THE CONSTITUTION

and what it means today

By Edward S. Corwin

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TO

Adelaide and Bill

PREFACE

The first edition of this book appeared in 1920. It contained a little over one half as many pages and about one quarter as many words of commentation as the present edition. Since neither cases nor other authorities were cited, there was, naturally, no table of cases, whereas the table in this edition has nearly 650 entries; and there was no index. But compared even with the immediately preceding seventh edition, the present edition is considerably more comprehensive both as to variety of subjects treated and as to materials used. The method of treatment which was adopted several editions back is, however, still adhered to. I have endeavored, especially in connection with the more important topics, to accompany explanation of currently prevailing doctrine and practice with a brief summing up of the historical development thereof. The serviceability of history to make the present more understandable has been remarked upon by writers from the time of Aristotle.

During the past decade the Constitution has been subjected to the impact of two major crises. The first of these was the necessity which confronted it in 1937 of affording the New Deal lodgment within the constitutional fold. As was pointed out in the previous edition of this work, the official guardians of the fundamental law met this necessity by returning to Chief Justice Marshall's sweeping conception of national supremacy, thereby discarding the century-old theory that the reserved powers of the States comprised an independent limitation on national power. In this connection the reader's attention is specially directed to the case of United States *v.* Darby, decided in 1941.

The second great crisis was our participation in World War II and the events leading up to it. In wartime, however, interpretation of the Constitution falls much more

largely to the political branches of the government than to the judiciary. In this edition, accordingly, considerable attention has been given to executive and legislative acts illustrative of the war power and suggestive of its effect both on private rights and constitutional structure. At the same time several other topics which recent events have brought into prominence have been accorded greater space than hitherto, such as Nationality, Conscription, Executive Agreements, and so on.

At the close of my preface to the previous edition of this work I wrote: "Constitutional law has always a central interest to guard. Today it appears to be that of organized labor." This was said apropos of the Court's virtual repeal of the Sherman Act so far as the activities of labor unions are concerned and of its bringing picketing under the rubric "liberty." Pursuing this same course of decision further, the Court has today replaced the older doctrine of *laissez faire* of which business management was the beneficiary with one equally challenging to public authority of which organized labor is the beneficiary. As Justice Jackson put the matter in a recent dissenting opinion: "With this decision [in Hunt *v.* Crumboch, decided June 18 last] the labor movement has come to full circle. . . . This Court now sustains the claim of a union to the right to deny participation in the economic world to an employer simply because the union dislikes him. This Court permits to employees the same arbitrary dominance over the economic sphere which they control that labor so long, so bitterly and so rightly asserted should belong to no man." These are harsh words for a Justice of the Supreme Court to address to his brethren, but that is far from saying that the majority of the Court on that occasion did not deserve the reproach.

Certain other features of the Court's work in constitutional interpretation in the interval since the publica-

tion of the seventh edition invite a more mixed appraisal. The Court has continued to champion racial and religious minorities. Its efforts in the latter behalf, usually evoked by the activities of Jehovah's Witnesses, have often divided the Justices sharply, have produced numerous right-about-fronts on their part, and have frequently failed to justify an obvious departure from common sense and common law.

For its defense, on the other hand, of the principles of fair trial, fair play, and equality before the law in behalf especially of persons of color, little but praise should be awarded. In its holdings in such cases as Screws *v.* United States, decided May 7 last, and Steele *v.* Louisville and Nashville R. Co., decided December 18, 1944, the Court appears in its best light and its great powers find their real vindication in terms of democratic ideals. In view of what was said above about the Court's inordinate pro-labor leaning it is only just to add that in the last mentioned of the above cases it was held that a collective bargaining agreement against negro firemen was violative of the Railway Labor Act. The application which the case makes of the principle of "equal protection of the laws" as a canon of interpretation of statutes may have an important future.

I feel that in closing this Preface I should pay some attention to current criticism of the Court by the Bar, particularly as I have at hand an excellent example of it in a recent address by the President of the American Bar Association, Mr. David A. Simmons. Referring at one point to the fact that the late Chief Justice Edward Douglass White, in the course of his twenty-seven years on the Supreme Court, wrote seven hundred majority opinions, ten concurring opinions, and only twenty-three dissents, Mr. Simmons continues: "He was a great judge who recognized that the first principle in the supremacy of law was certainty.

"He found it necessary to dissent in less than 5 per cent of his opinions. Lawyers could advise their clients as to applicable rules of law with reasonable certainty.

