AMERICAN CONSTITUTIONAL LAW

BY

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WITH A FOREWORD BY

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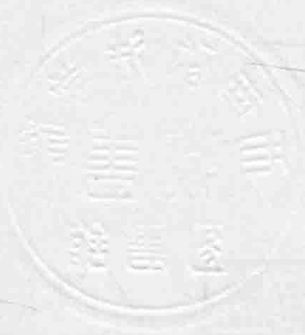

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For

BRIAN MICHAEL

FOREWORD

When an American begins his study of the British constitution he may find some difficulty in understanding it. He is told that the Sovereign is divorced from all politics, but when he reads the Queen's Speech at the opening of Parliament it seems to him that she is advocating legislation which is to be enacted in the coming session. Again, he finds that the House of Lords still has great powers of obstruction, but that these are not exercised even when there is a Labour government in power. Finally, although he is told that the Rule of Law, protection against arbitrary arrest, freedom of speech and of the press, are essential elements in the English polity, he is also informed that they receive no constitutional protection and that they can be abolished by Parliament at any time. It is only after further study that he begins to realize that law in the books and law in action may be two entirely different things.

An Englishman who seeks to understand the American system of government is in even greater danger of committing a similar error, for he is inclined to think that all that he needs to do is to read the Constitution of 1789 and its twenty-two amendments, but, unfortunately for him, he will soon find out that this will land him in a morass of misunderstanding and error. It ought to be obvious that a document which contains less than 8000 words can hardly be more than an outline. This is not to decry the Constitution, for if its authors had attempted to create a detailed governmental structure it would not have survived the stresses of the century and a half during which the thirteen States along the Atlantic coast stretched across the continent, and the population increased fifty-fold. To understand this Constitution it is, therefore, necessary to study its history, and, in particular, its development in the decisions of the Supreme Court, because, as the late Mr Justice Jackson has said, the American system is, in large part, 'government by lawsuit'.

It is not an easy task to explain to an Englishman, who must always think unconsciously in terms of Parliamentary supremacy, a system which is so legalistic in character, but Dr Schwartz has, I believe, accomplished this with outstanding success in the present book. He has been helped by two circumstances. In the first place, he has a thorough and practical knowledge of the British form of government, so that he is able to draw

illuminating contrasts between the two systems, and to emphasize important points of difference which might otherwise escape notice. Secondly, his training as a lawyer has enabled him to explain technical legal points without confusing either himself or the reader.

The book is divided into two parts. The first deals with the basic principles of the Constitution, while the second is concerned with certain modern developments which are of peculiar interest today. This division is a convenient one, because a foreign reader can hardly understand any of the problems now at issue unless he has an accurate picture of the Constitution as a whole.

Perhaps the most important part of this picture is the devotion which is accorded to the Constitution by the people whom it governs. The well-meaning foreigner, who frequently suggests that sympathy should be shown to the Americans because they are forced to live under an outmoded system of government, may well be surprised to find that the overwhelming majority of them are convinced that it requires little or no amendment. It is not only in Fourth of July orations that the Constitution is described as 'God-given'. It is true, of course, that a system of government based on a division of powers, and on a series of checks and balances, may be less rapid in its actions than is a unitary system in which supreme power is placed in the hands of a small number of men, but this has never been regarded by Americans as a valid criticism. They think that the speed of governmental action can be bought at too high a price, and that it is safer, on some occasions, to be able to rely on efficient brakes.

Dr Schwartz does not accept the view that the Constitution is above criticism, and in a number of instances he suggests possible amendments, although he recognizes that they stand little chance of adoption. But he does make it clear that many of the strictures which have been directed against the Constitution are unfounded, and that where there have been failures of government these have usually been due to the men who work the machine rather than to the machine itself.

The English reader will be interested to find that some of the problems which are now being considered in the United States are also of immediate importance in Great Britain. The first is concerned with the maintenance of our civil liberties at a time of 'cold war'. To what extent, for example, should freedom of speech be accorded to those who advocate the forcible overthrow of the existing system of government? The second is concerned with the modern development of the administrative process. In this field

Dr Schwartz is especially expert, for he has written books on the British, French, and American systems: it is not surprising, therefore, to find that his chapter on 'Administrative Law', with its analysis of the American Administrative Procedure Act, 1946, contains much that will be of value to English students.

It is an honour to have been asked to write a foreword to a book which will undoubtedly take a permanent place in the literature of political science.

A. L. GOODHART

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PREFACE

The American who spends some time outside of the United States is struck immediately by the widespread interest displayed in the institutions of his country. Such interest appears, indeed, to be at an all-time high, now that the United States has come to play such a significant role in world affairs. Throughout the world, there is the keenest desire to learn more about the country which, for good or ill, has emerged from its isolationist state to a position of international leadership.

