

American Constitutional Development

BY CARL BRENT SWISHER

THOMAS P. STRAN PROFESSOR OF POLITICAL SCIENCE
THE JOHNS HOPKINS UNIVERSITY

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BOSTON • NEW YORK • CHICAGO • DALLAS • ATLANTA • SAN FRANCISCO

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EDITOR'S INTRODUCTION

CONSTITUTIONALISM has played a dominant rôle in the United States. It has affected public affairs both for better and for worse, at some junctures restraining mere momentary and dangerous impulses and at others standing in the way of mature judgment. However, although its significance throughout our life as a nation will not be disputed, comprehensive histories of American constitutional development, covering the whole ground within reasonable compass, have been wanting. This book provides such a survey. But Professor Swisher has not merely filled an hiatus. In fact, that contribution may seem relatively small when other merits are envisioned. His blueprints show the skill of a master architect and also an originality that has given to the rebuilt edifice a better design and more satisfying dimensions.

He writes both with authority and, unlike some specialists, with rare insight and penetration. Already his books and articles have brought him a high reputation in the field that has commanded his interest since undergraduate days. At the same time they reflect more than technical competence: above all, perhaps, a realization that law is an "end product," shaped by the interplay of social forces and constantly being reshaped in compliance with the dynamic needs of society. Respect for tradition does not crowd out breadth of view, freshness of judgment, or the vigor of an inquisitive mind. From early days — under the influence of a great teacher, the late Russell M. Story — he broke free from the formalism of the Pharisees and, peering behind the law and the prophets, searched for the springs of action, the causative factors. His first book, which dealt with the California constitutional convention of 1878-1879, was concerned mainly with motives and political techniques. His biographies of Justice Field and Chief Justice Taney show keen awareness of the complexities that go into the framing of judicial opinions. Practical acquaintance with problems of administration at Washington and service for two years as special assistant to the Attorney General confirmed his realistic attitude.

Realism here manifests itself in various ways. Constitutional problems are viewed, not in any narrow legalistic sense, but in relation to concrete and shifting circumstance. Law appears as the creature of its environment. Judges, whose opinions modify or make law,

respond to a like control. They come to the bench with a formed social outlook or at least tendencies toward it, and often interpret the law in the light of personal philosophy. That human frailty Professor Swisher exposes in his analysis of judicial opinions. But he does not overemphasize it or assume that judges are abnormally biased. Nor does he look askance at tradition and precedent. If today means more to him than yesterday, he does not imply that the past, even the distant past, should be ignored or neglected. He sets great store by experience. He believes that, in spite of the hazards of navigation which lie ahead, our constitutional heritage will help us in charting a course to some safe harbor.

A unique feature of this book is its expansion, like a river, from remote sources to the vast delta and gulf of our own time — generations ago, a trickling stream; now, a mighty flood. This feature may be illustrated by remarks which Sir John Seeley made sixty years ago. He felt that the interest of English history should deepen steadily to the close. "Yet our popular histories scarcely seem to think so. . . . English history, as it is popularly related, not only has no distinct end, but leaves off in such a gradual manner, growing feebler and feebler, duller and duller, towards the close, that one might suppose that England, instead of steadily growing in strength, had been for a century or two dying of mere old age." Professor Swisher does not leave off in a gradual manner. The fifteenth of thirty-nine chapters carries us through the period of Reconstruction. Approximately half of the book is devoted to the present century. Interest centers in the problems of our own time. Yet we are reminded here, as in the pages of William Stubbs, that the roots of the present are buried deep in the past and that there is a certain continuity in the majestic movement of politics.

Several authorities in constitutional law have read parts of Professor Swisher's manuscript and have commented on its quality with enthusiasm. The book deserves high tribute. In addition to being praised by the experts, it will be widely read. Within and without our college gates it may well become the chief medium through which Americans will familiarize themselves with the growth of the Constitution.

EDWARD MCCHESENEY SAIT

POMONA COLLEGE

PREFACE

FOR THE CONVENIENCE of readers, a statement of the scope and purpose of this volume has been incorporated in the Introduction which immediately precedes the first chapter. My task at this point, therefore, is limited to giving a brief account of the origin of the book and making grateful acknowledgment for the assistance of many people. The volume rests in part upon projects which were completed before plans for this particular study were made. They include the writing of two biographies of members of the Supreme Court, the organization of a course in American constitutional development at Columbia University in the early nineteen-thirties, and two years of fruitful experience at the Department of Justice. The present volume was outlined in 1937 and 1938 in oral and written conversations with Russell M. Story and with Edward M. Sait, the editor of the series in which this book is included.

