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The Supreme Court and Political Questions (Book Review)

William Tapley

limit such deductions is virtually to tax gross income or gross receipts and this is unconstitutional, in the author's opinion. All deductions must be allowed to arrive at net income. Today states refuse to allow a deduction for federal income taxes paid or state income taxes paid. Many states refuse to allow deductions for actual losses, etc.

The author's presentation of his thesis is made with much vigor and passion. He is profoundly disturbed by what he feels is an unconstitutional usurpation of power on the part of state legislatures. To quote the author, "The action of the legislative or executive branches which conflicts with the limitations (as the author sees them) in the Constitution is void, *even though it is action which would advance social justice.*" This quotation indicates a positive point of view, one that the reader will sense throughout the book. It presents a vital issue that has been clamoring for solution during the past ten years.

Certainly this book has done much to help by analyzing the principles which govern and control the taxing power of the Government of the United States and the governments of the several states. In an attempt to solve the larger problem of advancing social justice, such an analysis must be a starting point.

BENJAMIN HARROW.*

THE SUPREME COURT AND POLITICAL QUESTIONS. By Charles G. Post, Jr., Ph.D. Baltimore: Johns Hopkins Press, 1936, pp. vii, 145.

The primary object of the Constitutional Convention was to create and establish a strong Federal Government. To this end, the first three Articles of the Constitution provide that the legislative power shall be vested in the Congress; the executive power shall be vested in the President; and the judicial power shall be vested in one Supreme Court and such other inferior courts as the Congress shall ordain and establish. This separation of powers has been consistently recognized throughout our history. The framers realized that an absolute demarcation was neither possible nor desirable. Express provision was made for the exercise of a power by one department which would ordinarily vest in another. For example, the President might exercise the power of vetoing legislation; the Congress might sit as a court of impeachment; and the courts might promulgate rules for their practice and procedure. In the development of our Constitutional Law many other instances may be cited where it is recognized that one of the branches of government may act in respect to a matter that belongs within the jurisdiction of another branch. To cite but one example, the Constitution provides that Congress has power to regulate commerce among the several states. Congress may pass a general law on this subject leaving to an administrative board or to the Executive Department the power to carry out the details. "The filling in of details" has never

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

been regarded as wrongful delegation, although the principle of separation is fully recognized. However, where there appears to be a clear violation of the principle, the action cannot be sustained. We need only to refer to the many recent decisions of the Supreme Court concerning the New Deal legislation to appreciate that the principle stated is most important and vital. In respect to the exercise of the judicial power, the Court, of necessity, must be its sole judge. From the beginning the Court has never hesitated to refuse to act in a matter that clearly belongs either to the legislative or executive branches, and it is to be expected that it will so continue to act in the future. As in the past, these matters will probably be classified by the Court as "political questions" belonging properly to one or the other departments. When such decisions are made, imaginative minds will immediately contend that such a determination destroys the duty of the judiciary to enforce the Constitution.

The author, as the title to his work implies, has made a study of this question as he states, "to observe the doctrine of political questions, as it were, in action; to note the consequences when the court enshrouded a question in the folds of this doctrine and finally, to discover the motives of jurists in so placing a problem within the category of political questions and then accepting the decision of the political departments". The setting is enveloped in mystery from which one may anticipate discoveries. It is a revelation which results from a peek behind the judicial robes, showing the motives of the judge who has the temerity to dispose of a question political rather than justiciable in nature. And so the author's study begins with an examination of all the types of cases that have been disposed of under this principle. There is the case of *Luther* v. *Borden*[1] arising out of Dorr's rebellion, where the Court refused to determine which of two contending governments within the state was the *de jure* government; *Pacific States Co.* v. *Oregon*,[2] where the Court refused to pass upon the question whether in adopting the initiative and referendum, a state ceased to be republican in form. In both instances the Court was of the opinion that the questions presented were not justiciable but rather political and properly belonging to the Legislative Department, and, therefore, refused to assume jurisdiction. Then there are cited and explained by the author other cases arising under the Reconstruction Acts; the status of Indian tribes; treaties with foreign powers; and the relation of the United States with foreign countries, particularly in reference to the declaration and termination of hostilities. In making this review the author is able to answer the first of two questions propounded by him in his study, to wit: What are the consequences that result from such decisions? His answer is that the Court refuses to assume jurisdiction. As this is axiomatic it is submitted that so elaborate a demonstration is hardly necessary.

The remainder of the study is devoted to answering his second question, which is: What gives rise to the utilization of the concept? Fortunately for the reader the question is reduced to simple terms by the inquiry as to what causes the jurist to place a particular problem in the category of political questions? It is with trepidation that the author gives his answer for, indeed,

[1] Luther v. Borden, 7 How. 1 (U. S. 1848).

[2] Pacific States Co. v. Oregon, 223 U. S. 118, 32 Sup. Ct. 224 (1912).

the answer will reveal the important discoveries to be made. The motives of the Court are to be found! To the author it is not enough that the doctrine of separation of powers clearly explains the Court's decision; it is not enough that in their nature these political questions must, in their final decision, lie with the electorate; it is not enough that there are no rules conferring jurisdiction upon the Court. These theories are discarded as unrealistic, false, and doctrinaire. The real reasons, argues the author, for the Court's establishing political questions as a category, are expediency, social or economic policy, and in some instances a realization that a decision would not be enforced by the Executive or recognized by the states. In *Luther* v. *Borden*,[3] Dorr, with his rebellion, had caused enough rumpus; and wise discretion required that further disputes should be determined by the legislature rather than the judiciary. In brief, there are times when expediency requires the Court to accept as final the determination of the political departments that black is white. Those who recall the unanimous decision of our Supreme Court in the *Schechter* case,[4] and who appreciate how easy it might have been on the ground of expediency for the Court to refuse jurisdiction, would hesitate to accept the conclusions of the author.

The "discoveries" made in this study were made about a decade ago by Professor Maurice Finkelstein. His article appeared in the Harvard Law Review,[5] under the title of "Judicial Self-Limitation." A scholarly reply to this article appeared in a later issue of the Harvard Law Review,[6] written by Mr. Melville F. Weston. It is unfortunate that the author, having included in his study a bibliography of about seventy-five writers, has omitted Professor Finkelstein's article, although he has included Mr. Weston's reply thereto.

WILLIAM TAPLEY.*

SCIENTIFIC TAX REDUCTION. By Howe P. Cochran. New York: Funk & Wagnalls Company, 1937, pp. i, 757.

It is not surprising that in the past year an unusual number of able and interesting books have been presented to the public as an aid to an enlightened discussion of specific tax laws or of the general aching problem of taxation. After twenty-four years of experience with the Federal Income Tax law, twenty-one years of administering a Federal Estate Tax law, and seven years of playing hide-and-go-seek with a Federal Gift Tax law, the taxpayer at last is confronted with a book that he can read as he runs. The author of *Scientific Tax Reduction* is a born story teller and the art of telling stories is, like literature, as old as the human race. *Scientific Tax Reduction* reads like a

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[3] See note 1, *supra*.

[4] Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 Sup. Ct. 837 (1935).

[5] Finkelstein, *Judicial Self-Limitation* (1924) 37 HARV. L. REV. 338.

[6] Weston, *Political Question* (1925) 38 HARV. L. REV. 296.

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