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The Court and the Constitution. By Owen J. Roberts.

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BOOK REVIEWS

THE COURT AND THE CONSTITUTION. By Owen J. Roberts. Cambridge: Harvard University Press, 1951. Pp. 102. $2.00.

The Constitutional issues arising out of the New Deal, which agitated the Supreme Court in the late 'thirties and early 'forties, have pretty much been put at rest. But close divisions continue to be the rule in the Court, and public interest in the Court's decisions remains high, with vehement criticism heard frequently. In these circumstances, a pronouncement on "The Court and the Constitution" by former Associate Justice Roberts is a noteworthy event. It was his vote, with those of Chief Justice Hughes and Justices Brandeis, Stone and Cardozo, which, in the memorable Spring of 1937, sustained state minimum wage legislation, the National Labor Relations Act as applied to employees in factories, and the new federal systems of unemployment compensation and old age insurance. In addition to his important role on the Court at a historic moment, Mr. Justice Roberts was widely respected, both during his many years of practice and while a member of the Court, for his brilliant legal talent. The interest which normally would attach to an expression of his views is heightened by the fact that these lectures were given at the Harvard Law School as the first of a triennial series under a fund left by the late Justice Oliver Wendell Holmes.

Although the most publicized issues before the Court these days involve the application of the constitutional provisions which specifically restrain the powers of government, Mr. Justice Roberts chose to devote his lectures to that other bulwark of our constitutional system, the principle of federalism. As he points out in his introductory statement, the framers of our Constitution deliberately created a new dual form of government and left for the Supreme Court the resolution of controversies that would arise from any attempts by one government to transgress upon the domain of the other. The lectures examine the way in which the Court has discharged that function in three fields: taxation of governmental activities, regulation of business conduct in areas within the reach both of federal and of state power, and the interpretation of the Fourteenth Amendment.

The first lecture reviews the winding and highly technical path taken by the Court in dealing with the proposition, fathered long ago by Chief Justice Marshall, that the State Governments and the Federal Government must by implication from the Constitution be immune from taxation by the other. In general, Mr. Justice Roberts approves of the large scale withdrawal of implied immunities that has occurred in the past few decades. He would go further. He questions the soundness of the present rule that neither State nor Federal Government may tax the property of the other. Withdrawal of federal property from state taxation imposes a discriminatory burden on citizens of the community in which the federal property

happens to be located. Furthermore, the continuing expansion in federal activities may result, under established rules, in withdrawal of so much of a state's territory from taxation as to create serious financial embarrassment.

Mr. Justice Roberts also urges that the rule exempting governmental securities from ad valorem and income taxation should be abolished. The rule tends, he argues, to drive investors into the public bond field, discriminating against those who want to invest their capital in productive private enterprise. While generally favoring a contraction of the area of inter-governmental tax exemption, Mr. Justice Roberts is emphatic on one point: it should not be considered within the power of Congress to immunize activities involving the federal government from state taxation, as the Court has suggested but never squarely held. That, in Mr. Justice Roberts' view, is strictly a job for the Court.

In discussing the considerations which he thinks should control the Court's decision in these matters, Mr. Justice Roberts draws heavily, as the above summary indicates, on policy considerations. In the light of his own approach it seems rather curious that he should scold Mr. Justice Holmes for his statement, made in answer to a famous dictum of Marshall's, that "The power to tax is not the power to destroy while this court sits."[1] If Holmes meant, says Mr. Justice Roberts, that each sovereign may tax the other up to the point where a majority of the justices pragmatically declare that the burden has become too heavy, then "the Court is a super-legislature." The reader may wonder whether the Court can really be anything else in deciding, for example, whether the United States should be allowed to tax New York's bonds or mineral waters.

The second aspect of federalism discussed by Mr. Justice Roberts is the conflict of police power, "the power to regulate the conduct and relations of the members of society." The general power of legislation is one of those reserved to the States. The power granted to the Federal Congress to regulate commerce among the several states is of broad scope, producing a rather wide variety of Federal-State conflicts. While this overlapping of power has given rise to problems of great difficulty, Mr. Justice Roberts does not consider them in any detail. Rather, he devotes most of his lecture to reviewing the increase in the scope of federal power over commerce in the 20th Century and the increasing readiness of the Supreme Court to sustain regulation of local activities because of their impact upon interstate commerce.

