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BOOK REVIEWS

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STATES' RIGHTS—THE LAW OF THE LAND. By Charles J. Bloch.
Atlanta: The Harrison Company. 1958. Pp. 381. \$10.00.

Though this work is priced at \$10, it is worth every penny of it and more, too. In my opinion, men and women everywhere in America who have a deep, abiding love of country, both state and national, and who are vigilant for the protection of the rights of the individual, for which these governments were established, will find this book a wonderful source of material for the thinking out of their problems incident to liberty under the law.

Though the title of this book, *States' Rights—The Law of the Land*, is well justified historically and authoritatively, nevertheless, such title to my mind, insofar as "States' Rights" is used, has a connotation suggesting bias in favor of the states in the southern part of the United States and also suggesting a hostility to the national government. This work by Mr. Bloch is not a book limited to students of government located in the South, but its field of interest is really national. Nor does this work by Mr. Bloch justify a connotation of hostility to the United States Government, which hostility the author really does not have. My suggestion for the title would be: *Diffused Authority—The Law of the Land*.

Our total government, made up of governments of our states and of our national government, has been and is set up with a division of powers. This division of authority is effected both laterally and vertically. This total government is divided between the national government on the one hand and the state governments on the other; and, further, in all of these governments powers are divided among the executive function, the legislative function, and the judicial. All of this is a device for one purpose only and that is to diffuse the powers of government and thereby more certainly preserve the freedom of the individual under law.

For the foregoing purpose the line of demarcation between the authority of our local state government on the one hand, and the authority of our national government on the other, was and is clearly defined. Likewise, the division of governmental authority between the executive function, the legislative function, and the judiciary is also clearly defined.

When we observe these lines of demarcation being changed by those occupying the seats of the Supreme Court and see this branch of the government engaging in altering this line of demarcation without authority or order and their supporters claiming such unauthorized fiats to be the Law of the Land, we are concerned for our liberties.

Could it be that the day of the Saxon with his liberties and principles is over? Could it be that the abusers of power never knew Wordsworth, Milton, Washington, Jefferson, Patrick Henry and others, whose very heart throbs were echoed by Wordsworth in one of his Sonnets on National Independence and Liberty:

“We must be free or die, who spoke the tongue
That Shakespeare spake; the face and morals hold
Which Milton held.”

If the law of the land when once having been determined must be changed or if the United States Constitution must be altered, there are orderly ways for such to be accomplished and an abuse of power is not one such way.

We are indebted to Mr. Bloch for his definitive research into the field of separation of powers between our national and state governments and among governmental functions. His work is not only monumental, but clearly delineates the hazards we are being subjected to in the preservation of our liberties in the present trend of thought prevailing among members of the United States Court.

The reading of this book really is a “must” by all unbiased and clear thinking men and women in America, irrespective of race or color.

Mr. Bloch introduces the work with statements from three eminent statesmen and lawyers: Senator Richard B. Russell, Senator Herman E. Talmadge, and Robert B. Troutman. He then divides his work into ten chapters as follows:

Introductory Statement

The Colonial Period in America (1607-1781)

The Shift from Colonies to States (1781-1789)

The Bill of Rights (and the 11th Amendment) (1789-1798)

“States’ Rights” before the War, and the War Amendments (1798-1868)

The Impact of the Fourteenth Amendment (1868-1937)

The Changing Tide. The "Law of the Land" Begins to Crumble (1937-1953)

The Philosophy of Myrdal, Clark, et al. Versus "The Law of the Land" (May 17, 1954)

"After That, the Deluge" (1954-1957)

What of the Future? A Government of Laws or of Men? (1957 - ——)

In addition to a well-prepared index, the author sets out an impressive table of cases numbering between 375 and 400, nearly all of which are from the United States Supreme Court.

In the concluding chapter of this book the first sentence is: "If our government is to be one of laws and not men, action is necessary."

This last chapter directs attention to the power of the Senate to prevent unprepared and inappropriate men from being placed on the United States Supreme Court, and to the power of the Congress in providing clerks for the Justices of the Supreme Court; and further to the power the Congress has to prevent the Supreme Court from having jurisdiction of cases wherein is more likely to be involved the issue of the location of the line of separation between national and state government authority and between the several governmental functions under the United States Constitution.

