

# McLaughlin: A Constitutional History of the United States

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## BOOK REVIEWS

*A Constitutional History of the United States*, By Andrew C. McLaughlin. New York. Appleton-Century, 1935. One Volume, pp. xi, 833.

G. W. Paschal, one of the leading commentators on the Constitution of the United States, wrote in 1878: "There is too great a disposition among men to take essential things for granted. And yet when the philosophical historian comes to review the downfall of empires, he is forced to the conclusion that the loss of liberty is more the result of ignorance of the fundamental principles of government than of apathy in defending them." Andrew C. McLaughlin, professor emeritus of history at the University of Chicago and author of the volume under review, states that it is his purpose "to present briefly and clearly the constitutional history of the United States during nearly two centuries" not only for the student but also for the average American citizen not highly trained in the law. It is not primarily a history of constitutional law as announced by the courts, but a study of the development of constitutional principles in relation to actual political and social conditions and forces outside of the court-room. The court decides what is the law, history aims to tell why it is the law. "The most significant and conclusive constitutional decision was not rendered by a court of law but delivered at the famous meeting of General Grant and General Lee at Appomattox." In this volume the author traces the roots of the Constitution, presents its underlying philosophy, discusses its principles and growth derived from primary sources.

After an introductory account of the British Empire in the middle of the eighteenth century, the author discusses the colonial background of the American Revolution (Chapters I to IX). The pith of these chapters is that the relationship between the colonies and England was an ever present reality and never seriously questioned by the colonies before 1763. But after that date when an attempt was made to adapt the colonial relationship to new conditions, the problem proved to be insoluble for the reason that there had grown up two separate peoples, two divergent conceptions of the state, one in England, the other in America, each in response to the law of their separate growth which made it impossible for one to appreciate the position of the other. Before 1763 the colonists had felt the need of British protection against the almost constant danger of a French attack. But once the French menace was gone, the feeling of dependence upon England disappeared and the chief bond between colonies and empire suddenly snapped. The substitution of a more definite control over the colonies after the Treaty of Paris of 1763 for the preceding easy going policy aroused resentment. The colonies had grown up with the determination to run their affairs in their own way. The immediate point of difficulty concerned the right of Parliament to tax the colonies. It is evident that the contest for colonial legislative supremacy over the royal authority or parliamentary supremacy parallels in many respects the contest between King and Parliament for supremacy in England in the seventeenth century. Parliament stated a similar case in the Petition of Right in 1628 and on other occasions. The Americans set forth their contentions in various declarations and resolutions of grievances. The author summarizes these contentions as follows: "(1) There were certain fundamental rights which government could not take away from its subjects. (2) Those rights were embedded in the British Constitution. (3) Men were not called upon to obey an act depriving them of their rights. . . . (4) There was a British

constitution limiting governmental authority. . . . (7) The charters and immemorial custom gave sanction to the right, the legal right, of the colonies to manage their own taxation and internal government." (p 48.)

In Chapter X the author analyzes the philosophy of the American Revolution as revealed in the Declaration of Independence. Professor McLaughlin concludes that Jefferson's equalitarian doctrine "all men are created equal" is a mere rephrasing of Locke's postulate of a "state of nature" before the emergence of any government. It was no new doctrine. It goes back in the history of philosophy even to the *Summa Theologica* of St. Thomas Aquinas, that a law contrary to natural right and justice is no law at all. St. Thomas says: "Every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it defects from the law of nature it is no longer a law; it is but a perversion of law." Locke's philosophy was one of compact and natural rights. The authors of the Declaration of Independence used Lock's famous essay on "Government" to justify revolution, just as their English ancestors of the seventeenth century had done. Although the Declaration states that it is self-evident "that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness," Jefferson had no intentions of asserting "that each man was as strong, virtuous and competent as every other; nor was he desirous of announcing social, economic or political equality," nor was he bent on announcing universal suffrage. Inspiring as is the equalitarian doctrine, it has limitations in the sphere of governmental theory and practice and these become obvious during and after the Revolution.

The author then discusses the framing of state constitutions and the Articles of Confederation (Chapters XI to XIII). The Declaration of Independence hastened the necessity of establishing state governments. Separation from England meant that the colonies were no longer colonies in the British Empire, but independent states. Furthermore, there was the problem of organizing America, of arranging some practicable scheme in which the states would work together for a common cause. The Articles of Confederation were essentially equalitarian and particularist. They not only protracted the war but plunged the country into political impotence and financial collapse. In the Articles, the states had announced their separate sovereignty, but their actual incapacity to act as independent sovereignties soon proved itself.

