

This Constitution of Ours. By Florence Ellinwood Allen. New York: G. P. Putnam's Sons, 1940. Pp. viii, 198. \$2.00.

When the outstanding woman jurist of this generation writes a book on *This Constitution of Ours*, one might anticipate a heavily documented treatise beginning with *Marbury v. Madison*,¹ and ending with *Chambers v. Florida*.² Had Florence Allen drawn on her rich experience in the constitutional law field and written such a book, she undoubtedly would have made a worth-while contribution to legal literature. Whereupon her scholarly tome would have gone on the shelves of a hundred law libraries, to be consulted by lawyers and judges deep in constitutional lore and promptly forgotten by everyone else.

Florence Allen did not write such a book. Instead she wrote 124 small pages³ so clear and concise that he who runs may read. Thus the book is short, but so is the Declaration of Independence. It is simple and direct, but so is the Gettysburg Address. It has only eight footnotes—eight more than the Sermon on the Mount. But note the following ringing passages: "I see the Constitution as an instrument for freedom, and I shall attempt to show in these pages that, if at times seemingly insuperable barriers have halted our progress, the difficulty has been not so much with the instrument as with ourselves."⁴ "The charity embodied in the first Article of the Bill of Rights is not secure until we ourselves have learned to practice that charity toward those with whom we may profoundly disagree."⁵ "Eternal vigilance is the price of freedom, but eternal vigilance is difficult; it makes demands on our finest, but our most reluctant, characteristics, for liberty and democracy and honor do not come to us ready-made."⁶ "Liberty cannot be written ready-made into a charter. It must be written into our hearts, and thus sent on by us as a living force to the next generation."⁷

Why did Judge Allen write this book? Does she have a definite and peculiar message to convey, and if so, what? This reviewer concludes that Florence Allen, the judge who usually deals in stark realities and not in a rarefied upper air,⁸ nevertheless believes that America has a destiny peculiar unto itself and wholly different from that of the Eastern Hemisphere. Although her judicial opinions are frequently pragmatic in approach, in her book she seems to see the Western World almost as part of a universal plan—the melting-pot of a new race which is destined to carry the torch of human liberty to generations yet unborn. In fact, if someone less hard-headed than Judge Allen had written this book, one might think that the author attributes to America the major role in a metaphysical scheme of things yet to come. "Today the scientist is awakening to a new conception of philosophy," she observes in her preface. And thus, believing so strongly that America is the promised land of the future, she calls on all of us, young and old, to grasp the priceless heritage of a free people.

Let us look at the evidence supporting my belief that Judge Allen is interpreting "this Constitution of ours" against a new and novel background.

¹ 1 Cranch (U.S.) 137 (1803).

² 60 S. Ct. 472 (1940).

³ The book also has an appendix containing the Constitution, an excellent index to the Constitution, a bibliography, and a general index.

⁴ P. 7.

⁵ P. viii.

⁶ P. 30.

⁷ P. 124.

⁸ Cf., e.g., *NLRB v. Louisville Refining Co.*, 102 F (2d) 678 (C.C.A. 6th 1939); *NLRB v. Sands Mfg. Co.*, 96 F. (2d) 721 (C.C.A. 6th 1938).

In her preface she writes: "We should ask ourselves *why*⁹ it is that here in America a vast body of people has been freed, to an unusual degree, from war and from threat of war; and what has enabled them to engage in a common enterprise, not for a favored class but for the 'general welfare.'" At page 4 she writes, "and those *mysterious*¹⁰ great men, Washington, Jefferson, Lafayette, and Paine. . . ." At page 9 she notes that George Washington, who presided over the constitutional convention, said, "The event is in the hand of God." At page 12 she notes the anomaly of a conventional, socially correct, and even fashionably dressed George Washington leading a revolution. At page 115 the following significant sentences appear: "The advantage of the American system we take too much for granted. *History does not record their like in any other country, at any time.*"¹¹ On the same page a French writer is quoted thus: "The Constitution has always had a sacred character for which there is no counterpart in any other country. It may be a wise political document, but it is also even more important as the most genuine and truly mystical source from which every American derives the consciousness of being himself." At page 117 we read: "The reverse side of the Great Seal of the United States bears the startling legend: 'The Heavens approve a new order of ages.' It is for America to choose whether or not to shut out that prospect, or to go forward with the effort to establish a new order of ages, a republic of conscience in which mankind shall be freed forever from war and from the threat of war."

