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BOOKS REVIEWED

Constitutionalism in America: Origin and Evolution of Its Fundamental Ideas. By Arthur E. Sutherland. New York: Blaisdell Publishing Co. 1965. Pp. xv, 618. \$9.50.

Of the writing of books on American constitutional law there is no end. Comes now the Bussey Professor of Law at Harvard University with a volume aimed, not at the specialist in the delphic pronouncements of the United States Supreme Court, but at a "trade" or college student audience. The book, in my judgment, has two principal merits: First, Professor Sutherland has dipped deeply into English history to show the background of the American idea of constitutional government; he begins with the Magna Carta and covers rapidly but well the period from 1215 to 1791 (when the first ten amendments were added to the basic charter); second, and of more importance, he sets forth a discussion of five constitutional principles, "those that are so general, so abiding, as to be parts of 'the very idea of a government of limited powers set up by a free people.'"¹ These include (a) freedom of "an organized majority" to control its political and economic fate; (b) a "righteous and just" government; (c) "equality of all men before government"; (d) the fragmentation of governmental power; and (e) "government by written compact."² The history I leave aside for purposes of this review, stating only that the one-third of *Constitutionalism in America* devoted to it provides in one place a valuable exposition of the main threads of development leading to the convening of fifty-five men in Philadelphia that summer of 1787.

As for the remainder, I am of two minds. On the one hand, the book is a solid, tightly written delineation of almost eighteen decades of American constitutional history. Nothing here is particularly new and startling, but withal it is a useful book for the college student in constitutional law. In this, it seems to be better for pedagogical purposes than are the several casebooks used in college classes. As one who labors at the impossible task of teaching constitutional law to law students, I would far rather they came to law school with a background of study in a book such as *Constitutionalism in America* than with backgrounds of study in casebooks not dissimilar from those used in law school. It is an odd fact, but nonetheless true, that, as law schools (that is, law professors) are tending more and more to bring "non-legal" data to the study of public law and with some even trying (as Dean Erwin Griswold has suggested should be done) to discern the basic principles of the several legal categories and to cease proliferating the minutiae of individual decisions, some of their colleagues on political science faculties are becoming increasingly "legalistic." The result is a duplication of effort. If political science faculties are going to continue to teach constitutional law with law school materials (often not of the latest vintage), then, perhaps, in the interests of efficiency and parsimony of effort, we in the law schools should require constitutional law as a prerequisite to entry into law school and should cease offering it. However, the alternative of a course using a book such as that under review would seem to be preferable, even though it is, of course, true that it is the instructor, not the materials, that is important in the pedagogical process. I would even go so far as to say that the time has come to prescribe a limited part of the pre-legal curriculum, and that constitutional history should be part of it. In

1. Sutherland, *Constitutionalism in America: Origin and Evolution of Its Fundamental Ideas* 1 (1965). (Footnote omitted.)

2. *Id.* at 2-7.

any event, I would like to have students come to law school and to constitutional law classes after having studied such a book as *Constitutionalism in America*.

That is the plus side—and it is enough to recommend the book. But there are drawbacks, in my judgment, serious shortcomings which tend to diminish a thoughtful and carefully written effort. Let me briefly mention five which are particularly evident:

1. *The failure to discuss decisional areas outside of the judiciary.* Professor Sutherland appears to believe that the Supreme Court is the sole interpreter of any significance of the Constitution. But is this so? Is it not true that the twentieth century has seen the development of what Roscoe Pound once called "executive hegemony" and what others have called the "administrative state"? The locus of governmental power in many respects has shifted to the executive branch. It is simply not valid any longer to call the Court the sole maker of constitutional law. Through the exercise of sheer political power, the President at times also makes it. For that matter, Congress does too—in, for example, such statutes as the Sherman Act, the Employment Act of 1946, and the Civil Rights Act of 1964. (This, of course, does not mean that all statutes are of that dignity. Some of them are, and the three mentioned seem to fit into that order of importance.) As lawyers, we have a conceit that constitutional law is the province of courts and the legal profession only; in the immortal words of *Porgy and Bess*, "It ain't necessarily so."

2. *The failure to delineate the fundamental change in government which came with the "constitutional revolution" of the 1930's.* In brief, this is the rise of the "Positive State," with a government which has expressly accepted the affirmative responsibility for the economic well-being of the American people. The development was long in the making, reaching what is perhaps its apex or, at least, a high plateau in the 1960's in the socio-economic programs of the federal government. The Employment Act of 1946 is the basic charter of the Positive State, which makes that statute as important as any constitutional amendment.

