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Book Reviews

American Constitutional Law. By Bernard Schwartz, Professor of Law and Director of the Institute of Comparative Law, New York University. Cambridge University Press, 1955. Pp. xiv, 364. $5.00.

This treatise on American Constitutional Law, by Professor Bernard Schwartz, is exceedingly well written, clear, concise and well documented. It is divided into two parts, Part I covering the structure of our constitutional system, and Part II dealing with the modern developments that have occurred under it.

As the author says in his preface, "it is the purpose of this book to present the workings of the American system of constitutional law to a British audience, with emphasis upon the significant changes that have occurred therein in recent years". In the five chapters which make up Part I, there is a very clear and readable discourse upon the doctrine of the dual system of federal and state jurisdiction, and also of the separation of powers within the three branches of the federal government, both of which are the basis of our written Constitution. In this connection, the contrast is shown between the Canadian and Australian Constitutions, and how the latter more closely follows our federal system.

The author lays great emphasis upon his belief that a Constitution which cannot be enforced by the courts contains but empty words, and that it is the Supreme Court's function of judicial review which insures the national authority by making that Court the ultimate arbiter of the federal system. Reference is made to the failure of the French judiciary to exert a power of review over the constitutionality of the Acts of the legislature as having made the various constitutions in France mere paper instruments, and has in effect placed the French legislature in a position of practical supremacy, not unlike that enjoyed by the Parliament in England, where the courts may only interpret, and not question the validity of Acts of Parliament.

A very succinct explanation is given of the fact that there is a separation of powers between the legislature and the executive in the United States to an extent wholly foreign to the British governmental structure, because in Britain the dominant characteristic is the fusion, not the

division of authority between Parliament and Government, while with us the Congress and the President are wholly independent of one another. The author explains that in Britain the doctrine of the separation of powers today means little more than an independent judiciary, while in the United States this doctrine means much more, for it is the judiciary that prevents the fusion of functions between the legislature and the executive. Also the point is emphasized that it is easy for the English observer to comprehend the importance of the Federal Government in the American system, but that it is harder for him to secure a similar comprehension of our state governments, since it is difficult for him to understand a system in which governmental power, instead of being concentrated in the unitary force with which he is familiar, is separated.

There are excellent chapters, well written, very comprehensive and yet not too lengthy, on the composition, powers and functioning of the Congress, both House and Senate; and likewise an equally excellent discourse on the office of President. The author points out that as respects the latter, the language of Article II of the Constitution which contains the provisions dealing with the President and his powers, is imprecise and indefinite by comparison with the provisions of this instrument defining the authority of the other branches of our government. He states that the provisions with respect to the President, it is true, constitute the base upon which executive power in the federal system was built, but that the structure of presidential authority itself is much larger than the constitutional function. He explains that "It is the composite of the powers asserted by American Presidents during the history of the Republic, which have, by dint of repeated exercise, attained the status of powers authorized by constitutional usage or convention", and that "So far as the presidential office is concerned, indeed, largely because of the rudimentary character of the provisions of Article II in the American Constitution, the unwritten constitutional law is, in many ways, more important than the written one" (p. 88).

There is an exceptionally well written section on our constitutional method of electing Presidents, with emphasis upon the breakdown of the intended operation of the electoral college system as provided in the Constitution, namely, that the electors should exercise their individual judgments in casting their votes, the obvious cure for which is to substitute a direct system of choice by popular ballot. As respects tenure, the author feels that the Twenty-second

Amendment, ratified in 1951, providing that no person shall be elected more than twice, is a mistake, because it may prove detrimental in time of real crisis.

There is also an excellent comparison of the position and powers of the President with those of the Prime Minister in England. The author maintains that the position and powers of our Chief Executive lie somewhere between those of the Crown and those of the Prime Minister, but the fact that a President's tenure does not depend upon congressional approval enables him to maintain an independence of the legislature which no British Prime Minister could assert and long remain in office. Further, the author points out that the Prime Minister, in relation to members of the Cabinet, is more or less like the chairman of the board of directors of the governmental enterprise, whereas the relationship of the American President to his Cabinet is an entirely different one. He dominates them completely, as they hold their office entirely at his pleasure. Also, the author points out that the President is vested with high authority which under the British System is still retained by the Crown. He is, automatically, by virtue of his office, Commander in Chief of the armed forces. He has an effective veto power over legislation, the prerogative of pardon, and the promulgation of executive orders, the latter in England being more matters of form than of substance.

