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## Book Review

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## BOOK REVIEWS

THE CONSTITUTION AND THE SUPREME COURT. By WALLACE MENDELSON. New York: Dodd Mead and Company, 1959. Pp. 520. \$6.50.

It is indeed difficult to review a book such as this. In the first place, this is a case-text designed for use in courses in constitutional law. The difficulty is that texts are more or less valuable depending upon the objective of the course for which they are selected. Secondly, text books, especially those of the case-method variety, present a dilemma to the reviewer because they are apt to present relatively well-accepted doctrine while attempting to obtain variety or "improvement" by deleting parts of this doctrine and developing aspects not contained in previous texts. Accordingly, a review must attempt to weigh the effects of the deletions and additions and simultaneously to ascertain precisely what direction the new design pursues. Also, it is a rather difficult exercise to switch continuously from author to court and back again as one balances and weighs the materials. This is especially true since I am of the school of thought which is quite convinced that the Supreme Court is not omniscient, and therefore I feel quite free to differ with decisions which the Court has reached from time to time. Despite these peculiarities which confound a reviewer of this type of book, it would seem to be an acceptable premise that such a book must present itself and withstand analysis in competition with other books in the particular field involved.

The author seeks, as indeed he relates in his introduction, to present his material in such a way that students will be diverted from "the more traditional arrangement"<sup>1</sup> by which they fail "to see the Constitution for the clauses."<sup>2</sup> Certainly this goal has not been accomplished. In fact, because of the emphasis on certain clauses, vision of the Constitution has been obstructed. This is not really the fault of the author, however, but an inevitable result of the case method of presentation. Undoubtedly this method has its advantages, *e.g.*, it concretely illustrates interpretation of the Constitution in actual life situations. By the same method, however, invaluable time is spent upon clauses that obscure the view of the Constitution and upon words which obscure the view of the clauses.

One need not read far into the text before he observes an illuminated sign suggesting the course of philosophy to be taken in the book. For example, the author says "our practice suggests an

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<sup>1</sup> At vii.

<sup>2</sup> Ibid.

inarticulate faith that within the four corners of the written Constitution are to be found the answers to all social problems and that courts have special competence to read what is written there."<sup>3</sup> From this page to the bitter end, the author presents selected materials, principally cases from the Supreme Court, in harmony with his philosophical beliefs.

This book contains more than eighty cases, and some half dozen of them are from the 1957-58 term of the Supreme Court. While neither the number of cases nor their vintage gauge the value of a book in constitutional law, it is interesting to note that the opinions were written by only twenty-seven Justices. No constitutional law book would dare proceed without paying tribute to Chief Justice John Marshall because his obiter dictum established the philosophy of the court, and the philosophy of Marshall has in one way or another touched upon virtually every facet of constitutional law. Accordingly, Marshall rates five of these precious cases. The only other justices rating as many are Black, Douglas, and Stone. Cardozo, Reed, Jackson, and (although he is relatively new on the court) Mr. Chief Justice Warren each have four decisions of the magic eighty. It is, considering the philosophies of the above justices, most surprising that only three of the All-American opinions were written by Mr. Justice Holmes, but this situation is partly alleviated by the fact that he repeatedly appears on the scene in cases cited and in comments given about the cases. But the bomb-shell has not yet been dropped. The author pays the highest tribute of all to Mr. Justice Frankfurter, who hits the scoreboard for eleven cases. Thus, if (as he purports to do) the author covers the Constitution and not just the clauses, he attributes in excess of thirteen percent of our constitutional law to *one judge*. Perhaps in tribute we might well call our present Constitution, as interpreted, "The Frankfurter Constitution."

From the opening passages where the author bemoans Marshall's decisions permitting Congress to control "old Victorian" immorality but restraining that body from controlling "modern 'immorality,' as practiced by 'reputable' and 'orthodox' businesses . . .,"<sup>4</sup> to the end where finally Congress is given almost complete control over business and the individual becomes untouchable, the author has paved the road with a steady succession of cases to demonstrate this trend. This is justifiable, perhaps, in factually demonstrating a trend, but the intermittent comments by the author rationalizing such a demise of our basic philosophy by nine of one-hundred-eighty-million men,

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<sup>3</sup> At 2.

