Missouri Law Review

Volume 4
Issue 3 *June 1939*

Article 5

1939

Book Reviews

Book Reviews

CONSTITUTIONAL LAW OF THE UNITED STATES. By Hugh Evander Willis, Bloomington: The Principia Press, 1936. Pp. viii, 1198.

A treatise on Constitutional Law written from a point of view that gives full and frank recognition to the fact that our Constitution is a living instrument, constantly being adapted to changing social and economic conditions and needs, and that the Justices of the United States Supreme Court whose interpretation and construction make possible this constantly changing development should share honors as constitution makers with the original framers, is a welcome addition to the serious and constructive literature in this important field of the law. The writing of any comprehensive text book upon so vast a subject as the "Constitutional Law of the United States" is necessarily a tremendous task, but to write it as a historical as well as a legal discussion of constitutional development throughout the life of the Republic is a task that few would have either the courage or the learning to undertake. That it falls short of what might have been hoped for on the basis of its prefatory indications is certainly not unexpected. To fully measure up to such hopes, and to furnish a careful lawyer's study of American constitutional law, while at the same time taking full account of the influence and importance of the many and varied social and economic forces in our constitutional development, might well require several volumes and a lifetime of effort. Many reviewers have dwelt at some length upon the faults and shortcomings of this study. The present writer prefers merely to recognize that there are imperfections and to emphasize the fact that much has been accomplished toward realizing the purposes set for this larger task.

Mr. Willis informs his readers at the outset that he expects to follow the functional approach, and, while the outline of his study is highly orthodox, there is much in his method of attack that is distinctly new in text book treatment of this subject. Economic, social, and historical forces that demand constitutional change are considered, frequently at some length, as is the case, for example, of money and banking in Chapter XII and prohibition in Chapter XXIX. Many highly controversial subjects are discussed in a way freely to express the author's point of view, as well as that of numerous other law review contributors in the field. The bibliography of this latter material constitutes a highly usable and valuable part of the finished product. Unlike many other texts in this field, very little space is devoted to quotations from Supreme Court opinions. This is not because the importance of their source is not fully recognized; quite the contrary. But the book is written primarily for lawyers, who have ready access to all opinions, and these are amply cited.

While the work is primarily a lawyer's treatise, there is much of value for

the political scientist, the economist, and the historian, all of which materials were freely tapped in its preparation. There has long been need for a greater realization and understanding of the social and economic forces that contribute to our constitutional development, and a more complete understanding on the part of many lawyers that our Constitution today is vastly more than the bare document turned out by its framers in 1787 plus twenty-one formal amendments, and that the Court does not reach into the formal document and draw forth the answers to constitutional problems by a near mechanical process as indicated, for example, by Mr. Justice Roberts' "bricklayer theory" of jurisprudence where he says the duty of the Court is "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."[1] That such a notion is, or at least recently was, widely prevalent has been amply demonstrated by the extensive discussion of constitutional issues during the past few years. If this volume, which is likely to be widely used as a text, does no more than to combat that conception with some small degree of success, its preparation and publication will have been well worth while.

This review is by no means intended as a defense of Mr. Willis against his critics, or as an answer to specific criticisms that have been launched, but certainly the reviewer who takes issue with his ranking of Mr. Justice Holmes alongside James Madison and Chief Justice Marshall, and who finds no value for the lawyer in the constitutional history contained in this volume, is likely to encounter as much adverse opinion as has Mr. Willis himself.

The author's excursions into political theory, as exemplified by his discussion of sovereignty (Chapter II), as well as his economic (e. g. Chapter XII on Taxation, Money and Banking), and historical (e. g. Chapters XVII and XVIII on Personal Liberty and Social Control) discussions, are both interesting and valuable. To have carried into effect consistently throughout the work his discussion of political, social, and economic forces would have been highly worth while, but would have expanded the product far beyond a single volume. The result of restricting this process of analysis to certain portions of the study is, perhaps, to leave it lacking somewhat in balance.

In addition to apparent inaccuracies, such as the statement that the *Dartmouth College* decision freed corporations "from the exercise of the sovereign powers of police, taxation, and eminent domain" (p. 611), and the giving of an impression of hasty construction here and there, many of the author's statements are far too brief to be particularly helpful to one not already familiar with the case material. The explanation of the original package doctrine (p. 268) is illustrative of this shortcoming. Aside from these bases of criticism, however, the freshness of its point of view and its method of attack make this volume a distinctly worthwhile contribution. At the same time, it constitutes a store-

1. United States v. Butler, 297 U. S. 1, 62 (1936).

house of information and a guide to other materials that make it a highly valuable tool in the hands of any practicing lawyer or other student of constitutional law.