Our author is most convincing of his theorem that this constitutional device of separating powers of government between the states on one hand and the national government on the other is the cornerstone of the Republic and must be protected and preserved. Mr. Bloch states that this fact was never more graphically demonstrated than by Justice Harlan, the elder, 50 years ago when he stated:

"The preservation of the dignity and sovereignty of the States, within the limits of their constitutional powers, is of the last importance, and vital to the preservation of our system of government. The courts should not permit themselves to be driven by the hardships, real or supposed, of particular cases to accomplish results, even if they be just results, in a mode forbidden by the fundamental law. The country should never be allowed to think that the Constitution can, in any case, be evaded or amended by mere judicial interpretation, or that its behests may be nullified by an ingenious construc-

tion of its provisions." *Ex Parte Young*, 209 U. S. 123, at page 182-3, 28 S. Ct. 441, 52 L. Ed. 714.

Our author could just as well have concluded his dissertation by a quote from the late Chief Justice White, the late Justice Holmes, the late Justice David J. Brewer, or even the enigmatic Justice Frankfurter.

SAMUEL L. PRINCE*

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THE BILL OF RIGHTS. By Learned Hand. Cambridge: Harvard University Press. 1958. Pp. v, 82. \$2.50.

Judge Hand's subject in these, the 1958 Oliver Wendell Holmes Lectures, is "the measure of judicial intervention that can be thought to be implicit, though unexpressed, in the Constitution." He has engagingly and most persuasively set forth the philosophy of Judicial Non-intervention, a doctrine which his own judicial prestige and rich experience, both on the district bench and on the great appellate court known throughout the land as "C. A. 2," has commended to the thoughtful consideration in our time of those concerned with the proper function of the judicial branch in our system of government.

The Constitution, Judge Hand observes, has not conferred upon the courts authority to pass upon the decisions of another "Department" of the government; indeed, the "Supremacy Clause" would logically support an inference to the contrary. Nevertheless, it was probable if not certain that the whole system would have collapsed without some arbiter whose decision should be final.

The courts were undoubtedly the best "Department" to serve as such an arbiter, since by the independence of their tenure they were least likely to be influenced by diverting pressure. It having always been thought proper in construing written instruments to engraft upon the text such provisions, though not expressed, as were essential to prevent the defeat of the venture at hand, it was altogether in keeping with established practice for the Supreme Court to assume an authority to keep the States, the Congress, and the President within their prescribed powers, as otherwise the government could not proceed as planned.

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Since, however, such power is not a logical deduction from the structure of the Constitution, but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks it sees, an invasion of the Constitution. Instead, the courts should confine the power to the need that evoked it, the need in such a system as ours of some authority whose word should be final as to when another "Department" had overstepped the borders of its authority, and each "Department" within its prescribed borders, and the States, left free from interference. ". . . [I]t was and always has been necessary to distinguish between the frontiers of another 'Department's' authority and the propriety of its choices within those frontiers."

Judge Hand then enters upon "a discussion of how this distinction can be observed in applying the prohibitions in the First, Fifth, and Fourteenth Amendments, cast as these are in such sweeping terms that their history does not elucidate their contents." He indicates a preference for the view that such prohibitions are to be read, not as "embodying the limitations current in 1787, and so through their history to give them a more or less definite content," nor as postulates embodying part of the "Natural Law", but rather "as admonitory or hortatory, not definite enough to be guides on concrete occasions, prescribing no more than that temper of detachment, impartiality, and an absence of self-directed bias that is the whole content of justice."

It is difficult not to agree with the closely knit and happily phrased reasoning that follows, whereby Judge Hand arrives at his conclusion that he cannot frame any definition from its decisions under the clauses of the Bill of Rights "that will explain when the Court will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the states within their accredited authority. Nevertheless, I am quite clear that it has not abdicated its former function, as to which I hope that it may be regarded as permissible for me to say that I have never been able to understand on what basis it does or can rest except as a *coup de main*."

On the way, he demonstrates that, when the courts annul a statute as a redress of what is declared to be an "arbitrary" abuse of power, they necessarily engage in "an authentic exercise of the same process that produced the statute itself," un-

avoidably weighing “the values and sacrifices” that influenced the choice made by the legislature in *its* exercise of that process. He says that the question arose “in acute form” in “The Segregation Cases”; in his opinion the Court in those cases meant to and did “overrule” the “legislative judgment” of States “by its own reappraisal of the relative values at stake.”

