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***Supreme Court and Supreme Law*, edited by Edmund Cahn (1954)**

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BOOK REVIEWS

SUPREME COURT AND SUPREME LAW, edited by Edmund Cahn, Indiana University Press, Bloomington, 1954. Pp. 259, \$4.00.

This collection of essays purports to take stock of the American Institution of Judicial Review after approximately 150 years. Certainly no excuse is necessary for such an undertaking, but it would be interesting to know more than the foreword divulges about the occasion for this particular collaboration. Professor Cahn is presumably responsible for bringing the authors together in the book, but at least part of their performance appears to have been put on before an audience with the editor as an informal master of ceremonies. Thus, each of them first delivers himself of a relatively short paper on which the others comment extemporaneously. Following this, however, come longer papers on which no comment is reported—leaving the reader to guess that the latter were separately prepared, perhaps after it had been decided to commit the joint enterprise to print.

At all events there is much more substance in the final chapters (IV through VII) than in the earlier ones—excepting only chapter one which evidences both careful preparation and seasoned analysis. Professor Cahn calls this chapter "An American Contribution," by which he means the *flexibility* imparted to the theory of the written constitution by both judicial review and provision for formal amendment. The point is well-taken: We are too often led to believe that our adaptation of the written constitution itself established the "type" by completing a scheme already implicit in earlier models. Bryce, no doubt, contributed to this over-simplification by emphasizing the relative rigidity of the American Constitution as contrasted with the British. Cahn's observations are more sagacious.

Chapter II on "Conditions and Scope of Constitutional Review" includes essays by Ralph Bischoff, John P. Frank, and Paul Freund. Freund is a little too brief and tentative in his comments to afford basis for review. Bischoff and Frank do a competent job of marshalling limited case materials but their conclusions are more respectable than profound.

Chapter III is devoted to "The Process of Constitutional Construction" and includes another essay by Bischoff plus two by Willard Hurst and Charles Curtis respectively. Hurst's observations of the "Role of History" stem from a consideration of three cases, in two of which the historical meaning of terms at the time the document was framed dictated their judicial interpretation; in the other interpretation was dictated by developments post-dating the drafting of the language. This provides a usefully concrete setting for a theoretical controversy familiar to all students of constitutional law, and Hurst treads these hot sands with unblistered feet. In short, he concludes that "The underlying, inarticulate policy seems sound. If the idea of a document of superior legal authority is to have meaning, terms which have a precise history-filled content to those who draft and adopt the document must be held to that precise meaning. On the other hand, when the document speaks in generic terms to outline substantive power and to announce standards for the use of power, 'we must never forget it is a constitution we are expounding'."

Charles Curtis follows this eminently judicious performance with an essay on "The Role of the Constitutional Text" which is thoroughly provocative and not a little ambiguous. "Men intend," says Curtis, "words mean." And this observation useful as it undoubtedly is for some purposes, leads him to what seems to be a sweeping

denial that the meaning of the constitutional text should ever be fixed by reference to historical considerations.

In other words he starts by condemning intent because of the subjectivism thereby imported into the process of judicial construction; he winds up condemning it because of its nominalism (*i.e.*, its tendency to fix meaning by reference to the denotation rather than the connotation of words). And in so shifting the ground of his condemnation he necessarily incurs the deep suspicion of common law lawyers in particular, where he might have had their hearty approval.

Mr. Bischoff's second and last appearance in the volume is on "The Role of Judicial Precedents." It is well done. In fact, one gets the impression here that he is in full command of all the factors entering into his problem—a high compliment considering that *stare decisis* has the widest conceptual range of all the institutional doctrines of our law.

All of the longer articles are good. To be sure, one suspects Mr. Frank has more enthusiasm for civil liberties than he has understanding of, or sympathy for, the limitations of law as a distinctive method of social control. Hence his reaction to the fact that the Court has not championed personal liberty in times of stress has the familiar flavor of liberal disillusionment. But Frank *does* indulge some useful speculation on possible indirect effects of judicial review. Thus, it is likely, he thinks, that the power to declare acts of congress unconstitutional may have contributed to the relative boldness of the Court in dealing with state legislation.