University of Missouri School of Law ROBERT L. HOWARD

THE RISE OF A NEW FEDERALISM. By Jane Perry Clark. New York: Columbia University Press, 1938. Pp. xviii, 347

We are reminded in the forefront of this book, by a quotation from Woodrow Wilson's Constitutional Government in the United States, that "the question of the relation of the states to the federal government is the cardinal question of our constitutional system. . . . It cannot . . . be settled by the opinion of any one generation because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question."

The economic and social problems of the present generation have taxed the ingenuity of the law maker as well as the other governmental agencies grappling with many problems which do not seem to be within the exclusive reach of either state or federal authority.

The book does not present a partisan attitude, favors neither "federal centralization" nor "states rights" but sets forth voluminous data concerning state and federal co-operative attempts to alleviate against problems, many of which were not known or at least little noticed, before the turn of the century.

This data may well be termed "a wilderness of single instances" and shows vast and careful research. Even the well informed cannot help but be astounded at the extent to which federal and state cooperation has already gone in an effort to deal with the many problems.

Informal co-operation, not the result of law, exists to a very large extent between the secret service division of the United States Treasury and state and local police officials, between federal and state agencies interested in public utility regulation, public health, certain educational matters, matters of labor standards, national and state planning problems and many other fields of activity. This informal co-operation is given by one government, either state or federal, to the government, state or federal, which has the main responsibility in the matter and does not seem to assume any of the attributes of usurpation.

In fact the sensitiveness of each government concerning its own prerogatives appears to receive the high respect at all times of the agencies of the co-operative government.

Many federal-state cooperative activities authorized by legislation have as their basis solemn formal contracts. Contracts between the federal and state governments are within the power of each to make so long as neither thereby surrenders any of its governmental power. The federal flood control program depends largely upon contracts with a state or group of states and on compacts between groups of states. Numerous other instances are also set forth.

Many instances are given of the cooperative use of government personnel. Striking examples are the "building of an army during the World War, the development of prohibition forces in the vain attempt to stem the flood of illegal liquor during the prohibition era and the organization of the Civilian Conservation Corps" in which the federal government depended largely upon state personnel.

States sometimes avoid constitutional inhibitions against federal officers holding state office by designating the position one of employment rather than an office, and many instances are recited where federal personnel is used by the states in carrying out state functions, as viz: in California where the state deputizes federal employees to serve as special state game wardens.

One of the more interesting phases of cooperative activities deals with the grant of financial aid by the federal to the state governments for a great variety of activities, including "agricultural education, extension and experiment stations; forest protection; highways; militia and National Guard; vocational education and rehabilitation; unemployment relief; public employment offices; welfare services such as material and child health; venereal-disease control and many aspects of the newer program of social security."

These federal aids to States "have increased from $11,000,000.00 in 1915 to $800,000,000.00 in 1936." This movement started long before the great panic of 1929-30 but has been greatly accelerated during the depression period. We are told that the system's growth has been in a "hit or miss fashion" and that the "purposes of grants-in-aid constitute a kind of never ending circle." The federal government furnishes most of the finance and in doing so has some say, more or less, as to how the state shall administer the fund. States seem willing enough to receive the grants but are inclined to "bristle up" if too many directions are given and so far have exhibited strong propensitives to retain their respective sovereign rights. Whether this will continue to be true the author does not hazard a guess.

We are reminded that federal grants to states is not new; that in the early days the federal government "gave vast amounts of public lands to the states for the development of state schools and colleges, for roads, canals and railroads and reclamation purposes" and that as early as 1837 the federal government got rid of a surplus of $28,000,000.00 in its treasury by giving it to the different states in proportion to their representation in Congress.

One of the latest forms of federal cooperation with the state is the method by which the federal government grants credits for certain state taxes, viz: inheritance taxation and unemployment compensation taxation. The former was done to protect those states whose wealthy citizens might be tempted to move to states with lower inheritance tax rates and the latter was done "to induce states to take action on the unemployment compensation question" by relieving such states from the many hazards that might spring up if a single or small number only of states undertook to legislate alone on the subject. If employers could avoid the tax by moving across state lines no single state would dare assess the tax.

We are told that it is too early yet to judge the final effect of this great increase of federal-state cooperation. Much is yet in an experimental stage but out of the whole, definite and fixed, and probably permanent, programs of federal-state co-operation will no doubt evolve.

To the student interested in a comprehensive study of the present trend and of the attempts that have been made through federal-state cooperative activities in dealing with social and economic problems in which both the federal and state governments are vitally interested, the book affords source material of a very high value. The material is well arranged and is ready for the interpreter.

St. Louis, Missouri FRED L. WILLIAMS

TRADE ASSOCIATIONS IN LAW AND BUSINESS. By Benjamin S. Kirsh, in collaboration with Harold R. Shapiro. New York: Central Book Company, 1938. Pp. 399.