The author correctly refers to the fact that the President's veto power is greatly weakened by inability to veto only part of a bill, the lack of such power enabling Congress at times to assert pressure upon him to permit legislation which otherwise he would veto. As the author says, the obvious answer is to give the President the power of partial veto, which power is, in fact, possessed by the Governors of most of our states. It is pointed out that during the last twenty-five years there has been a tremendous rise of Presidential power in initiating legislation, particularly in fiscal and economic matters, with respect to which the President has the advantage of the technical skill and continuous services of the Bureau of the Budget and of the Council of Economic Advisers.

As respects foreign affairs, the author asserts that limiting to the Senate participation in the treaty making process is a great defect in the American system. He recommends that the House of Representatives should be associated in the process of approving treaties, and that approval by a majority, and not two-thirds of both Houses before treaties can be ratified should be the requirement.

The great growth of Executive Agreements concluded by the President is analyzed and the resulting dangers alluded to. The Teheran, Yalta and Potsdam Agreements are mentioned, but the author does not attempt to analyze their consequences. The proposed, highly controversial Bricker Amendment is discussed in a subsequent chapter, hereinafter referred to. The author stresses the fact that although the President is placed by the Constitution at the head of the Executive department of government and is charged with the duty to see that the laws are faithfully executed, he must detour around powerful administrative agencies which are not subject to his authority and which, therefore, have great potential power to obstruct the President's effective overall management of national affairs. However, the author has high praise for the Hoover Commission's work.

The chapter on the Federal Courts is a very thorough exposition of their origin, development and jurisdiction. However, it is amazing to find that the author is content to rest the blame on the Constitution for President Franklin D. Roosevelt's court-packing plan, saying, as respects this sinister political plan, "From the constitutional point of view, it should be emphasized, President Roosevelt's 'court-packing' plan, if once it had been passed by the Congress, could not have been assailed", since the Constitution, while expressly providing for the Supreme Court, "does not in any way specify the composition of that tribunal", which is left to Congressional action, and that "It cannot be denied that the failure to fix the membership of the Supreme Court in the Constitution constitutes a dangerous *lacuna* in the American organic instrument" (pp. 144-5. Italics supplied.)

The second part of the book, entitled "Modern Developments", opens with a chapter on "The New Federalism", which is characterized by the preeminence of federal authority, accompanied by corresponding diminution of the reserve powers of the states. The author very accurately states that the American social and economic system is constantly being subjected to greater regulation and control by Washington; that the national government's power over commerce is so construed that even enterprises having only the most remote effect upon the national economy, are nevertheless subjected to central control; that national authority has been greatly expanded by use of the federal power to tax, and to spend under the claim of promoting the general welfare; that the power of the states has deteriorated by the constantly increasing reliance of their

governments upon the federal grants-in-aid which are normally given only upon condition that the recipient becomes subject to varying degrees of federal control. As a result of all of these factors, as the author points out, there is presented a real problem as to the future of the American states as separate government entities.

There is a very incisive, factually correct chapter on the steel seizure case, — *Youngstown Sheet and Tube Company v. Sawyer,* 343 U. S. 579 (1952). The author points out that the majority of the Court, without qualification, rejected the theory of absolute prerogative in the Executive, and declared that he is subject to judicial control; and further held that neither do the military powers of the President, as head of the nation's armed forces permit interference with the civilian life of the country, such as that involved in President Truman's steel seizure order, nor does the provision in Article II of the Constitution, directing the President to "take Care that the Laws be faithfully executed" include inherent power to take measures and exercise authority not specifically conferred.

There is also an exceedingly well written chapter on "The Changing Role of the Supreme Court". As the author points out, the doctrine of judicial supremacy as it was applied by the Supreme Court prior to 1937, has become a thing of the past. In 1937 began a period of increasing restraint with which the Court has exercised its power of judicial review in dealing with Acts of Congress. The Court's position has, since then, become primarily that of an arbiter of the federal system, namely, to hold state authority within the limits of this system, and also the position of guardian of civil liberties, namely, judicial guardian of the Bill of Rights. Prior to 1937 most of the work of the Supreme Court was concerned with the protection of *property* rights as against what were conceived as executive violations of due process, while now the emphasis has shifted to protection of *personal* rights. In other words, in the last seventeen or eighteen years the court has stressed the doctrine that if a law encroaches upon a civil right, *e.g.*, freedom of speech, press, religion or right of assembly, the presumption is that such law is invalid, unless its defenders can show that the interference is justified because of the existence of a "clear and present danger" to the public security. The author concludes this chapter with the statement that this change in the attitude of the Court has not been caused only by a change of personnel, but that it is his belief that this change is one that rests on something

more permanent, namely, it reflects changes in legal ideology common to the American legal profession as a whole.