Whether the result would have been the same if the interests involved had been economic, he of course cannot say, but he regards it as beyond doubt that the “old doctrine” of intervention (which had apparently for a time fallen into disuse in issues involving economics and property) seems by these cases to have been reasserted “at least as to ‘Personal Rights.’” Noting that the Court made no mention of the section of the Amendment empowering Congress to enforce its provisions by appropriate legislation, “which offered an escape from intervening” (as was suggested by Justice Jackson in his questions to counsel during the oral arguments), he said that the Court must have regarded this as only a cumulative corrective, “not being disposed to divest itself of that power of review that it has so often exercised and as often disclaimed.”

Judge Hand concludes in part:

It is often hard to secure unanimity about the borders of legislative power, but that is much easier than to decide how far a particular adjustment diverges from what the judges deem tolerable. . . . Moreover, it certainly does not accord with the underlying presuppositions of popular government to vest in a chamber, unaccountable to anyone but itself, the power to suppress social experiments which it does not approve. . . .

Each one of us must in the end choose for himself how far he would like to leave our collective fate to the wayward vagaries of popular assemblies. . . . For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. . . .

. . . To me it seems better to take our chances that such constitutional restraints as already exist may not sufficiently arrest the recklessness of popular assemblies.

On earlier occasions, Judge Hand has expressed concern over the employment by the federal courts of the "stately admonitions" of the Bill of Rights as the basis of judicial "second-guessing" of legislative choices, and annulling statutes that resulted therefrom.

In 1942, in *The Contribution of an Independent Judiciary*,¹ he said that they possess "only that content which each generation must pour into them anew in the light of its own experience," and that if an independent judiciary "seeks to fill them from its own bosom, in the end it will cease to be independent," for "that bosom is not ample enough for the hopes and fears of all sorts and conditions of men, nor will its answers be theirs; it must be content to stand aside from these fateful battles."

And in 1946, in *Chief Justice Stone's Conception of the Judicial Function*,² he said that the Chief Justice was among those holding to the "notion that the Bill of Rights could not be treated like ordinary law; its directions were to be understood rather as admonitions to forbearance; as directed against the spirit of faction when faction sought to press political advantage to ruthless extremes", and regarding it as "apparent that any more stringent doctrine than they were willing to admit made the courts a third camera, in fact final arbiters in disputes in which everybody agreed they should have no part. Unless they [the courts] abstained, the whole system would fall apart; or, if it did not, certainly the judges must be made sensitive and responsive to the shifting pressures of political sentiment, a corrective which few were prepared to accept."

Hence ". . . it is well for us to pause and consider how important in the days ahead may be his attempt to keep alive at the end, as he did at the beginning, the tradition of detachment and aloofness without which, I am persuaded, courts and judges will fail."³

The subject of the Lectures is a timely one. The Supreme Court has once again, by a series of recent decisions, become a storm center of controversy, the opinion being widely held, and fortified by sharp statements of Justices themselves in

1. THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 1692-1942 (published by the Massachusetts Bar Association), pp. 59-67.

2. 46 COLUM. L. REV. 696 (1946).

3. *Id.* at 699.

dissents, that the Court has unwarrantedly encroached upon fields of authority of other "Departments" and of the States. Proposals to limit the Court's appellate jurisdiction in a number of fields are under serious consideration in the Congress. Judge Hand's forebodings may be materializing in a substantial degree, and the principle of judicial restraint embraced in the "non-intervention" doctrine may well commend itself to a majority of the Justices as preferable to the deepening of a developing rift with the people. At least it is a doctrine that attests faith in representative government.

ROBERT MCC. FIGG, JR.*

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RECENT PUBLICATIONS RECEIVED

INTERNATIONAL TRADE ARBITRATION. Edited by Martin Domke. New York: American Arbitration Association. 1958. Pp. 311. No price available.

CRIME AND INSANITY. Edited by Richard W. Nice. New York: Philosophical Library, Inc. 1958. Pp. 280. \$6.00.

ESSENTIALS OF AMERICAN GOVERNMENT. By John H. Ferguson and Dean E. McHenry. New York: McGraw-Hill Book Company. 1958. Pp. 487. \$6.50.

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