

Constitutional Law: Cases and materials, by EDWARD L. BARRETT, JR. Professor of Law, University of California, Berkeley; PAUL W. BRUTON, Professor of Law, University of Pennsylvania, and JOHN HONNOLD, Professor of Law, University of Pennsylvania; 2nd ed. (The Foundation Press, Inc., Brooklyn, 1963), pp. i-xxxviii, 1-1339. Price not stated.

With few exceptions Australian casebooks have been singularly uninspiring and serve practically no purpose other than to provide students with extracts from the law reports in substitution for the reports themselves. This American book, however, a second edition from a competent team of joint authors, sets a standard which intending authors of legal source books in this country should endeavour to attain. The material which it contains either to supplement the cases recorded or to explain their significance has been selected with skill and the result is one of the most adequate single contributions to the study of constitutional law which this reviewer has yet seen.

To most lawyers outside the United States, at first sight, the major division of material seems unusual. The book comprises two parts; the first entitled 'Allocation of Governmental Power' and the second called 'Limitation of Governmental Power'. A casebook on Australian constitutional law would allot relatively little space to the limitations on governmental power, but in the American book the materials in Part 2 occupy over 700 of its some 1300 pages. The explanation is simple enough. Fresh from their struggles for independence, the early Americans were most anxious to write guarantees of private rights into their Constitution. The 1787 text contains several but the Bill of Rights was added in 1791. Further guarantees were added after the Civil War, including the Fourteenth Amendment adopted in 1868, which prevents the States from depriving any person of life, liberty or property without due process of law or from denying persons the equal protection of the laws. The materials set out in Part 2 leave the reader in no doubt as to the tremendous volume of legal resources which have been employed both in seeking to invoke the constitutional guarantees and in circumventing them.

Part 1 on allocation of governmental power has a valuable first chapter on the role of the federal judiciary. It includes the usual run of cases commencing with *Marbury v. Madison*¹ and grafts on to them a variety of observations. For example, there is a description of the organization and jurisdiction of the Supreme Court and a note on the resistance of State courts to Supreme Court orders. There is also an examination of the control by the Supreme Court of its own case load. Many informative facts emerge, for example, in 1957 the Supreme Court's dockets contained only thirteen original cases as against 1995 appeals providing thereby a striking comparison with our own High Court. One also learns that the Court's obligatory jurisdiction now accounts for only about 9 *per cent.* of all its appeal business. The reader is also led into the mysteries of the jurisdictional statement, petitions for certiorari and other procedural delicacies without a great deal of pain.

Chapter 2 covers the scope of national legislative power. It introduces the subject by the publication of excerpts from the proceedings of the Constitutional Convention of 1787 which the authors, somewhat optimistically, hope will afford an intimate glimpse into the process of deliberation and compromise which produced the Constitution. Again notes come to the aid of the reader invoking consideration of some of the finer points of American constitutional law, for example, the unresolved question of whether there is an implied and resulting power over external affairs, that is to say, a power which does not depend upon the affirmative grants of the Constitution.

The treatment of the federal commerce power itself spreads over two sections; one dealing with early developments in the sources of national power and the other entitled 'National Control of the Economy'. The arrangement demonstrates how, through political and flexible judicial exploitation, the federal power has been sufficient ultimately to enable

¹ (1803) 1 Cranch 137, 2 L. Ed. 60.

the Government of the United States to grapple with national economic and social problems without the assistance of specific powers similar to some of those found in section 51 of the Commonwealth Constitution, such as the conciliation and arbitration power. Again the materials are punctuated with interesting observations and notes, for example, during the litigation of the *Schechter Poultry* case,² in which the Supreme Court invalidated the National Industrial Recovery Act of 1933, 1,600 injunctions were issued in the lower federal courts against carrying out Acts of Congress and business flooded to the doors of district judges known to be hostile to the legislation. There is also speculation as to how far the commerce power will sustain Attorney-General Robert F. Kennedy's campaign to combat organized crime.

