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## Book Review: The Supreme Court - Constitutional Revolution in Retrospect

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## BOOK REVIEWS

THE SUPREME COURT—CONSTITUTIONAL REVOLUTION IN RETROSPECT. BERNARD SCHWARTZ. New York: The Ronald Press Company, 1957. Pp. vii, 429. \$6.50.

In the days before he achieved his present nationwide fame as sometime counsel of the House Subcommittee on Legislative Oversight, Bernard Schwartz had already attained a considerable reputation as a writer on public law—English and French as well as American. This volume is the seventh book he has published in ten years, a remarkable output for a thirty-four year-old professor of law. His latest volume is an effort to present, for “the non-lawyer interested in the functioning of his country’s political system,” a critical study of the work of the Supreme Court during the past twenty years.

Unfortunately the non-lawyers have not waited for this book. Criticism of the decisions of the United States Supreme Court by the laity has been rampant in the last few years, and since the Segregation cases it has mounted to a torrent. It is not only a frequent preoccupation of journalists; it is even more the subject of letters to the editor from the least educated, if not the most humble, laymen. Much of the criticism is not very well-informed. My favorite letter ran something like this:

Dear Editor. Your paper has been full of articles and letters arguing whether Constitution says the Supreme Court can end segregated schools. Some say it do; some say it don't. I decided to get me a copy of the Constitution and settle it. I've just read it three times, start to finish. It don't say.

Mr. Schwartz, of course, does not make this mistake. In his preface he comments that the United States Supreme Court reports constitute his staple reading. Understanding might be advanced if newspapers would cease publishing letters attacking the Supreme Court unless the writers could certify that they too had been reading the reports for years—or at least had read a thoughtful commentary on the work of the Court by someone, like Mr. Schwartz, who has.

Mr. Schwartz, like the lay critics, is dissatisfied with many decisions of the Supreme Court, and Mr. Schwartz, like the lay critics, observes that the Supreme Court decisions in recent years have reflected a radical departure from settled law—indeed he calls

his book "Constitutional Revolution in Retrospect." But here the similarity ends. The lay critics who mourn the Court's departure from precedent, whether it be the revolt from the Old Court decisions on economic regulation in the Thirties or the revolt from the liberal court decisions on freedom in the Forties, get small comfort from Mr. Schwartz. Least of all will his book comfort those lay critics who denounce the Supreme Court for its usurpation of power and its encroachments on the Congress and the states.

For Mr. Schwartz's Revolution gets down to this: Since 1937 the Supreme Court has revolted from its former role as Supreme Censor and has adopted the doctrine of self-restraint, or deference to the legislative will. It is no longer a super-legislature, but acts only as a referee, whose duty it is "to keep the ring free"—but only from governmental action that passes the bounds of reason.<sup>1</sup> This is true not only of economic regulation, but also of governmental limitation of personal liberty.

DEFERENCE as the basic theme of the Court's work since 1937 meets with Mr. Schwartz's approval, since he believes that judicial review is basically an undemocratic institution. If democracy is essentially the present will of the people and judicial review is essentially the check of the past upon the present, the Court serves best when it exercises the most self-restraint, as it has in recent years. "Abnegation rather than activism remains the proper posture for a judicial tribunal to assume toward the elected representatives of the people," he says.<sup>2</sup> The heroes of the book are primarily Holmes, Frankfurter, Jackson, and *stare decisis*; the villains, Black and Douglas ("libertarian activists") and the dissenting opinion.

Most of the book consists of a description and evaluation of the substantive output of the Supreme Court under eight chapter heads: The Congress, The President, The Administrative Agency, The Courts, The States, The Individual, The War Power, and The Cold War.

In Chapter Two, Mr. Schwartz looks at the decisions of the post-1937 Court involving the powers of Congress and finds that they provided a needed corrective to the limitations imposed by the pre-1937 Court on the commerce clause and the taxing and spending powers. He suggests that deference may have been carried too far when the Court upheld federal regulatory power in *Wickard v. Filburn*, *Southeastern Underwriters*, and *Appalachian Power*, and

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<sup>1</sup> P. 368.

