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Constitutional Law: A Textbook, by Bernard Schwartz

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BOOK REVIEW

CONSTITUTIONAL LAW, Bernard Schwartz. The Macmillan Company. 1972. Pp. XVII, 424. \$11.95.

This is a short textbook on constitutional law written by a professor at New York University Law School. In a little more than 300 pages of text the author deals with federal judicial power, congressional power, presidential power, federal-state relations, criminal procedure, and civil liberties and rights. The author does a good job of summarizing this vast quantity of frequently nebulous material. In addition, the book contains an excellent analytical index to the Constitution of some 40 pages which enables one to identify quickly all clauses which touch upon a particular subject.

The author makes it clear in his preface that this book has been written with his constitutional law students in mind. In other words, it is intended primarily as a teaching supplement and not a research tool. This is an important point. Many texts by law professors are fine works of scholarship but are not suitable as an aid to the student in his efforts to understand the course material. The reasons for the inadequacy vary; sometimes the writer is incapable of putting his thoughts down in a style which is easily understandable by the beginner, sometimes the presentation is just too lengthy, sometimes the writer does not have the capacity for avoiding detailed and distracting treatment of relatively unimportant legal issues. The student does not need a scholarly treatise; he needs something to give the course structure. The book for the student is a special purpose work, and many texts do not meet the need. I believe that Professor Schwartz' book succeeds in this respect.

I think there is a great need for this kind of book in legal education. There are very few of them. By contrast, there are hundreds of casebooks. I would guess that the reason there are few student texts and so many casebooks is that the text is much harder to write than the casebook. The casebook poses questions; the text has to furnish some answers. Obviously there is great danger of oversimplification in the short textbook, and Professor Schwartz' text is guilty of this in many places. But this inherent weakness in the brief textual treatment of legal subject matter does not outweigh the value of this type of work as a guide to the student in organizing the material in the course.

Books of this kind offer an overview to the student of a vast

and frequently complex body of law. If such books are used as a substitute for reading cases and thinking about problems, they become destructive of the purposes of legal education. We all know that such books are frequently used in an improper manner. However, better that they read such books than the commercial outlines that are available. My main point is that such texts for students are valuable educational supplements if properly used, and legal education would be better off if there were a lot more of them of good quality.

As useful as this book is, I have a number of criticisms. Professor Schwartz deals with judicial review of the constitutionality of legislative and executive acts as if it were a self-evident truth in our governmental system. The student reading his treatment of the subject would not get the flavor of the controversy which surrounds this governmental principle. It is a remarkable political fact that a majority of nine men appointed for life can second-guess national and local elected officials on the meaning of such phrases as "due process," "equal protection of the laws," "establishment of religion," and get away with it. There can be no doubt that it is an elitist element in an otherwise largely democratic system. It would seem that such a body would deem it obligatory to act with great restraint in exercising its extraordinary power, but it frequently does not. The student would get no feeling for these issues from reading Professor Schwartz' treatment.

Nor is the subject of war and emergency powers of the federal government adequately dealt with. There is no discussion of the legality of the internment of the Japanese in World War II, for example. The deployment of troops by the President without congressional authorization either as commander in chief or as an instrument of foreign policy is given summary treatment. The constitutional justification for the actions of Presidents Johnson and Nixon with respect to the Vietnam war is not discussed at all; this is a surprising omission for a book which for the most part is quite current.

The book deals at some length with the development of substantive due process as the means by which the judiciary imposed its classical economic views. There is now in process of development, however, the new substantive due process, liberal style, which has to do with the constitutional right of privacy and the like; this is not discussed. In addition, I found the treatment of the relationship of the treaty-making power to constitutional constraints upon

the powers of the federal government to be oversimplified even considering the limited objectives of this book. The demise of the "privilege" idea in relation to government employment and other government benefits is inadequately treated. The restraints imposed upon police interrogation are glossed over. Finally the problems inherent in the reapportionment issue are largely ignored.

I am sure that this book is going to be picked at by law teachers and others for its oversimplification and its omissions, and indeed, for its occasional errors, as I have just done. Anyone who writes a text of this kind on any legal subject has to expect that, and constitutional law is probably the most difficult subject to treat in this brief form because of its intrinsic imprecision. Nevertheless, if students use this book in a constructive manner, their education will be enriched; if they use it to avoid the hard work of reading cases and thinking about them, it's not the fault of the book.

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