The *Carter* decision,[2] one of the last to impose a narrow view of federal power, struck down the labor and price provisions of a statutory code of fair competition for the bituminous coal industry on the ground that Congress did not have power

1. *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218 (1928).

2. *Carter* v. *Carter Coal Co.,* 298 U. S. 238 (1936).

to regulate things which affect interstate commerce only indirectly. Mr. Justice Roberts asserts that whether this decision is right or wrong, the Court "was surely right in saying that a contrary decision would open the door to federal regulation of local activities to an almost unlimited extent." The later decisions which extended federal power over labor relations and wages and hours to most of American industry demonstrate, for Mr. Justice Roberts, the difficulty which confronted the Court in placing limitations upon that power once the distinction propounded in the *Carter* case of direct as against indirect effects had been abandoned. In the light of these decisions, and those authorizing wide-spread regulation of agriculture and marketing, Mr. Justice Roberts concludes that Congress may regulate any local business if it professes to believe that its operations may be detrimental, in however slight or remote a degree, to interstate commerce.

Mr. Justice Roberts certainly is not happy about the trend here, but he seems to accept it as the lesser evil. He confesses difficulty in seeing "how the Court could have resisted" the popular demand for uniform standards "for what in effect was a unified economy," although "in a sense" the broad interpretation of the federal commerce and tax powers may have been a "subterfuge," adopted in the fear that a firm restraint on the federal power might have resulted in even more radical changes.[3]

The third lecture deals with the Fourteenth Amendment and particularly its Due Process Clause: "nor shall any State deprive any person of life, liberty, or property, without due process of law." After commenting on the broad meaning which the Court gave "liberty" in that phrase, Mr. Justice Roberts describes how the Court came gradually to define "due process of law" as condemning state action "for arbitrariness, for lack of fairness assumed to be a postulate of the sort of civilized society for which our government exists."[4] He thereupon enters the current heated controversy about the extent to which the Fourteenth Amendment makes applicable to the states the guaranties of the first eight amendments, which, by terms and early decision, had been made applicable only to the Federal Government. Mr. Justice Roberts appears to rely primarily on a simple textual argument in his discussion of the problem. The argument starts with the proposition that constitutional language should not be assumed to be superfluous. The phrase, Due Process of Law, which is used in the Fifth Amendment, cannot be interpreted to include anything specifically mentioned elsewhere in the first eight amendments, because then the specific references would be superfluous. But the language of the due process clause of the Fourteenth Amendment is the same as that of the Fifth. Therefore, nothing specifically referred to in the first eight amendments can be included under the Due Process Clause of the Fourteenth. For example, since the

3. Pp. 61-62.

4. P. 69.

Fifth Amendment contains both a Due Process Clause and a prohibition against the taking of private property without compensation, then the requirement of compensation for taking is not one of the things included within the concept of Due Process. However, thirty years after the adoption of the Fourteenth Amendment the Supreme Court repeatedly held in unanimous decisions that for a state to take private property without compensation would be a deprivation of property without Due Process of Law.[5] The discussion in the Court's opinions ignored this argument of implied exclusion. Mr. Justice Roberts terms the inclusion of the just compensation clause within the sweep of the Fourteenth Amendment a strong exercise of judicial power, making possible the review of the Supreme Court of all rate litigation in the states.

But even this strong decision, Mr. Justice Roberts finds dwarfed by the decisions after 1925 holding that the liberties protected by the Due Process Clause of the Fourteenth Amendment include those drawn from the provisions of the First Amendment: the freedom of speech, press and religion. This line of decisions is characterized as "the most sweeping judicial extension of federal power over state action in the history of the republic."[6] In this connection Mr. Justice Roberts refers to the view advanced by Mr. Justice Black[7] that the purpose underlying the adoption of the Fourteenth Amendment was to make each and all of the first eight amendments applicable to the states. Mr. Justice Roberts finds Mr. Justice Black's analysis of the historical evidence less persuasive than the study by Professor Fairman,[8] who reached the conclusion that the sponsors of the Fourteenth Amendment did not intend to make all of the provisions of the first eight binding upon the states.

