Michigan Law Review

Volume 29 | Issue 6

1931

Review: CASES ON CONSTITUTIONAL LAW

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CASES ON CONSTITUTIONAL LAW. By Dudley O. McGovney. Indianapolis: Bobbs-Merrill Co. 1930. Pp. xxxix, 1803.

Professor McGovney's CASES ON CONSTITUTIONAL LAW is a book of eighteen hundred and three pages. Yet no one would have the hardihood to suggest that the subject can be presented commensurably in smaller compass if comprehensiveness and completeness be regarded as factors in the determination of the material to be selected to illustrate the progress of the law in this field. It is true that the late Dean Hall was able to compress his casebook into fourteen hundred and fifty-two pages, as originally published in 1913;[1] but in 1926 he found it necessary to add a supplement which enlarged the book to eighteen hundred and sixty-seven pages.[2] Professor Powell has concluded that "if in 1895 Mr. Thayer was wise in deciding that an adequate collection of cases on selected topics in constitutional law required over 2400 pages, the demands of corresponding adequacy in 1930 could hardly be satisfied with less than five thousand."[3] If time were not of the essence such a book would have much to recommend it. When, however, the question of class-room presentation within the time commonly allotted to constitutional law is raised, the

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[1]CASES ON CONSTITUTIONAL LAW (1913).
[2]CASES ON CONSTITUTIONAL LAW (Published with Supplement, 1926).
[3]Thomas Reed Powell, 44 HARV. L. REV. 484 (1931).

problem is somewhat like that which confronted the Old Woman Who Lived in the Shoe.

In my own course on constitutional law I have sixty class hours at my disposal. I do not proceed from case to case and problem to problem with machine-gun rapidity and precision; nor do I like to make wholesale omissions as to each topic considered. In using a casebook of the size of either of those mentioned it is, therefore, possible for me to cover only a portion of the material set forth. With a view to covering some topics intensively to the entire exclusion of others of perhaps equal or for some purposes greater importance, I have had to make a choice. In this I have been guided to a large extent by data which are annually set forth by Professors Frankfurter and Landis in the HARVARD LAW REVIEW in an article which they call "The Business of the Supreme Court."[4] Writing under this subject for the October Term, 1929,[5] they have presented a table[6] which gives in statistical form a classification of the opinions of the Supreme Court by subject matter. From this table it appears that the greater part of the litigation reaching that court involved the application of the commerce clause, the Fourteenth Amendment, or other clauses which have to do with some phase of taxation. For the October 1929 term, nineteen case were classified as involving the commerce clause; seventeen cases raised questions of due process or equal protection; and thirty-five cases considered various phases of taxation, these three subjects accounting for a total of seventy-one cases out of the one hundred and thirty-four decided by the court at that term. Cases on these three subjects comprise 895 pages in Professor McGovney's book, and since this is approximately the amount of ground I usually cover in the time allotted, I am devoting the entire course during the present year to their consideration. Incidentally, some of the students, with their eyes on the bar examination, have questioned the wisdom of this choice. I have made this explanation for the purpose of indicating that the discussion of Professor McGovney's book which follows is confined to that portion of it which deals with the subjects I have considered or shall consider in the classroom.

Consideration of the subject of due process of law begins with Chapter V, which is divided into two sections. The first section is called "Due Process of Law: Amendments V and XIV, As a Standard of Validity of Modes of Law Enforcement," that is, due process of law as to procedure. In all, it includes fourteen cases, six of which were decided prior to 1900. With few exceptions they are the landmark cases in this country in which the Fifth and Fourteenth Amendments have been resorted to as a shield against arbitrariness in governmental action taking form in court procedure. Problems of due process as to procedure, insofar as the action of administrative boards and officers is complained of, are presented in a separate chapter, although the first case in Chapter V, section 1, is *Den ex dem. Murray et al. v. The Hoboken Land, etc., Company.*[7] By any test, however, that case is probably entitled to first place in a discussion involving due process of law as to procedure. The section is brought to a close in an interesting way by the

[4]The first article on this subject appeared in 43 HARV. L. REV. 33 (1929) under the title "The Business of the Supreme Court at October Term, 1928."

[5]44 HARV. L. REV. 1 (1930).

[6]*Ibid.*, pp. 24-25.

[7]18 How. 272, 15 L. ed. 639 (1927).

inclusion of *American Railway Express Company v. Commonwealth of Kentucky.*[8]

The second section of Chapter V presents the due process clauses as a "Standard of Validity of the Substance or Purpose of Legislation." This section includes forty-seven cases, of which "nine are prior to 1880; six between 1880 and 1900; eleven between 1900 and 1920; and twenty-one subsequent to 1920."[9] In general they are arranged chronologically as to each phase of the problem under consideration. Five of the early cases were decided prior to the adoption of the Fourteenth Amendment, their inclusion no doubt being dictated by the desirability of showing something of the nature of the concept of due process of law before its positive constitutional recognition as a limitation upon legislative action by the states.[10] Beginning, however, with *Munn v. Illinois*[11] and *Mugler v. Kansas*[12] and ending with cases like *Tyson & Bro. v. Banton*[13] and *Ribnik v. McBride*,[14] the conflict between legislative experimentation on one hand and judicial conservatism (in the majority opinions) on the other is traced. Most of the cases in this section are relatively recent, and Professor McGovney has candidly admitted that he has made no attempt to catalog the numerous applications which have been made to almost every conceivable subject matter.[15] With this position I heartily agree. I do not believe the multiplication of case material can be carried far enough in a casebook to familiarize a student with the nature of the operation of the Fifth and Fourteenth Amendments to such an extent that he can embody the results of his observations in a generalization sufficiently comprehensive to provide the basis for an accurate prediction, mechanically arrived at, of the decision of the court in the next novel case. Due process does not lend itself to definition for the reason that it is a dynamic and not a static concept. If a student of the subject is provided with the kind and quantity of material which will acquaint him with the method of approach used by the majority and minority of the court to problems of due process, the editor of the casebook is, in my opinion, entitled to feel that his obligation in this respect has been discharged. Undoubtedly the early decisions possess great historical value, but the interest of the average student is prospective rather than restrospective, and in his selection of recent cases on this subject Professor McGovney has provided sufficient material to fix the point of departure. If more cases are desired, the reports are accessible and abound with them. Nor do I demand, as Professor Powell does,[16] that the cases be given in full. *Dred Scott v. Sandford!*[17] Of recent cases omitted, *Liggett Company v. Baldridge*,[18] stands out in my estimation as one worthy of inclusion.

