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Vagaries and Varieties in Constitutional Interpretation, by Thomas Reed Powell

Albert S. Abel
University of Toronto

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VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION. By Thomas Reed Powell. New York: Columbia University Press, 1956. Pp. xv, 229. \$3.50.

Published a generation earlier and piously assembled by a hand other than the author's, this posthumous work might quite possibly—and quite justly—have been titled *The Wit and Wisdom of Thomas Reed Powell*. As he was witty and wise, so are these lectures, even though print fails to convey his full impact.

This is the first “hard cover” publication to bear his name as author. It was indeed a point of pride with him to have dissociated himself from the book-writing mob. All his previous work appeared in periodicals and was confined to their pages except for one group of essays on the police power which was collected and separately published as a paper back by the law review in which it initially appeared. His reasons for so limiting himself, which need not be detailed, were based on his fierce intellectual integrity. The result, however, was that the thinking of the keenest constitutional, not to say the keenest legal, mind of our time was dispersed in fugitive writings and in the dust-covered notebooks of student generations. If this book helps to preserve him from the oblivion that is the general lot of the magazine writer and the universal fate of teachers who concentrate on teaching, Columbia University has in publishing it performed a signal service to the recorded history of legal thought.

If much of the specific content of the lectures does not seem especially original, it is because it *was* original and he was the originator. There are still a few who have not got the word but in substance it may be said that Thomas Reed Powell found constitutional law dogmatic and left it pragmatic. This does not mean that he saw in it only a shimmering jelly of the economic biases and personal sentiments of the judges. Far from it. He was as unconvinced by that approach as by that which saw only the ineluctable exposition of a plain text. Instead his teaching was that there was a connective tissue of principles but that they were to be discovered not by meditation on judicial precepts but by rigorous exploration of judicial practice. That was the method that he commended to (commended to? demanded of!) his students and which they carried forth into office, court or classroom. Today so many of the profession are his intellectual progeny, lineal or collateral, that his approach and even many of his special conclusions have become commonplace. The novelty has worn off, so that, if evident novelty be the criterion of a book's importance, this one may be said to have come too late. It is no doubt important to serve up fresh those propositions whose keeping

qualities are poor; but, I submit, less so or not at all those like Powell's that have a permanent worth.

True enough, if the book had come thirty years earlier, it might have meant many less student headaches. Nearly all recognized that he was a great teacher but many thought him hard and some said impossibly hard to understand. He was a practitioner of the "ask-it-to-them" as contrasted with the "tell-it-to-them" school of teaching. When he did relent, his comments were cryptic and were often felt to shed new darkness on the field. There must be leaders of the bar and ornaments of the bench who even today are puzzled as to what TRP did think about such and such a line of authorities after his socratic probing. This the book time and again discloses although not, it must be owned, to the casual reader. As the rather highfalutin' title suggests, this is not everyman's primer of constitutional law. It is a compact, clearly reasoned analysis of the Court's performance, the unravelling of which calls for active mental participation by the reader. For one willing to make that effort, however, it offers in return a basis for a real understanding of the Constitution as a working instrument.

TRP was a forthright type who professed no freedom from nor concealment of penchants and predilections. The book is truly representative of the man in this as in other respects. His evaluations of judicial performance, his enthusiasms and his dislikes appear—not writ so very large perhaps and yet observable enough. Intergovernmental immunities, a subject which I personally found tedious even when I listened to him and which to my shame I still cannot get excited about, fascinated him and claims its full chapter in the book. There is also manifest his preference for a national rather than a federal ordering of affairs about which I have more reservations than he. It was never his wish, however, to coerce agreement but only to provoke thought so that likemindedness on specific matters is not required for benefiting from the work. What is required—what he required—is stiff, frank coherent thinking. One who brings that to the book will take from it such insights into what the Constitution, as operated by the Court, is all about as no one else has given in equal measure. His exploration of the riddle of the commerce clause will probably always remain an essential starting point for its study (although defective in failing to take explicit heed of Mr. Justice Rutledge's perceptive observation as to the non-reciprocal character of the positive and negative aspects of that clause). His comments on due process would have been equally valuable and he specifically notes his regret that the lecture series did not extend to include some discussion of it. I am sorry that he did not choose to develop it and scrap the inter-

governmental immunities lecture although his remarks as to this latter are probably definitive.

A note of regret is not the proper one with which to conclude this review, however. Rejoicing is more appropriate—rejoicing that we have this final statement to preserve in readily accessible form the contribution of the premier American constitutional scholar. That contribution is not essentially a body of doctrines as to particular issues. It is a working model of how to find probable judicial attributions of meaning, which any lawyer or student may usefully apply to any issue.

ALBERT S. ABEL†

THE FRAMING OF THE FOURTEENTH AMENDMENT. By Joseph B. James. Urbana: University of Illinois Press, 1956. Pp. vii, 220. \$4.00.

Like many hardy themes, the fourteenth amendment loses in novelty, but gains in interest. Not that one dare say the amendment is, or has been, *all* things to *all* historians or judges. But, upon what other law text, at least since the days of the Schoolmen, has more been written, and that more vehemently and industriously, by so many, about less?

Readers looking to Dr. James' monograph for a synthesis, or even for a leavening, of this mountainous literature, are likely to be disappointed. He has not written a summary or critique, even of the extensive recent research on the origins and draftsmanship of the key sections. His aim and contribution rather are to fit the entire amendment into context, "to integrate," as he says, "the various known facts of the period as a whole with a complete narrative of the evolution of the amendment." However, no examination is made of the movements prior to December, 1865, which directly influenced the 39th Congress in framing its joint resolution. Furthermore, the long and intricate ratification process has been reserved for separate treatment.

Within these limits, James' title is architecturally precise; treatment is mainly confined to the months December, 1865 to July, 1866; organization is almost starkly chronological.

The primary difficulty of course is that the fourteenth amendment was an omnibus measure. Textually, historically, it constitutes the heart and body of Reconstruction. It was at once the keystone of the sectional settlement, a "constitutionalization" of the war's outcome, and, in its

† Professor of Law, University of Toronto.