

HANDBOOK OF AMERICAN CONSTITUTIONAL LAW. By Henry Rottschaefer. St. Paul: West Publishing Company, 1939. Pp. xxv, 982.

Professor Rottschaefer has in general followed the same analysis for his text on Constitutional Law which the reviewer adopted and followed in his text on Constitutional Law published in 1936, and which has also been followed by Professor Dowling in his Casebook on Constitutional Law. Under this analysis Mr. Rottschaefer first sets forth the framework of our federal government, including separation of powers, dual form of government, and judicial supremacy; then treats the powers of the various branches of government; and finally discusses the limitations on these powers of government.

The reviewer certainly would not criticize this general arrangement. However, there are some specific problems in connection with the author's analysis which deserve a word of comment. He has an introductory chapter on the separation of powers¹ and another introductory chapter on our dual form of government,² and then he follows these two chapters with six chapters stating further the powers of Congress and (after a chapter on amendment) a chapter on the powers of the executive and a chapter on the powers of the judiciary. The materials in these chapters originally related to the doctrine of separation of powers, but at the present time they may very well be taken to relate both to separation of powers and dual form of government. However, it is hard to understand why the chapter on amendment should be sandwiched in between these other chapters. The chapter on interstate relations, of course, relates only to our dual form of government, but is correctly treated as a part of this topic. One of the chapters on the limitations on the powers of government is headed "Limitations on the Taxing Power of the States," whereas most of the other headings under this general topic refer to the protection of personal liberty. Chapters 15, 17, and 18, are discussions of the due process clause (and the equality clause); and it would seem that they should follow each other in this order, but for some reason the discussion of the contract clause is introduced as Chapter 16 to make another sandwich. Due process as a limitation on the federal taxing power is treated in connection with Chapter 7, which discusses the federal taxing power. Due process as a matter of procedure and due process as a matter of jurisdiction are not considered in connection with the chapters just referred to, which treat of due process as a matter of substance, but are treated in the last two chapters of the textbook; and then due process as a limitation on state action is treated separately from due process as a limitation on federal action. The reviewer cannot see any special reason for the analysis so far as it relates to these specific topics, but he has no criticism to make of it. So far as he would criticize the book from this standpoint, it would be because it has not sufficiently set forth the extent to which our Constitution has been made by the United States Supreme Court.

So far as the scope of the book is concerned, it treats of practically all

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1. Chapt. 3.
 2. Chapt. 4.

the topics usually treated in textbooks on Constitutional Law. The topic of sovereignty is not treated separately but given only casual consideration, although what the author does say about sovereignty shows that he has a sound viewpoint with reference to the matter. Many would agree with the slight treatment given to this topic, yet much time has been devoted to it by the United States Supreme Court cases and it is involved by other Constitutional Law topics, so that it might well have been accorded a little more extensive attention. The topic of suffrage is practically omitted, and the topic of jurisdiction of the federal courts also is omitted. Certain minor topics, or points of Constitutional Law, also have escaped the author's attention. In his discussion of the territory³ of the United States he does not discuss the power to incorporate new territory. In his discussion of aliens⁴ he does not discuss the question of whether they are entitled to a judicial tribunal when they claim United States citizenship. He does not adequately discuss the effect of war upon constitutional limitations.⁵ He does not discuss the power of Congress to overthrow a treaty by a statute.⁶ He does not discuss separately the requirement of an orderly course of procedure for due process as a matter of procedure. He does not give adequate treatment to the constitutional social control of public utilities except so far as concerns their furnishing facilities and their continuing their business⁷. He gives us no history of the evolution of the due process clause. He does not set forth the work of the Supreme Court in enlarging and modifying old constitutional limitations and creating new constitutional limitations like due process as a matter of substance.

