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The Supreme Court: Constitutional Revolution in Retrospect, by Bernard Schwartz

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BOOK REVIEWS

THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT. By Bernard Schwartz. New York: The Ronald Press Company. 1957. Pp. vii, 429. \$6.50.

When this book was published its author was professor of law and director of the Institute of Comparative Law at New York University School of Law. In the interval he has had his day on the front pages of the nation's newspapers—and a day it was such as comes to few professors of law no matter how venerable in the teaching profession or how long and how much esteemed by bench and bar.

The day of Bernard Schwartz in the news, or more accurately days since he was in the frontpage headlines for most of a fortnight, came in February, 1958, in the course of the investigation of the House Subcommittee on Oversight into the conduct of the independent regulatory commissions and agencies. The 34 year-old law teacher set a storm blowing when he made a series of startling charges to the general effect that the subcommittee, because of strong pressures, was sitting on a complex of scandalous situations in which it ought to be probing resolutely. After an internal staff report of the subcommittee was released in the press Bernard Schwartz was discharged from his position as the subcommittee's chief counsel.

Testifying before the subcommittee concerning his alarming charges, Schwartz made the original sworn public statements about Richard A. Mack's financial dealings with the attorney for an applicant for a Federal Communications Commission license and channel assignment to operate a Miami, Florida television station. His other testimony included statements which opened up to general view the Sherman Adams-Bernard Goldfine friendship-influence case. There is much more that could be said about Bernard Schwartz's tempestuous sojourn with the House Subcommittee on Oversight, which followed, as it happened, service as special consultant to the Second Hoover Commission and to the House Subcommittee on Government Information. But the foregoing summary is enough to demonstrate that the author of this study of the Supreme Court is no isolated academician, remote from the times in which he lives.

For our purposes then so much for Bernard Schwartz other than as the writer of this book. As its author he must be put down at once as one of the not too large company of professors of law who really know

a great deal about the United States Supreme Court in its long sweep of history. To be sure many legal scholars know the Supreme Court's work in one or two or at most a few fields. Not many have either the overall view of constitutional history or the grasp of detail, case by case, that Schwartz possesses. For although he centers on the work of the Supreme Court since 1937, there are frequent references to guideposts erected by Marshall, Story and Taney, by Holmes, Brandeis, Hughes and others who have gone before. He writes about the past two decades but he illuminates them with flashes of light that come down from the Court's earliest days.

The purpose of this New York University professor could hardly be better. Noting that popular interest in the Supreme Court has never been greater, he hopes to add to the information of the people about the institution. For he believes deeply that "the work of the Supreme Court is too significant to be the domain of a relatively few legal specialists" and that the "constitutional law dispensed by the Supreme Court is much more than the private preserve of the legal profession."¹¹

The author begins his enlargement of a fifth of a century of Supreme Court history in 1937 because in that year, as he sees it, "there occurred a veritable revolution in the Court's jurisprudence."¹² Whether it is fair to say that the revolution took place within the span of that one year, certainly 1937 was a memorable year. Early in that year came the so-called "court packing" bill of President Franklin D. Roosevelt. Before the proposal was voted down, Chief Justice Hughes and Justices Van Devanter and Brandeis went before the Senate Judiciary Committee to testify against it. While the legislative battle raged, the change of sides by Justice Roberts enabled the 5-to-4 decision of the Supreme Court in *West Coast Hotel Co. v. Parrish*³ to reverse in effect the much criticized 5-to-4 state minimum wage law decision handed down in the preceding term in *Morehead v. United States ex rel. Tipaldo*.⁴ It was also, and perhaps this was the most notable single event of all, the year of the departure from the Supreme Court of Justice Van Devanter and his replacement by Justice Black. So 1937 saw the break in the lineup of the pre-Roosevelt court, and the start of the more modern court of which Justice Black is now senior member with twenty-one years of service.

Something had to begin to happen in 1937 or soon thereafter. As the author says, by 1937 there had occurred "perhaps the outstanding

1. SCHWARTZ, *THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT* iv (1957) (hereinafter cited as SCHWARTZ).

2. *Ibid.*

3. 300 U.S. 379 (1937).

