BOOK REVIEWS


Certainly a major fault of this effort of Professor Schwartz is that it is an attempt to accomplish the impossible. A real treatise on the American Constitution would satisfy a great demand, not only that of students who fail to find elucidation in their law school courses (not to mention the attractive market afforded by political scientists), but also that of teachers who would like to afford their students an appropriate reference work. The need is demonstrated if not met by the recently published collection of essays on constitutional law sponsored by the Association of American Law Schools. Without attempting to push the comparison too far, I would suggest that the problem of such a task is akin to that of Hercules in the Augean stables. The accumulation of the past when combined with the production of the present makes it well-nigh impossible to deal with the subject. Under the circumstances, a reviewer of these efforts might well be satisfied to adapt one of Dr. Johnson's remarks and let it go at that: "Sir, a woman's preaching is like a dog's walking on his hinder legs. It is not done well; but you are surprised to find it done at all."

Unfortunately, the longer I deliberated on these volumes the less kindly I viewed them. And when I came to realize that any author whose ego permitted him to label his treatise A Commentary on the Constitution of the United States would hardly be concerned about adverse criticism by even the most eminent authority, no less mine, I decided to suggest a few reasons why these volumes fail to measure up to the commentary they purport to be. For certainly, however important Mr. Justice Story's work of similar title, or the commentaries of Blackstone and Kent, few today can tell or care whether these works were well received by the lesser minds of their day. To put it in another of Dr. Johnson's homely metaphors: "A fly, Sir, may sting a stately horse, and make him wince; but one is but an insect, and the other is a horse still."

The first of my reasons is that Professor Schwartz is extraordinarily

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cavalier in his disposition of what some of his peers have regarded as complex and difficult problems. For example, one question that has been mooted throughout our constitutional history, the question of the origins and justification for judicial review, is actually disposed of by Schwartz in two sentences: "Judicial review was not specifically spelled out in the Constitution because it was not deemed necessary. Judicial review as an essential element of the law was part of the legal tradition of the time."¹ No evidence is adduced in support of this bald proposition except perhaps Lord Coke's hoary dictum: "quod Rex non debet esse sub homine, sed sub seo et lege," or his sterile statement in Dr. Bonham's Case. (Schwartz tells us that it makes no difference that what Coke said on his feet he later retracted on his knees.) Never mind that generations of scholars and lawyers have worried the problem, that the evidence in support of Schwartz' thesis is scanty at best. Judicial review of national government action exists; it was always thus; it was always intended to be thus.

Schwartz is equally facile in disposing of the problem of distribution of sovereignty in a federal nation. Others have found it not a simple concept with which to deal, whatever conclusion they may reach. For the author of these volumes, it presents no difficulty at all. Austin is utilized to establish the definition of sovereignty. Sovereignty must rest in one person or institution. In the United States such sovereignty can be found nowhere. The states are limited by the supremacy clause and the national government by the inhibitions of the Constitution. "If there does exist sovereignty in the sense of supreme political power in the American system, it exists only in the people as a whole, from whom springs all legitimate authority. 'Any one,' said Daniel Webster in his argument in an important case, 'who should look to any other source of power than the people would be as much out of his mind as Don Quixote, who imagined that he saw things which did not exist. Let us all admit that the people are sovereign.'"² Schwartz rather quixotically also suggests that sovereignty was not to be found in the people: "Yet, though our system may be said to be a government of the people (since in form and in substance it emanates from them), it is wholly antithetical to the concept of extreme popular sovereignty."³ Sovereignty rests nowhere in this nation and thus the states have no justification for asserting that they ever exerted sovereign powers. Since it is indivisible, they cannot have exerted a portion of the sovereign power. (The nation, despite the absence of sovereign power, is superior to the states by reason

² Vol. I, p. 35.
³ Vol. I, p. 16.
of the supremacy clause.) Even "cooperative federalism has behind it the ultimate sanction of federal coercion—contradiction in terms though that may be."4

Second, Professor Schwartz seems to have amended Holmes’ famous dictum to read: “The life of the law is not reason, it is rhetoric.” And usually someone else’s rhetoric. The Webster quotation already noted is one example. Webster supplies another. The subject is the power of the national judiciary to determine the constitutionality of state action. It is not a subject frequently mooted by scholars any more. Even the most reticent supporters of judicial review, like Judge Learned Hand5 and Professor Sidney Hook,6 concede this power to the national judiciary. But Schwartz’ proof leaves something to be desired, if rhetoric alone will not satisfy. The power of review of the constitutionality of state action must be placed in the national judiciary because the only alternative would be to leave it to the states to judge for themselves. The reason that alternative is not feasible is to be found, we are told, in Webster’s “celebrated Reply to Hayne, ‘the honorable gentleman says, that the States will only interfere, by their power, to preserve the Constitution. They will not destroy it, they will not impair it; they will only save, they will only preserve, they will only strengthen

Ah, Sir, this is but the old story.’”7 One cannot help but wonder whether the rhetoric would be any less effective had the words “Supreme Court Justices” been substituted for the word “States” in the quotation. But perhaps the justification is to be found not in Webster’s rhetoric but in Schwartz’ own: “The high Justices are men set apart—the depositaries of the law—who by their disciplined training and tradition and withdrawal from the usual temptations of private interest may be expected to be as free from partiality as the lot of man will admit.”8 As a statement of the ideal no one could quarrel with the proposition; as a statement of fact its accuracy is something less than doubtful.