Essential to an understanding of the United States is some knowledge of the American system of constitutional law. For it is no exaggeration to say that the Federal Constitution is the fulcrum upon which American institutions turn. The interpretation of that instrument by the courts has, without a doubt, played a significant part in American history—and this is true not only of legal history in the narrow sense. It may be going too far to say that the history of the United States could be written in terms of leading Supreme Court decisions. But it is certainly true that a study of American history that did not consider them would be a distorted one.

It is the purpose of this book to present the workings of the American system of constitutional law to a British audience, with emphasis upon the significant changes that have occurred therein in recent years. There are, in the author's experience, few fields where comparative analysis can be more fruitful than in that of public law. This is especially true when the law compared is based upon common-law traditions and techniques similar to that upon which the law of Britain is grounded. Nor should the use of the comparative method lead to the feeling that the author's primary purpose is to place the British system in an unfavourable light in comparison with its American counterpart. It is not intended to set up the American law as a yardstick to which the British practice must conform nor to judge the House of Lords and other English courts by appealing to the superior moral jurisdiction of the United States Supreme Court.

The author cannot let this opportunity go by without expressing his gratitude, as an alumnus of the University, at having this volume published by the Cambridge University Press. Publication of his work under the University seal is for him a fitting expression of the respect and

affection engendered in him by two years' residence in what is, without a doubt, the most beautiful university he has encountered.

The Master of University College should be paid public thanks for his kindness in consenting to write a foreword, which so greatly increases the value of the book for the British reader. Thanks are also due to the *Canadian Bar Review* and the *Modern Law Review* for permission to use material that originally appeared in their pages.

BERNARD SCHWARTZ

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CONTENTS

PART ONE

THE STRUCTURE

Chapter I

THE BASES OF THE AMERICAN SYSTEM

English writers on constitutional law, reads a well-known passage by A. V. Dicey, have 'good reason to envy professors who belong to countries, such as...the United States, endowed with constitutions of which the terms are to be found in printed documents, known to all citizens and accessible to every man who is able to read. Whatever may be the advantages of a so-called "unwritten" constitution, its existence imposes special difficulties on teachers bound to expound its provisions. Anyone will see that this is so who compares for a moment the position of writers, such as Kent or Story, who commented on the constitution of America, with the situation of any person who undertakes to give instruction in the constitutional law of England.'[1] American jurists, asserts Dicey, who have written upon constitutional law, have known precisely what was the subject of their work. 'Their task as commentators of the constitution was in kind exactly similar to the task of commenting on any other branch of American jurisprudence. The American lawyer has to ascertain the meaning of the articles of the constitution in the same way in which he tries to elicit the meaning of any other enactment.... The task, in short, which lay before the great American commentators was the explanation of a definite legal document in accordance with the received canons of legal interpretation.'[2]

It is, however, a mistake to assume that constitutional law in a country governed by a written organic instrument, such as the American Constitution, involves solely an application of the legal canons of construction. It may be, as the United States Supreme Court stated almost a generation ago, that 'When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.'[3]

But this picture of American constitutional law as only a mechanical process akin to the judicial construction of a contract or a will, though true in some cases, is at variance with reality in the majority of instances. The American Constitution does not purport to prescribe its provisions in minute detail. And, perhaps even more important, it is not a self-executing

1 Dicey, *Law of the Constitution* (9th ed. 1939), 4. 2 *Ibid.* 5.
3 *United States* v. *Butler*, 297 U.S. 1, 62 (1936).

document. The *ought* laid down by the Constituent Assembly of 1787 must run the gauntlet of judicial interpretation before it attains the practical status of an *is*. This is, in a sense, true of all legislation; but it is especially true of a constitution whose terms must, of necessity, be less specific and detailed than those of an ordinary law. A constitution is, in practice, what the courts say it is. The American Constitution, like other organic instruments, would lose much of its practical efficacy if its terms were to be read by the courts in a destructive spirit.