In Chapters XIV and XV, the author gives special attention to the framing of the Federal Constitution and the essential characteristics of the federal structure. When the Constitution came from the Philadelphia Convention in 1787, the people found a vigorous national control in a Congress, Presidency and a Supreme Court, "that sovereign powers were distributed between the states and the national government; the national government had only the powers granted it explicitly or by implication; the states individually retained the residue; each government within its sphere of authority operated immediately over the individual citizen; neither government was to be inferior to the other or in ordinary operation to come into contact with the other; the constitutional system was established as law enforceable in courts and was superior to the authority of every state acting through its government or by convention of its citizens; the national government recognized and made applicable the principle of the separation of powers within certain modifications." (pp. 193-194.) Through debate, discussion, interchange of opinion and compromise, the Federal Convention had worked out a system of government which has stood the test of time and results. It has prevented the multiplication of sovereignties upon this continent. More-

over, it must be remembered that the Convention achieved these results in the face of conflicts of interest. There were those who believed that the Articles of Confederation should be revised, while others were convinced that an entirely new instrument of government should be drawn up. There was the North against the South, the free states against the slave states, the advocates of democracy against the advocates of aristocracy, the commercial and financial interests of the East against the agricultural interests of the West and South. Chapter XV describes the procedure of ratification in the various states. The states were slow to ratify the new Constitution. Three years were to pass before all thirteen states approved the document.

The rest of the book, 570 pages, constituting the major portion of the work, deals with the great debates and controversies concerning the nature of the Constitution and the Union, the leading decisions of Marshall and Taney, the development of the presidency, the problems of civil war and reconstruction, and the adaptation of law to a changing social and economic order. The author analyzes the controversies concerning implied powers, state sovereignty, states' rights, nullification, the power of Congress over territories, the admission of new states, the origin of the Cabinet, annexation of foreign territory, presidential authority under Jackson, the status of slavery, the causes of the Civil War, the problem of reconstruction, and the interpretation of the Fourteenth Amendment. Three chapters (XXIII, XXX, XXXIV) are concerned with the Supreme Court under John Marshall and Roger Brooke Taney, two men who, in turn, occupied the office of Chief Justice from 1801 to 1864. The constitutional decisions of John Marshall asserted and defended, by broad principles of construction, the competence of the national government within the field of sovereignty assigned to it. They laid down decisively the fact of limitations on the states. They upheld the power of the Supreme Court to review state decisions and in this way protected the Constitution from infringement. John Marshall's decisions represent the first phase of constitutional interpretation—that in which the language of the Constitution itself predominated. With the accession of Chief Justice Taney in 1835, the interpreters of the Constitution were occupied more and more with constitutional theory. The problems of a dual government (the state and the nation) came to the fore, the doctrine of broad police power, the problem of human rights and property rights arising out of the slavery controversy engaged the attention of the Court. Since that time many momentous decisions hinge not on the literal reading of the Constitution but on the Supreme Court's conception of constitutional theory. No man has ever more frankly recognized that fact than the present Chief Justice, Charles Evans Hughes. When Governor of New York, he said: "We are under a Constitution, but the Constitution is what the judges say it is."

Professor McLaughlin summarizes the general constitutional effects of the Civil War as follows: "slavery was wiped out; the house was no longer divided; the institution which had been the basis of sectionalism in its most dangerous aspects was gone. The nation existed as a political or legal fact, no longer to be threatened by state sovereignty. The actual national character and quality of the union had henceforth opportunity for expression not only in political affairs but also in social and economic development." (p. 640.) The common co-operative effort of millions of men who were engaged in the war to maintain the union "probably prepared men of action and of energy for undertaking extensive corporate enterprises and for the work of integrating the nation industrially as it had been integrated legally." (p. 641.)

The author's treatment of such events and tendencies as "government by

commission," the power of the Senate to conduct investigations, the changing position of the presidency resulting from the adoption of the budget system, and the origin of the Fourteenth Amendment are too brief or too vague. In discussing the origin of the Fourteenth Amendment the author concerns himself more with the rights of the freedman than with the industrial development which was getting under way to the tune of laissez-faire and economic individualism and its influence on the amendment. The Fourteenth Amendment declares among other things that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This clause was inserted not only to establish the rights of negroes, but for another reason. After the Civil War there was an extraordinary industrial development—industry became national in scope and character. The extension of federal judicial supremacy over the local legislatures was desirable for individuals and corporations that wanted to carry on their business in their own way free from legislative interference. Consequently, when the problem of defining the rights of negroes came before Congress in the form of a constitutional amendment, experts in the law of the Constitution as interpreted by the Supreme Court took advantage of the occasion to enlarge the sphere of national control over the states, by including among the safeguards devised for negroes a broad provision for the rights of all "persons" natural and artificial, individual and corporate. In 1819, Chief Justice Marshall had defined a corporation as "an artificial being, intangible, and existing only in contemplation of law."