Apart from the commerce power the national power to wage war is probably the most important of the Congressional powers. The power to wage war is one to wage war effectively and during the Second World War it was possible for Congress to undertake a comprehensive control of the economy. The cases in this book deal mainly with the constitutional problems which arises with respect to the war power when hostilities have ceased.

On the debit side, arising out of the classification of materials, if Part 1 is intended to delineate the nature and scope of national legislative powers it partly fails. The lesser federal powers become lost among the commerce cases and one cannot help feeling that by their arrangement of materials in this way the authors perhaps imposed an unnecessary handicap on themselves.

The authors enjoy more success in their handling of State power in Chapters 3 and 4 where they are not of course concerned to undertake a complete survey of State legislative competence, but only to embark on an exposition of that part of State governmental power relating to the federal structure of the Constitution. The various sections of Chapter 3 deal with the regulation of transportation; production and trade, and the interstate movement of persons. Chapter 4 is confined to an examination of State taxation power.

Chapter 5, the final chapter in Part 1, handles inter-governmental relationships. It is principally concerned with the Supreme Court's doctrinal approach to the power of the United States and the States to tax each other. This, too, is an area of law where the Supreme Court has shifted its attitude. A broad view of inter-governmental immunity which dominated the decisions for many years ended with *Helvering v. Gerhardt* in 1938.³ On the question of the immunity of government instrumentalities the authors make a rather unfortunate reference to experience in Australia. The note after setting out section 114 of the Constitution refers to *D'Emden v. Pedder*⁴ alone of all the Australian cases on implied

² *Schechter Poultry Corp. v. United States* (1935) 295 U.S. 495, 55 S.Ct. 837, 79 L. Ed. 1570.

³ (1938) 304 U.S. 405, 58 S.Ct. 969, 82 L. Ed. 1427.

⁴ (1904) 1 C.L.R. 91.

immunities. The *Engineers' Case*⁵ is not mentioned, the only further observation of the authors being that since 1904 there has been a narrowing of the immunity doctrine and now signs of expansion. So often books from the northern hemisphere make lazy comparisons which injure rather than foster a proper appreciation of the Australian constitutional system.

Part 2 makes a notable contribution to an appreciation of the nature and difficulty of the issues to which constitutional guarantees readily give rise. The authors have chosen and handled their materials with admirable skill, particularly those relating to the Fifth and Fourteenth Amendments.

Chapter 6 examines the Bill of Rights and the Civil War amendments and sets out the preliminary material relevant to the basic problems pursued in greater detail in the later chapters.

Chapter 7, entitled 'Criminal Justice and Fair Procedure', contains most of the authorities relating to the Bill of Rights, held in *Barron v. Baltimore*⁶ not to apply to State action. The purpose of most of the first ten amendments is to safeguard the broad principles of natural justice against violation by the national government. For example, the amendments restrict the right of search, inhibit deprivation of life, liberty or property without due process of law and reasonable bail.

Chapter 8, which deals with the right to equality, reveals the high quality of the book. In this chapter the reader will find the major decisions on racial segregation and related problems up until April 1963. The changed impact of the Fourteenth Amendment becomes apparent as the historic struggle, vividly portrayed in the book, occurs in the United States to establish effective equality as between the white and coloured citizens of the United States. The cases are amplified and made more meaningful by a series of notes. Thus, in respect of the basic decision in *Brown v. Board of Education of Topeka*⁷ in 1955, when the Supreme Court declared that as a matter of fundamental principle racial discrimination in public education was unconstitutional, the authors refer to the intrinsically difficult problems in implementing the decision. At the time of the *Brown* case segregation in the schools was required by law in seventeen States and the District of Columbia affecting over 8,000,000 white and 2,500,000 Negro children. The authors record that following *Cooper v. Aaron*⁸ in 1958, the School Board of Little Rock made arrangements to lease its idle school properties to the Little Rock Private School Corporation which operated a school for white students with the aid of private donations. In this way the casebook has been able to portray the living law and the social and economic as well as the legal implications of the judicial efforts of Chief Justice Warren's court.

