A Commentary on the Constitution of the United States; Part III: Rights of the Person by Bernard Schwartz

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state constitutions. After the war with Great Britain, many state tribunals recognized the liberty, some to the extent of applying it to witnesses and to parties in civil disputes. By 1789 there was a viable corpus of state law and custom endorsing the right, and it was therefore somewhat natural for James Madison to include it in his draft of the fifth amendment. Although Levy admits that there is virtually no evidence concerning legislative intent, he does speculate from the language itself that the amendment was designed to be broad in scope and mandatory in application.

Levy's book, although excellent, is not without its weaknesses. The author devotes too much space to the procedural controversies of ecclesiastical tribunals and too little to the status of the common law on the subject of involuntary testimony. Indeed, he hardly broaches the latter topic until midway in his book, although it would seem to be more central to his thesis. In addition, he writes excessively about the religious controversies themselves although they serve only as background to the legal questions involved. In contrast, Levy conveys an impression of hastiness in his treatment of the colonial response to English precedent. Granted the sources are thin, but so, sometimes, is Levy's discussion of them. Finally, the author seems unduly Whiggish in his summary remarks on the supposed dedication of the founding fathers to the right against self-incrimination. That the revolutionary and constitutional patriarchs were so devoted does not seem to follow from Levy's preceding discussion; indeed the early legalists of America seem to have been somewhat uncommitted to many of the fundamental elements of what modernists would call "due process." Despite these errors of emphasis and exaggeration, Levy has given us a brilliant piece of scholarship on a much-neglected subject.

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Rights of the Person comprises, in two volumes, the third and concluding part of a comprehensive commentary on the United States Constitution.¹ Part I (two volumes) dealt with the powers of govern-

¹ Its publisher styles it "the most comprehensive commentary on the Constitution yet to appear."
ment; Part II (one volume) treated the rights of property.

Volume I, Sanctity, Privacy, and Expression deals with criminal justice, the right of privacy, and the freedoms of speech, press, assembly, and association. Volume II, Equality, Belief, and Dignity considers equality, freedom of religion (and freedom from the establishment of religion), and dignity of the person.

Each volume contains three chapters, each ranging from 60 to 175 pages. Arrangement of subject matter, in general, is traditional; chapters are logically arranged and section headings are clear enough (except for the use of “same” instead of full sectional titles) to allow ready reference use.

Footnotes appear at the end of each volume and a table of cases and index are at the end of Volume II. This placement of footnotes makes reference to them difficult, reduces the understanding of the analysis, and proves continuously irritating to the reader. The table of cases is comprehensive, listing cases cited both in the text and in footnotes. The date of each case is given, as is a single citation of source. For Supreme Court cases, citation is to the United States Reports. Parallel citations to the Lawyers' Edition and to the Supreme Court Reporter would render Professor Schwartz's treatises more useful, though at the cost of considerable effort. The index (17 pages) is good, but insufficiently detailed—a circumstance mitigated in part by the logical organization of chapters and of sections, by the comprehensiveness of section titles, and by the excellence of the table of cases.

Considered as a whole, by one who has read it all, Schwartz's commentary, Rights of the Person, seems to be an exceptionally comprehensive, well organized, scholarly, and lucid treatise on constitutional liberties. Except for one chapter—the last—the subject matter of individual chapters is logically related, the outline carefully structured, and the treatment free of irrelevancies. Chapter 20, entitled “Dignity of Person,” however, covers a considerable range: citizenship and immigration; treason and comparable crimes; privileges and immunities of national and state citizenship; freedom of movement; political rights, such as assembly, petition, voting, and candidacy for office; slavery and involuntary servitude; freedom from cruel and unusual punishments and from self-incrimination; unlawful detention; and “dignity in the welfare state.” There is no unifying theme in this chapter. Certainly, the phrase “Dignity of Person” does not convey the contents of this subdivision.

2 Schwartz is Edwin D. Webb Professor of Law at New York University.
This is not the case in the instances of Chapter 16, "Privacy of the Person"; 17, "Expression of the Person"; 18, "Equality of Person"; or 19, "Belief of Person", although the apparent desire for similarity of chapter titles leads the author to the ambiguous heading "Sanctity of Person" for Chapter 15, which, basically, deals with criminal justice. Why the discussion of coerced confessions, treason and "comparable crimes," and constitutional prohibitions against cruel and unusual punishments and against self-incrimination was not included in Chapter 15 is difficult to understand. Likewise, the treatment of freedom of person and of citizenship, statelessness, and alienage seems so basic to individual liberties that it ought to come first, rather than near the end of a commentary on the rights of the person. The discussion of "political rights" (assembly and petition, the suffrage, candidacy for office, and freedom from discriminations based upon color, literacy, previous condition of servitude, property, race, sex, and/or taxpaying) might, perhaps, best stand alone as a separate chapter. Freedom of movement poses obvious problems when considered as a constitutional right. In its domestic aspects at least, it belongs with the discussion of privileges and immunities of citizens or with the material on the interstate commerce power. In the sense of travel abroad, it might appropriately be considered with the implications of due process of law, the war powers, and the foreign relations power.