3. *The failure to distinguish between the "formal" and the "practical" or "living" Constitution.* Lord Bryce made a distinction between a "legal" and a "practical" sovereign. Any sophisticated study of constitutional law today must make a similar distinction—between what the document sets out as formal authority and what goes on in fact by way of effective control. It is the "living" or "practical" Constitution which has developed so as to make the Presidency the center of power. To mention but one bit of evidence: The effective control of the war-making power today is in the hands of the President, despite what the Constitution says. Furthermore, the Supreme Court, which has much power but which surely is a greatly overrated (and over-studied) organ, has nothing or very little to say on this most portentous of all questions.

4. *The failure to go much beyond the four corners of the judicial opinion for insight into American constitutionalism.* Little is said about the social and economic conditions in the nation, conditions which certainly have had much bearing on political developments and on the drives, urges and imperatives which lead to constitutional decisions. Furthermore, there is nothing in the book about the problem of decision-making. The tides of controversy which recently have swirled around the Supreme Court concerning its methodology are ignored. The problems of choice by judges get no mention. On the other side of the spectrum, nothing is set forth with any precision concerning the societal impact of Court decisions. Professor Sutherland seems to proceed on the assumption—unmerited, in my judgment, or at least unproved—that the Court has had great and perhaps pre-eminent influence in the manner in which American government has developed. Little is in fact known about the actual

impact of Court decisions, although such astute political scientists as Robert Dahl and Robert McCloskey have concluded that the Court throughout American history has never long been out of phase with the dominant opinions in the American polity. If they are correct, then Professor Sutherland's tacit assumption is at least open to question. In short, the ferment in social science thought known as "behavioralism" is not present in the book, although an adequate understanding of the American Constitution and the Supreme Court can hardly be attained without it.

5. *The failure to mention emergent problems of constitutionalism.* These include: (a) the increasingly insistent need to think in terms of a larger-than-national resolution of many of the problems facing the American people today. We live in an era when "interdependence" is a truism and when a not insignificant amount of the stuff of sovereignty has slipped out of American hands. Consider, in this respect, the position of the dollar in international monetary matters today; it is kept viable through co-operative efforts of European Central bankers. This, in late 1965, posed an acute question of supranationalism. Supranationalism (or multinationalism) is not unknown, even under the U.S. Constitution—but Professor Sutherland does not mention it; (b) the "evolving mix" between public and private enterprise. A new government/business interface is in process of creation, one in which the lines between what purportedly is public and what is private are increasingly being blurred. This creates more problems for American constitutionalism, as Dean E. V. Rostow and Professor Charles Reich, among others, have noted, but, again, the book under review does not reach that point; (c) the rise of decentralized centers of power, of which the corporation is particularly noteworthy. Professor Sutherland mentions "private governments" in passing, but that is hardly enough. The group basis of American society has not yet been assimilated into constitutional theory, although many (but not all) of the so-called civil rights and civil liberties decisions of the Supreme Court in recent decades really relate to members of a group and an individual's rights as a member of that group vis-à-vis members of other groups. This is true in matters of statutory interpretation (as in labor law) as well as constitutional interpretation. Robert Horn's *Groups and the Constitution* (1956) effectively makes the point.

In conclusion, while I would like to have students come to law school with at least the insights and learning that this book can give them, I hope that it could be supplemented by study into some of the five areas set forth above. It would be too much to hope that all five would be part of the intellectual equipment of the neophyte.

ARTHUR SELWYN MILLER*

The English Bar: A Priesthood. By Barnett Hollander. London: Bowes and Bowes. 1964. Pp. 70. \$3.75.

The profession of law is the only aristocratic element which can be amalgamated without violence with the natural elements of democracy, and which can be advantageously and permanently combined with them.—*de Tocqueville*.¹

The law has lost its aristocratic status in this country. Too many laymen, and even lawyers, regard it not as a profession, but simply as a business, and, too often, a

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1. 1 de Tocqueville, *Democracy in America* 281 (rev. ed. 1900).

slightly unsavory one at that. It is the point of this small book to show that in England this degradation of the Bar has not taken place; that there, at least, the Bar (which under the English definition excludes solicitors) is still an aristocracy in the proper sense of that word—ruled by the wise, or as the author puts it, a "priesthood." I must admit that I did not need much convincing of the barrister's sacerdotal character. At any rate, the author did convince me.

