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Constitutional Law for Popular Consumption, by Thomas James Norton

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REVIEWS

CONSTITUTIONAL LAW FOR POPULAR CONSUMPTION*

The most enthusiastic supporter of the 18th Amendment must admit that it has had at least one very unfortunate result; it has induced many persons who think they know something about constitutional law to write at least an article and perhaps a book with the purpose of explaining the constitutional principle quite erroneously supposed to be involved, but usually only with the effect of demonstrating how little the author knows about constitutional law. Many lawyers (this malady is not confined to lawyers but is especially virulent in our profession) would probably have continued to enjoy high reputations as authorities in constitutional law had they not, impelled by personal dislike of prohibition, clearly demonstrated the contrary by displaying their ignorance in print.

The first is that the meaning of Liberty of the Man (the of pseudo-constitutional law. It is rather more logically reasoned than many of its class, but the fact remains that it is substantially without value because based upon prejudice and fundamentally unsound assumptions, which may perhaps be summarized as follows:

The first is that the meaning of Liberty of the Man (the capitals are quoted from the book) is inherent and clearly defined. Such an assumption is, of course, too ludicrous to be worthy of serious consideration. Indeed, Jefferson himself later gave up his concept of natural rights which he had embodied in the Declaration of Independence.[1] The author not merely cites this discarded theory of the Declaration of Independence but also such ancient authors as Blackstone for their concept of the natural rights of man. Perhaps he would also cite Blackstone and his contemporaries in connection with the natural rights of married women! But after all these obsolete authorities are quoted and enlarged upon, the author is still compelled to admit that natural rights, whatever they are, may be restrained in the interest of public safety. Of course, this gives away his entire case, since the question of what public safety requires must be left largely to the legislative bodies.

The next assumption, upon which the argument of the book is based, is that the ideas of the fathers of our country—more specifically the members of the Constitutional Convention—are binding upon posterity forever. Why this should be we are not

*Losing Liberty Judicially, by Thomas James Norton, New York: The MacMillan Company. 1928. pp. xi, 252. Price $2.50.

[1] See Address by Hon. W. G. McAdoo before the Institute of Public Affairs at the University of Virginia, 1927, at p. 103 of the Proceedings, as published by the University.

very definitely informed. The author cites some cases where he thinks railroads have been rather harshly treated, but if we should adhere to the ideas of the fathers of our country, railroads would be abolished, as they knew nothing of such contrivances. The reviewer yields to no one in admiration for the wisdom and practical sense of the persons who framed our Constitution, but to assume that they could foresee all of the actual changes of conditions and make the necessary legal adjustments for such conditions, is to assume that they were each of them infinitely wiser than any other man who has ever lived on this earth. They did not claim such omniscience themselves, or they would not have provided for amending the Constitution.

The author further lays down as a settled principle, that in case of doubt the courts should decide in favor of vested interests, that is to say, that property should be preferred over personal rights. Of course, this is purely a matter of opinion, and all that the reviewer can say is that he disagrees. He is comforted with the reflection, however, that the great majority of the people of this country would not accept this view of the author and even the courts would not dare to avow an acceptance of such a position, although it seems that at times they may actually adopt it.

But all of these assumptions are really only applications of the fundamental fallacy which runs through the entire book, and which is almost invariably met with in this class of writing. The author thinks that whatever he does not like is unconstitutional. This is no doubt a simple solution of constitutional difficulties, at least for the one making it, but it is entirely evident that if it is to be adopted, not merely will majority government cease but any government at all will end for there will certainly be someone who will not like any particular government activity, and to whom therefore, it will be unconstitutional. Mr. Norton does not like prohibition, which, of course, is his privilege. But his argument from such dislike to a theory that it is contrary to "constitutional principles" is not merely a demonstration that he is unfit to write upon constitutional problems but that he is absolutely ignorant of the most elementary of these principles.

The specific applications need little further consideration. The prohibition situation is the one discussed at the greatest length but the author makes other verbal assaults upon some other activities of the Federal and State governments, of which he disapproves. In some of these cases he may be right, but for the reason already suggested, that he proceeds upon fundamentally unsound bases, he is never convincing. Perhaps it may be worth while to mention one or two other rather elementary matters where the author displays his own "constitutional illiteracy," a quality which he is purporting to remedy. He suggests that the Federal Courts are constitutional courts and cannot be interfered with by Congress. Thus he is apparently ignorant of the fact that all of the courts except the Supreme

Court could be abolished by Congress and that, therefore, whatever interference Congress may make in their functions cannot be attacked upon constitutional grounds. Furthermore, the author informs us[2] that it should be held that the Senate is without power to obtain information with respect to legislation because it is not the sole legislative body, the House and the President sharing the legislative function. If this conclusion is correct it follows that, since no body or official has sole legislative functions, no information which respect to legislative questions can be obtained from anyone at all. The output of Federal Legislation is not always of such striking excellence with all sources of information open to the legislative bodies that one can comfortably contemplate what would happen if they were denied any information whatever, as our author seems to think desirable.

It may seem that undue space has been used in reviewing such a worthless type of book. This is undoubtedly true; but this book and other of its kind constitute a very real menace to our American institutions. The author is much excited over the constitutional illiteracy of other people, but his book cannot remedy the situation. Worse still it may transform a reader who knows himself to be a constitutional illiterate (and who is, therefore, not very dangerous) to the more dangerous illiterate who thinks that he does know something about it.

Furthermore, the book, if it has any practical effect at all, will lead to a further breaking down of public confidence in the courts. The author attacks agitation for the recall of judges, although curiously enough, this is in a paragraph just after the one in which he asserts the doctrine that if the courts do not uphold the constitutional rights of the individual the people are entitled to take such matters in their own hands. The mere recall of judges would seem to be a very mild method of effecting this sort of revolution. But the book not merely attacks liberal decisions of the Supreme Court but cites with approval such reactionary cases as *Pierce v. Society of Sisters*,[3] *Adkins v. Children's Hospital*[4] and *Evans v. Gore*.[5] It is decisions like these and like *Lochner v. New York*[6] which it must be admitted the author does have the grace not to commend, that will lead, if anything does, to the recall of judges and to other similar unfortunate measures. In the last analysis the stability of the courts is dependent upon popular approval, and every decision which is regarded by the public generally as an indication of undue favoring of vested interests as against the interests of the public as a whole, will tend just that much to break down the popular confidence in the courts which is the foundation upon which they actually rest.

[2] In connection with his discussion of *McGrain v. Daughterty*, 273 U. S. 135.

[3] 268 U. S. 510.

[4] 261 U. S. 525.

[5] 253 U. S. 245.

[6] 198 U. S. 45.

As for this book and others like it, it is only to be devoutly hoped that we are about through with this flood of pseudo-constitutional law. No doubt training in the Constitution is a desirable thing, but the training should be conducted by persons who have some real knowledge of American constitutional principles; and this book, like most of its class, is a demonstration only of its author's ignorance and prejudice.

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