In what respects does Judge Allen find "this Constitution of ours" so peculiar that it may prove to be the one charter of liberty hardy enough to survive the present deathwatch of democracy? Why does she believe that our Constitution is destined to live, while one by one the other great documents of the remaining free governments of Europe perish?

In the first place "in what previous charter can be found the profound truth of the Constitution that freedom depends upon the general welfare of the entire mass of men? No one is free until he lives for the freedom of all."¹² The welfare of each individual man and woman is bound tightly to the welfare of all. Thus, the first principle is unity. In order to translate this unity of the whole people into practical terms the Constitution "established a strong national government in which the House of Representatives was directly elected by the people and at the same time it preserved self-government to the states."¹³ Furthermore, "internal free trade over forty-eight states was made possible by the interstate commerce clause."¹⁴ "This clause has been called the foundation of our solidarity as a nation."¹⁵

In the second place, "the separation of the executive, legislative, and judicial powers is one of the distinctive features of our system. Experience under the colonial governments has instilled a deep consciousness of the dangers of power concentrated in any one authority."¹⁶ But in their application of Montesquieu's theory in the Western World the founding fathers incorporated certain novel incidents. Thus, while the legislative power was reposed in a Congress, the Constitution provided that this

⁹ Italics added.

¹⁰ Italics added.

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¹² P. 5.

¹³ P. 57. At p. 53 the author writes: "The fact that the states, under the Constitution, have far greater independence than similar territorial units in the governments of Europe, has resulted in the retention, to a high degree, of local self-government."

¹⁴ P. 57.

¹⁵ P. 39.

¹⁶ P. 46.

Congress should meet once a year. This provision "was based upon memories of genuine oppression."¹⁷ Furthermore, the constitutional convention "clogged" the war power and the treaty-making power by reposing them, not in the executive, but in the Congress. This tying-in of the war power to the general welfare, concludes Judge Allen, is one of the most revolutionary provisions in the entire Constitution.¹⁸

Finally, "the rights of the individual were splendidly protected by the Bill of Rights."¹⁹ Freedom of religion, freedom of the press, freedom of assembly, freedom of speech—these together are the very essence of democracy itself. "It is not too much to say that an extremely imperfect government may and often has over the lapse of years been made workable where freedom of speech, press, and assembly have existed; and there is no government so perfect that it will not in the course of time disintegrate without these safeguards."²⁰

Throughout her book Judge Allen emphasizes certain fundamentals which the reader is asked to bear ever in mind. She notes over and over again that true democracy is predicated on the principle taught by great teachers since the dawn of recorded history—the inherent worth and dignity of man as a human creature, regardless of race, regardless of color, regardless of condition. As previously indicated in this review, she also sees this individual citizen as an integral and highly important part of a national plan—the general welfare. But in order to make his contribution to the general welfare and thus to the destiny of our land, each of us must work intelligently for America. Liberty and democracy are not self-executing. We must learn and we must work. If America is to be saved from the fate of Europe, salvation will not come suddenly at the mourner's bench but through the long, strong pull of a people which knows why and where it is pulling.

Judge Allen has made a most important contribution to the literature of human liberty. If one reads carefully the lines she has written he will learn much; if he reads between the lines he may learn even more.

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¹⁷ "The failure of Charles I to call the Parliament for eleven years, during which he had exacted forced loans from his barons, laid tonnage charges on ships, and imposed fines, had not been forgotten. The Parliament of France at the time of the Revolution had not been called into session for over a hundred years." P. 19.

¹⁸ "In no provision of our Constitution is the total change to the democratic ideal shown more radically than in the simple statement which gives to the representatives of the people the power to say whether the people's sons shall risk their lives in armed combat, and thus takes from the executive in this country the power to declare war." P. 64.

¹⁹ P. 57.

²⁰ Pp. 88-9.

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