I am indebted to the many persons who aided in shaping the book and improving it as to style, accuracy, perspective, and emphasis. Professor Sait followed the preparation of the book from beginning to end, and is entitled to high credit for its better qualities. Carl McFarland read two-thirds of the chapters and criticized them in detail. Robert E. Cushman made important suggestions for the revision of a third of the manuscript and read part of the galley proof. James Hart scanned the entire manuscript. V. O. Key, Johannes Mattern, and Malcolm Moos read substantial blocs of material. My wife, Idella Gwatin Swisher, followed the book from its inception to the final stages of publication. Many other people, including both colleagues and graduate students, read chapters or parts of chapters and aided in working out particular problems.

Still others assisted in various ways. Librarians in the Social Sciences at the Johns Hopkins University, Margaret Lough and Beatrice Blakslee, cooperated generously. Mary Ellen Brown helped with research and stenographic work. Lilly E. Lavarello did much of the typing and helped to make the index. The Social Science Research Council made an award to cover the cost of final revision and preparation of the manuscript for the press.

CARL BRENT SWISHER

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INTRODUCTION

"WE MAY WELL WONDER in view of the precedents now established," said Charles E. Hughes in 1920, "whether constitutional government as heretofore maintained in this Republic could survive another great war even victoriously waged."¹ The conflict known as the World War had ended as far as military hostilities were concerned, but was not yet officially terminated. Most of the war statutes were still in effect, many of the emergency organizations were still in operation, and the pent-up emotions of the American people, now denied their normal military outlet against the enemy, were turned against so-called radicals, nonconformists, and other unpopular groups in the United States. The war had brought invasion of the rights of property and regimentation of individual lives to a degree never previously experienced by American citizens. Much of the regimentation of property soon came to an end, and gradually, in spite of the fears of Mr. Hughes and others, the traditional safeguards of civil liberty became effective once more. The country experienced a nominal "return to normalcy." Beneath the surface, however, apart from the war and in spite of professions of Presidents Harding, Coolidge, and Hoover in favor of more business in government and less government in business, the decade of the nineteen-twenties witnessed a renewed and less spectacular extension of peacetime regulatory power over the rights of property. The business collapse of 1929 outlived protestations that the economic order was fundamentally sound and belied the prophecy that prosperity was "just around the corner." The crisis, characterized by a member of the Supreme Court as "more serious than war," culminated in the program called the New Deal. That program included regulation of property in some respects more

¹ *New York Times*, June 22, 1920.

drastic than during the earlier war period, regulation sanctioned by the Supreme Court only after the administration came near winning a struggle to "reform" the Court itself.

Before the New Deal program had moved far enough into history for unbiased appraisal, the flames of war again engulfed much of the world. Amid confusion of counsels the United States moved obliquely in the direction of the conflagration and then plunged into the white heat of conflict at the catastrophe of Pearl Harbor. The outer reaches of governmental power over life, liberty, and property speedily moved beyond those of the earlier World War and of the New Deal period. From the beginning, for those who had the time and the capacity to visualize it, the prospect of post-war confusion loomed darkly. If "constitutional government as hitherto maintained in this Republic" had faced an uncertain future a quarter of a century earlier, the earlier uncertainty now appeared infinitesimal in contrast with that upon the horizon.

The future of the American constitutional system will be vitally affected by the solution of problems created by the new war, by the international organization established, by the leadership chosen here and in other parts of the world, by the willingness of people of diverse interests to harmonize their interests for the welfare of all, and by many other factors. In a high degree the solution of the problems of the future lie in conditions of the future about which men can only speculate. Even so, the roots of the civilization and of the constitutional system of the United States go deep into the past. Established principles of law, the wellspring of custom, the tradition of meeting particular problems in particular ways, the inherited conviction that rights must be preserved, the devices of administration entrenched in statute, administrative orders, and judicial decisions — all carry over into the determination of future conduct. To a degree, therefore, the time most fitting for restudy of the past is the time when the future is most uncertain. The experiences which have molded our institutions are not devoid of current significance because they took place in times gone by, amid conditions different from those of today. Differences of conditions, indeed, add at times to their relevance in the search for perspective.

This volume represents a restatement of significant facts in American constitutional history, in the hope that a fuller knowledge and better understanding of those facts will contribute to a better understanding of the problems of today and tomorrow. It is in the main

a factual presentation, organized with such breadth of vision as could be brought to the task. Opinion and evaluation creep inevitably into the selection and organization of materials, and into the language of the writer, but the purpose has been not to indoctrinate the reader with a point of view, but to portray for readers of varying points of view the swelling tide of American constitutional development as it has flowed down through the years.