Following the analogy, however, it is apparently a priesthood such as we find in the religious orders: one in which the members are expected to take a vow of poverty.² The minimum fee that a Q.C. (Queen's Counsel) is supposed to charge for a consultation (with a junior and the solicitor) is £3. 5s. 6d, something under ten dollars. A "junior" barrister, *i.e.*, one who has not taken "silk" (become a Q.C.), gets even less.³ As a result of their meager fees,⁴ it is not surprising that solicitors, who are permitted to practice before County Courts but not the higher courts, frequently have barristers handle even these cases, because it is less costly than wasting their own more valuable time.⁵ It is also not surprising that the average number leaving the Bar is greater than the number starting practice,⁶ and that, accordingly, proposals for a fusion, such as we have in this country, of the office and court branches of the profession have been made.⁷

Something will probably have to be done to improve the financial status of the barristers, but that is not Mr. Hollander's concern,⁸ and probably he is right, since the religious orders have managed to survive in spite of economic considerations, because of the value of the ideal which gives them life.

It is the ideal of a single-minded devotion to justice⁹ which vivifies this ancient elite from the Inns of Court. The symbol of the infusing elan of the English Bar is its "etiquette," the quaint Anglicism for the expected (and, hence, obligatory) mode of conduct of a barrister. Mr. Hollander gives us a number of examples of the behavior required. One that especially appeals to me is the obligation of a barrister "except in special circumstances" to accept any brief, *i.e.*, take any case.¹⁰ In interpretation of the rule, Mr. Hollander quotes Lord Shawcross. His words merit this lengthy quote:

I have recently heard it said that certain members of the Bar in one of Her Majesty's Colonies refused to accept a brief to defend an African accused of offences of a quasi-political nature against public order. The suggestion is that those barristers made excuses and declined to act, their true reason being that they thought that their popularity or reputation might be detrimentally affected by appearing for the defence in such a case. For the prosecution they might appear, but not for the defence.

If this report were true, it would disclose a wholly deplorable departure from the great traditions of our law and one which, if substantiated, both the Attorney-General and the Bar Council would have to deal [with] in the severest possible way.

2. Compare Daumier's comment to Plate 20 of his work, *Gens de Justice* (Tudor ed. 1959): "Mon cher monsieur, il m'est absolument impossible de plaider votre affaire . . . il vous manque les pièces les plus importantes . . . (à part) les pièces de cent sous!"

3. Hollander, *The English Bar: A Priesthood* 50 (1964).

4. See also *id.* at 67.

5. *Id.* at 66.

6. *Id.* at 52.

7. See *id.* at 66.

8. He opposes fusion. *Id.* at 70.

9. See *id.* at 26.

10. Compare ABA, *Canons of Judicial Ethics*, Canon 31.

Among laymen on both sides of politics there are some foolish and shortsighted enough to think that a barrister may and should pick and choose the cases in which he is prepared to appear.

It would be well if those people remembered how the present rule—that a barrister must accept a brief on behalf of any client who wishes to retain him to appear before any court in which he holds himself out to practise—was finally established. It arose in 1792 over the prosecution of Tom Paine for publishing the second part of the *Rights of Man*. The great advocate, Erskine, who accepted the retainer to defend Paine, and was deprived of his office as Attorney-General to the Prince of Wales for doing so, said—and said truly—in a famous speech “From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end.”¹¹

This is typically British pianissimo, but it should be extremely moving to anyone interested in justice. American lawyers from Colonel Black, who defended the Haymarket anarchists, to Attorney General Flowers, who opposed the Ku Klux Klan, know the risk of representing unpopular clients or opposing popular ones. The British rule merits serious consideration here not only as a means of insuring that unpopular clients get the representation to which even they are entitled, but also as a defense from the public indignation to which lawyers are sometimes subject when they are high-minded enough to perform their obligations to justice in this regard.

The special character of this special class of law men is illustrated in a number of ways: the Lord Chancellor who never appointed a member of his own political party to a judgeship,¹² opposing counsel's obligation to take absent counsel's place¹³ and state the facts and law that he must overcome,¹⁴ the absence of a time limit on the length of oral arguments on appeal¹⁵—all of these, the fact that these things are done, that these rules can prevail, prove that we are dealing with a very special breed of men. Would that we could duplicate them!

In getting across the special spirit of the British barrister, the book (as you probably have gathered from the above) gives us a great deal (especially considering its brevity) of factual information on what the practice is like. It is a kind of potpourri of “Did-you-knows?” The details range from a description of the robes worn by women Q.C.'s,¹⁶ to the language of the sentence of death,¹⁷ now (temporarily?) out of use again. The special terminology of the English Bar (e.g., “Brief,”¹⁸ “Dock Brief,”¹⁹ “Devilling,”²⁰ etc.) is explained. The collection of information is fascinating. One is tempted to play the “Did-you-know?” game. Did you know that barristers are not liable for malfeasance or nonfeasance,²¹ and a solicitor gets a defense of advice of counsel in an action by his client where he relies on

11. *Id.* at 37 n.2.