One of the consequences of the rout of the NRA Codes by the decision in the *Schechter* case[1] was the feeling of disillusionment concerning industrial self-regulation. When the trade association occupied the center of the stage in the NRA Code system, the slogan of trade cooperation seemed ready for the supreme practical test to determine whether groups of trade rivals could set a plane of free and fair competition so as to reconcile the profit motive of competitive individualism with the public welfare.

It was a brave but terrifying experiment which doubtless failed because of its gigantic scale, its plurality of economic and social objectives in terms of recovery, planning and control of labor and trade practices, and the absence of well formulated policies with adequate administrative safeguards in the public interest. Yet from its ruins a deep shadow was cast upon the trade association —the chief actor in the drama. It was the trade association which was charged with "writing its own ticket" in the formulation of Code provisions, with emasculating competition by writing into the Codes provisions tending to increase control of production and prices, apparently on the theory that the Recovery Act had relaxed or suspended the restrictions of the anti-trust laws.

The author[2] of this book has not written an apologetic treatise to meet criticisms of the sort just described. The preface states: "The volume is a critique of the strength and weaknesses of the trade association movement. It points out in what respects trade association activities are either socially beneficial or hostile to the public welfare, and describes how judicial findings have

---

1. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935).
2. Mr. Kirsh, a member of the New York Bar, was formerly Special Assistant to the United States Attorney in New York in the prosecution of Sherman Anti-Trust Act cases. His collaborator, Harold Roland Shapiro, is Assistant Professor of Law in the New York Law School.

delimited rightful and wrongful actions of business groups in their concerted functions." While the author's views are said to be "those of the practitioner who has given considerable thought to the varied issues raised in the actual administration of trade association activity," Mr. Kirsh's work is a well balanced treatment of the broad economic and social factors as well as technical legal doctrines.

To be sure, the author has a thesis. In common with other writers on this subject he starts with the premise that "cooperation is a necessity in the modern business economy" and that "the modern trade association is the outstanding example of organization of business upon a cooperative basis." Unless the trade association survives and is given vitality, Mr. Kirsh sees only two practical alternatives. One is further trustification or possibly cartelization; the other is governmental regulation or participation. Both are rejected as repugnant to economic democracy. Consequently, Mr. Kirsh relies upon the trade association movement for the maintenance of the essentials of a free competitive economy by efforts within the ranks of industry itself rather than by governmental dictation from without. Unlike the trade associations of the past the author asserts that "the scope of modern trade association activities does not depend upon market control, and other activities deemed violative of law. On the contrary, the purpose of their activities is to promote the effective operation of economic forces by permitting the free interplay of independent individual judgment and action, and by requiring a high level of competitive conduct."

This is the philosophy which the author offers to meet the challenge that was left by the NRA debacle. It is all a matter of distinguishing between the good and the bad and presumably the Ph. D. trade associations will ultimately set the standards for the industry. But, while recognizing the need of providing legal safeguards against anti-social activities of associations, the author wonders whether the *Appalachian Coals* case[3] has dispelled the tendency to treat the integrated combination more liberally than the loose association. Critical of this unequal application of the Sherman Anti-Trust Act, the author presents in his introduction what is in substance a plea for the application of the "rule of reason" to all types of cooperative action by trade groups, including price and production agreements. The anti-trust system is also criticised for its tendency to provide a shelter for the "recalcitrant minority, the 'chiselers'—who object to association plans aimed to overcome chaos in production and prices in the industry." These non-conformists create the problem which the author describes as the "Achilles heel of the entire trade association movement, both from the legal and administrative point of view." The author refrains from making any specific recommendations for legislation to correct the foregoing

3. Appalachian Coals, Inc., v. United States, 288 U. S. 344 (1933).

conditions but he leaves the inference that the present inquiry by the Temporary National Economic Committee might lead to proposals to that end.

The present work is substantially similar in coverage and arrangement to Mr. Kirsh's earlier book on "Trade Associations" published in 1928. The grist of the judicial process in the intervening decade is reflected in certain changes in arrangement and in the thorough revision of a few chapters to include all of the recent developments and decisions of the courts.

The subject matter of the book is not confined to anti-trust phases in the narrow sense but covers various trade practices at common law and under the Federal Trade Commission and Clayton Acts, as amended recently by the Wheeler-Lea Act and the Robinson-Patman Act. The scope is sufficiently indicated by the following topics: statistical reporting service; uniform cost accounting methods; trade relations; standardization; credit bureau functions; boycotts and defensive combinations; patent interchange and cross-license agreements; uniform basing point systems; collective purchasing functions; foreign trade functions.

From the analysis of the decisions of the courts and the frequent references to the related economic and business aspects of the problems involved, the reader can piece together the factors tending toward legality and those tending toward illegality. The author frankly discusses the indefensible activities of trade associations which have been condemned by the courts.

