

Congress, the Constitution, and the Supreme Court, by Charles Warren

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BOOK REVIEW

Congress, the Constitution, and the Supreme Court, by Charles Warren. Little, Brown, and Company, Boston, 1935. One Volume, 346 pp.

This is a new, enlarged, and revised edition of the book published by the author in 1925. It is the best defence of the Supreme Court now available. Although a lawyer, the author has written a book which may be easily understood by the layman as well as by the lawyer. Moreover, it is a timely book for never has there been such widespread interest in the Constitution of the United States and the method of its enforcement by the Supreme Court.

In the first four chapters, the author is concerned with an exposition of the function of the Court as an interpreter of the Constitution with special emphasis on the origin of the power to declare Acts of Congress unconstitutional. After surveying the history of colonial and state courts, the Constitutional Convention, the Bill of Rights and their enforcement, and the views of the early Congresses on the subject of the Court, he concludes that "the function of the Supreme Court in holding an Act of Congress invalid was a necessary judicial function; that a Court with such a power was embodied in the Constitution, because the framers had already been familiar, by actual experience, with the value of their state courts in curbing by judicial decision excesses in the use of power and violations of their State Constitutions by State legislatures; that the framers expected and intended that the Supreme Court should exercise similar power; that the general public and those who ratified the Constitution had the same expectations and intentions as to the Court; that the radicals of 1788, who secured the insertion into the Constitution of a Bill of Rights, understood that it would be a useless action unless such Bill of Rights could be enforced by a Court; and finally that the early Congresses themselves, for twelve years, recognized and endorsed the existence of this power of the Court, with hardly a dissenting vote." The doctrine that the judges have the power to declare an Act of Congress unconstitutional when in their opinion it violates the Constitution was not positively established until 1803 when Chief Justice Marshall gave the opinion of the Court in the case of *Marbury v. Madison* involving a section of the Judiciary Act of 1789. In giving the opinion of the Court, Chief Justice Marshall cited no precedents but based his argument on the general character of the American constitutional system. He argued that the Constitution is the supreme law of the land; it controls and binds all who act in the name of the United States; it limits the powers of Congress and defines the rights of citizens. If Congress could ignore its limitations and trespass upon the privileges of citizens then the Constitution would disappear and Congress would become sovereign. Since the Constitution must be and is from the nature of things supreme over Congress, it is the duty of judges, under their oath of office, to sustain it against measures which violate it. Therefore, the courts must declare null and void all acts which are not authorized. "A law repugnant to the Constitution is void and the courts as well as other departments are bound by that instrument."

Every decision of a court decides and establishes which of two persons or parties, litigating before it, is right. For example, *A*, an actual person, has certain rights as a plaintiff, and *B*, another actual person correlatively has not certain rights. *A* claims that he has a right against *B* based on an Act of Congress; *B* denies this and says that he has a right based on some provision or guaranty of the United States Constitution. The Supreme Court is called upon

ultimately to decide which right shall prevail—that founded on the statute which is passed by Congress, whose members are only the representatives of the people with limited powers, or that founded on the Constitution, which emanated from the sovereign power, the people. The Court's decision must follow the Constitution and must disregard the statute if the Court finds that it violates the Constitution. If it does not conform to the Constitution it must be so declared. So, also, in a case between the United States and a citizen, if the United States relies on a statute and the citizen on the Constitution, the Court must decide the case in favor of the citizen. As long as there is a written Constitution which, together with its laws and treaties made under its authority, is declared to be "the supreme law of the land," there will be need of a supreme tribunal to interpret and apply its provisions. The wit of man has never yet devised a form of words which everybody will understand in precisely the same way, and the simpler or more general the phraseology the greater the likelihood of disagreement. Hence somebody must be charged with the duty of interpreting it. The decision must be final.

In Chapter V the author considers some of the proposals to make Congress the supreme and final judge of its own powers by abolishing or impairing the power of the Court.

In Chapters VI, VII, and VIII the author is concerned with five-to-four decisions and decisions which have been favorable and unfavorable to labor. With an industry which will make his book very useful to students of American constitutional law, he includes not only a list of the cases in which the Court has held an Act of Congress unconstitutional with a brief description of each case, but he also lists the ten cases in which an Act of Congress has been declared unconstitutional by the Court by five-to-four decisions and the seventeen cases in which the constitutionality of Acts of Congress was upheld by five-to-four decisions.

Mr. Warren is a lawyer by profession. To him the Constitution is a document framed by a Convention in 1787, put into operation in 1789, and since that time amended at various times by joint action of Congress and the states. Hence he fails to take cognizance of changing economic conditions; nor does he answer those who maintain that the Supreme Court is an impediment to national social legislation. In fact many readers will resent his sneering references to "politicians, labor leaders, or social reformers, of whatever degree of eminence," or to "labor leaders, radicals, sociologists, men and women alike, who have been made dissatisfied by some particular decision or decisions rendered by the Court in holding an Act of Congress unconstitutional." Such remarks tend to convey the idea that the author is so full of fact and the critics so full of folly. Moreover, Mr. Warren is too easily satisfied by the principle of compensation. The judicial veto of a minimum wage law is compensated for by judicial approval of other laws favorable to labor. He deals with laws annulled and laws sustained as a bookkeeper deals with items of income and expenditure or an official scorekeeper keeps a record of the games or points won and lost. It is obvious, even to the layman, that a judicial veto of a minimum wage law is not compensated for by judicial approval of any number of other acts favorable to labor. His failure to study and evaluate the problem from all angles must detract from the scholarly reputation which his "Supreme Court in United States History" won for him. However, in spite of these minor shortcomings, the book should be useful for those interested in the Supreme Court and its power and jurisdiction.

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