<sup>4</sup> At 55.

and his often sarcastic and devastating remarks at judges or others who would dare repudiate such a trend, along with his cleverly worded, leading questions to decoy students in a "note," "comment," or "quaere" take the book out of the realm of an objective and factual text and into the realm of personal bias fortified by court decision.

The book has, however, a fascinating core of cases, especially relating to facets of individual freedoms. The author has troubled himself to search out many "cases in point" to illustrate various ideas and contentions and in this respect has done a remarkable job. But finally it must be said that were an instructor to use *only* this book for a constitutional law text his students would be woefully lacking in many fundamental respects, for though it is thorough on some subjects, (*e.g.*, "freedom") it has lost too many fundamental constitution-explaining cases. It has exchanged the fundamental for the spectacular. It has traded the life of the Court for the life of Frankfurter.

A. D. Miller\*

#### THE SUPREME COURT AND FUNDAMENTAL FREEDOMS.

BY GEORGE W. SPICER. New York: Appleton Century Crofts, 1959. Pp. viii, 182. \$1.50.

This volume is not, and does not purport to be, a treatise on civil liberties and the Supreme Court. The author's purpose is to discuss, more or less in summary fashion, recent Supreme Court cases, deducing therefrom any significant trends or doctrinal attitudes underlying the Court's approach in specific areas of constitutional law. This Dr. Spicer does with admirable consistency, and the result of his efforts is a compact, but useful, introduction to the role of the judiciary in preserving and creating an appreciation for our freedoms. Dr. Spicer considers the members of the Court to be "the guardians of individual liberty against both national and state governments,"<sup>1</sup> although he is fully aware that the case-by-case approach of a judiciary will often lead to obscure and confusing results.

In addition to presenting a logical analysis of the Court's approach on particular occasions or in specific areas of constitutional law, the author points up the social interests involved. For example, while peaceful picketing is properly recognized as an exercise of free speech, it "is more than speech; it is an economic weapon, and as such, it

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<sup>1</sup> At 4.

is subject to extensive regulation by the State with respect to both its methods and its purposes."<sup>2</sup> While discussing internal security, Dr. Spicer reminds us that "no thoughtful citizen would deny that military and industrial information and equipment must be protected from espionage and sabotage."<sup>3</sup> It is, incidentally, his opinion that great damage has been done civil liberties in this latter area. Persons who are security minded "have no formula for separating the subversive and disloyal from persons with political and economic views more radical or progressive than those of the dominant element of the community."<sup>4</sup> Their formula, therefore, is to "restrain and punish all whom [they] suspect of being disloyal or subversive."<sup>5</sup>

One of the most interesting chapters deals with political and social equality. This chapter discusses, principally, decisions of the Court invalidating Southern attempts to disfranchise the Negro, segregation in public and interstate transportation, and, of course, the recent decisions relating to segregation in education and on public golf courses, beaches, parks, and playgrounds. This reviewer had hoped to find a more thoughtful treatment of the desegregation cases but Dr. Spicer, outside of presenting the rationale of the *Brown* case,<sup>6</sup> says little about the constitutional issues involved and the Supreme Court's method of handling the problem. Instead, he criticizes the Virginia "Interposition" resolution and the "Southern Manifesto" of 1956. Although these topics are of considerable interest, a discussion of them sheds little light on the Supreme Court's treatment of public segregation since 1954. Are the issues so simple that the Court is justified in outlawing segregation on public golf courses, beaches, parks, and playgrounds, by a series of per curiam decisions following in the wake of *Brown v. Board of Educ.*?<sup>7</sup> One need not quarrel with the result to wish that the Supreme Court had taken time to present a full statement of the constitutional principles involved.

Aside from the foregoing qualification, the reviewer recommends this volume to one desiring a brief, clear statement of the work of the Supreme Court in giving content to the constitutional guarantees of liberty found in the first and fourteenth amendments to the Constitution.

*Allen Butler\**

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<sup>2</sup> At 32.

<sup>3</sup> At 119.

<sup>4</sup> At 169.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

<sup>7</sup> *Ibid.*

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