The tendency in other works in the field has been to expand accounts of the origin of the Constitution and changes which took place down until the post-Civil-War period and to deal only in brief summaries with the period thereafter extending down to the present day. Many authors have dealt fully with the relevant portions of English history and with those phases of the British constitution which crept inevitably into our constitutional system in spite of widespread antagonism to the common law and other characteristics of the mother country. They have given us detailed histories of the colonies, showing the evolution of characteristics which molded the institutions of the several states and at some point shaped the pattern of the federal system. They have drawn from the inadequate records of colonial experience accounts of early unsuccessful efforts toward the establishment of inter-colonial union, efforts which paved the way for the final achievement. Histories of the period of government under the Articles of Confederation and of the adoption of the Constitution and the establishment of the new government have been written in great detail. The constitutional controversies of the first third of the nineteenth century, especially those involving slavery and the Civil War but including others, have been presented from many angles.

Important as is the study of origins and early history, however, the development of the Constitution of the United States has not been a mere matter of origin and application during the first century of its existence. The unfolding of constitutional powers has continued at an accelerating pace. Differences which may have appeared originally to be but differences of degree have become so great as to amount to differences of kind. The Constitution of the nineteen-forties is much further from the Constitution of the eighteen-seventies than was the latter from the Constitution as originally applied.² For readers concerned with problems of today and tomorrow, the history of the Constitution must leave no gap between the much-discussed period of early decades and the happenings of the present hour. The period

² For discussion of meanings attached to the word "constitution," see chapter I.

of Theodore Roosevelt and William Howard Taft rivals or exceeds in importance that of Andrew Jackson and Martin Van Buren. The first World War had an impact upon our constitutional system no less great than that of the Civil War. The evolution of governmental controls for corporate enterprise and the judicial rationalizations of sweeping extensions of governmental power are far more important today than the earlier bitter controversies over the constitutional issues of slavery. The New Deal and the coming of the second World War shook our institutions to their very foundations. The need for discussion of recent constitutional development is no less great because the history of yesterday cannot be embalmed in settled interpretation until the perspective of tomorrow has been achieved. No implication is intended that the distant past may be ignored or neglected. Every period must be re-examined from time to time in the light of new experience. The present account of the early decades of American constitutional history is to some extent such a reinterpretation within the limits of the space allotted.³ It has seemed best, however, to expand the traditional account of the post-Civil-War period and to reserve approximately half the volume to continue the account of American constitutional development after the turn of the twentieth century.

The method of interpretation varies in terms of efforts to show, not merely the nature and scope of the Constitution in particular periods, but also the causes of changes and the manner in which they were brought about. Ample use is made of decisions of the Supreme Court,⁴ because of the fact that the judicial battle-line marks oftentimes the periphery of permitted constitutional expansion. The outlines of the Constitution are molded amid the clash of conflicting philosophies on the Court. Yet judicial decisions alone provide an inadequate basis for an understanding of constitutional development. The attitudes of the people or of politically influential groups determine whether or not attempts will be made to expand or curtail the operations of constitutional government in particular directions. The area of conflict may therefore be found oftentimes in Congress rather than in the judiciary. The negative decisions of Congress have as

³ The centuries of English history lying back of the origin of the American constitutional system must be passed with but a reference. Study of such history, recorded in the works of many authors, will amply repay the reader interested primarily in the development of the American Constitution.

⁴ For a brief discussion of source materials, see the bibliographical note at the end of this volume.

much to do with shaping the contours of the Constitution as do the enactments which it makes in new fields. The fact that Congress chartered no national bank between 1836 and the Civil-War period, for example, is of comparable importance with decisions of the Supreme Court in earlier years holding that Congress had the power to establish such a bank. Except in time of war or other major crisis, legislative steps of constitutional significance have seldom been taken without prolonged debate. Such debate and the maneuvering connected with it play a prominent part in many of the following chapters.

The executive branch of the government, like Congress and the judiciary, plays an important part, both positively and negatively, in the development of the Constitution. Such presidents as Martin Van Buren, James Buchanan, Benjamin Harrison, and Calvin Coolidge played parts which were largely negative or which sought to restrain the contemporary course of constitutional expansion. Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Woodrow Wilson, and Franklin D. Roosevelt enlarged the powers of their office and established precedents for the exercise of broader powers by their successors. In a very real sense they, like the participants in the Constitutional Convention of 1787, were makers of the Constitution.

Within the executive branch of the government a limitation upon constitutional development has come into view, particularly in recent years, apart from the personality, ability, and program of the President. It lies in the ability or inability of the administrative mechanism to perform the tasks assigned to it. Both in private industry and in government, experience has shown that huge organizations tend to bog down in bureaucratic lethargy. Even though Congress enacts measures conferring new powers, the President approves them, and the Supreme Court gives its sanction, all will be to no avail if the task prescribed is too difficult for performance or if it adds too much of a burden to an already overburdened administrative machine. Although constitutional development is not primarily a matter of administration, the development of machinery and methods is so related to it as to require periodic attention to the organization and reorganization of the government for the performance of governmental functions.

The following chapters, therefore, reproduce in various ways the interplay of administrations, the Executive, Congress, and the courts, to show the processes by which the Constitution is adapted to the