Considered as A Commentary on the Constitution of the United States (its main title), rather than as an exposition of the principles governing constitutional Rights of Person (the title of this part), Professor Schwartz's work has a number of theses (or biases, if you will). Schwartz states some of these explicitly and early; others are implicit (or, on occasion, explicit) throughout the work. The dominant theme of the first two volumes (dealing with the powers of government), he tells us, was that of a Constitution "construed to endow government with all the necessary authority to fulfill the great ends set forth in the Preamble." The emphasis of Volume III (dealing with the rights of property) was "the fundamental change that has more and more conceived property in terms of social function, rather than private right." Rights of the Person finds its "main theme" in a "necessary" and "direct consequence of those in the prior parts."

With the Powers of Government so expanded and the Rights of Property so constricted, it has been necessary for the law to place increasing

4 Id.
5 Id.
stress upon Rights of the Person, by way of compensation. Personal rights have had to be given countervailing scope, if the ultimate social interest—that of individual life—was not to be lost sight of. The Bill of Rights has had to be given ever greater effect as the Great Charter of personal liberties and has become the very stuff of contemporary constitutional law.6

Stated somewhat more explicitly, the thesis of Rights of Person is that there is a direct correlation between a concern, on the part of the courts, for personal rights and the deterioration in the status of property rights. Schwartz states his hypothesis thus:

If both property and person were to be placed virtually beyond the pale of constitutional protection, it would strip the individual of the very attributes of individuality for the furtherance of which the society itself was constituted. More than that, it would leave him helpless in an age in which the individual is, at best, in danger of being overwhelmed by concentrations of power....

To express it another way, it may scarcely be doubted that society has by now fairly got the better of individuality. With the rights of property so severely compressed, emphasis must be placed on maintaining the rights of the person, if man is to be able to keep even a modicum of liberty.7

In the treatment of specific constitutional concepts, Schwartz's approval (or disapproval) of existing interpretations and tendencies is often apparent. Thus, he writes of "Expression and the First Amendment:"

The words of the First Amendment cannot be given absolute effect in law which they have in language. ["Congress shall make no law . . ."] . . . The First Amendment freedoms are not ends in themselves, but only means to the end. . . . their exercise must be compatible with the preservation of other rights essential in a democracy and guaranteed by the Constitution. The application in practice of the First Amendment can no more be governed by absolute rules than can that of other organic provisions. The demands of First Amendment freedoms, as well as the competing claims of governmental authority to secure other recognized interests are 'better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.'8

Although, the freedom of expression clause of the first amendment should be interpreted in light of its "historical" and "logical" meaning(s), and not in a "literal vacuum,"9 the same is not true of the equal protection clause of the fourteenth amendment, which should

6 Id.
7 Id. at 4-5.
8 Id. at 262.
9 Id. at 261.
be read literally. Here, Schwartz argues, the language of the amend-
ment is controlling:

What is important in this respect is, not the possibly restricted intent
of the contemporary Congressional leaders, but the language which they
wrote into the Constitution. What was, after all, submitted for ratification
was such language and not the subjective designs of particular pro-
ponents of the Fourteenth Amendment. And the language of the Amend-
ment plainly states that the guarantee of equality contained in it is to
apply to any person. Unless words are to be deprived of their ordinary
meanings, this must include every natural human being within the
jurisdiction of any state—irrespective of citizenship, sex, or race.10

Why the words of the first amendment are to be “deprived of their
ordinary meaning” and those of the equal protection clause of the
fourteenth are not to be is nowhere explained, unless it be in the
sentence: “Such . . . is, in fact, the presently accepted scope of the
Equal Protection Clause.”11

In interpreting first amendment freedoms, if one follows Schwartz’s
argument, “it should be evident to one of discernment in law that the
absolutist interpretation of the First Amendment carries within it its
own reductio ad absurdum,”12 or, alternatively, “it has been clear, from
the beginning of our history, that the Constitution does not provide
for a wholly unfettered right of expression.”13 Yet, no such “logical”
or “historical standards” apply (at least not any more) in the case of
equal protection; here the “express wording” and “presently ac-
cepted scope” are controlling. Clearly, one can have it both ways in
constitutional interpretation: a “literal interpretation” of equal pro-
tection, a “balancing test” for first amendment freedoms.