<sup>2</sup> Pp. 60-61.

federal tax power in the *Kabriger* case. In considering congressional investigations, he notes that the Court had put "few, if any, Constitutional restrictions of any consequence upon the permissible scope of Congressional inquiries." He approves, since abuse of this power "does not justify the courts as setting themselves up as censors of what is, after all, the internal functioning of a coordinate branch of government."<sup>3</sup>

In Chapter Three, "The President," Mr. Schwartz gives his enthusiastic approval only to the result in the *Steel-Seizure Case*.<sup>4</sup> He deplores the many concurring opinions, which left only Burton agreeing with "Black's clear repudiation of Presidential prerogative." After all, the Court was deferring—to Congress. In the field of foreign affairs, he finds deference to the President, particularly in the *Belmont* and *Pink* cases, less palatable.

In deferring to legislative delegations of power to Administrative Agencies (Chapter Four), the Court has retreated too far in Mr. Schwartz's opinion. By its approval of "standards" so vague as to be illusory the Court has removed itself as a controlling factor. In contrast, deference to the "combination of functions" and the "institutional decision" is apparently approved, despite the possibility of some unfairness to the private litigant, on the theory that the legislature, not the courts, can best impose fair standards of administrative procedure. When it comes to judicial review, he finds the Court too reluctant in granting review, too restrictive in its approach to standing, too narrow in its scope of judicial review. Again, however, he looks to legislative standards for review, such as are incorporated in the Administrative Procedure Act, for improvement.

Chapter Five deals with the work of the Supreme Court as a court. Mr. Schwartz is troubled by the Court's denial of review through certain decisions on interest or standing, the doctrine of political questions, and through the use of the power to deny the writ of certiorari. *Erie Railroad* is criticized as an unjustified disregard of precedent; but the deed done, elimination of diversity jurisdiction is the suggested cure. In the exercise of its function of insuring fair criminal procedures, the Court's rejection of Black's total incorporation theory<sup>5</sup> is endorsed enthusiastically. When it

<sup>3</sup> Pp. 56-57. One may suppose that some decisions of the Supreme Court last spring (1957) would not be approved by our author—unless his experience as legislative counsel has made him less trustful of Congress.

<sup>4</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>5</sup> The theory (never that of a majority of the Court) that the fourteenth amendment incorporates the first eight amendments to the Constitution thus making them applicable to the states.

gets down to some of the consequences, however, such as failure to insure right of counsel in non-capital cases, he finds the result less to his liking. He apparently approves the double standard for trial by jury, coerced confessions, and illegal evidence, since state deficiencies in these areas are so prevalent they cannot be contrary to civilized standards of decency.<sup>6</sup> In contrast, "Illinois' failure to furnish transcripts to indigent defendants is, today, one which shocks the conscience," although the consciences of Burton, Minton, Reed, and Harlan were not shocked and the conscience of Frankfurter was shocked only as to future defendants, not as to present convicts.

In Chapter Six Mr. Schwartz takes an unusual view of the Supreme Court decisions affecting the relations between the states and the federal government. Opposed to increasing centralization, he recognizes that the doctrine of deference to state legislatures has expanded the powers of the states to regulate business and to tax and regulate interstate commerce. The former gets grudging approval, but the latter is condemned. Even the compensating use tax is criticized as a "protective tariff."<sup>7</sup> Deference is improper because of the overriding need to promote the policy of the commerce clause—and, besides, judicial annulment of state taxes is faster than congressional legislation.<sup>8</sup>

The decisions of the Supreme Court affecting the rights of "The Individual" (Chapter Seven) are generally approved—once the view of the 1943-48 majority that first amendment freedoms held a preferred position had been rejected by the 1948-57 majority. *Feiner v. New York*, *Bread v. Alexandria*, and *Giboney* are approved as fair limitations on freedom of speech. The Court's rejection of prior restraints over press and movies is also favored, however. When it comes to religious freedom, the *Everson* and *McCullum* cases are approved while the *Zorach* case is criticized. The proper test, Mr. Schwartz suggests, is that "the State may not . . . penalize religion as religion," nor "aid religion as religion." This would seem to the reviewer to be more a challenge to legislative draftsmanship than a guide to constitutional decision.

Mr. Schwartz's discussion of the Segregation Cases is the most interesting part of Chapter Seven. Perhaps no decision in recent years has been more frequently criticized as revolutionary, as an

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<sup>6</sup> P. 184.

<sup>7</sup> P. 218.

