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Vagaries and Varieties in Constitutional Interpretation (Book Review)

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views of various schools of thought in medicine, particularly those fields that deal with the back and those fields which deal with the head. Which schools will the particular member of the impartial medical panel belong to in a given case? This would seem to present a real issue with reference to testimony by impartial medical witnesses.

It has been urged by those who are opposed to the plan that the jury would give greater credence to the impartial medical witness than it would to an expert called by either of the parties. The report replies by stating that where the impartial medical witness is called upon to testify he may be questioned as to his conclusions and the certainties thereof, as to his doubts and differences of medical opinion in the area of the injuries involved, and he may be cross-examined as any other witness. The concern expressed might better be resolved upon the theory that a trial is a search for truth and not a game of chance.

The report concludes that the use of impartial medical experts in those cases in which there is a substantial controversy between the parties as to the medical aspects of the case is sound both in principle and in practice, and that it makes a valued contribution to the correct disposition of those controversies, and helps immeasurably toward the fair settlement of cases. Moreover, it states that men of high professional competence and standing in the medical profession are agreeable to serve as panel members, whereas heretofore they had shied away from contact with any situation which might require their appearance in court as a witness.

This book will be useful for the general practitioner and is recommended as a possible source of assistance in evaluating comparable injuries for settlement purposes.

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VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION. By Thomas Reed Powell. New York: Columbia University Press, 1956. Pp. XV, 229. $3.50.

It certainly was "a happy inspiration," as Mr. Freund says in his foreword, that led to the choice of T. R. Powell as Carpentier Lecturer at Columbia in 1955, and thus to the publication of this book. For Powell was pre-eminent in the history of the Republic among logical critics of the work of the Supreme Court. This volume, moreover, is typical of all his work—scattered in more than 200 articles in

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law reviews and impressed upon the minds of countless students. In a sense, the lectures were an epilogue, though he could hardly have had in mind that his earthly sojourn was so near to its end.

Powell's general characteristics were brilliance, logic and wit. He overawed us, as students. Later, in personal and more convivial relations, he was less awesome, but surely as direct and persuasive in tracing his argument from premise to conclusion.

Powell's philosophic inspiration came from John Dewey, and his jurisprudence from Holmes. From these he learned that it is hopeless to seek abstract truth. It did not phase him, for he had an abstraction of his own—surely unrecognized by him—the practicalities of each situation. He reports that he once asked Holmes ". . . why counsel should not give up prating about national and local, uniformity and diversity, and tell the Court that the law is free for a decision either way, and then add: 'I propose to confine myself to practical considerations why my way is wiser than my opponent's way,' "[1] and that Holmes replied: "I wish to God they would."[2] This, of course, depicts Holmes as agreeing to a complete pulverization of all pretense of legal principles in constitutional law, and making of the Court a legislative body, and of the advocates before it lobbyists instead of lawyers.

He deals first with the origin of judicial review of legislation. Noting the fact that the constitution does not provide for it, he attributes its force to an evolutionary process; really started by Marshall in *Marbury v. Madison,*[3] and thence growing (like Topsy), [the metaphor is his],[4] fed by almost universal public acceptance. Many liberal theologians who are impressed by Darwin seem to think that God gave the universe its start in much the same way. But there is evidence that Powell thinks that Marshall's first shove to judicial review was better planned.

As a true pragmatist, Powell is not concerned with the ontological problem of the origins of the power of the judiciary to void legislation. While he admits that the power itself may well have been usurped by the Court,[5] he is content with it, since it has been sanctioned by a century and a half of "sufficient national acquiescence."[6] Yet, he violently disputes Hamilton's argument that the power of the Court depends on the will of the people. He says: "this mythical will of the people is to me as fanciful as the notions of emanations of concreteness from Olympus, Mount Sinai, or the Pythoness of Delphi."[7] He adds: "I prefer the frankness of Professor John W.

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[1] P. 178.
[2] *Ibid.*
[3] 5 U.S. (1 Cranch) 368 (1803).
[4] P. 3.
[5] P. 20.
[6] *Ibid.*
[7] P. 15.