The chapter on "The Negro and the Law" is a good chronological summary of the Supreme Court's decisions prior to a complete reversal of its position in the school anti-segregation cases. *Brown v. Board of Education,* 347 U. S. 483 (1954). However, the chapter is entirely devoid of any treatment of the real underlying problems involved in this extreme decision indicating, at least to this reviewer, that Professor Schwartz has a lack of adequate understanding of the real, underlying problems involved in the racial situation in the Southern states.

Perhaps one of the most informative and comprehensive chapters in the entire book is that in Part II, "Civil Liberties and the 'Cold War'." The evolution of our loyalty, or test-oaths and anti-sedition laws is succinctly given, including a detailed anaylsis of the Smith Act of 1940 and its interpretation by the Supreme Court in the opinions in the communist trials, *Dennis v. U. S.,* 341 U. S. 494 (1951). The same chapter contains an equally informative and well written discourse upon the development of loyalty proceedings in the post-war period, growing out of the so-called "cold war". This includes a comparison between the loyalty order of the Truman Administration and President Eisenhower's order promulgating the Security Requirements for Government Employment. The latter did away with the line between loyalty and security-risk cases, and provides for exclusion from federal civil service of any persons whose employment is not "clearly consistent with the interests of the national security", emphasizing the fact that the civil servant has only a *privilege* and not a *right* in his government position, at least not as a matter of constitutional law. The problem of reconciling freedom of speech and other freedoms safeguarded by a Bill of Rights with the security of the state or nation is, as the author points out, tending more and more to be resolved in favor of this security by contemporary constitutional theory in Europe as well as here, because of the tragic experiences in Europe between the two World Wars.

The author says that it is not for the judiciary in this country to oppose legislation designed to deal with communism, merely because the judiciary may differ with congressional judgment with respect to the gravity of the threat of communism. However, he does admit that the words of Lord Bryce, more than half a century ago, that

"the unbounded freedom of discussion" was one of the outstanding features of the American system, are not as true today as they were when written. Yet the author concludes his treatise on "Civil Liberties and the 'Cold War'" with observations which appear to be of mere rhetorical rather than of any real value, since they appear to be lacking in a complete evaluation of the dangers which actually beset our country today from communism, from both within and without our borders. For example, the author says among other things in his concluding remarks in this chapter, that:

> "The Communist leaders, who were convicted in the *Dennis Case*, were punished not for any overt acts but for teaching and advocating their political philosophy. Their views may have been highly repugnant to most Americans, but should they be rendered criminal when expressed in speech alone?
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> . . . . . .
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> "It is one thing drastically to limit speech in time of actual war. . . . It is quite another thing to assert the wisdom of restrictions upon speech during peace-time—or even in the quasi-peace of the 'cold war' era. As long as overt acts are not involved, one may well say, with Justice Holmes, 'in the main I am for aeration of all effervescent convictions — there is no way so quick for letting them get flat'." (pp. 280-81).

There is a good chapter on Administrative Law with a detailed analysis of our Administrative Procedure Act of 1946, and a comparison of the English system of administrative procedure. The author points out that the value of our federal Act has been doubted by some British jurists, one going to the extent of saying that it has little to commend it. With this Professor Schwartz strongly disagrees, asserting that our Act represents the first legislation in the common law countries to ameliorate the effects that have arisen under the administrative process, by requiring recognition of the essentials of fair procedure, under legislative formulation of the fundamentals of such procedure.

Professor Schwartz points out, after a review of Supreme Court decisions, that while the tendency has been to narrow the scope of judicial review in administrative procedure cases, the judiciary is, nevertheless, far from surrendering the field to the Administrator, and that the judiciary has a vital role to play in relation to Administrative law. He shows that under the British decisions, this

branch of the law has not advanced as satisfactorily as it has in this country.

The last chapter in the book, entitled "The United States and the United Nations", is an excellent analysis of the evolution of the treaty-making power under the Constitution. The author points out that, except for dividing the treaty-making power between the President and the Senate, the Constitution says next to nothing about how American foreign policy is to be conceived and executed, and yet the conduct of foreign affairs by our Government has evoked more critical comment from students of comparative law than any other phase of our Constitutional system. The author sees a great weakness in the diffusion, under the Constitution, of responsibility for foreign affairs between the President and the Senate by requiring the latter's ratification by a two-thirds vote of treaties before they become effective. He asserts that if legislative approval of treaties under the Constitution had been by majority vote, either of the Senate or of both Houses, there is little doubt but that the Treaty of Versailles would not have failed of ratification. He points out that even a majority vote in the Senate may be far from truly representative of the country as a whole.

