since judges constantly make "political" decisions?[13]

It is hard to avoid the conclusion that Rodell's kinship with his favorite demons, McReynolds, Sutherland, Van Devanter and Butler is much closer than that with his heroes, Holmes, Brandeis, Cardozo and Stone. The Court has the power, it should use it for the general good and not trouble itself with petty philosophical problems about whether the possession of absolute power requires that it be cautiously employed — just what McReynolds believed. The present Chief Justice has already been assigned a place among the very greatest because of one forthright opinion[14] while the Court that prepared the way for that opinion and made it virtually inevitable is denied any credit because it also decided the *Dennis* case.[15] One need not agree with the *Dennis* decision to recognize that this superficial kind of appraisal is completely inadequate. But except when he is writing history, this kind of thinking permeates the book. Until Rodell recognizes that a good heart, a shrill tongue and a facile pen are no substitute for troubled cogitation, he will go on wasting his talents.

*Lawrence J. Latto**

---

12 *Id.* at 20.

13 *Id.* at 13.

14 *Id.* at 323-324.

15 *Id.* at 320.

* Member of the District of Columbia bar.

BOOKS RECEIVED

BIOGRAPHY

THOMAS J. WALSH. By Josephine O'Keane. Francestown: Marshall Jones Co., 1955. Pp. 284. $4.00. A life story of the famous Montana Senator, well known for his investigation of The Teapot Dome Scandals, written by a close relative.

CIVIL RIGHTS

THE FREEDOM READER. Edited by Edwin S. Newman. New York: Oceana Publications, 1955. Pp. 256. $3.50. A collection of statements on issues affecting the basic American freedoms, including important Supreme Court decisions and excerpts by leading contemporary figures.

NATIONAL SECURITY AND INDIVIDUAL FREEDOM. By John Lord O'Brian. Cambridge: Harvard University Press, 1955. Pp. 84. $2.00. 1955. *Godkin Lectures, Harvard University.* The lectures point up the danger that exists when over-zealous exponents of national security conflict with our individual freedoms.

SECURITY THROUGH FREEDOM. By Alpheus Thomas Mason. Ithaca: Cornell University Press, 1955. Pp. xi, 232. $290. A well documented work on property rights as contrasted with individual rights. The idea that security can only be found through freedom of thought and action is the book's central theme.

CONSTITUTIONAL AMENDMENTS

*THE FORGOTTEN NINTH AMENDMENT. By Bennett B. Patterson. Indianapolis: The Bobbs-Merrill Co., Inc., 1955. Pp. ix, 217. $4.00.

CONSTITUTIONAL LAW

*AMERICAN CONSTITUTIONAL LAW. By Bernard Schwartz. New York: Cambridge University Press, 1955. Pp. xiv, 364. $5.00.

THE BIRTH OF THE BILL OF RIGHTS, 1776-1791. By Robert Allen Rutland. Chapel Hill: University of North Carolina Press, 1955. Pp. 243. $5.00. A detailed historical account of the process whereby the Bill of Rights became the first ten amendments of the Federal Constitution. The majority of attention is focused on the fight to incorporate the Bill of Rights into the Constitution.

* Reviewed in this issue.

CRIMINAL LAW

THE TROUBLE WITH COPS. By Albert Deutsch. New York: Crown Publishers, Inc., 1955. Pp. xii, 243. $3.00. A comprehensive documentary of the how and why of police corruption, based on interviews and private documents; it encompasses both the small town and the big city. The author points up the problem and suggests improvements.

GOVERNMENT

EUROPEAN AND COMPARATIVE GOVERNMENT. *Second Edition.* By Robert G. Neumann. New York: McGraw-Hill, 1955. Pp. xiii, 818. $6.50. A discussion of the governments of Great Britain, France, Germany and the Soviet Union with a comparative analysis of these governments as well as a comprehensive treatment of political concepts and institutions.

MONOPOLY IN AMERICA. By Walter Adams & Horace M. Gray. New York: Macmillan Co., 1955. Pp. xv, 221. $3.50. Describes monopolies as an outgrowth of discriminatory governmental measures with special emphasis on government policy of taxation and disbursements of contracts. The authors would wish more competition and less regulation.

JURISPRUDENCE

*THE MORAL DECISION. By Edmond Cahn. Bloomington: The Indiana University Press, 1955. Pp. ix, 342. $5.00.

LABOR LAW

BRITAIN VIEWS OUR INDUSTRIAL RELATIONS. By Mark J. Fitzgerald, C.S.C. Notre Dame: University of Notre Dame Press, 1956. Pp. ix, 221. $4.25. This work is based on an analysis of over sixty reports of British union-management teams which visited this country between 1948 and 1953. Special attention is placed on the phases of industrial relations the reports considered most important to our high rate of productivity.

LABOR DISPUTES AND THEIR SETTLEMENT. By Kurt Braun. Baltimore: The John Hopkins Press, 1955. Pp. xvi, 343. $6.00. The existing methods of settling labor disputes are thoroughly discussed along with a treatment of their respective development.

* Reviewed in this issue.

The author has enumerated the practical application of each method.

MUNICIPALITIES

GOVERNING URBAN AMERICA. By Charles R. Adrian. New York: McGraw-Hill, 1955. Pp. vii, 452. $5.50. The author's approach combines the use of political science and materials from social psychology and sociology. Its purpose is to teach the citizen what he needs to know about the operations of his city.

OIL AND GAS

*HANDBOOK OF OIL AND GAS LAW. By Robert E. Sullivan. New York: Prentice-Hall, Inc., 1955. Pp. xix, 556. $8.50.

PROCEDURE

THE CHALLENGE OF LAW REFORM. By Arthur T. Vanderbilt. Princeton: Princeton University Press, 1955. Pp. vi, 194. $3.50. The Chief Justice of the New Jersey Supreme Court sets out a procedure for achieving substantial impartial justice. Decisions would reflect the facts of each case rather than being based on the blindness of technicalities.

SECURITY

THE OPPENHEIMER CASE. By Charles P. Curtis. New York: Simon & Schuster, 1955. Pp. ix, 281. $4.00. The complete story of the hearings as taken from the transcript, reproduced verbatim as they were published by the Atomic Energy Commission.

STATUTES

ARRANGEMENTS UNDER CHAPTER 11 OF THE BANKRUPTCY ACT. By Sydney Krause. New York: Practicing Law Institute, 1955. Pp. 39. $1.50. An explanation of the statutory procedure and the technique of conducting arrangement proceedings under chapter eleven of the Bankruptcy Act. Various advantages over liquidation or an assignment are carefully explained.

* Reviewed in this issue.

SUPREME COURT

THE HOLMES READER. Edited by Julius J. Marke. New York: Oceana Publications, 1955. Pp. 282. $3.50. Major writings of Justice Holmes and views of him by contemporary writers of note.

THE MARSHALL READER. Edited by Erwin C. Surrency. New York: Oceana Publications, 1955. Pp. 256. $3.50. A presentation, through articles by outstanding authorities, of the life and the contributions of Chief Justice John Marshall.

*NINE MEN. By Fred Rodell. New York: Random House, 1955. Pp. xii, 338. $5.00.

TORTS

PROSSER ON TORTS. *Second Edition.* By William L. Prosser. St. Paul: West Publishing Co., 1955. Pp. xviii, 952. $10.00. An enlargement, both in content and physical makeup, of Dean Prosser's well known treatise on torts first published in 1941.

* Reviewed in this issue.