It is true that Schwartz in at least one place resolves a conflict between rhetors by reason. He accepts the Marshallian principle that “the power to tax . . . involves the power to destroy.”9 He rejects Holmes’ reply: “The power to tax is not the power to destroy while this Court sits.”10 Unfortunately, the reason he uses is hardly persuasive: “The power to tax is one which is peculiarly insusceptible to quantitative differences of

6 THE PARADOXES OF FREEDOM (1962).
7 Vol. I, p. 47.
I should think that the power to tax is one peculiarly susceptible to quantitative differences in degree. And I think Schwartz would agree, at least to the extent of distinguishing discriminatory taxes from nondiscriminatory taxes in appropriate circumstances.

Third, Schwartz either deliberately or inadvertently is guilty of important error, or more charitably, is guilty of ambiguity that will lead the reader into error. Thus, for purposes of establishing the appropriate principles, Schwartz delineates between government corporations that are government agencies and those that are not. "The only question that remains is that of whether the incidence of a particular state tax is in fact upon a federal function or instrumentality. If the state tax must be paid directly by a federal agency, it is, of course, invalid. In this sense, an agency of the United States is any authority within the Federal Government (regardless of whether its formal title be that of department, bureau, division, commission, board, or some other name, or where in the tripartite governmental structure it be located) or owned by the Government. In the latter category would fall the government corporation, of the type involved in McCulloch v. Maryland itself, whose stock is owned by the United States. . . . Even though such corporation has been chartered by the Congress to carry out specified federal policies, it cannot be deemed a federal instrumentality for purposes of tax immunity."

One wonders whether it would make any difference to Professor Schwartz that the Bank of the United States was not owned by the United States, that the United States had a minority stock interest, that representation among the directors reflected stock ownership, and that the bank was run as a private concern.

This introduces the real deficiency of these volumes. The use of ideology to settle hard questions, the reliance on rhetoric rather than reason, the proliferation of error, none of these separately or together explain the essential failure of the book. The real defect lies in the distortion of history in order to justify conclusions that history would not justify. This utilization of "anti-history," as Professor Roche calls it, is not unique. I recently attended a conference at my own law school where some of the most eminent scholars would engage in the rewriting of the history of the fourteenth amendment rather than concede that its history would not support the conclusions they favored. Constitutional law cannot be separated from constitutional history. That does not mean that constitutional law is today whatever it was

11 Ibid.
12 Ibid.
13 Roche, The Expatriation Cases: "Breathes There the Man, With Soul So Dead . . . ?", 1963 SUP. CT. REV. 325, 326.
yesterday. It is because constitutional law is a process rather than a static set of rules that a commentary can no longer encompass it. This appears to have driven Professor Schwartz to describing to the best of his ability that which is, or was, at the moment of writing, and then to amend history to demonstrate that this was always so. Thus, he may well be right in suggesting that the federalism that once called for division of sovereign power between nation and states (and the people, if you will) has disappeared. It is different, however, to say that it disappeared and to say that it never existed.

Having said all that, I would say one thing more. The book is not without merit. Most of its propositions of law are accurate. A student cramming for a typical state bar examination would probably find in here all he possibly need know of the subject. He will not have an accurate picture of how the current rules developed or what the process is that is likely to transmute them into something different in the future. But bar examiners are not interested in those things. Neither, I suspect, are most students, most lawyers, most professors. For these, and for the political science market to which I already alluded, the volumes will fill a longfelt need. Professor Schwartz may prefer the solace of royalties to the fulsome praise of critics. I expect that there will be much more of the former than the latter.

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Race is today in the forefront of those social and scientific issues where the search for truth is obstructed by partisan politics. Because feelings on racial issues are so intense, intelligence often takes a back seat to ideology. What passes for blocks of scientific truth are gathered not to build an intellectual edifice, but to hurl at our political opponents. A person's interpretation of scientific or historical data respecting race can be inferred with considerable accuracy from his position on the fluoridation of water. Consequently practically everything published for popular consumption and concerned with race, including The Geography of Intellect, is special pleading and is to be identified with one or another political syndrome. The liberal syndrome is often as obnoxious to the search for

1 It is certainly true that there is no necessary identity between views on race and politics, see, e.g., Sharp, The Conservative Fellow Traveler, 30 U. Chi. L. Rev. 704 (1963), but it is a rare economic liberal who is not also liberal on civil rights; and