4. 298 U.S. 587 (1936).

example in our constitutional history of judicial lag."⁵ In the three years from the latter part of 1933 (the year of Franklin D. Roosevelt's first inauguration) to the middle of 1936 acts or parts of acts of Congress, including several of the key elements of the New Deal, were declared unconstitutional in twelve decisions. Changes in outlook came with changes in the Court's personnel, beginning with the appointment of Justice Black in 1937 and followed, in short intervals, by the appointments of Justices Reed, Frankfurter and Douglas. The pre-1937 Court had struck broadly at congressional attempts to maintain fair industrial and labor standards and to use the power to tax and to appropriate for the promotion of the general welfare. The post-1937 Court, as shaped by the first Roosevelt appointments, moved away from what Schwartz calls "the apogee of the doctrine of judicial supremacy"⁶ and began to allow Congress greater latitude in its treatment of national problems. This change with its later modifications and adaptations forms the substance of Bernard Schwartz's study.

In the two decades since 1937 the Supreme Court has had to cope with legal aspects of World War II and many phases of the Cold War that has extended over approximately two-thirds of the period. Schwartz describes these controversies and discusses the Supreme Court's handling of them as well as the Court's relationship to the office of the President, and to Congress and the administrative agencies, and the function of the Court as referee between the states and the federal government. Finally he takes up the record which the high tribunal has written during this period as the protector of the Bill of Rights.

Opposed to the policy of nullification of congressional acts in the early days of the New Deal, the author is still opposed to it in the second decade of his score of years. He generally sides with Congress, and, like Justice Frankfurter, only most reluctantly joins in a judicial upsetting of a legislative act. He sees the apparent incongruity of the Smith Act of 1940 "in a country whose first article of faith is the principle of full and free discussion."⁷ He makes it clear that "the Smith Act is aimed, not so much at seditious acts, as at seditious teaching or advocacy," that it "restricts not so much deeds as words," and that "as such, it constitutes a clear limitation upon the freedom of speech and of the press guaranteed by the First Amendment."⁸ But he does not concern himself with desirability or even necessity. And so he does not say that the Smith

5. SCHWARTZ 10.

6. *Id.* at 12.

7. *Id.* at 308.

8. *Ibid.*

right of free speech, like other constitutional rights, must be reconciled with the other rights safeguarded by the organic instrument; it can be restrained where necessary for the preservation of other freedoms essential to a democracy and guaranteed by our Constitution."⁹

Schwartz finds that broad principles have dominated the Court's work and that is why he says it is possible to analyze the high tribunal's jurisprudence from an institutional point of view without more than passing reference to the individual personalities of the Justices. The Court as a whole, though not all its members to the same degree, "has accepted the implications inherent in the constitutional revolution of 1937."¹⁰ With this has gone "more internal consistency to the work of the high tribunal than is often realized."¹¹ But in a final chapter called "Anatomy and Pathology," he gathers some of his dislikes within a total result that he finds largely supportable. He notes a too easy willingness, at least on the part of some Justices, to overrule precedents, for while he recognizes readily enough the necessity for accommodation to change, he underscores at the same time the indispensability of certainty.¹² The author is disturbed, too, by the increasing use of the dissenting opinion in the last twenty years. He points out that during the early days of the New Deal there was a basic cleavage within the Court. Yet during this period dissenting opinions were written in only 13 to 19 per cent of the cases.¹³ In recent years, "even though there has been no such fundamental split in philosophy on the bench,"¹⁴ the percentage has been much higher. He quotes statistics which show that in the terms 1943 to 1956 dissents were delivered in the majority of cases and that in the two terms of 1951 and 1952 dissents were filed in 80 or 71 per cent of the cases.¹⁵ The increase in dissents, he observes, "has been accompanied by a similar proliferation of concurring opinions"¹⁶ where disagreements not in result but in reasoning are aired. This inclination to dissent and concur disturbs him because "what detracts from the esteem in which the highest tribunal is held cannot but reflect adversely upon the law throughout the land."¹⁷

Act contains unconstitutional provisions. He puts it this way: "The

9. *Ibid.*

10. SCHWARTZ 344.

11. *Ibid.*

12. "Without certainty, the law becomes not a chart to govern conduct, but a game of chance; with only certainty, the law is as the still waters in which there are only stagnation and death." SCHWARTZ 346.

