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Schwartz: Rights of the Person

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RIGHTS OF THE PERSON. By *Bernard Schwartz.* New York: Macmillan. 1968. Pp. xi, 1018 (2 vols.) $25.

The publication of *Rights of the Person* marks the completion of Professor Bernard Schwartz's magnum opus, his commentary on the Constitution of the United States.[1] Appropriately enough, these final two volumes focus upon the most recent preoccupations in constitutional law.

Rights of the Person canvasses the hotly contested battlegrounds of constitutional adjudication in our generation: the controversies concerning the position of radical politics in a nation fearful of its security, the meaning of equality for a long-suppressed racial minority, the role of the police and the uses of the criminal process, the position of religion in education and in public life, and the essential institutions of politics itself. Merely to list these issues suggests the difficulty of presenting them meaningfully within the confines of a comprehensive survey. Within the past two decades each of them has become a recognized specialty of scholarship, possessing its own vast literature of historical research, logic-chopping casuistry, contentious propaganda, behavioral impact studies, philosophical punditry about the merits or about the judicial role, and so forth—a torrent of learning in which even the specialist can only hope to paddle his own canoe without capsizing in the rapids. Surely no legal institution has ever been the subject of such continuous observation, analysis, and comment as the United States Supreme Court and its constitutional jurisprudence.

Thus, it is understandable that one picks up an all-embracing review of the Constitution with skeptical curiosity. The appearance of these latest volumes was peculiarly timely in 1968—a year that signaled a major shift in the nation's political mood, marked by the impending end of the "Warren Court" and a revolt against its works in a historical fight over the successor to the Chief Justice. The time

1. A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES. Part I appeared in two volumes in 1963, under the title THE POWERS OF GOVERNMENT, Part II in one volume, THE RIGHTS OF PROPERTY, in 1965.

may well be ripe for stock-taking, for consolidating some theoretical positions, whether or not the changing of the guard brings a slowing or reversal of the flow of innovation. Still, a general commentary on constitutional "rights of the person" seems at first blush an impossible undertaking. The issues at stake are as ancient as the earliest articulated concerns of civilization, and more universal than the membership of the United Nations. They are timeless themes of philosophy and literature, and they are the daily grist of politics and litigation. An exposition of these issues under our Constitution can be presented as a study in historical evolution, as the ultimate challenge to the contest of reason this country uniquely entrusts to lawyers, or as a grand procession of classic dilemmas—the antinomy which Cardozo stated rather than resolved in his phrase about "ordered liberty." To understand the scope of any guarantee stated in the Constitution, we want to examine its historical origins, the verbal choices its text offers to exegesis, the rhetoric of claims and counterclaims in which it appears, and the social context in which these claims once had, now have, or may someday have validity. To do one of these things well practically excludes doing the others within any reasonable compass, as anyone who teaches constitutional law has learned to his frustration. To undertake a synthesis of these diverse approaches and to apply it to the Constitution as a whole is an impressive ambition.

Fortunately, Professor Schwartz did not let himself be deterred by the false choices of whether to write another history of constitutional adjudications in the Supreme Court, or a philosophical disquisition on human rights, or an annotated encyclopedia of leading cases. These volumes repeat none of these particular forms. Rather, they borrow from each; none is missing entirely, but none is wholly dominant. In less capable hands, so eclectic an approach might produce a disaster of uncritical generalities and superficial popularization. This author's erudition maintains a notable depth of scholarship for the breadth of the topics covered. His books represent a highly personal combination of ingredients. They are a commentary, as they purport to be, but they are also a solidly professional work.

Of course, any choice of ingredients put into the combination creates problems. Commendably, *Rights of the Person* is a commentary on the Constitution, not on the Supreme Court. Too often legal scholarship forgets the difference, or assumes that the Constitution is *only* what the Supreme Court says it is. Professor Schwartz does not enter at length into the learned debates of the Court watchers that stir the academic world. Nevertheless, these books do not, nor could they, often venture beyond the Constitution as law to consider it in action outside courts; for instance, these volumes do not deal with the Constitution as a factor in legislative debate and executive messages, or as a still powerful appeal in public

rhetoric, or as the ultimate touchstone of ideological legitimacy in America. *Rights of the Person* remains a commentary on constitutional *law*, though free of the technical constraints of a legal treatise. Thus, the author illuminates his exposition with frequent judicial quotations without strict concern for the immediate use of the quoted statement in a majority opinion, dissent, or extra-judicial essay, or for its place in an on-going contest of ideas with a competing philosophy. And in finding illustrative examples in cases from many courts, he risks misleading the unwary or nonprofessional reader about the relative weights of citations. In particular, the decisions of state courts on federal constitutional rights, although indisputably a part of our constitutional reality, are still a most unreliable guide to authoritative constitutional law. In a book that undertakes to combine extensive description, accurate exposition, and independent evaluation, these divergent uses of the sources must be kept clear in the reader's mind.

