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Book Review

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BOOK REVIEW

A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, PART I, THE POWERS OF GOVERNMENT. By Bernard Schwartz. (New York: The Macmillan Co., 1963. Vol. I, Federal and State Powers, pp. xiv, 470. Vol. II, Powers of the President, pp. viii, 497. Each volume \$12.50.) On rare occasions one comes upon a work that is at once so obviously a thing apart and about which his enthusiasm mounts with each passing chapter. This is the situation with this monumental work by Professor Schwartz, Professor of Law at New York University. This is a two-volume presentation of the powers of government and we are promised a second part dealing with the rights of the individual.

The first volume begins with an introductory chapter dealing with some historical background along with definitions of some basic American legal concepts such as judicial review and the rule of law. There follow chapters on state-nation and interstate relations, and the organization and powers of Congress, primarily investigatory, fiscal, and commerce powers. A closing chapter in the first volume is concerned with the organization, jurisdiction, and procedure of the courts. The second volume is devoted to the Presidency. The organization of the office and the various powers of veto, appointment, removal, presidential prerogative, and pardon take up one chapter. The President's powers in connection with the conduct of foreign relations and his war powers each "rates" a chapter.

The importance of an accurate summary of the current meaning of the Constitution is obvious for all to see. The need for such a statement has been just as apparent to persons working in the field. Schwartz's work satisfies this need, at least as far as the coverage provided by these two volumes is concerned. One of the great difficulties of constitutional law is its lack of "pat" answers and rules, its tendency to indefiniteness. Therefore, one might suggest that an author contemplating a commentary on the Constitution projected for utility over an extended period of time might be well advised to put the work in some kind of loose-leaf arrangement in order that the whole could be, with a minimum of inconvenience, kept current. Be that as it may, Professor Schwartz has done an admirable job in his exposition of what the Constitution means (in the areas he has covered) as of the date of publication, and he has done an even more admirable job of presenting what the Constitution has meant in years past. The work is thus a combined guide to what is and to what has been.

One of the great problems in an undertaking such as this is the matter of the approach to be used — historical, analytical, or whatever. Here the author has done a very nice job of combining the possibilities. This is excellent constitutional history. The section on the commerce power of Congress is particularly good and is exemplary of the approach used. The chapter opens with what amounts to a definition of the commerce clause with emphasis on the negative aspects of the clause. By this is meant the extent to which the clause negates state power by implication. This is in contrast to the positive affirmation of Congressional authority. This point of view is expanded in a review of the portion of the commerce power that is exclusively Congressional and the portion wherein the states have concurrent power of regulation. In the course of this discussion the author presents Marshall's point of view as expressed in *Gibbons*¹ and in *Wilson*² followed by a rather detailed review of *Cooley*.³

The statement of *Cooley*⁴ is the sort of coverage consistently given to cases in this work. It is reasonably concise and complete and exceptionally readable. Professor Schwartz has the virtue of making the complex simple without sacrificing accuracy or, really, completeness. The discussion moves easily and naturally from *Cooley*⁵

1 *Gibbons v. Ogden*, 6 L.Ed.23 (9 Wheat.) (1824).

2 *Wilson v. The Black Bird Creek Marsh Co.*, 7 L.Ed. 412 (2 Pet.) (1829).

3 *Cooley v. The Board of Wardens of Philadelphia*, 13 L.Ed. 996 (12 How) (1851).

4 *Ibid.*

5 *Ibid.*

to railroad regulation — rates, with *Munn*⁶ (1877), safety, with *Smith*⁷ (1888) and *Southern Pacific*⁸ (1945), and service, with *Lake Shore*⁹ (1899). There follows motor-vehicle regulation — safety, with *Barnwell Bros.*¹⁰ (1938), licensing, with *Hendrick*¹¹ (1915), *Fry*¹² (1952), and *Thompson*¹³ (1941), and license fees, with a review of some cases already cited. Using the *Cooley*¹⁴ and *Gibbons*¹⁵ cases as take-off points, Schwartz next proceeds to discuss racial discrimination in transportation and state quarantine, inspection, exclusion, and embargo laws with later cases that illustrate the points made. The discussion then moves into the area of Congressional consent to state action affecting interstate commerce that would otherwise be invalid and state legislation that is in conflict with Congressional action. Here *Cooley*¹⁶ is again the “root” case and the development since is followed through such decisions as *Leisy*¹⁷ (1890) and *Prudential*¹⁸ (1946).

The matter of the taxation of foreign commerce calls for detailed consideration of *Brown v. Maryland*¹⁹ along with the recent *Hooven & Allison*²⁰ (1945) and *Youngstown*²¹ (1959) decisions. The discussion of the original package doctrine is carried over into the field of interstate commerce with *Woodruff*²² (1869), *Brown*²³ (1885), and *Leisy*²⁴ (1890). The seemingly omnipresent question of state taxation of interstate commerce is next pursued with the leading case of *Coe v. Errol*²⁵ and *Berwind-White*²⁶ (1940), *McLeod*²⁷ (1944), *Henneford*²⁸ (1937), and the Drummer Cases of *Robbins*²⁹ (1887) and *Nippert*³⁰ (1946) aiding to clarify a difficult aspect of the total problem. The chapter concludes with a discussion of what has been the legal history of state gross receipts taxes, property taxes (with their accompanying apportionment and unit rules), and privilege taxes. In the closing lines of the chapter the discussion comes full circle with a return to the concept of the negative aspect of the commerce clause which is held to be “operative only until the Congress provides otherwise. The Supreme-Court jurisprudence discussed in this chapter is thus relevant only in the dormancy of Congressional power over commerce.”