Burgess who said in substance 'I do not hesitate to declare that our form of government is the aristocracy of the robe, which I venture to regard as the best form of aristocracy in the world.' " [8]

Powell sees no inconsistency between his admission that the power of the Court over legislation exists only by virtue of "sufficient national acquiescence," and the assertion that our government is an "aristocracy of the robe." There are vast differences between the traditional aristocracies and our Court. For one, the Court never defends itself under attack. There have been many attacks on the Court, and many proposals to curb its power both long before and after the stillborn plan of F. D. Roosevelt. At the moment, bills are pending in Congress, in reaction to the Court's segregation decision, which seek to limit the scope of judicial review. But the power of the Court has survived because—and only because—it has throughout its history commanded "sufficient national acquiescence." Nor was this acquiescence imposed by force or fear as was the case in the older aristocracies of England and France or the newer ones in Russia and China. Moreover, in the case of the aristocracy of the robe, their opponents content themselves with open argumentative criticism and efforts to reform. Southern senators issue a manifesto which can be weighed by the people; F. D. Roosevelt called the Court, horse and buggy; T. Roosevelt raved and ranted at Holmes, and other presidents have not withheld severe criticism of the Court. The legal process of impeachment has been suggested by disappointed interests, but as far as I know, no one has ever cried "off with their heads." These aristocrats are in this respect unique. There have been no palace revolutions, purges or suspicions of murder. In the main, the justices are known for longevity, and no matter how young they are in the beginning, they have nearly always become "the nine old men."

Having established the fact of judicial supremacy over legislation, Powell turns to a description of how the justices have used this power. Here, again, he is on solid and familiar ground. For he has but little difficulty in showing that in the field of constitutional law, the Court legislates and that no single principle or group of principles can be discerned in the opinions of the Court. More important, the support for the opinions cannot be found in the constitution itself. Where can one find in the constitution any set of words which would require that the guaranty of liberty means, liberty to work in a bakery more than ten hours per day, or the liberty of women and children to work for less than a minimum wage?

Yet, the justices pretend to be applying the text of the constitution and steadfastly refuse to admit that they are legislating. But Powell, as have others before him, proves that at least in constitutional law, the judges are in reality ignoring the text of the constitution and re-writing it from day to day to suit preconceived notions of govern-

[8] *Ibid.*

ment. Powell has no patience with judicial pretensions that they are interpreting the text, and not legislating. He boldly says that such statements are either "crooked or stupid." [9] He recognizes, of course, that constitutional law is sui generis in this regard. He claims that he ". . . suffered much in the process of trying to test particular decisions by their consonance with assumed, so-called general principles, and even more acutely by trying to test them by their consonance with each other." [10] This acute suffering led to sin—a transgression of the Tenth Commandment—as he complains: "the supposedly great teachers of common law subjects were able to paint pretty pictures and perfect geometric patterns. Why couldn't I do it in public law as they did it in private law?" [11] Later, he at least partially takes this back and subscribes to the famous Holmesean dictum, "the life of the law has not been logic: it has been experience." [12]

The rest of the book is much more of the same; this time applied to the judicial utilization of the commerce clause. These chapters contain a detailed analysis of the growth of national power under judicial guidance; the relation between federal and state powers; the limits—under the commerce clause—of state police and taxing powers. This part of the book should be required reading and study for students of constitutional law, but not for the purpose of learning the art of prognostication of judicial decisions. He does not subscribe to any such possibility. In dealing, for example, with the extent to which states may regulate interstate commerce, he recounts that after his students ". . . had searched in vain for a formula, I suggested that one might safely say that the states may regulate commerce some, but not too much." [13] And later on, dealing with the limits of the state taxing power, he tells of a suggestion he made to the Legislature of Massachusetts (a suggestion he, himself, calls "pernickety"). In order to make sure that the statute would be upheld, his suggestion was that it be amended to read ". . . this tax shall be imposed on the net income properly allocated to Massachusetts, or on doing business measured by the net income, whichever may make any particular levy more palatable to the Supreme Court of the United States." [14]

Thus, though the reader will not find any guides to decisions in Powell's work, he will be impressed by the sheer mastery of the material, the poniard thrusts to the jugular at each breach of logical reasoning, the careful analysis of the process of growth. All this is intellectualism at its best. The judicial decisions are indeed all grist for his mill. They are, as he most adequately proves, hopelessly irreconcilable, their reasoning is often fallacious, they do not even

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[9] P. 28.
[10] P. 33.
[11] *Ibid.*
[12] P. 37.
[13] P. 178.
[14] P. 197.