On the whole the statements are characterized by accuracy, but there are a few little statements about which the reviewer would like to raise questions. It seems to him that where on page 5 the author speaks of the legal force of constitutions as being no greater than that of valid statutes a distinction should be made between their force over conduct under them and over the agencies of government. On page 13 he says the better opinion is that the Supreme Court did not usurp its power of judicial review. Other recent writers, like James Truslow Adams, Morris L. Ernst, Louis B. Boudin, and Edward S. Corwin, take the opposite view; yet they are not referred to. In the middle of page 45 there is evidently a typographical error in printing the word "not." In the discussion of the relation between the legislative and judiciary powers over rules of procedure (evidence omitted) on page 52 would it not be better to say that the powers are concurrent and separate, instead of making the judiciary powers subordinate to the legislative? He seems to take the view that there is no federal police power except as incidental to the regular powers of the federal government⁸. Of course, all of the powers of the federal government which are not tax powers or powers of eminent domain are police powers.

3. P. 372

4. P. 375; cf. 440.

5. P. 381.

6. P. 382.

7. P. 497.

8. Pp. 88, 453.

The interstate commerce power, for example, is a specific police power of the federal government. Evidently the topic of reciprocal immunity from taxation, beginning on page 96, was written before the latest decisions of the Supreme Court, so that there is no recognition of the fact that *Collector v. Day*⁹ has been overruled and now we have a rule of reciprocal taxation instead of reciprocal immunity from taxation. If the historical and philosophical methods had been followed more closely, the author might have been able to anticipate this result. On page 175 he correctly states that the federal taxing power may be used for federal police power purposes but not for state. But the black letter heading is confusing, and the text on page 624 is even more confusing on this point. On page 111 he says that the federal government cannot impose duties upon any officers of the state governments. This statement is questionable in the light of *dicta* as to the power of the federal government to impose duties on state courts, as in the case of a federal employer's liability act or the Volstead Act. In his discussion of the decision of *Erie v. Tompkins*,¹⁰ on page 118, he does not recognize the possibility of a federal common law in other cases than diversity of citizenship. Should not the text on page 124 be clarified by excepting foreign corporations engaged in interstate commerce who thereby have as much protection against discriminations under that clause as natural persons have under the privileges and immunities clause? It would seem the statement on page 171 as to the scope of the federal government's spending power is stated in too limited terms. His discussion of the commerce power of the federal government is more or less incoherent on the issue as to whether it is an exclusive or a concurrent power and, whether one or the other, whether it is subject to the state's police power,¹¹ because he does not recognize as a basis for his discussion the changes in the attitude of the United States Supreme Court with reference to the matter. It must be taken for granted that the Supreme Court viewpoint is that the federal government's power was a concurrent power up to the decision of *Cooley v. Board of Port Wardens*,¹² an exclusive power over matters national in scope without any rule for state police power from *Cooley v. Board of Port Wardens* to *Plumley v. Massachusetts*,¹³ but from *Plumley v. Massachusetts* to the present time subject to the state's general police power even though the federal government's power is exclusive. From page 204 on, there is a suggestion that due process does not limit federal taxation the same as it limits state action, because the federal government may tax for the general welfare. Is there any distinction? On page 208, the author takes the position that the Constitution, as made by the Supreme Court, prohibits confiscatory taxation. After the decision of *A. Magnano Co. v. Hamilton*,¹⁴ it would seem that at least there was a question about this proposition. In his discussion on page 226 of the gold

9. (U. S. 1870) 11 Wall. 113.

10. (1938) 304 U. S. 64.

11. Pp. 90, 280, 284, 320.

12. (U. S. 1851) 12 How. 299.

13. (1894) 155 U. S. 461.

14. (1934) 292 U. S. 40.

