

American Constitutional Law (Book Review)

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(3) Professor Blume refers to the Federal Rules but without noting that, in the main, the Federal Rules have been paralleled by the Rules of Civil Practice effective in New York for many years.

G. *Interpleader*

(1) The law affecting interpleader was substantially revised in New York in 1954.¹¹ An action of interpleader may be commenced by a stakeholder without procuring leave from the court. A defendant stakeholder may prosecute a defensive interpleader without application to the court.

(2) Professor Blume disposes of the whole matter of interpleader in a little more than six lines.¹²

(3) A reading of Professor Blume's treatment of the subject does not give the reader any clear notion as to the problems implicit in interpleader, nor does it give any indication of what efforts have been made to meet the problems.

In my judgment, Professor Blume who, as stated at the outset of this review, is uniquely equipped to present a modern picture of the state of civil procedure in this country, has failed to do so. The larger part of the book deals with antiquated and now superseded rules of procedure. The book is neither fair to the writer nor to the reader. It is not fair to the writer because of his possession of a thorough understanding of modern systems of procedure. It is unfair to the reader in that he is made familiar with much of what the law was but not enough of what the law is.

LOUIS PRASHKER.*



AMERICAN CONSTITUTIONAL LAW. By Bernard Schwartz.† Cambridge, England: The University Press, 1955. Pp. xiv, 364. \$5.00.

This treatise from a comparative law viewpoint (the British and French political systems supplying the comparative standards) adds the virtue of brevity to an accurate and comprehensive survey of American constitutional law. Approximately half of the pages (Part I. "The Structure") present an illuminating summary of leading cases and comments on the doctrine of judicial review, federalism and the traditional roles of the respective branches in tripartite gov-

¹¹ See N.Y. CIV. PRAC. ACT §§ 285-87.

¹² P. 256.

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ernment. The second part discusses dynamic developments of the past twenty-five years in the areas of federal-state relations, presidential powers, the shrinking role of the Supreme Court, discrimination, civil liberties, administrative law and foreign relations. On the whole, a convenient text suitable for many student uses is offered.

In a work directed at British and French students, as well as Americans, controversial theses are inevitable in making any clear cut comparisons. One is that the written nature of the American Constitution is not important at all. "It is erroneous to assume, as so many people do, that the difference between American and English constitutional institutions stems only from the fact that the fundamental law in the United States is a written instrument."¹ "The American Constitution does not purport to prescribe its provisions in minute detail. . . . [I]t is not a self-executing document. . . . [Its] terms must, of necessity, be less specific and detailed than those of an ordinary law. . . . The organic instrument lays down only the framework of the governmental system in vigour in the United States."²

Some of us have supposed that the miracle of American constitutional law has been the achievement, with a written instrument, of the flexibility attained by the British with an unwritten one. Practically every modern European nation with written charters of government has been forced to scrap and rewrite them in the past century and a half; the American Constitution, alone among major written ones, has survived the tremendous social changes of this period with only a dozen amendments (the Bill of Rights coinciding with ratification of the basic charter). Of course, the 350 volumes of Supreme Court reports have made this survival possible by a process of bending without breaking. But the Constitution as a document is no mere lagniappe accompanying conflicting views on what it means by 93 men, quick and dead. It is more than a "paper instrument"³ outlining a "framework" and suitable only as an appendix in fine print to a school book on American politics. The first eight amendments, for example, contain no fewer than sixteen highly specific rules of criminal procedure. The body of the document has a detailed definition of treason, and, in addition, spells out the nature and quantum of proof requisite for conviction. In a dozen years of practice and teaching, I have always insisted on careful reading and rereading of the Constitution before any consideration of the cases and materials interpreting it. One of the most lamentable modern paradoxes is the impressive number of judges, lawyers and writers, proclaimed as constitutional experts, yet betraying no direct acquaintance with the words of the Constitution itself.

Dr. Schwartz maintains, in the first part of this book, that judicial review of legislative and executive action distinguishes the Amer-

¹ P. 7.

² Pp. 3-4.

³ P. 11.

ican constitutional system from European ones, just as the written nature of the American document does not. Yet this distinction—at least so far as power to invalidate federal legislation is now exercised—has become vestigial. As the author acknowledges in the second part of his work, since 1937, but a single case has undertaken to invalidate an act of Congress. The growing role of what Professor Finkelstein early dubbed “judicial self-limitation” has now all but assimilated the American system to the British one of parliamentary supremacy. Except for keeping the states within bounds on legislation affecting interstate commerce and civil liberties, the Supreme Court has all but abandoned the power claimed for it in *Marbury v. Madison* in its retreat to non-committal positions, with doctrines of political questions, presumptions of constitutionality and strong requirements of “standing” to challenge statutes on constitutional grounds.

Dr. Schwartz is probably correct in ascribing awesome prestige to American judges in comparison with their continental counterparts. There is asserted to be, however, a decline in the American judiciary, more marked among elected state judges but present nevertheless on the federal bench. “The systematic political appointments of recent Presidents, aggravated by the mediocrity of the judges selected by Mr. Truman,” the author quotes a French jurist with approval, “has without any doubt contributed to the decline.”⁴ The author notes the effect of “the tendency to make appointments on a political basis in lowering the calibre of the federal judiciary. . . .”⁵ But the political qualification of judges did not begin with Mr. Truman. The Democratic Presidents Roosevelt and Cleveland named no Republicans to the federal bench, and Wilson was only slightly more tolerant with a 98.6 per cent Democratic list for his 72 appointments. Republican presidents since McKinley have averaged better than 94 per cent Republican designees. And Mr. Truman at least enjoys the distinction of being one of only a half-dozen presidents to name a member of the opposite political faith to the Supreme Court. Despite the regrettable tendency to make judicial appointments as a reward for non-judicial achievement, numerous political appointees—sublimely undistinguished C minus men—have diligently applied themselves to the reading of cases and have demonstrated how great were their theretofore undeveloped capacities. Moreover, it is something of an achievement in character and integrity that in the entire history of the federal judiciary, only seven of its number (Dr. Schwartz claims nine, erroneously, I believe) have been impeached, and but four of these convicted.

There is much to be learned by practicing lawyers, students and laymen generally from the pages of this scholarly and well written text.

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⁴ P. 134.

⁵ *Ibid.*

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