The man responsible for this section quoted above was John A. Bingham, a member of the House of Representatives, a prominent Republican and a railroad lawyer from Ohio. In the case, *Barron v. the Mayor and Council of Baltimore*,<sup>1</sup> the city had taken private property for public use, as alleged without compensation. Chief Justice John Marshall held that there was no redress in the Supreme Court of the United States. Why? Because the first ten amendments to the Constitution were limitations on Congress, not on the states. (Compare Amendments V and VI.) Hence the provision was to apply not only to former slaves but to all individuals and corporations under the national flag. In 1882, while arguing a tax case for a railway company before the Supreme Court, Roscoe Conkling declared that the protection of freedmen was by no means the sole purpose of the Fourteenth Amendment. "At the time the Fourteenth Amendment was ratified, individuals and joint stock companies were appealing for congressional and administrative protection against invidious and discriminating state and local taxes." Mr. Conkling, an eminent corporation lawyer from New York, was a colleague of Bingham on the congressional committee concerned with the amendment. Since that time the Supreme Court has held a domestic corporation to be a "person" within the meaning of the provision of the Fourteenth Amendment and therefore entitled to the equal protection of the laws<sup>2</sup> In the case *Smyth v. Ames*,<sup>3</sup> a railroad corporation was held to be a "person" within the meaning of the equality clause.

Professor McLaughlin's book is undoubtedly the best one volume history of

<sup>1</sup> 7 Pet. 243, 8 L.ed. 672 (1833).

<sup>2</sup> *Santa Clara Co. v. South. Pac. Railroad*, 118 U.S. 394, 6 Sup. Ct. 1132, 30 L.ed. 118 (1886); *Smyth v. Ames*, 169 U.S. 466, 18 Sup. Ct. 418, 42 L.ed. 560 (1898); *Covington & C. Turnpike Co. v. Sandford*, 164 U.S. 578, 17 Sup. Ct. 198, 41 L.ed. 560 (1896).

<sup>3</sup> *Supra*, note 2.

the Constitution of the United States that has yet appeared. It is admirably organized to serve as a basic text for university and college courses in American constitutional history. The footnotes which contain amplifying and illustrative materials are well designed to encourage further investigation and study. Some 300 cases are listed in a special index with citations and dates. A full index adds to the usefulness of the volume. It is the opinion of the reviewer that this work by a recognized authority is not only timely but suitable to anyone who wishes to know something about the development of American constitutional principles.

HERBERT WILLIAM RICE.\*

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*Cases on Damages*, by Charles T. McCormick, Foundation Press, Chicago, 1935. 789 pages.

Professor McCormick's casebook is by far the best in its field. It is a casebook on "damages" and not a book on "legal liability." The cases are well edited, the footnotes suggest helpful inquiries, and the book is moderate in size.

There is, perhaps, in most law school curricula little room for damages as a separate course. And that is not because the process of estimating compensation and calculating relief in dollars and cents is not an important problem in most law suits. It is frequently suggested that the problems covered in a course on damages are covered incidently or directly in the regular courses in torts, contracts and property. Those of us who teach these other course must be conscious of the fact that we refer to such matters as "value at the date of conversion," "difference between the contract price and the market price," "difference between the value of the chattel before and after the accident," as if by such references given as answers we have settled the problems troubling the parties in our hypothetical law suits. Whether we are law teachers, practicing lawyers, or judges, we are academic and impractical when we assume that "market value" has a definite meaning and is a descriptive phrase.

In his first chapter Professor McCormick sets out a number of cases to illustrate this matter of estimating "value." The selection of cases is good. There are cases concerning the conversion of household goods, the destruction of grain, the burning of buildings and the destruction or impairment of heavy equipment and machinery in which a substantial sum originally has been invested. The possibility that there may be a choice between "markets" in getting at a particular estimate is emphasized. And the editor has, too, a chapter on "Eminent Domain" to illustrate the problems incident to the process of estimating values of real estate to be taken for public use.

A clue is disclosed in the preface to the editor's main purpose in picking and arranging his selection of cases. In his opening sentence he says that the difference between "questions of liability and questions of the measure of damages is a difference of degree." Perhaps he is right. This reviewer has been inclined to stress the differences, to point out that the process of fixing the limits of responsibility and the process of estimating compensation are two separate processes and that these two processes must be considered apart from each other to permit one to make anything approaching an adequate analysis of the adjustments already made or to be made in any particular law suit. Perhaps these differences can be overemphasized. The purpose of the lawsuit is ultimately to

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