espouse consistent policies. In short, they are like statutes. In spite of Powell's rejection of one decision after another, he asserts, with some surprise in his tone, that ". . . on the whole it has created for us a fairly well balanced constitutional federalism." [15] As to the "intricacies and varieties in reasoning," [16] he dismisses them as merely ". . . food for thought, and not a little food for lawyers." [17]

Of course, it is from constitutional law that the enemies of "perfect law" get their greatest comfort. For here, as Powell so forcefully shows, there is as little adherence to established policies as there is in the Statutes at Large. Of course, in interpreting the constitution, the judges legislate. Take, for example, the problem of taxation by Congress of salaries of government employees or agencies. In *McCulloch v. Maryland* [18] it was held that the power to tax is the power to destroy, and that therefore the State of Maryland could not tax a branch of the United States Bank. In *Collector v. Day* [19] the immunity was extended to state officers. This immunity was somewhat limited in *Helvering v. Gerhardt,*[20] and finally completely withdrawn in *Graves v. New York.*[21] It could hardly have been anticipated in 1819 that the army of state and federal employees would expand so vastly by 1939, and that the taxation of their incomes would present serious economic and fiscal problems that would require a new approach. Natural law does not require that statutes remain unchanged or unrepealed. Nor does it require that a legislating judiciary should steadfastly adhere to a policy which has outgrown its utility.

Of course, Powell is right: the Supreme Court in constitutional matters is our third legislative house. That is why it is proper to disagree not only with its conclusion—we do that in private law as well—but also with its premises, both articulate and inarticulate. For they are legislating *ad hoc,* in each case, and doing so "with sufficient national acquiescence."

Mr. Powell's style, both here, as in his articles, deserves mention. He packs tons into inadequate space. He quips, often brilliantly, and often makes the simple seem hard. For example, he says:

> Unwelcome common law and statutory interpretations admit of but slightly delayed prospective change by legislation. The correction of judicial infelicities in assuming constitutional negatives is much more difficult, whether by judicial recantation or by constitutional amendment.[22]

This, of course, simply means that it is easier to amend a statute than to amend the constitution, or to get the Court to reverse itself.

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[15] P. 179.
[16] *Ibid.*
[17] *Ibid.*
[18] 17 U.S. (4 Wheat.) 415 (1819).
[19] 78 U.S. (11 Wall.) 113 (1870).
[20] 304 U.S. 405 (1938).
[21] 306 U.S. 466 (1939).
[22] P. 14.

This type of utilitarian approach is entirely proper in studying constitutional law. For here we are not dealing with law "properly so called" except in the Austinian sense. The oft quoted remark of John Chipman Gray who tried teaching constitutional law after a lifetime concern with the Rule against Perpetuities, "this is not law—this is politics" is the lesson from Powell's book and from his life. Powell, therefore—for all his logic—commits a grave fallacy when he uses these cases as a refutation of the eternal verities of natural justice. To be sure, there is no ideal "Chancellor's Foot" by which the principles of natural law can be measured. But few can be found, even in these days, who are willing flatly to assert that the unseen and unknown do not exist. Uncertainty is all that empirical logic permits. Yet these devotees of empirical logic insist that our conduct must be based on the assumption that non-existence of eternal light is the basic premise. To men of faith, this premise seems futile and unrewarding. More, much more is needed. The constitution, as the Supreme Court has interpreted it, has put into the hands of the Court a veto power on legislation. That power is, indeed, exercised by the Court in a manner more akin to the legislative than the judicial process. The decisions of the Court in this regard must be judged by right reason, by the extent to which they approximate the moral concepts that lie at the root of perfect law.

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THE ORIGIN OF POLITICAL AUTHORITY. *An Essay in Catholic Political Philosophy.* By Gabriel Bowe, O.P. Fresno: Academy Library Guild, 1955. Pp. 102. $2.00.

The problem of authority and how it is acquired is again proving troublesome to contemporary jurists and political theorists. Only a few weeks ago, the first meeting of the newly formed American Society for Political and Legal Philosophy, held at Brookings Institution in Washington, devoted two days to listening to and discussing three papers by Hannah Arendt, Charles Hendel, and Jerome Hall on various aspects of the nature of authority. The questions that followed the addresses indicated that, able though the papers were, the problem presents many aspects still unsolved. Perhaps the current concern with authority can be attributed to the juridical situation which arose in connection with the Nuremberg trials, where the lawyers had to work without precedents, procedural codes, criminal statutes, and

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