An excellent analysis of Supreme Court decisions is given in this chapter which places a treaty in the same category as an Act of Congress under Article VI of the Constitution, *i.e.*, a treaty may repeal a statute and a statute may repeal a treaty. Contrary to what is the law in the British Empire, in the United States a treaty is, by virtue of our Constitution, placed on a parity with an Act of Congress, unless judicially construed as one whose provisions are not intended to be self-executing. However, as Professor Schwartz points out, the question that presents real difficulty is the *extent* of the treaty-making power, — is there less limitation upon that power than upon Acts of Congress? May a treaty alter the separation of powers prescribed in the Constitution between the States and the Nation? *Missouri v. Holland*, 252 U. S. 416 (1920), holds that it can. This decision specifically upheld an Act of Congress passed to give effect to the provisions of a treaty the United States had made with Great Britain for reciprocal protection of migratory birds, by providing for specified closed seasons, etc. The Court declared that while the power at issue was one which the Congress could not exercise unaided, because that would encroach upon powers reserved to the states, it could exercise it to give effect to a

treaty. Professor Schwartz maintains that the result of this decision is that a treaty can vest in the federal government a regulatory power which is not possessed by it *under the Constitution*, and, therefore, in effect gives to a treaty a status dangerously approaching that of a Constitutional Amendment. But the reasoning in the Court's opinion (by Mr. Justice Holmes) in the *Holland* case does not support this conclusion. The opinion states in the following passages quoted by Professor Schwartz (252 U. S. at 433):

> "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made *under the authority* of the United States. *It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. . . . It is obvious that there may be matters of the sharpest exigency for the national well being that an Act of Congress could not deal with but that a treaty followed by such an Act could, . . .*" (Italics supplied.)

Professor Schwartz concludes the chapter with a very incisive discussion of the sharp, prolonged controvery in the Senate, and indeed throughout the country, over the need to limit the treaty-making power as proposed by the Bricker Amendment, which so far has been defeated. It is emphasized that the movement behind the Bricker Amendment, imposing limitations upon both the treaty-making power and executive agreements made by the President alone, in the course of our international relations, has arisen largely from fear concerning the effect of certain proposals upon individual rights under both federal and state law, especially those made by organs of the United Nations, such as the Covenant of Human Rights whose provisions appear to be self-executing. Treaties entered into by the British Government, as well as by many other countries, do not, like an American treaty, become the source of legal obligations affecting private rights without legislative action. As Professor Schwartz explains, when the proponents of the Bricker Amendment realized that they could not hope to prevail in their attempt to alter the self-executing effect of treaties made by our Government, they then sought to accomplish the same result for international agreements other than treaties. Accordingly, they supported a substitute measure which, while retaining the provisions for voiding treaty and international agreements that conflict

with the Constitution, replaced the provision against the self-executing effect of treaties by one that prohibited international agreements other than treaties from becoming effective as internal law in the United States except by an Act of Congress. This substitute measure, however, failed of passage in the Senate by only one vote short of the requisite two-thirds.

While Professor Schwartz does not express actual approval of the proposed changes in our treaty law, he wisely concludes that "The problems involved are so important, both for American and international law, that, whatever the outcome, it is all to the good that there be a full public discussion of them" (pp. 331-2). He predicts that the controversy has by no means ended.

Finally, it is believed there is no fairer way to conclude this review of an outstanding work on our Constitution than to say that its author has with great skill adhered generally to the rule which he has aimed to follow throughout, and which he thus stated in his final chapter: ". . . one like the present writer, who attempts to enlighten a British audience on the contemporary working of the American Constitution, must feel that he is called upon to perform the part neither of a critic nor of an apologist, nor of a eulogist, but simply of an expounder; his duty is neither to attack nor defend the federal organic instrument, but simply to explain the system set up by it" (p. 308). As the Honorable A. L. Goodhart, Master of University College, Oxford, says in his highly complimentary foreword, this treatise should be of very great value to all Englishmen who are seeking thorough knowledge of our own form of government, because first, Professor Schwartz "has a thorough and practical knowledge of the British form of government, so that he is able to draw illuminating contrasts between the two systems, and to emphasize important points of difference which might otherwise escape notice. Secondly, his training as a lawyer has enabled him to explain technical legal points without confusing either himself or the reader" (pp. ix-x). Professor Goodhart concludes with the prophecy that this treatise "will undoubtedly take a permanent place in the literature of political science" (p. xi). To this it may well be added, from the American point of view, that the excellence of Professor Schwartz's work warrants its adoption as required reading in courses in our American law schools on constitutional law.

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