13. SCHWARTZ 357.

14. *Ibid.*

15. *Ibid.*

16. *Ibid.*

17. SCHWARTZ 354.

A particularly noteworthy section of the book is that which deals with the citizen who happens to be a Negro and equal protection of his rights under the law. Here Bernard Schwartz puts the basic public questions as follows: "Has the high bench, as has been charged, distorted the Constitution, in accordance with the personal prepossessions of its members, to deprive the states of their sovereign powers over their education systems? Are the Court's decisions abolishing segregation in public schools based upon a cavalier disregard of settled law and a judicial attitude that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the Court, and that the Court itself knows no fixed principles?"¹⁸

To answer these questions, Schwartz undertakes a consideration of the relevant constitutional provisions—the thirteenth, fourteenth and fifteenth amendments. Part of the trouble, he finds, is that these post-Civil War changes in the Constitution, freeing the Negro, giving him the benefits of citizenship and granting him the right to vote, still are not accepted fully in the South. To the South the ratification of these amendments was coerced as part of the terms of the peace. But ratified they were and they are as much parts of the Constitution as any other part. If they "override the powers reserved to the states under the Tenth Amendment,"¹⁹ the author sees no support for defiance. They were adopted long after the tenth amendment and according to settled rules of construction take precedence over the earlier general provision.

After reviewing cases dealing with voting, separate and restricted accommodations and other aspects of racial discrimination, the author arrives at the 1954 public school desegregation case, *Brown v. Board of Education*.²⁰ Noting that Chief Justice Warren's opinion, supported though it was unanimously, "strikes at the core of the South's way of life—a way of life that has roots far deeper than the actions of legislatures and courts," Schwartz concedes frankly that the decision's extreme critics are not likely to be "persuaded by any legal arguments that the present writer can make."²¹ Yet he feels others must speak up for the Court since "in singling out the Supreme Court as the cause of the destruction of the interracial pattern developed by it, the South is letting its natural desire for a scapegoat obscure the real origin of its present difficulties."²²

18. *Id.* at 263.

19. *Id.* at 264.

20. 347 U.S. 483 (1954), 349 U.S. 294 (1955).

21. SCHWARTZ 273.

22. *Ibid.*

Whatever these difficulties of the South are, there is a larger consideration in Bernard Schwartz's eyes. In an especially strong passage he writes :

One point needs to be emphasized in any consideration of the constitutional storm stirred up by the desegregation ruling of the highest tribunal, and it has nothing to do with the merits of that ruling as a matter of constitutional law. Successful defiance by the South of the decision of the Supreme Court will result in a far more radical change in our constitutional system than even the most extreme critic of the Court asserts was brought about by the *Brown* decision. A constitutional system such as ours, governed by a written organic instrument, must of necessity be a Law State par excellence. That such a system can flourish only in a society imbued with a legal spirit and trained to reverence the law is as certain as any conclusion of political speculation can be. For such a system properly to operate, there must be some machinery set up to ensure that the provisions of the Constitution are adhered to. A Constitution whose provisions are enforced only by the voluntary adherence of those subject thereto is a mere paper instrument. . . .

. . . Indeed, respect for the Court's decisions is the *sine qua non* of our structure; draw out this particular bolt, and the machinery falls to pieces. To make even one exception to the principle that the Supreme Court alone is the trustee of the law is to take the fatal first step toward abrogation of the rule of law Of what importance is it to say the states are prohibited from doing certain acts, if the states recognize no legitimate authority to decide whether an act done *is* a prohibited act? If the states alone have the right to decide on their own powers, does any Constitution remain? Does not the power of the states become absolute and uncontrolled? Can anyone talk to them of transgressing their constitutional powers, when they deny that anyone has a right to judge of those powers but themselves?²³

This is a good point at which to turn back to one of the author's major concerns, expressed on his very first page—the flood of denunciation that has rained on the Supreme Court in recent years. For while he favors fruitful criticism, based on understanding, he is alarmed at how far the pendulum has swung from veneration of the Supreme Court to

23. SCHWARTZ 273-75.

vituperation. He hopes therefore to make a contribution of his own to restoring the Court to its former place of respect and esteem.