"Today we do not find the law in this happy situation. In 1943 in the Supreme Court of the United States dissents were filed against 44 per cent of the opinions of the court; in 1944 there were dissenting opinions in 63 per cent of the cases, and during the last term of the court there were almost as many dissents or qualified concurrences as there were majority opinions.

"Is the applicable rule of law really so difficult to ascertain? Or is each judge seeking to extract from the atmosphere about him, or from his own personal sense of justice—social or otherwise—his own notion of equity, which he writes into the law?" (*New York Times*, December 18, 1945.)

A partial answer to this criticism is rather obvious. "The applicable rule of law" *is* frequently difficult to ascertain, that is to say, the rule that can be applied with the best prospect of serving the public interest and hence of surviving. Furthermore, some special consideration is undoubtedly due the present Court especially in the field of constitutional interpretation, in view of the fact that it has been constrained within the recent past to abandon certain guiding principles that were no longer "applicable," and has not yet been able in every instance to take its bearings from the new point of view. Even so, Mr. Simmons and those who share his views are not thus completely answered. Whether a contribution to the development of the law or not, it is certainly none to public morale when the Supreme Court of the United States splits seven ways for Sunday. For people are apt to argue that if the Supreme Court, a supposedly learned and dis interested body, cannot agree within the field of its special competence, how can we ever hope that capital and labor will agree, to say nothing of the nations of the

world agreeing. Inasmuch as the country has to live with the Court, the demonstration by it that it can live with itself fairly comfortably must always be reassuring and edifying.

I wish to express my appreciation to Gladys Fornell of the staff of the Princeton University Press for her careful and intelligent editing of my copy and to Dorothy Pardee and Jack Peltason for their invaluable assistance in compiling the Table of Cases and the Index.

EDWARD S. CORWIN

Princeton University
January 1, 1946

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THE PREAMBLE

WE, THE PEOPLE OF THE UNITED STATES, IN ORDER TO FORM A MORE PERFECT UNION, ESTABLISH JUSTICE, INSURE DOMESTIC TRANQUILLITY, PROVIDE FOR THE COMMON DEFENSE, PROMOTE THE GENERAL WELFARE, AND SECURE THE BLESSINGS OF LIBERTY TO OURSELVES AND OUR POSTERITY, DO ORDAIN AND ESTABLISH THIS CONSTITUTION FOR THE UNITED STATES OF AMERICA

THE Preamble, strictly speaking, is not a part of the Constitution, but "walks before" it. By itself alone it can afford no basis for a claim either of governmental power or of private right.[1] It serves, nevertheless, two very important ends: first, it indicates the source from which the Constitution comes, from which it derives its claim to obedience, namely, the people of the United States; secondly, it states the great objects which the Constitution and the Government established by it are expected to promote: national unity, justice, peace at home and abroad, liberty, and the general welfare.

"We, the People"

"We, the people of the United States," in other words, We, the citizens of the United States, whether voters or non-voters.[2] In theory the former represent and speak for the latter; actually from the very beginning of our na-

[1] Jacobson *v.* Mass. 197 U.S. 11 (1905).

[2] "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty." C. J. Taney, in Dred Scott *v.* Sanford, 19 How. at p. 404 (1857). On the relationship between citizenship and voting, see C. J. Chase in Minor *v.* Happerset, 21 Wall. 162 (1874).

tional history, the constant tendency has been to extend the voting privilege more and more widely, until today, with the establishment of woman's suffrage, by the addition of the Nineteenth Amendment to the Constitution (see p. 209), the terms voter and citizen have become practically interchangeable as applied to the adult American.

"Do ordain and establish," not *did* ordain and establish. As a *document* the Constitution came from the generation of 1787; as a *law* it derives its force and effect from the present generation of American citizens, and hence should be interpreted in the light of present conditions and with a view to meeting present problems.[3]

The term "United States" is used in the Constitution in various senses (see pp. 137 and 173). In the Preamble it signifies, as was just implied, the States which compose the Union, and whose voting citizens directly or indirectly choose the government at Washington and participate in amending the Constitution.[4]

The Framework of Government

Articles I, II, and III set up the framework of the National Government in accordance with the doctrine of the Separation of Powers, which teaches that there are three, and only three, functions of government, the "legislative," the "executive" and the "judicial," and that these three functions should be exercised by distinct bodies of men in order to prevent an undue concentration of power. Latterly the importance of this doctrine as a working principle of government under the Constitution has been much diminished by the growth of Presidential leadership in legislation, by the increasing resort by Congress to the practice of delegating what amounts to legislative power to the President and other administrative agencies, and by the mergence in the latter of all

[3] See the words of Chief Justice Marshall, quoted on pages 65-66.