Impressive in the coverage of Supreme Court decisions throughout the work is the large number covered as well as the good, brief, comparative analyses that are common. Professor Schwartz sets forth the rules of law of the leading cases along with pertinent quotations. These are treated either chronologically or in such manner that the reader is easily able to see just where a case fits into the general picture of constitutional development. The only suggestion that might be offered in connection with the coverage of Supreme Court opinions is that possibly there could

- 6 *Munn v. Illinois*, 94 U.S. 113 (1887).
- 7 *Smith v. Alabama*, 124 U.S. 465 (1888).
- 8 *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).
- 9 *Lake Shore & M.S. Ry. Co. v. Ohio ex rel. Lawrence*, 173 U.S. 285 (1899).
- 10 *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938).
- 11 *Hendrick v. Maryland*, 235 U.S. 610 (1915).
- 12 *Lloyd A. Fry Roofing Co. v. Wood et al. Member of The Arkansas Public Service Commission*, 344 U.S. 157 (1952).
- 13 *People of State of California v. Thompson*, 313 U.S. 109 (1941).
- 14 See note 4 *supra*.
- 15 See note 1 *supra*.
- 16 See note 4 *supra*.
- 17 *Leisy v. Hardin*, 135 U.S. 100 (1890).
- 18 *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946).
- 19 *Brown v. Maryland*, 6 L.Ed. 678 (12 Wheat.) (1827).
- 20 *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945).
- 21 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
- 22 *Woodruff v. Parham* (8 Wall. 123) (1869).
- 23 See note 19 *supra*.
- 24 See note 17 *supra*.
- 25 *Coe v. Erroll*, 116 U.S. 517 (1940).
- 26 *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940).
- 27 *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944).
- 28 *Henneford v. Silas Mason Co.*, 300 U.S. 517 (1937).
- 29 *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887).
- 30 *Nippert v. Richmond*, 327 U.S. 416 (1946).

profitably be more treatment of concurring and dissenting opinions. These are certainly not neglected but greater coverage would be desirable.

Mention has been made of the genius of Schwartz to make the complex simple. One notable example of this is his presentation of the background of *United States v. Belmont*³¹ (II, 153). This is a matter that perennially confuses students (and certainly others) and the author has done a superb job of clarification. The same is true of his explanation of the distinction between a treaty and an executive agreement (II, 155ff.).

The material is generally very well organized throughout, as witness the discussion of sovereignty on page 34 of the first volume and the point of an implied power being deduced from an implied power on page 95 of the same volume. Again the author has the very laudable quality of being able to put things concisely and correctly. The whole work is excellently written and reads easily. The text is mostly "wheat" with very little "chaff." This in itself adds a touch of novelty in the literature of today.

On another point the work deserves the highest commendation. This is a truly objective study of the Constitution and of how it has come to be what it is. True, the author's opinions are present but not in an obtrusive or unpleasant manner. There is no attempt to the "hard sell." It is a real pleasure to read objective, factual prose where the author has no thesis to prove and whose purpose is the presentation of a historically accurate treatment of all of the important areas appropriate to a constitutional commentary "while at the same time seeking to avoid the arid pedantry all too often characteristic of a legal treatise." (I, x) The author has succeeded admirably.

Here and there relatively minor objections can be raised. For example, in the discussion of the Preamble on pages 14-15 of the first volume, the author might well have taken note of the original draft of that part of the Constitution as "We the people of the states of . . ." until the Committee on Style changed it. Mentioning this might also have changed to some extent the emphasis in the discussion on these pages.

The really disturbing defect of these volumes is another matter. The whole is superbly documented with almost literally hundreds of references to sources in each chapter, but these are all placed, of all places, at the close of the second volume. The inconvenience that devolves upon the reader when footnotes are placed at the end of a volume is simply compounded almost indefinitely when they are all placed at the close of the second volume. The net result will probably be that most of these will go completely unconsulted, which is a sad waste. It is no answer that they are there for the information of the not-so-lazy reader. The work is such a thorough pleasure to read otherwise, it should not have been burdened with what is an almost impossible task even for the not-so-average reader. Footnotes should be footnotes and really each should be placed at the bottom of the page on which the reference occurs, but by no stretch should they be placed at the close of the second volume. This may cut publishing costs but it also reduces the value of the book to the reader and renders almost a nullity the efforts on the part of the author that has gone into the compilation of these footnotes.

At the close of Volume Two there is an excellent Table of Cases and a very adequate index.

Paul C. Bartholomew

31 U.S. v. Belmont, 301 U.S. 324 (1937).