With a book such as Schwartz's, carefully written and yet bold, on subjects and controversies of universal importance, the temptation of independent comment is irresistible. In succumbing the writer wishes to identify the following observations as such.

First, controversy is inevitable in a self-governing democracy, and the Supreme Court, as one of the three coordinate branches of the Federal Government, is certain to be sharply criticized on occasion just as the President and Congress are at other times. From pre-Civil War days—indeed from *Marbury v. Madison*—those who have not liked Supreme Court rulings have denounced the judges who made them and have worked actively to bring about reversal.

Second, the general rule of allowing the legislative body wide scope is sound, but excesses and abuses will arise and when they do the Supreme Court must stamp them as such or it is no longer "supreme." The Smith Act of 1940, as applied, came into direct conflict with the First Amendment, and unless the conflicting legislative limitation is demonstrably urgent, the guaranties of free speech and free press, must take precedence. This is the essence of the Supreme Court's modification in 1957 in *Yates v. United States*²⁴ of the Vinson Court's approval of the Smith Act in *Dennis v. U. S.*²⁵ It is a strong modification, if not an outright reversal, for which the country may be profoundly grateful to the Warren Court.

Third, the life of the law is its growth and the dissents of today may point the way of tomorrow. It is just as important upon occasion that conflicts be aired as it is that at other times unanimity be preserved. If the question is close in the eyes of the Justices and the positions are complex, an adult people are entitled to know these facts and to take them into account in the forming of an intelligent public opinion.

Fourth, the Civil War amendments and the circumstances surrounding their passage are part of the trouble in the desegregation controversy but had they not been enacted when they were, it would have been necessary to have submitted and ratified them later. How fortunate we are today that we have them to apply in the existing situation and that we are not just now beginning a campaign of popular education for their incorporation into the Constitution for application at some future time.

24. 354 U.S. 298 (1957).

25. 341 U.S. 494 (1951).

For in the small world in which we live we no longer have unlimited time to demonstrate that we actually believe the ideals that we profess.

IRVING DILLIARD†

STUDIES IN JURISPRUDENCE: V, FREE MAN VERSUS HIS GOVERNMENT. Edited by Arthur L. Harding. Dallas: Southern Methodist University Press. 1958. Pp. xi, 117. \$3.00.

"Free Man Versus His Government" resounds with echoes of a call to revolution, but a brief reflection on the Latin divider variously abbreviated v. and vs. brings apprehension of the frequently dull form of debate called litigation. This title identifies four essays from the 1957 Conference on Law in Society presented by the Southwestern Legal Foundation and the Southern Methodist University School of Law.¹ No revolutionary tocsins sound among them or in any of them. Motions for continuance and settlement negotiations, with even a few expressions of expectation that settlement will be on mutually advantageous terms, are more frequent than requests for peremptory instructions or notices of appeal.

Professor Beutel² on "Freedom of Political Association" does appeal from decisions supporting exculpatory oaths and decisions holding that the federal government cannot protect freedom of political assembly for a non-federal purpose from private interference. Professor Harding³ on "Freedom to Use Property" is content to assert that private property is here to stay. He indicates that the "bundle of rights" has been re-sorted and new sticks have been added in such a way as to recognize more economic values and make them more valuable by achieving a balance of social interests that works to enhance freedom. The manner here is less of the indictment or brief and more of the historical survey.

Professor Stumpf⁴ on "Freedom to Learn" comes to three opinions of truth in the realm of values. He chooses continual rational examination and restatement, based on faith in absolute truth and skepticism of

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1. The present volume is the fifth of a series which was begun in 1954.
2. Frederick K. Beutel, Professor of Law, University of Nebraska.
3. Arthur L. Harding, Professor of Law, Southern Methodist University.
4. Samuel Enoch Stumpf, Professor of Philosophy, Vanderbilt University.