Of course, many pages of exposition also can present only familiar material, without containing any surprising information or novel insights for anyone who is acquainted with constitutional law. That is an unavoidable cost of comprehensiveness; one who undertakes to be encyclopedic cannot be expected to be continuously profound.

What of the substance of Professor Schwartz's Constitution? Much is implicit in the very title of these two volumes. *Rights of the Person* avoids the risk of becoming a mere annotation of the separate clauses as they appear in the Constitution in favor of grouping the constitutional safeguards into "rights" that are related by the interest protected, not by the usual circumstances of their invasion. Thus the protections of personal security through the stages of the criminal or administrative process, from arrest, bail, and fair trial, to habeas corpus, double jeopardy, and legislative attainder, are collected under the heading *Sanctity of the Person* (ch. 15). The next chapter, on privacy, covers conventional searches and inspections as well as electronic surveillance for both criminal and administrative purposes. This discussion is followed by chapters on freedom of expression, the equality principle, and religion. But the fifth amendment privilege against self-incrimination—including the problem of coerced confessions—and the prohibition against cruel or unusual punishments are separated from the rest of criminal procedure and presented along with citizenship and nationality law in a final chapter on *Dignity of the Person*. Here, too, we find the closely circumscribed law of treason, far separated from the other constitutional doctrines which have developed in response to the governmental pursuit of "subversion" that gives us its modern functional equivalent.

The gain in focus and readability achieved by this organization

carries a price. Professor Schwartz has introduced an unacknowledged bias toward seeing the "rights" discussed as something apart from the constitutional text that attempted, so far as the foresight and the language of 1789 and 1866 would permit, to give them legal expression—a form of analysis one would consider a throwback to the "higher law," but for the fact that *Griswold*[2] commands caution in dismissing the recurrence of "natural rights." This bias might have been counterbalanced by inserting reminders, in discussions of the case law, of the constitutional words before the judges for interpretation. But perhaps the implicit "natural rights" flavor is, if not deliberate, at least not uncongenial to the author's thinking. As a matter of fact, this may be as good a place as any to mention—though it seems unbelievable—that I could not find the text of the Constitution of the United States printed anywhere in these two volumes of commentary on that Constitution.

On the substance of the issues, the author's positions defy the Procrustean categories of "liberal," "conservative," "activist," "abstentionist," or whatever. He is emphatic on the importance of enforcing procedural guarantees against government agents of all kinds, in the investigatory as well as in the trial process. A striking contribution, because the problem is so often ignored in the mainstream of the alien and the immigrant, particularly with respect to entry and deportation; these two emphases join, for instance, in a critique of *Abel v. United States*.[3] On the other hand, Professor Schwartz is satisfied to leave wiretapping policy to Congress; and his reasonable apprehension of the irrational and destructive force of mobs, direct action, and organized extremism (he refers more than once to the experience of the Weimar Republic) allows him little sympathy for the constitutional claims of those engaged in picketing and other forms of demonstration, door-to-door canvassing, civil disobedience, group libel, or communism.

The treatment of the first amendment, though painstaking, largely recapitulates conventional wisdom. The author scornfully dismisses the debate on whether the free speech clause states an "absolute" by viewing, and refuting, the claim as one of an "absolute" *right* of speech regardless of circumstances. This analysis is consistent with his own approach, but it fails to examine the more plausible claim that the amendment states an absolute prohibition against any restraints directed *in terms* against speech. Yet we might have been spared much if that approach had been developed in *Gitlow*[4] and after; if it had confined the clear-and-present-danger test (or later versions of it) to the restraint of speech under nonspeech laws, where

2. Griswold v. Connecticut, 381 U.S. 479 (1965).
3. 362 U.S. 217 (1960).
4. Gitlow v. New York, 268 U.S. 652 (1925).

it originated, and had prevented the extension of that test to controls expressly directed at speech rather than deferring to a supposed governmental predetermination of the constitutional necessities.

Moreover, the author's first amendment analysis is obfuscated by a curiously old-fashioned conception of "the police power," as though this were some kind of affirmative grant of a defined authority instead of a name for the residue of all plenary power that is not constitutionally denied to state government. Thus he attempts to explain why, though the first amendment protects only the verbal element in speech, wearing "freedom buttons" is a privileged form of protest but hanging rags on a clothesline is not: the police power can reach the latter but not the former (pp. 396-97). These analytical tools prove equally inadequate in the commentary on obscenity, in Professor Schwartz's jurisprudence as in Justice Brennan's; the discussion begins with the "simple proposition" that the police power includes the *power* to protect public morals, therefore it plainly encompasses the *power* to protect the public against obscenity (p. 314). As this formulation indicates, the search for a "power" before examining a claimed constitutional limitation prejudices the latter. Of course the search is illusory; unlike the Federal Constitution, state constitutions do not grant or delegate lists of powers any more than do the national constitutions of unitary states or the British constitution. But the method of analysis implies the possibility of a "lack of power" *antecedent* to the first amendment claim—a theory for which there can be no federal constitutional source save a reversion to generalized substantive due process. And the needless finding of "power," which focuses on the case *for* control, will likely prejudge the real question of constitutional limitation, which focuses on the case *against* control.[5]

