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Vagaries and Varieties in Constitutional Interpretation

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VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION. By Thomas Reed Powell. New York: Columbia University Press, 1956. Pp. xviii, 229. \$3.50.

The last work by Thomas Reed Powell, Story Professor of Law Emeritus at Harvard University, is the fourteenth series of the James S. Carpentier Lectures delivered in April and May, 1955, at Columbia University where he had taught constitutional law until 1925. Stricken late in the following summer, Professor Powell was unable to give the lectures final editing before his death. The task of preparing the manuscript for publication, furnishing footnote references, and providing some additional explanation was ably performed by Professor Paul A. Freund in collaboration with Professor Ernest J. Brown, both former students of Professor Powell and later his colleagues on the Harvard Law School faculty.

The six lectures contained in the volume comprise the only unified analysis of constitutional problems of the American federal system by Professor Powell. Although he had contributed scores of articles on special aspects of federalism to the law journals, he had never attempted a synthesis of his thought. This final distillation is a highly expert treatment of those particular areas of national-state relationships in which Professor Powell's major interests lay, especially the great antinomies of constitutional law with which the United States Supreme Court has wrestled with varying results over the years of its history. These lectures reflect the sharply analytical faculty, the constructively critical mind, the engaging wit and candor, and the vast erudition in American public law which marked the teaching and writing of Professor Powell during a period of approximately fifty years of distinguished biprofessional service as a lawyer and a political scientist.

The lectures fall into two principal categories. The first includes lectures I and II, respectively entitled, "Establishment of Judicial Review" and "Professions and Practices in Judicial Review." These lay the groundwork for later analysis of special aspects of federalism by a critical examination of the origin, development, and practices of the doctrine of judicial review. Professing disinterest in arguments of judicial usurpation, Professor Powell points to the popular as well as judicial acquiescence in the doctrine for more than a century and a half. He disagrees with Beveridge and Warren, who state that the power was of transcendent importance at the time it was asserted by Chief Justice Marshall in *Marbury v. Madison*. In

due season the power would have been exercised even had Marshall not made his affirmation in 1803 (p. 22). Despite recurrent criticism, judicial review has become a balance wheel of the American system even though, as Powell says, "all the courts can do is to say something. The effect depends on others" (p. 8).

The principal emphasis of lecture II, as also in those which follow, is well expressed by Bishop Hoadley, who, in 1717 before there was a constitution of the United States, said: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver to all intents and purposes, and not the person who first wrote or spoke them" (quoted on p. 27). The recurrent theme throughout the volume is that judges intrude their personal views of policy in interpreting the Constitution. Some judges seek to "impress on us in effect that it is not they that speak but the Constitution that speaketh in them" (p. 28). Such judicial professions of automatism and denials of personal power do not bear up under the careful scrutiny of Professor Powell whose study confirms that judges make law as well as find it. Constitutional law is molded by experience rather than by impersonal logic, by the prevailing conceptions of policy and the pressing necessities of the times, reflected in the predilections and prejudices of the judges, who do in fact consider practical results. As Justice Holmes, who is frequently quoted with approval by Professor Powell throughout his lectures, once wrote: "A page of history is worth a volume of logic in certain questions" (quoted on p. 40).

In the second group of lectures (III-VI) the same realistic and penetrating technique is applied in the analysis of four major aspects of American federalism, including, respectively, the development of national power, intergovernmental relations, state police power, and state taxing power. In his treatment of leading cases in each of these major chapters in American constitutional development, Professor Powell traces the undulating course of the law from the early years of competitive federalism to the present era of greater cooperation between nation and states. Increasingly the Supreme Court has invoked practical considerations in decision making as the number of "mechanically minded doctrinarians" on the Court has declined. Formalisms which once imposed severe restrictions on national power have gradually been abandoned as justices have become increasingly "aware that a nation should have the power of a nation" (p. 85). Similarly, the need of the states for revenue, urgencies of economic regulation, deference to diversity, and other realistic fac-

tors have contributed to more liberal construction of state powers. Thus the dogmas of earlier days have given way to the necessities of mid-twentieth century government.

Professor Powell's penetrating examination of leading cases in the light of actual factors influencing judicial decisions reflects his breadth of view both as a lawyer and as a political scientist. As a bold, persistent, articulate, and perceptive critic of the Supreme Court, he has won the respect not only of his colleagues in political science but of both bar and bench. Typical convictions repeatedly expressed in his Carpentier lectures and evidencing his pragmatic approach to the study of judicial opinions include the following: a skepticism of generalizations; a conviction that broad questions need to be split up into subordinate and more particular problems for separate and independent analysis and judgment; the belief that no single set of formulae or judicialisms are adequate for all cases; a strong aversion to judicial automatism and denial of personal power; and his emphasis on the invocation of realistic considerations by the judiciary in applying the Constitution to the ever changing, complex conditions of modern society.

To the close student of the judicial process, one particularly interesting aspect of Professor Powell's lectures is his evaluation of various justices of the Supreme Court. On page 81, he comments, "The thesis which underlies the title of this series of lectures could be amply supported by the kaleidoscopic voting of Mr. Justice Roberts during his judicial career," and, on the following page, "... considering his full fifteen years of judicial service, Mr. Justice Roberts might be said to have been divided against himself." Justices McReynolds, Van Devanter, Butler, and Sutherland, who served on the same court with Roberts, are also subjected to critical commentary (pp. 40-48). In contrast, Professor Powell praises Justices Holmes, Brandeis, Stone, and Cardozo for their "superlatively high-grade minds" (p. 45). Of Justice Stone, he wrote: "He always had a capacity for growth. There was never any question as to the strength of his brain power or the granite solidity of his character" (p. 46). Powell's comparison of the contributions to the development of the American federal system by the two chief justices with the longest tenure is also particularly enlightening. His evaluation of Marshall and Taney follows:

"Taney's mind seems to me markedly neater than that of Marshall, and his arguments are less open to refutation. Marshall was more intricate, more philosophical, cleverer at turning

sharp corners, and his elocution is more sonorous than Taney's—gifts which doubtless are literary virtues but not necessarily judicial ones. Marshall was a nation builder, which Taney was not. As a creative statesman Marshall built superstructures on the foundation laid by the Fathers, but Taney in my view kept closer to that foundation than did Marshall, with always the tragic exception of his *Dred Scott* enormity as to the absence of national power to forbid slavery in the territories" (pp. 150-51).

Although Professor Powell was one of the Court's most persistent critics, he did not question the intellectual integrity of any justice, even though woefully mistaken both in his conclusions and in the reasons advanced in their support.

The six lectures by Professor Powell cover only those subjects in which he had displayed greatest interest in past research. He acknowledges the incomplete coverage and omission of such currently significant matters as civil liberties, separation of powers, due process, equal protection, and other phases of the field which would necessarily be considered in a major treatise. This volume, as an expert treatment involving analysis of the finer points and implications of Supreme Court cases, is inappropriate for laymen who have no comprehensive background and basic knowledge of American constitutional law. Despite limited coverage and technical treatment, however, this notable addition to the literature of public law by an eminent analyst and critic of the Supreme Court will be welcomed by political scientists and other students of government, as well as by legal practitioners of bench and bar.

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