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BOOK REVIEW

EVERYMAN'S CONSTITUTION

BY HOWARD J. GRAHAM

*Madison: State Historical Society of Wisconsin, 1968. Pp. xiv, 631.
\$12.95*

FOR 35 years, Howard Jay Graham has labored to provide his countrymen with a more accurate view of the purposes and scope of the 14th amendment of the United States Constitution. In this collection of his essays, students of the Constitution can, for the first time, fully grasp both the magnitude of his task and his extraordinary achievement in laying bare truths which decades of mistaken scholarship have obscured.

The title of this collection, *Everyman's Constitution*, yields a key to Graham's approach to constitutional interpretation. Decrying "lawyer's history," which he regards as based on an overemphasis of verbalisms and an excessive concentration on appellate decisions, he stresses the dominant currents of thought which entered into our constitutional heritage through the 14th amendment. For Graham it is the stock of Lockean and Jeffersonian inspired natural rights ideas, as articulated by the anti-slavery forces of the nation, which dominated the thinking of the amendment's framers. These ideas give us the most accurate insight into the purposes of the guarantees of section one of the 14th amendment — privileges or immunities of United States citizens, due process of law, and equal protection of the laws.

Graham demonstrates in convincing fashion that the interpretation given the amendment by the United States Supreme Court from the time of its adoption in 1868 until *Brown v. Board of Education*¹ in 1954 was grossly erroneous. Provisions which were intended to make newly emancipated blacks full fledged citizens, possessed of the same rights as white American citizens, and free from all forms of public discrimination by private or public agencies, were constricted into the narrowest possible compass. After stating in the *Slaughterhouse Cases*² that the purposes of the 14th amendment were the "freedom of the slave race, the security and firm establishment

¹ 347 U.S. 483 (1954).

² *Butchers' Benevolent Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 83 U.S. 36 (1873).

of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him,"³ the Supreme Court proceeded in that very opinion to draw a sharp distinction between state and national citizenship, ignoring the framers' basic conception of a very broad scheme of rights enjoyed by all United States citizens. By reducing the privileges and immunities clause to a virtual nullity in *Slaughterhouse*, the Court left due process and equal protection to carry the burden. In the *Civil Rights Cases*,⁴ the Court then destroyed the fifth section of the amendment, authorizing Congress to enforce the amendment's other sections, by holding invalid the Civil Rights Act of 1875,⁵ which had sought to protect accommodation and other public rights of blacks. According to the Court, Congress had power only to set aside discriminatory state acts.⁶ This was a conclusion wholly at variance with the framers' intentions. Finally, by upholding classifications based on race under the deceptive guise of "separate but equal facilities," the Court in *Plessy v. Ferguson*⁷ gave judicial sanction to the very type of discrimination that the post-war amendments were intended to prevent. The great political compromise of 1877 saw the Court moving in step with the Congress and President Hayes to bury the past and appease the South at the expense of black citizens, who, decade by decade, had seen their dream of a better life smashed by new political and social forces, and sanctified by judicial writ. It is one of the magnificent ironies of our constitutional history that amendments designed to wipe out slavery, the least American of institutions, could so easily meet destruction at the hands of "realists," both on and off the Court.

Another grand theme in Graham's studies is his explanation and clarification of the development of economic due process in the post-war era. For several decades it was alleged and widely believed that the framers of the post-war amendments had conspired to protect the growing corporate enterprises of the nation, and that this objective had been more prominent in their thinking than giving any real assistance to black citizens. This false conclusion derived from the celebrated argument of Roscoe Conkling — a prominent ex-Senator and member, in 1860, of the joint committee of Congress which drafted the 14th amendment — on behalf of the railroad in *County of San Mateo v. Southern Pacific R.R.*⁸ In that case Conkling pro-

³ *Id.* at 71.

⁴ *United States v. Stanley*, 109 U.S. 3 (1883).

⁵ Act of Mar. 1, 1875, ch. 114, 18 Stat. 335.

⁶ *United States v. Stanley*, 109 U.S. 3, 11 (1883).

⁷ 163 U.S. 537 (1896).

⁸ 116 U.S. 138 (1885).

duced, for the first time, the manuscript journal of the committee, and, as Graham concludes, "by means of extensive quotations and pointed comment [Conkling] conveyed the impression that he and his colleagues in drafting the due process and equal protection clauses intentionally used the word 'person' in order to include corporations."⁹ By 1886 the Supreme Court accepted the proposition without argument. Graham shows that Conkling was incorrect, or, to be blunt, had deceived the Court by misusing the journal. In a masterful and intensive examination of pre-war legal writings and decisions, the author shows that due process and equal protection concepts as generalized expressions for protecting persons and property were well-recognized and fed into the post-war streams of thought without the existence of any Congressional "conspiracy" in the drafting of the 14th amendment. Corporations, as legal persons, or as legal representatives of shareholders, could assert as naturally as individual litigants the guarantees against arbitrary governmental action — *i.e.*, due process or equal protection rights — in a nation so deeply devoted to the business ethic as is the United States. What seemingly gave support to the conspiracy theory was the fact that the decline in legal support for black citizens was paralleled by the elevation of economic due process in the period 1890-1936.

This brief summary is wholly inadequate in conveying the breadth and richness of Graham's research. He is indeed, as Leonard W. Levy states in a highly perceptive forward, "surely the greatest authority on the history of the amendment. He is its Maitland, and perhaps our foremost living historian of American constitutional law as well."¹⁰ Among the most engaging features of this work, are the introductory and appended statements which the author supplies for each essay. They furnish a running account of his intellectual pilgrimage which commenced in the 1930's, and they allow him to take account of later research. What is striking is the high degree of accuracy of all of his original investigations, the meticulous attention to factual evidence, and his ability to prove or disprove hypotheses by using rigorous methods of analysis.

But there is more to Mr. Graham's work than historical detection of the highest quality. He is deeply devoted to the highest values in American life, past and present. He sees legal, social, and political events not as discrete examples of human success and failure, but as reflections of the very nature of a people and their culture. He rejoices when good triumphs and is saddened by the victories of immoral or thoughtless men. Who else could take the subject of frontier tax titles and in two chapters (11, 12) bring vividly alive

⁹ H. GRAHAM, *EVERYMAN'S CONSTITUTION* 30 (1968).

¹⁰ *Id.* at vii.

the rich and varied strands of economic and social life in nineteenth century frontier communities. There is even a "hero," — the virtually forgotten Robert S. Blackwell, whose 1855 treatise on tax titles¹¹ became a bible for lawyers and judges of that era, and contributed greatly to Judge Thomas M. Cooley's own great treatise¹² which advanced the cause of due process limits on governmental action.

Philosophically, Howard Jay Graham belongs to that group of historians who see man not as a toy or puppet in the hands of government or other quasi-public organization, but rather, in the American tradition, as a potentially noble creature already possessed of an extensive range of rights, with new ones constantly being discovered as the conditions of his life and environment change. The need for imposing due process standards on those conducting the affairs of large corporations and labor unions is the plea that closes his book. He would, I am certain, applaud the growing effort to bring due process into student-institutional relations in our universities. He would, I presume, approve of the Supreme Court's discovering a right of privacy in a Constitution which to Justice Black's judicial eyes, contained no mention of privacy. It is in this sense that the Constitution is, and as Graham proclaims must be, "everyman's," — a living document shaped, and reshaped by each generation in the hope of strengthening the lives and values of a free people.

*William M. Beaney**

¹¹ R. BLACKWELL, TREATISE ON TAX TITLES (1855).

¹² T. COOLEY, CONSTITUTIONAL LIMITATIONS (1868).

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