There is another drawback implicit in using the terminology of "rights" of persons rather than that of constitutional limitations on government: it obscures rather than highlights one of the most interesting current phenomena in constitutional law. This is the impending shift from ancient demands for limitations on a govern-

5. If the cited illustrations of the "freedom buttons" and the clothesline display, for example, are to be distinguished by delimiting the reach of a "power" and not only the reach of the first amendment's limitations, then a finding that the "power" falls short would logically apply also to wearing similar buttons without a "freedom" or any other message—that is, it would support a "right" that could not be founded on the first amendment and, by the hypothesis of a prior search for "police power," need not be. These premises create trouble for the analysis of our most recent claims of right in dress, hair styles, and the like (p. 396). They similarly confuse the deduction of the constitutional status of obscenity from the power of the Court of King's Bench to punish Sir Charles Sedley for "making water on the persons below" from a balcony in Covent Garden (p. 314). One would confidently assume that this would not give rise to a first amendment claim even by today's more advanced theoreticians—despite reports of some disputed emission from a hotel window during last summer's political discussions in Chicago.

ment of circumscribed functions to modern demands for affirmative action from a pervasive government. As an eminent comparativist, Professor Schwartz knows the different history, style, and role of the power-limiting Bill of Rights and the concept of judicial review in the Anglo-American tradition, as contrasted with the programmatic social assertions which the Continental tradition enshrines in constitutions as the highest political symbols of past victories and present commitments. When constitutions of the latter tradition assert a right to health, to welfare, to education, to employment, to a fair share of the nation's material goods, they create a standard for the political performance of government that is no more sought to be enforced in courts than is the preamble of the Constitution of the United States. In the present commentary, the author recognizes that similar claims are being pursued at the frontiers of constitutional litigation under the Bill of Rights and the fourteenth amendment; it would have added clarity if this development had been displayed, and if the difficulty of deriving such political claims from what are historically and textually *restraints* on government had been discussed, uncluttered by the ambiguity of "rights."

But if much of the book's wisdom is conventional, it is so from conviction and not from failure to recognize the troublesome questions. The conclusions are stated reasonably, without shouting or preaching. The style matches the content. Much of it necessarily is a parade of declarative sentences reciting holdings and citations, enlivened by an occasional retelling of some significant case. The author is an indefatigable collector of quotations from historic and literary as well as legal sources, but these quotations are scattered through the text as grace notes rather than for the relevance of the source. The subject of constitutional rights is rife with temptation to pontificate in orotund generalities and indisputable abstractions, and sometimes those drawn from Supreme Court Justices and those of the author tend to merge into one another. The chapter titles are forced into an awkward parellelism of "rights"—*Sanctity of the Person, Privacy of the Person, Expression of the Person, Equality of the Person, Belief of the Person,* and *Dignity of the Person*—and these capitalized titles are then used in the text as if they were established terms of constitutional law. The style also suffers from alternating the editorial "we" with abuse of the passive voice ("It is felt," "it has been pointed out"), which sometimes leaves the source in doubt. The most irritating quirk, however, is the author's undeviating misuse of "such" for "this" or "the," paragraph after unrelenting paragraph, until one is distracted from the substance to search for even one "this." Such kind of editing ought to be one modest service a publisher extends to an author and his readers.

Despite its shortcomings, the completed work adds up to an im-

pressive accomplishment. It is a detailed inventory of American constitutional rights as they exist two thirds of the way through the twentieth century. The picture it presents is that of a mature legal system, hedging the application of power to the individual by procedures evolved over centuries of English and American history and by a few substantive axioms with which men of good will seek to umpire the many collisions between the claims of government and of individuals in a complex modern society.

Such an inventory largely submerges the original excitement of clashing principles in a judicious review of working compromises. But the reasonable judgments of judicious men—as lawmakers, judges, or academic commentators—do not exhaust the function of these principles. The protections against authority that law promises the individual are always unfinished business. Their classic statement in the Constitution permits the perennial questions always to be reopened: whether this Constitution does not pledge the society it governs to be even more free, committed to tolerating even hostile heresy and offense to good taste, committed to trusting in its survival even without elaborate structures of secrecy and surveillance to protect it. In the nature of things, such questions will long be pressed only as minority views, in dissent on and off the Supreme Court. They are not then "constitutional law." We knew, when we studied the Constitution in the post-war years, that it did not forbid racial segregation, or prosecutions based on illegally obtained evidence, or the malapportionment of legislatures. Today there are other claims that are not constitutional law. But even if some minority views never become "constitutional law," it is nonetheless important that those who assert them are appealing *to* the Constitution of the United States—not *against* it.

Although Professor Schwartz stays close to prevailing doctrine both in his presentation of "the law" and in his own preferences he knows that his commentary necessarily speaks from its own time, and he indicates where some of the known constitutional frontiers in our time are. Whatever may lie beyond those, his work will have lasting value in telling the future where the Rights of the Person stood in the United States of 1968.

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