[4] The most comprehensive discussion of this subject is that by counsel and the Court in Downes *v.* Bidwell, the chief of the famous Insular Cases of 1901. See 182 U.S. 244.

three powers of government, according to earlier definitions thereof. (See pp. 108-110.)[5]

ARTICLE I

Article I defines the legislative powers of the United States, which it vests in Congress.

SECTION 1

Kinds of Law under the Constitution

¶ All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

This seems to mean that no other branch of the Government except Congress may make laws; but as a matter of fact, by Article VI, ¶2, treaties which are made "under the authority of the United States" have for some purposes the force of laws, and the same is true of "executive agreements" which are entered into by the President by virtue of his diplomatic powers, and do not transgress the Constitution, acts of Congress, or treaties.[1] Also, of course, judicial decisions make law since later decisions may be, by the principle of *stare decisis*, based upon them. Indeed, the Supreme Court, by its decisions interpreting the Constitution, constantly alters the practical effect and application thereof. As Woodrow Wilson put it, the Supreme Court is "a kind of Constitutional Convention in continuous session." Likewise, regulations laid down by the President, heads of departments, or ad-

[5] So broad a principle as the doctrine of the Separation of Powers has naturally received at times rather conflicting interpretations, occasionally from the same judges. Cf. in this connection C. J. Taft's opinion for the Court in *Ex parte* Grossman 267 U.S. at pp. 119-120 (1925), with the same Justice's opinion in Myers *v.* U.S., 272 U.S. at p. 116 (1926).

[1] B. Altman & Co. *v.* U.S., 224 U.S. 583 (1912); United States *v.* Belmont, 301 U.S. 324 (1937); United States *v.* Pink, 315 U.S. 203 (1942).

ministrative bodies, like the Interstate Commerce Commission, the Securities and Exchange Commission, and so on, are laws and will be treated by the courts as such when they are made in the exercise of authority validly "delegated" by Congress.

SECTION II

The House of Representatives

¶1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

"Electors" are voters. The right here conferred is extended by Amendment XVII to the choice of Senators. While the enjoyment of this right is confined by these provisions to persons who are able to meet the requirements prescribed by the States for voting, provided these do not transgress the Constitution (e.g. Amendments XV and XIX), yet the right itself comes, not from the States, but from the Constitution, and so is a "privilege and immunity" of national citizenship, about the exercise of which Congress may throw the protection of its legislation and which, under Section I of the Fourteenth Amendment, no State may "abridge."[1] Is the limitation of the right to vote to persons who have paid a poll tax such an abridgment because of its restrictive operation on the right to vote for members of Congress? Some people contend that it is, but in the single case challenging the validity of the poll tax requirement the Court unanimously sustained it as a constitutional qualification for voting in State elections, a holding which logically settles the question of the requirement's validity for voting in Congressional elections.[2] (Cf. p. 138).

[1] *Ex parte* Yarbrough, 110 U.S. 651 (1884); United States *v.* Classic, 313 U.S. 299 (1941).

[2] Breedlove *v.* Suttles, 302 U.S. 277 (1937). The opponents of the poll tax make a good deal of a dictum by J. Jackson in his concurring opinion

¶2. No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

It was early established in the case of Henry Clay, who was elected to the Senate before he was thirty years of age, that it is sufficient if a Senator possesses the qualifications of that office when he takes his seat; and the corresponding rule has always been applied to Representatives as well.

An "inhabitant" is a resident. Custom alone has established the rule that a Representative must be a resident of the *district* from which he is chosen.

¶3. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of *New Hampshire* shall be entitled to choose three, *Massachusetts* eight, *Rhode Island and Providence Plantations* one, *Connecticut* five, *New York* six, *New Jersey* four, *Pennsylvania* eight, *Delaware* one, *Maryland* six, *Virginia*

in Edwards *v.* Calif., 314 U.S. at p. 185 (1941). They are also apt to contend that voting in a Congressional election is a "federal function" the performance of which a State may not tax, but even conceding the "function" theory, the Constitution still confines it in the case of Congressional elections to those who are entitled to vote in State elections.