Leaving the question of the historical evidence regarding the intention of the sponsors of the Fourteenth Amendment, Mr. Justice Roberts turns to the language of the provisions involved and this he finds to be decisive against the incorporation thesis. He reviews the language essentially in terms of the argument of redundancy, summarized above, which was necessarily abandoned in the taking of property cases already referred to. Looking at the language of the Fourth and Fifth Amendments, for example, Mr. Justice Roberts concludes that the Due Process Clause of the Fifth Amendment was intended to protect only those liberties traditionally protected in England and observed in the Colonies and that the other limitations were intended to supplement that protection. The argument is certainly plausible when one looks at such provisions as the prohibition against quartering soldiers and the protection of the right to bear arms. But it seems to this reviewer

5. *Chicago, Burlington & Quincy R.R. v. Chicago,* 166 U. S. 226 (1897).

6. P. 73.

7. See *Adamson* v. *California,* 332 U. S. 46, 68 (1947).

8. 2 Stanford L. Rev. 5 (1949).

to lose all persuasiveness when one looks at the rights of the Sixth Amendment guaranteeing a criminal defendant the right to a public trial, to be informed of the charges against him, and to be confronted with witnesses against him. If the Due Process Clause of the Fifth Amendment does not include such protections as these, it is difficult to see exactly what it does include. In Mr. Justice Roberts' argument, the historic phrase "Due Process of Law," with its unbroken service in the cause of freedom for over 500 years, seems to be practically drained of all content.

Indeed the dilemma presented by Mr. Justice Roberts as a basis for his argument seems to be a false one. The argument that the draftsmen cannot be presumed to have put unnecessary language into the Constitution, while sound enough in some contexts, is not convincing here. Anxious as they were to secure protection for a full measure of personal liberty, it is not hard to believe that the framers of the Constitution made explicit those guaranties which were uppermost in their minds and still used the historic phrase as a safeguard against forgetfulness and against dangers which might not become apparent until the organism which they were consciously creating had experienced many years of growth. The likelihood of such a course seems all the greater when it is recalled that due process has always been a term of vague contours, no more sharply defined in 1790 than in the 17th Century by any authoritative catalog of liberties.

Mr. Justice Roberts' discussion of the meaning of the Fourteenth Amendment appears to confuse two issues. One, raised by Mr. Justice Black, is whether the Due Process Clause of the Fourteenth Amendment embraces specifically each and every one of the provisions of the Bill of Rights. It is against this position that the historical investigations of Professor Fairman are most compelling. Granted that the draftsmen of the Fourteenth Amendment did not have that intention, and the Supreme Court has never held that they did, there still remains the problem of whether the Due Process Clause of the Fourteenth Amendment may properly be interpreted to include some of the things prohibited to the Federal Government by the first eight. The highly technical linguistic argument on which Mr. Justice Roberts appears primarily to rest was repudiated fifty years ago in the taking of property cases already discussed. Since that time the Court has consistently rejected the contention that all provisions of the Bill of Rights are incorporated in the Fourteenth, but in the very decisions rejecting this claim the Court has indicated that basic liberties were protected by the Due Process Clause, without regard to whether or not they happened to be mentioned in the first eight amendments.[9] The recent *Wolf* case,[10] holding that unreasonable searches and seizures by state officials were a violation of due process, merely reiterates the often stated principle

9. Cf. *Hurtado* v. *California,* 110 U. S. 516 (1884); *Twining* v. *New Jersey,* 211 U. S. 78 (1908); *Palko* v. *Connecticut,* 302 U. S. 319 (1937).

10. *Wolf* v. *Colorado,* 338 U. S. 29 (1949).

that the Due Process Clause exacts from the states all that is "implicit in the concept of ordered liberty."