clauses in United States bonds, he does not discuss the rationale of the police power given in Justice Stone's dissenting opinion. Many think this may be the ultimate rationalization of the holding in this case, if it is adhered to. The author's rationalization of the first child labor decision would seem to confuse due process questions with commerce questions. It is submitted that the only rationalization of this decision is that it is wrong and that it already has been impliedly overruled. The statement on page 270 as to the power of Congress over foreign commerce would seem to be an understatement. The text material on the subject of unconstitutional conditions¹⁵ has very little meaning and is perhaps inaccurate. The correct view on this subject undoubtedly is that the only unconstitutional conditions which a state cannot impose on a foreign corporation not engaged in interstate commerce are those which affect either the powers of the federal government or the powers of other states. Since the *Dred Scott*¹⁶ decision confined to the Northwest Territory the power of Congress to "make all needful rules and regulations respecting the territory or other property belonging to the United States," it would seem that this is not the proper rationale for the federal government's power to acquire new territory. In the author's discussion of impairment of the obligation of contracts on page 568, he develops as exceptions to the doctrine announced in the *Dartmouth College*¹⁷ decision not only arrangements which do not constitute contracts but enactments in the exercise of an express or implied reservation of power, and he includes the police power under this implied reservation of power. But he says nothing whatever about the power of eminent domain.¹⁸ The reviewer wonders if it would not have been better to have made eminent domain and the police power, except for the franchises and rates of public utilities, two additional exceptions, (c) and (d).

On the whole, the author's approach to his subject is orthodox. His treatment of the materials which he has to examine is sometimes but not always critical. In his discussion of the separation of powers he does not rationalize the modern, growing administrative tribunals and commissions. Sometimes he gives dogmatic statements with little rationalization.¹⁹ Sometimes he gives conflicting statements in true cyclopedic style without pointing out any conflicts.²⁰ His black letter is often very disappointing. Many times it really says nothing.²¹ He makes no criticism of the rule forbidding income taxation of judicial salaries.²² He does not attack the position of the Supreme Court that the making of contracts and carrying of insurance by people in different states does not amount to interstate commerce.²³ His distinctions are not always clear-cut. What he has to say about taxa-

15. Pp. 326, 555.

16. (U. S. 1856) 19 How. 393.

17. (U. S. 1819) 4 Wheat. 518.

18. Pp. 568, 571, 603.

19. Pp. 242, 289.

20. Pp. 87-88.

21. Pp. 238, 369, 446, 741, 748, 756, 842.

22. P. 203.

23. P. 235.

tion for regulation on page 176 seems to be forgotten when he discusses the same subject on page 624. He does not criticize the decisions of state courts in construing constitutional amendments as to compensation for property "taken, damaged, or destroyed for public use."²⁴

On the other hand, he takes a great many very fine positions. His position that the Supreme Court has now made an income tax an indirect tax²⁵ is a courageous and careful analysis of the work of the Supreme Court. His discussion of the police power of the states and of the federal government (which he unnecessarily calls regulatory powers) is very fine. And his statement as to the creative activity of the judiciary and its weighing of values is a fine expression of the judicial process. His rationalization of the topics of price regulation²⁶ and of jurisdiction for taxation²⁷ is especially good. He also discusses interestingly the police power of a state over foreign contracts made by a citizen of the state as one of the parties to the contract.²⁸

On the whole the reviewer would say that the author in his treatment of constitutional limitations has not sufficiently brought out the fact that originally the purpose of the Constitution was to protect personal liberty against government, both the national and state, whereas now the purpose of the Constitution is more and more coming to be the protection of personal liberty of individuals by the government against economic and other external social control by corporations and other groups; that he has not sufficiently set forth the history of the great constitutional doctrines; and that he has not given the Supreme Court sufficient credit for making our United States Constitution.

The English of the book is clear and understandable, but it is sometimes dull and never sparkling; however, the book in general is a good Hornbook and is incomparably better than its predecessor, which, for example, talked about the "pursuit of happiness" as "one of the most comprehensive [guaranties] to be found in the Constitution."

HUGH E. WILLIS.†

THE NEW FEDERAL RULES OF CIVIL PROCEDURE, including Rules of the United States Supreme Court, Annotated and Digested to date; Rules of Federal Criminal Appellate Procedure, Annotated and Digested to date with approved Forms by the United States Supreme Court. By Byron F. Babbitt. St. Louis: Thomas Law Book Company, 1938. Pp. 362.

As frankly indicated by the author in his introduction, this work is intended as a desk book for the practicing lawyer and not as an elaborate and detailed treatment of federal procedure. The single volume is presented in three parts. The first part consists of the new rules of federal civil proce-

24. P. 718.

25. P. 190.

26. P. 482.

27. P. 688.

28. P. 540.

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