⁵ *The Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd. and others* (1920) 28 C.L.R. 129.

⁶ *Barron v. The Mayor and City Council of Baltimore* (1833) 7 Pet. 243, 8 L. Ed. 672.

⁷ (1955) 349 U.S. 294, 75 S.Ct. 753, 99 L. Ed. 1083.

⁸ (1958) 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5.

Chapter 9 analyses the limitations of governmental power to interfere with business and economic relationships. It is more confined than its title suggests dealing only with two constitutional issues, namely, the contracts clause of Article 1, prohibiting the States from impairing the obligations of contract, and the effects of the Fourteenth Amendment. At first the contracts clause gained prominence as a protection for public grants of land and later for its protection of private credits during the depression of the 1930's when State legislatures enacted moratorium laws. As the authors note, however, other constitutional provisions have usurped the role of the contracts clause.

The Fourteenth Amendment, so far as it guarantees due process and equal protection for all persons, did not at first have a marked impact on State laws. The early history of the clause is ably dealt with in section 2 of the Chapter and its subsequent flowering and employment to invalidate many State laws dealing with social and economic matters until 1937 is equally well expounded. In 1937 the change in membership of the Supreme Court following President Roosevelt's threat to pack the Court, brought about a completely changed attitude, as the cases set out in the book show. For example, in 1949 the Court upheld in *Railway Express Agency v. New York*⁹ a State law prohibiting advertising on the side of vehicles except advertisements about the business in which the vehicle was engaged. A terse note observes, however, that State courts have refused to go as far as the Supreme Court in abandoning judicial control of economic legislation.

The final chapter, Chapter 10, deals with the basic concepts of freedom of speech and association, guaranteed so far as national action is concerned by the First Amendment, and subsequently held by the Supreme Court in *Fiske v. Kansas*¹⁰ in 1927 and *De Jonge v. Oregon*¹¹ in 1937 to be guaranteed as against the States by the Fourteenth Amendment. An apposite collection of cases and materials is included. Some of the most topical are those which deal with the Congressional enquiries into Un-American activities and cases such as *Barenblatt v. United States*¹² in 1959 serve not only to highlight the issues involved but also the fundamental division of view within the Supreme Court, with Warren C.J., Black J. and Douglas J. prominent in dissent. In *Barenblatt's* case the majority held that Congress did not violate the First Amendment in requiring the petitioner to answer questions relating to membership of the Communist Party. On the minority view it was a case of exposure for the sake of exposure. The last words on the struggle of balancing self-preservation against political freedom have yet to be written, if they ever will be, but the book records *Gibson v. Florida Legislative Investigation Committee*¹³ last year, in which Mr Justice Goldberg, appointed to the Court in 1962, delivered the majority opinion of the Court holding

⁹ (1949) 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533.

¹⁰ (1927) 274 U.S. 380, 47 S.Ct. 655, 71 L. Ed. 1108.

¹¹ (1937) 299 U.S. 353, 57 S.Ct. 255, 81 L. Ed. 278.

¹² (1959) 360 U.S. 109, 79 S.Ct. 1081, 3 L.Ed. 2d 1115.

¹³ (1963) 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed. 2d 929.

that the National Association for the Advancement of Coloured People could not be required by the State law to produce its membership lists. In the opinion of the Court, the evidence failed to disclose any substantial relationship between the organization and subversive activities and the law therefore violated the Fourteenth Amendment.

The last two sections of Chapter 10 are given over to freedom in education and religion and the impact of war and emergency on the constitutional guarantees.

Appended to the book is a chart showing the composition of the Supreme Court since its inception, thus providing a key to the relationship between changes in the personnel and doctrines of the court.

It is a pleasure to commend this book to students of constitutional law.

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