12. *Id.* at 61.

13. Engagement of counsel in another court is not grounds for adjournment. *Id.* at 44.

14. *Id.* at 53.

15. *Ibid.*

16. See *id.* at 35.

17. See *id.* at 60.

18. *Id.* at 33, 43.

19. *Id.* at 51.

20. *Ibid.*

21. See *ibid.*

the barrister's advice?²² But enough. If you are interested in English legal institutions, you will find the answer to many questions you have wondered about, and many more you have not thought of, in this book. You will also find valuable information if you have occasion to refer a matter abroad or have one referred to you.²³

The book is not only of interest to lawyers. Thus, even television producers, large consumers of things legal, may find it of value by way of technical advice. I understand that a program a few years ago depicted a partnership of barristers. Barristers, although they may share chambers, may not have partners.²⁴ But here I am playing "Did-you-know?" again.

ROBERT A. KESSLER*

West's McKinney's Forms: Business Corporation Law. By Martin Fogelman. West Publishing Co. 1965. 2 vols. Pp. lii, 1227. \$30.00.

As a result of the first general revision in almost forty years of the laws of New York affecting corporations, some work was needed to guide the practitioner through the morass of the new substantive and procedural provisions miring the field of corporate law. Whether Professor Fogelman's work or any other accomplishes a goal like that can only be based on an answer to the question: Is it practical and useful for the practising attorney?

The two volumes of the form book examined permit an affirmative answer. These appear to have been organized with such a purpose in mind. The topics are set out in the order in which a practitioner might reasonably expect to encounter corporate problems. Following a general introduction consisting of discussion as to the advisability of incorporation and basic filing matters, the book continues with a logical development of subject matter—"Pre-incorporation Procedures," "Formation of Corporation," etc.

Admitted that the approach is a practical one, another question remains: How reliable is Professor Fogelman's guide?

There are all indications that a thorough and competent study has been made. Examination of "Chapter 2. Pre-Incorporation Procedures" demonstrates that the phase concerning the selection, reservation, and acquisition of the corporate name is more than adequately presented in detail. The subject matter is treated so that the newest member of the bar can proceed with confidence. Practical advice as well as pertinent references to other applicable statutes are interspersed throughout. Of particular value in this chapter is the checklist of items to be incorporated in a shareholders' agreement. The checklist concept, especially useful to the practitioner, is also used in the following chapter to emphasize the provisions which are to be set forth in the certificate of incorporation and/or the by-laws.

Consistently and throughout the two volumes, areas of corporate law have been treated with an approach that the reviewer has not elsewhere encountered under the new law. An example is the excellent exposition on dividends. A searching analysis of the source of dividends—an area of gordian complexity—is clearly presented in "Chapter 6. Dividends, Distributions, And Finance." Further, while the Business

22. *Id.* at 51, 67.

23. See, e.g., *id.* at 19.

24. *Id.* at 30, 39.

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Corporation Law revisers unfortunately decided not to collate the law regarding close corporations, the author has compiled, in Chapter 7, all the pertinent sections of the Business Corporation Law dealing with this subject, as well as other relevant statutes, *e.g.*, taxation statutes, and reorganized this material in a logical and comprehensive presentation responsive to the needs of small enterprises.

By its nature, a work of this kind is dichotomous. Regardless of the adequacy of the treatment given to the discussion of the law, the exigencies of practice demand an effective and conscientious exposition of forms. In general, scrupulous attention has been given to revising, modernizing, and creating the forms required by the new codification. An example of this careful scrutiny is evident in the "Share Option Plan for Directors . . ." Section 6:81, where consideration is also given to the federal tax statutes. And again, this attention to detail is evident in the many certificates prepared for delivery to the Department of State. In this respect, an important consideration is the fact that the Division of Corporations of the Department of State assisted in certain technical areas involved in the preparation of the forms. In addition, the comments, immediately following the forms, clearly make them more adaptable.

Professor Fogelman's logical presentation and comprehensive treatment of subject matter, his careful attention to detail, and the inclusion of practice aids, advice and functional features (such as the table of fees and taxes, the glossary of corporate terms, etc.), all point to a successful effort to provide a practice guidebook in the field of corporate law, one which is, on the whole as much geared to the practitioner with years of experience as to the recent graduate.

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