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[8]273 U. S. 269, 47 Sup. Ct. 353, 71 L. ed. 639 (1927).

[9]Supra note 3, p. 486.

[10]Lowell J. Howe, "The Meaning of 'Due Process of Law' Prior to the Adoption of the Fourteenth Amendment," 18 CAL. L. REV. 583 (1930).

[11]94 U. S. 113, 24 L. ed. 77 (1877).

[12]123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205 (1887).

[13]273 U. S. 418, 47 Sup. Ct. 426, 71 L. ed. 718 (1927).

[14]277 U. S. 350, 48 Sup. Ct. 545, 72 L. ed. 913 (1928).

[15]MCGOVNEY, CASES ON CONSTITUTIONAL LAW, p. 604n. (1930).

[16]Supra note 3, p. 485.

[17]19 How. 393, 15 L. ed. 691 (1857). The full report of this case covers nearly 240 pages.

[18]278 U. S. 105, 49 Sup. Ct. 57, 73 L. ed. 204 (1928).

Chapter X deals with the regulation of commerce. It has been subdivided into nine sections, as follows: what is commerce—interstate and foreign; dual control of interstate and foreign commerce; regulation of rates; motor-bus regulation; authorizing establishment of facilities; protecting from outside harms; prohibition of interstate commerce; law governing tort liability of interstate commerce; and maritime authority of the United States. The number of subdivisions tends, I think, to give the subject of power over commerce an appearance of multiformity which in reality it does not possess. For example, in considering what is interstate commerce I found it difficult to keep from anticipating cases which appear later in the chapter, such as *The Lottery Case*.[19] Likewise, under regulation of rates, *Wabash, St. Louis & Pacific R. Co. v. Illinois*[20] elicited a discussion of the *Shreveport Rate Case*[21] not reported but referred to in *Railroad Commission v. Chicago, Burlington & Quincy R. Co.*,[22] which is included in a later section under the title "protecting from outside harms"; and *Clark Distilling Company v. Western Maryland R. Co.*[23] seemed like an anti-climax to problems raised by an earlier section.

The chapter on constitutional limitations on taxation, Chapter XII, has been placed at the end of the book. It consists of a number of topics which are closely related to matters considered earlier in the book. Thus section 1, permissible purposes, raises questions involving a phase of due process with a tax situation as the screen on which the picture of the Fourteenth Amendment in action is thrown. Section 2 deals with limitations on federal taxation; section 3 illustrates a by-product of the dual nature of our sovereignty; section 4 reverts to due process in its application to jurisdiction to tax, notwithstanding the remark of Mr. Justice Holmes in the *Union Refrigerator Transit* case.[24] Section 5 is to the same effect as section 4 except as to the form of taxation involved. Section 6 presents the application of limitations on taxation found in the commerce clause; and section 7 closes the book with a discussion of corporate franchise and privilege taxes. The feasibility of segregating tax cases in a course on constitutional law from the broader problems to which they are germane may be open to doubt. The advantage, if any, lies in the fact that problems incident to the exercise of the power of taxation are presenting themselves with such persistency that a separate course on the subject is now offered in many schools. Such a course naturally has a decided constitutional flavor; and where it is given, as it is likely to be, by the professor who teaches constitutional law, there is ample justification for the omission of tax cases in the general course on constitutional law. As a matter of fact, the ramifications of the latter course have become so vast and far-reaching that it is to some extent breaking down of its own weight, as indicated by the appearance of such courses as municipal corporations (in part), administrative law, taxation, etc., in the curriculum. When the ample proportion of the subject of constitutional law are considered as a whole, its

[19] 188 U. S. 321, 23 Sup. Ct. 321, 47 L. ed. 492 (1903).
[20] 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244 (1886).
[21] 234 U. S. 342, 34 Sup. Ct. 833, 58 L. ed. 341 (1914).
[22] 257 U. S. 563, 42 Sup. Ct. 232, 66 L. ed. 371 (1922).
[23] 242 U. S. 311, 37 Sup. Ct. 180, 61 L. ed. 326 (1917).
[24] 199 U. S. 194, 211, 26 Sup. Ct. 36, 50 L. ed. 150 (1905).

fabric will remain unimpaired even if a few threads are drawn from the seamless web.

One feature of Professor McGovney's book, which is a departure from its predecessors, is his comprehensive treatment of the development of the doctrine of judicial supremacy. Whether or not the growth of the doctrine, which is now accepted without question, deserves the space allotted to it, is a matter upon which opinions may differ. In any event, he has at least shown what editors of casebooks on constitutional law can do, when unrestrained by publishers, and he has corroborated Professor Powell's remark that a five-thousand page casebook would have points in its favor.

I am grateful to Professor McGovney for moderation in the use of footnotes. Those which he has provided include references to periodical literature as well as to significant cases which have not found a place in his collection. In some instances where the subject under consideration was more adaptable to text than to case treatment, he has included text material, thus following an innovation which is rapidly becoming the fashion on the part of casebook makers.

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