<sup>8</sup> But unfortunately more permanent. There are various ways to destroy the states, but the reviewer submits that not the least effective would be for the Court to deprive them of revenues which come from making interstate commerce pay its way.

abandonment of stare decisis, as based on psychology and sociology rather than on law, and as an invasion of the reserved rights of the states. Mr. Schwartz disposes of these criticisms in rapid order. What does the fourteenth amendment say? Legislative classification is permissible, but legislative classification based on color lacks any rational basis. The fourteenth amendment certainly overrides powers formerly reserved to the states and was intended to. What are the precedents? The *Plessy* "separate but equal" doctrine was unreal, diametrically opposed to the clear language of the equal protection clause, and in any event applied only to transportation. The Court had never prior to 1954 considered directly the validity of the *Plessy* doctrine as applied to education.

Indeed he concludes that the legal basis of the Segregation Cases is so sound that strictures on legal grounds cover an antipathy toward desegregation which is grounded on mere sociological and psychological considerations.<sup>9</sup> The matter is so clear that he is finally driven to that unsophisticated doctrine of constitutional construction once favored by Mr. Justice Roberts;<sup>10</sup> writes Mr. Schwartz:

Imposed by coercion or not, the Fourteenth Amendment is now clearly a part of the Constitution, accepted as such even by the southern states. When confronted with a claimed violation of the Constitution, what is the Supreme Court to do? It must lay the constitutional provision that is invoked beside the act that is challenged and decide whether the latter squares with the former. . . . If the Fourteenth Amendment outlaws legislative classifications based on race, is a Court to be blamed if it holds that the Amendment means what it says, even in the field of educational segregation?<sup>11</sup>

Without in any way intimating that the Court's decision in the *Brown* case was not correct or, in a sense, inevitable, the reviewer would submit that it was not quite as simple as that.

In considering the Court's decision under the war power in Chapter Eight the writer is most critical of the *Yamashita* decision, but not the original *Kinsella v. Krueger*, recently reversed on rehearing.<sup>12</sup> The decisions in the area of martial law, Japanese evacuation, and price control are recognized as probably inevitable judicial responses to war emergency although the author expresses "some doubt as to whether the high Court has not been overzealous in immolating the Constitution on the altar of the all-consuming modern Moloch."<sup>13</sup>

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<sup>9</sup> P. 273.

<sup>10</sup> In *United States v. Butler*, 297 U.S. 1, 62 (1936).

<sup>11</sup> P. 273.

<sup>12</sup> *Reid v. Covert*, *Kinsella v. Krueger*, 354 U.S. 1 (1957).

<sup>13</sup> P. 300.

In his final chapter on the substantive output of the Court, Mr. Schwartz deals with the impact of the cold war on the Court. The Communist trials, restrictions on aliens, distortions of administrative law, and the *Rosenberg* case are considered in turn. In summarizing, he resorts to parable: "The political, like the animal, body has its periods of sickness and vigor. The decade and a half past has, without any doubt, been one in which our body politic has been constantly afflicted. . . . To be sure, the day will come when the body politic, like the animal body, will be restored to its pristine state of full vigor. . . . Then it will be that cases like some of those discussed in this chapter will be looked upon as the aberrations in the law that they really are."<sup>14</sup>

Winston Churchill said last summer that the United States Supreme Court "stands as the most esteemed judicial tribunal in the world," and so it does. It is esteemed by persons of all degrees of understanding of it. It is unlikely, however, that many twentieth-century Americans will apply to the Supreme Court Burke's attitude toward the British constitution: "We ought to understand it according to our measure; and to venerate where we are not able to understand." We must get on with the business of increasing popular understanding of the Court. Certainly this book of Schwartz's can perform a valuable service in this regard.

But there is a danger. So much of the book is devoted to the writer's disagreements with the Court that there is a real possibility that an uncritical or selective reader might come out with the impression that the work of the Supreme Court has been on the whole unsound, which is the last thing Professor Schwartz would want to happen.

Mr. Schwartz's book on the Supreme Court ought to be subtitled "One Man's Constitution." Every student of the Supreme Court will no doubt disagree to some extent with his conclusions, but it would be a fine book to give to law students to fight with—after they had read the cases. Nor would I hesitate to give it to the ordinary layman who never reads a Supreme Court case. He might end up accepting some judgments on Supreme Court decisions that are personally obnoxious to me, but this would be completely offset by the insight he would have gained into the functions and operation of the Supreme Court.

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<sup>14</sup> P. 341.

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