The book is fully documented with references not only to the cases but to non-legal materials in economic and trade journals, government reports and texts.

All things considered it must be said that the author has produced an admirable book of great value to trade association counsel, research students and business executives who are constantly faced with problems of the relation of government to business enterprise by voluntary association.

The George Washington University Law School

S. CHESTERFIELD OPPENHEIM

HANDBOOK OF THE CONFLICT OF LAWS. Second Edition. By Herbert F. Goodrich. St. Paul: West Publishing Co., 1938. pp. xiv, 624.

The organization of this book is essentially the same as that of the first edition. The original edition was an excellent and useful collection of materials on the main problems of the somewhat nebulous subject of Conflict of Laws. Critics of the first edition[1] found fault not with the subject matter included but with the so-called "vested rights" theory which served as a background for Dean Goodrich's discussion. There has been no departure in fundamental theory

1. Among the reviews of the first edition (1927), the following were representative: Cormack, (1928) 23 ILL. L. REV. 204; Lorenzen, (1927) 27 COL. L. REV. 762; Isaacs, (1927) 41 HARV. L. REV. 108; Beale, (1927) 25 MICH. L. REV. 819.

in this edition, but at the same time the author does not press his theory to the fore.[2] Indeed within the compass of a small book of 624 pages an author cannot be expected to do a great amount of theorizing in a field of the law so uncertain and confusing. The many recent decisions by the state and United States courts, the appearance of the American Law Institute's *Restatement of Conflict of Laws*, and an abundance of excellent discussions in the law reviews, have contributed to make this edition more positive and accurate. This clarification has, if anything, improved the attractive style and appealing presentation of the first edition.

Like its predecessor this Handbook is divided into fifteen chapters. Some rearrangements and additions have been made within a few chapters, but the order of appearance remains the same. The discussion of the "renvoi" doctrine has been moved from the chapter on domicil to the introduction. This brief section has been rewritten, and furnishes an American example. The doctrine of qualifications is not discussed in the introduction or elsewhere except for two minor references.

The introductory chapter contains a very helpful section on Supreme Court supervision of state conflict of laws decisions, and a very timely section on conflict of laws rules in the federal courts wherein *Erie v. Tomkins* is accorded a very brief discussion. The chapter on domicil has a new section dealing with domicil as a jurisdictional fact. Extensive revision of the materials on taxation was necessary, including a clarification of the statements regarding jurisdiction to impose death taxes and a reversal of position on the enforcement of foreign judgments for taxes. The chapter on jurisdiction has new sections on partnerships and other unincorporated associations and on limitations on the exercise of jurisdiction. A helpful new section, § 78, on the law determining whether a question is one of substance or procedure appears in the chapter dealing with that subject. New sections dealing with the law determining the nature of liability-creating conduct, vicarious liability, survival of actions, and an extensive elaboration of workmen's compensation materials in the light of Constitutional limitations have been added to the chapter on tort obligations. Only one new section on the law governing marriage where the parties have different domiciles has been added to Chapter 8. In Section 130 Dean Goodrich reached the opposite conclusion from his first edition on jurisdiction to annul marriages by stating that jurisdiction is vested in the domicil of the parties. The chapter on property has new sections on incumbrances and adverse possession of chattels. Three new sections have been added to the last chapter on judgments: Section 208, no court available in the forum: Section 210, judgments for taxes; Section 213, foreign judgments not on the merits. No important changes were made in the chapters on contracts, matrimonial prop-

2. The chief criticism of the second edition has been its failure to reexamine many of the postulates of the first. See reviews in (1939) 27 CALIF. L. REV. 234; (1939) 33 ILL. L. REV. 871; (1939) 52 HARV. L. REV. 549.

erty, legitimation and adoption, inheritance and the administration of estates.

This edition has had the benefit of the *Restatement of the Law of Conflict of Laws*, and relevant sections are continually cited. In some instances the Restatement is the only authority supporting textual statements. Having a greater source from which to choose, this edition carries more citations to legal literature than the 1927 edition. Reference to many important articles have been omitted, as seems natural in a book which cannot be expected to be encyclopedic in scope. However, some very old articles have been retained where there are modern articles which give a more integrated picture of the subject under discussion. The footnotes[3] show a considerable improvement over the former edition in one respect: textbook, judicial decision and law review citations now carry the date. One confusing factor, which seems to be the result of efforts to save space, is the inclusion of but one publication date where there is a series a law review note citations. This edition carries a table of cases at the end. The text material has been expanded by 79 pages and the index increased from 16 to 24 pages.

Emory University, Lamar School of Law

MAURICE S. CULP

3. The footnotes have cross references to such cases as appear in LORENZEN'S CASES ON CONFLICT OF LAWS (4th ed. 1937).