Professor Freund's "Review and Federalism" steers a more sober course: Despite his recognition that "Today national power over the economy is scarcely challenged," he is not at all sure that federalism is, so to speak, "through." At least there is some restraint in the necessity of securing authentication of the congressional power claimed from the judicial branch. Beyond this, the contribution of the Court has been to safeguard a national commercial interest against local barriers, and Freund shows little patience with Mr. Justice Black's preference for Congress rather than the Court as the guardian of the Commerce clause.

In discussing "Review and the Distribution of National Powers" Professor Hurst is again a judicious critic. On the whole, he discounts any notion of judicial responsibility for the shaping of basic institutional relationships within the government: "The Court decisions which so radically reduced the effective scope of the 14th amendment form a unique chapter in the story of judicial influence on the separation of powers within the national government" (page 158), and (page 166) "the future of judicial review as a creative force in our public policy lies more in a jealous safeguarding of the position of the individual in the application of law than in surveillance of general policy making."

Finally, there is Mr. Curtis again; this time to intrigue us on the subject, "Review and Majority Rule." His theme here is that judges watch the election returns. But, instead of resting on this somewhat hackneyed conclusion he gives us a mild touch of Rousseau in his analysis of the significance of this innocent habit. Thus, Mr. Dooley's prosaic observation of what judges do in fact is turned into something the judges ought to do in fulfillment of a democratic faith. The Constitution speaks an immanent law of "we the people" even as the judges elaborate the meaning of the ostensibly technical language of the document. Take due process of law for example: "When they put it into the fifth amendment its meaning was as fixed and definite as the common law could make a phrase. . . . It meant a procedural process which could be easily ascertained from almost any law book. We turned the legal phrase into common speech and raised its meaning into the similitude of justice itself." Well, at least let us hope

not. *Volkrech* is a mirage which we (being blessed by a fair correspondence between our authoritative institutions and our "national consciousness") certainly do not have to conjure up. And this means that there is no reason why we should not recognize *juristenrecht* as the reality behind our constitutional law.

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FREEDOM, JUSTICE, EQUALITY: Report on Civil Liberties, January, 1951—June, 1953; American Civil Liberties Union, New York. Pp. 158, \$50.

Published by ". . . the only permanent nation-wide non-partisan body devoted solely and comprehensively to . . . help[ing] create . . . universal and eternal vigilance . . ." in the assertion and defense of civil liberties, the contents of this Report are worthy of note, whether or not one agrees with A.C.L.U.'s self-characterization.

Following the sequence of its title, the first section of the Report is denominated "Freedom of Expression," and examines many instances of censorship and boycott, by lay and religious groups, in all major communications media—newspapers, books, magazines, radio, motion pictures and television. The incidents include the picketing of the movie "Limelight," radio and television "blacklisting" practices, and municipal and church attempts to prevent the performance of various plays and the screening of several motion pictures. The section also reports on security and loyalty measures throughout the United States, including accounts of the several United States Supreme Court cases concerning loyalty oaths. It examines academic freedom in public schools as well as universities. The report on religion and conscience which concludes the section deals with problems of conscientious objectors under the Selective Service System, and the various programs for religious instruction in public schools.

The second major division of the Report is entitled "Justice and Due Process." It provides a picture of the problems arising, especially in criminal cases, from the inadequacy of certain judicial processes, improper police practices, and wiretapping. With regard primarily to the national government, this section describes at length the issues generated by legislative committee and executive department procedures, particularly in loyalty and security investigations.

"Equality Before the Law" is the final substantive grouping made by the Report, and includes cases which have involved discrimination based on race, creed and national origin. Also discussed within this section are problems which have grown from what the Union terms the struggle for internal democracy in labor organizations.

The three major divisions of the Report contain accounts of several local matters, including an indictment against a Seattle writer whose pamphlet on marriage instruction had been deemed obscene by the grand jury, and the controversy which arose in Seattle concerning Section 315 of the Federal Communications Act, when KING-TV cancelled a speech by U. S. Senator Joseph McCarthy, in support of former U. S. Senator Harry Cain, on grounds of possible libel.

Detailed information on A.C.L.U. structure, personnel, membership, and finances appear in the last seventeen pages of the booklet. Explaining the period covered by the Report, the Foreword states that the executive staff of the Union has been so busy with cases during the past three years that it has been unable to issue what would have been the 31st, 32nd, and 33rd Annual Reports: since, as the Foreword further states, "Litigation continues to be the Union's chief field of activity . . .," the phenomenon of growth in membership and activity of A.C.L.U. in the past three years

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