Mr. Justice Roberts attacks this formulation vehemently. So construed, he says, "The Due Process Clause places in the Supreme Court an enormous power over the legislation of the states and the procedures of their courts as well as the powers of their executives." Whether this be thought wise or unwise, statesmanlike or otherwise "it is contrary to the views of those who adopted the Constitution" and, further, "even such a sweeping enactment as the Fourteenth Amendment was not intended to put the states in tutelage to the Supreme Court in any such fashion."[11]

The first conclusion is certainly correct. A provision making the original Bill of Rights applicable to the states was considered but not adopted by the First Congress. The second conclusion is simply not adequately supported by the Justice. There can be little doubt that those responsible for the Fourteenth Amendment intended to subject the states to extensive federal tutelage to protect the rights of negroes and others from arbitrary repression. Th radical Republicans who were the driving force behind the amendment sought goals which necessitated a serious impairment of the previously existing division of power. There is something unreal about the attempt, which Mr. Justice Roberts here joins, to make it appear that these radical Republicans were more interested in preserving the existing balance of federalism than in achieving their goals. Furthermore, recent historical studies of the antecedents of the Fourteenth Amendment which go deeper than legalistic analysis have shown most persuasively that as early as the 1830's and 1840's the abolitionists generally, and not just the extremists, had reluctantly come to the conclusion that a large measure of federal intervention in the affairs of the states was necessary to achieve individual freedom throughout the nation. Specifically, their own experiences while preaching for the abolition of slavery showed them that federal intervention was needed to protect their rights of free speech in many of the states. In addition, the Civil Rights Acts passed in the Reconstruction Period thrust the federal government deeply into the relations of the states and their citizens. And it seems clear beyond dispute that one of the major motives for the passage of the Fourteenth Amendment was to put the Constitutional validity of those statutes beyond dispute.[12] These factors, which Mr. Justice Roberts does not discuss, seem to go far toward contradicting his sweeping contention that the prevailing and long established interpretation given to the Due Process Clause is not warranted by the Fourteenth Amendment.

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11. P. 80.

12. See Graham, *The Early Anti-Slavery Backgrounds of the Fourteenth Amendment*, 1950 Wis. L. Rev. 479, 610; ten Broek, *Thirteenth Amendment to the Constitution of the United States*, 39 Cal. L. Rev. 1 (1951); Chafee, *Federal and State Powers under the UN Covenant on Human Rights* 1951 Wisc. L. Rev. 389, 418.

In concluding his lectures, Mr. Justice Roberts asserts that "progressively, the Supreme Court has limited and surrendered the role the Constitution was intended to confer upon it . . . the sharp division of powers intended has become blurred . . . doctrines . . . have more and more circumscribed the pristine powers of the states, which were intended to be reserved to them by the Constitution..."[13] Considering the topics covered by the lectures, it seems that these strictures do not apply to the Court's sweeping curtailment of inter-governmental immunities from taxation. In so far as these conclusions involve the expansion of the federal commerce power, many readers will feel that this invasion of the powers of the states was not only a necessary but also a proper consequence of a widespread demand for uniform standards "for what was in effect a unified economy." And in respect to the impairment of federalism through the established interpretation of the Fourteenth Amendment, many readers will feel that Mr. Justice Roberts is merely reviving the attempt of the Supreme Court in the post-bellum days to read the Fourteenth Amendment out of the Constitution as far as possible, because to give it its obvious and intended effect would enlarge the protective powers of the Federal Government.

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ADMINISTRATIVE LAW. By Kenneth Culp Davis. St. Paul, Minnesota. West Publishing Company. 1951. Pp. XVI, 1024.

To most practicing lawyers, administrative law has been a forbidding field which they feared to enter but could not avoid. The problems of administrative law could not be fitted into familiar legal patterns, yet the field seemed to lack a structure of its own. Relevant precedents were elusive, for until recently the digest systems and encyclopedias have ignored its presence as a separate field. Law School casebooks provided a semblance of order, and law review articles provided penetrating insights into particular problems, but no comprehensive and systematic treatment was available.

For lawyers lost in the wilderness of administrative law, Professor Davis' book will come as a welcome guide. It provides a framework which organizes the subject matter into an intelligible and workable body of law. It presents a detailed analysis of the major problems of administrative law, and is carefully documented with all of the leading and most recent cases. Above all, it is thought-provoking and readable.

Professor Davis has not attempted to provide a handbook on the procedures

13. P. 95.

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