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The Supreme Court: Constitutional Revolution in Retrospect (Book Review)

Francis P. Kelly

ticable from the standpoint of administration and enforcement of ordinance provisions.[2]

Undoubtedly, in developing the forms the author studied various ordinances of cities, towns and villages of the United States. However, the book is completely devoid of citations, annotations or comments to the forms. Therein lies its weakness. By omitting the citations, the reader is deprived of the benefit of the experience of the prototype of the form. The drafting of legislation includes, or should include, a comparative survey of laws on the subject matter in other jurisdictions and consideration of the problems, if any, which have arisen thereunder. Since the bases of the forms are not disclosed, it would be necessary for a person drafting an ordinance to undertake research on the matter practically de novo. Only thus can one eliminate or at least decrease the possibility of repeating mistakes of the past. Moreover, citations and comments to the forms would be valuable in determining where a certain form is appropriate for the particular community under consideration.

It is regrettable that this book, which is unique in so many respects and which is undoubtedly a valuable addition to the books on legal draftsmanship, should omit that essential to the scholarly, and in the last analysis the practical, approach to legislative draftsmanship.

ROSE M. TRAPANI.*

THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT. By Bernard Schwartz. New York: The Ronald Press, 1957. Pp. VII, 429. $6.50.

This is an excellent work. That is the basic and primary comment that presents itself to the reviewer's mind after he puts down Professor Schwartz's treatise. It is marked by scholarship lightly borne; by the broadest consideration of the Supreme Court and its place in our national life; by courage; by wit; and, above all, by the gift of holding the reader's interest. In his preface, Professor Schwartz candidly states that he strives to reach a wider audience than the specialist and legal scholar.[1] In this, his objective, he

[2] *Ibid.*

* Professor of Legal Research, St. John's University School of Law.

[1] P. IV.

should succeed admirably. The author is too disarmingly modest when he tells us at the outset:

> It is, of course, true, that much of the Court's work has concerned technical legal subjects that can hardly be presented with all the fluency of popular fiction.[2]

Professor Schwartz's entire study is a refutation of this modest avowal. I do not scruple to say that a layman completely untutored in the law should have no difficulty in apprehending and in enjoying this book.

One of the most appealing features of *The Supreme Court* is that it combines the closest sort of accuracy with a breezy literacy. Thus, for example, the discussion of the great increase in the federal power over commerce since 1937,[3] the recent vast enhancement in the status of executive agreements,[4] and the coolly temperate treatment of the segregation decisions[5] are outstanding for their careful summation and attractive presentation.

Certainly, Professor Schwartz cannot be accused of timidity. He does not hesitate repeatedly to arraign the pre-1937 Court as "Supreme Censor";[6] to assail the late Franklin Roosevelt as one who sought to subvert judicial independence;[7] to dismiss the late Senator McCarthy and the work of the House Un-American Activities Committee in a passing phrase;[8] and to challenge in the sharpest terms the views of so formidable a battery as Mr. Justice Black,[9] Mr. Justice Stone,[10] and Mr. Mieklejohn.[11] But all of this makes for lively and stimulating reading. And, again, those criticized in these passages have been fairly good controversialists themselves!

The Supreme Court is, happily, not a stranger to humor. Thus, the following shafts are typical:

> [In criticizing the multiplicity of opinions in the Steel Seizure case] It may be, as John Winthrop expressed it in 1644, that "Judges are Gods upon earth," but a pantheon that speaks with seven inconsistent voices hardly inspires the listener with the feeling of divine certainty.[12]

> [In complaining about the State Department's distinction between a treaty and an executive agreement] This reply, said the senator who had sent the

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[2] *Ibid.*
[3] Pp. 28-42.
[4] Pp. 86-93.
[5] Pp. 263-75.
[6] *E.g.*, pp. 13, 23, 80, 192, 310, 347.
[7] P. 65.
[8] P. 55.
[9] See, *e.g.*, pp. 164, 220, 221, 351.
[10] See p. 234.
[11] See p. 232.
[12] P. 72.

request, "reminded me of the time when I was a boy on the farm, and asked the hired man how to tell the difference between a male and a female pigeon. He said, 'You put corn in front of the pigeon. If he picks it up, it is a he; if she picks it up, it is a she.'" [13]

[In criticizing preoccupation with the behavioristic sciences] Judges are only men, we are told—which is, of course, an indisputable observation. . . . The state of a man's mind is as much a fact as the state of his digestion, according to the famous statement of a nineteenth-century English judge. Now, however, we are told that the two are intimately related and that the state of a judge's mind can hardly be known without some knowledge of the state of his stomach. To advocates of this sort of gastrological jurisprudence, all attempts to describe the court as an institutional entity are fundamentally naive.[14]

Professor Schwartz's devotion to the Constitution shines through his work. Thus, he can sound the cry of federalism in danger;[15] summon up the awful threat of "The Orwellian nightmare of 1984";[16] deprecate the growing use of the executive agreement;[17] and in a passage reminiscent of Acton and Jefferson, sternly bid us that confidence is irrelevant when we deal with the power of government.[18]

I cannot close this review without stating that on a number of issues I am in serious disagreement with Professor Schwartz. To discuss such disagreements here, even sketchily, would be impossible because of space limitations. The fact that these disagreements exist in no way detracted from my enjoyment of Professor Schwartz's book, or from my admiration for the scholarship that went into its preparation. I here merely list a few of these issues:

(1) I believe that the security problem in our national life is seriously underestimated.[19]

(2) It seems to me that at no point is the pre-1937 Court given a fair hearing. It is criticized in the harshest terms and in conclusory language.[20]

(3) The growth of national power is too cheerfully conceded as inevitable.[21]

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[13] Pp. 92-93.
[14] P. 343.
[15] P. 39.
[16] P. 228.
[17] Pp. 91-93.
[18] Pp. 79-80.
[19] See p. 322.
[20] See, *e.g.*, pp. 13, 17, 18, 310-13, 318.
[21] See, *e.g.*, p. 18.

(4) The *Sacher* case, with all of its disturbing implications, is inexplicably shrugged off in the most cryptic terms.[22]

A number of other points of disagreement could be cited. But, taken as a whole and in the light of its professed objective, this book represents a real achievement.

FRANCIS P. KELLY.*

[22] See pp. 313 n.12, 399 n.12. See also Sacher v. Association of the Bar, 347 U.S. 388 (1954); Isserman v. Ethics Comm., 345 U.S. 927 (1953); Sacher v. United States, 343 U.S. 1 (1952).

* Lecturer in Law, St. John's University School of Law.