American constitutional law is more than mere exegesis of a fundamental text. The organic instrument lays down only the framework of the governmental system in vigour in the United States. That is, indeed, its great virtue, which has enabled it to serve successfully as a charter of government for over a century and a half. 'The Constitution is a written instrument. As such its meaning does not alter', an American judge has declared. Yet, 'Being a grant of powers to a government, its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers conferred'.[1]

The text of the American Constitution may, as Dicey insisted, furnish a convenient basis for a commentator upon American constitutional law, which is lacking to his English counterpart. Yet one who looks only to the language of the organic instrument will obtain a partial and distorted picture of the working of the American constitutional system. The words of the fundamental law have remained essentially what they were in 1787. But the American governmental structure has changed so drastically in the past century and a half, especially so far as the extent and manner of exercise of State authority are concerned, that it would scarcely be recognizable to the Founding Fathers.[2] Having just engaged in a revolution against what they conceived to be excessive governmental authority, their primary concern was to ensure against the possibility of similar excesses in the constitutional structure they were establishing. Above all, they tried to prevent a concentration of political power such as that which they felt, rightly or wrongly, existed in the person of George III. 'The example of such unlimited authority that must have most impressed the forefathers', eloquently asserted Mr Justice Jackson in 1952, 'was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.'[3]

1 Brewer, J., in *South Carolina* v. *United States*, 199 U.S. 437, 448 (1905).

2 As the members of the Convention that drew up the Constitution in 1787 are usually called in America.

3 *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 641 (1952).

It was their fear of inordinate governmental authority that led the draftsmen of the American Constitution to emphasize the division of political power as its dominant characteristic. Power was, first of all, parcelled out between the nation and the individual States. The central Government could exercise only the authority expressly delegated to it in the Constitution. All powers not conferred upon it were explicitly reserved to the Governments of the respective States. And, within the Federal Government itself, distribution of authority was also the order of the day. The doctrine of the separation of powers became the corner-stone of the political structure created in 1787. The three departments of government were to be separate and distinct. They were to be independent of one another and each could exercise only the type of authority—legislative, executive, or judicial—delegated to it by the Constitution. 'In the government of this commonwealth', reads a State constitution which served as a model to the men of 1787, 'the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.'[1]

By such consistent division of authority, the framers of the American Constitution sought to ensure against the type of government which they felt had induced the Revolution of 1776. The power reserved to the States was to check the over-aggrandizement of that vested in the nation. And the separation of powers within the Federal Government was to curb a concentration of authority in the executive such as that which, in their view, had taken place under George III.

The structure of limited government created in conformity to the text of the Constitution adopted at the end of the eighteenth century is, however, wholly unlike that which exists in the United States of the middle of the twentieth century. The balance between State and nation, upon which the proper working of a federal system depends, has become basically altered. The authority of the central Government has been constantly increasing at the expense of that retained by the Governments of the States. Intervention by Washington in matters that were formerly deemed to be purely within local competence has, indeed, become so frequent that one wonders whether the States are not doomed to become mere vestigial survivals of a formerly flourishing federal system.

Within the national Government, also, the equilibrium between the three departments has become disturbed. The power of the American executive has been growing incessantly at the expense of the legislative

1 Constitution of Massachusetts, 1780, Part 1, Art. xxx.

and judicial branches. This shift in the constitutional centre of gravity[1] in the United States has drastically altered the separation of powers upon which the American Constitution was, as we have seen, grounded. It has made the presidential office the most powerful elective position in the world. In actual fact, indeed, the President of the United States today possesses far more authority than would have appeared possible to most Anglo-American contemporaries of King George III.

Important though the above development has been, it is, of course, not reflected in the text of the American Constitution. It remains basically what it was when it was originally framed in 1787. An analysis of American constitutional law limited to the language of the organic instrument would thus scarcely serve to give an accurate account. It is in this sense that Dicey's assertion of the difference between the English constitutional lawyer and his counterpart in the United States is not a precise one. The latter may, it is true, be furnished with a convenient framework for his inquiries by the terms of his written Constitution. It must, however, be emphasized that that document today furnishes only the essential framework of the American governmental structure.

The term 'constitutional law', states a leading English treatise on the subject, 'means the rules which regulate the structure of the principal organs of government and their relationship to each other, and determine their principal functions'.[2] And, it should be stated parenthetically, the constitutional lawyer is concerned primarily with those rules which are legal in nature, i.e. those which are recognized and enforced by the courts, rather than with what, since Dicey, have been termed 'conventions of the constitution'. In seeking out the rules of his constitutional law, the task of the American jurist is not as different from that of his English confrère as is commonly supposed. 'The true law of the Constitution', states Dicey, 'is in short to be gathered from the sources whence we collect the law of England in respect to any other topic',[3] with emphasis upon the reported decisions of the law courts. But these are also the sources to which the American constitutional lawyer looks. Developments since the drafting of his Constitution have been so great that most questions of constitutional law can no more be solved today by reference to its text alone than can questions of real property law solely by reliance upon the first chapter of the Statute of Westminster II. American constitutional law, like that in Britain, is essentially derived from the decisions of the courts. Those decisions, of course, are based upon the provisions of the American organic

1 The term used in Allen, *Law and Orders* (1945), 274.
2 Wade and Phillips, *Constitutional Law* (4th ed. 1950), 2.
3 Dicey, *op. cit.* 34.