Yet, for all that has been said about Schwartz’s tendency to serve
up constitutional law with philosophy, Rights of the Person is an
immensely useful, informative and intelligent work. In sheer number
of cases discussed, it is a monumental treatise. The quality of case
summaries is, unfortunately, uneven. On the other hand, what single,
human intellect could have digested equally well all of this immense
mass of legal materials?

Inevitably, certain topics are treated inadequately. One would
wish, for example, for an analysis of the competing principles at issue
in Feiner v. New York14 and in Terminiello v. Chicago.15 The state-

10 SCHWARTZ, Vol. II at 492.
11 Id. at 492-93.
13 Id.
15 337 U.S. 1 (1949).
ment (contained in a footnote) "it is paradoxical that Feiner's conviction was thus upheld while that at issue in Terminiello v. Chicago, 337 U.S. 1 (1949), where there was a clear breach of the peace, was upset on technical grounds,"16 is, at best, only moderately informative. Similarly, it is difficult to understand the omission of Newberry v. United States17 from the discussion of the power of Congress to regulate primary elections;18 yet Newberry is discussed in neither text nor footnotes.19 Other significant cases omitted include: Aguilar v. Texas,20 dealing with constitutional requirements for obtaining a state search warrant; Alcorta v. Texas,21 treating the application of due process of law to a conviction based upon perjured testimony; Balzac v. Puerto Rico,22 considering application of the Bill of Rights to "unincorporated territories;" Barenblatt v. United States23 and Uphaus v. Wyman,24 enunciating a "balance between individual and governmental interests" in the areas of Congressional and state investigations; Gallagher v. Crown Kosher Market,25 relating to Sunday closing laws; and Gibson v. Florida Investigating Committee,26 treating the rights of a state to compel testimony as to whether alleged Communists were members of the National Association for the Advancement of Colored People.

One might also mention in this connection: Henderson v. United States,27 invalidating the segregation of Negroes in railroad dining cars; Hirabayashi v. United States,28 upholding a wartime curfew as a military measure to prevent espionage and sabotage; McCabe v. Atchison Topeka & Sante Fe Railroad Company,29 denying the validity of a state law allowing railroads to provide sleeping, dining, and chair cars for whites only; Ex parte Merryman,30 dealing with the power to suspend the writ of habeas corpus; Murdock v. Pennsylvania, 31

16 Schwartz, Vol. II at 464 n.103.
17 256 U.S. 232 (1921).
18 Schwartz, Vol. II at 792. Compare the brief, but informative, discussion in a basic national government textbook: R. Carr, AMERICAN DEMOCRACY 159 (5th ed. 1968). See also the analysis of this and related "white primary" issues in V. Key, JR., SOUTHERN POLITICS IN STATE AND NATION 621-624 (1950).
19 Schwartz, Vol. II at 979.
22 258 U.S. 298 (1921).
28 320 U.S. 81 (1943).
29 235 U.S. 151 (1914).
30 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861).
31 319 U.S. 105 (1943).
indicating that "religious speech and press" enjoy a protection against restraint and regulation which may be denied to "secular or commercial speech or press;" *Norris v. Alabama* (the Second Scottsboro Case),\(^{32}\) dealing with the exclusion of Negroes from jury rolls; *Schnell v. Davis*,\(^{33}\) invalidating the "understanding" and "explanation requirements" of Alabama's literacy test; and *Williams v. Mississippi*,\(^{34}\) holding that literacy tests, in and of themselves, do not violate the fifteenth amendment since they do not deny anyone the right to vote on the basis of race or color.

The above list of cases omitted is not meant to be exhaustive; others might be mentioned. But it suggests significant oversights. One might validly choose to exclude various of these cases, but can one legitimately omit all of them?

Ultimately, perhaps, the major objection to *Rights of Person* is one common to all such commentaries. An exposition of the "principles of the Constitution" can never substitute for reading the cases. Through time consuming inefficient, and excessively demanding of one's time, the case method conveys understandings, insights, and intuitions unavailable in even the finest summary (and Schwartz's is one of the finest).

Yet, one who would understand the implications of *Baker v. Carr*,\(^{35}\) must read it—and *Colegrove v. Green*,\(^{36}\) *Gray v. Sanders*,\(^{37}\) *Wesberry v. Sanders*,\(^{38}\) *Reynolds v. Sims*,\(^{39}\) *Lucas v. General Assembly of Colorado*,\(^{40}\) and the other related cases. And he must read not merely the "opinion of the Court," but the concurring and dissenting opinions, where these exist. Schwartz's summary of *Baker v. Carr*, though more extensive than those of most other cases, conveys, at best, an imperfect understanding of even this great constitutional landmark.\(^{41}\) And this is even more true of lesser cases dealt with in a paragraph, a sentence, or a phrase.

The most that a treatise like Schwartz's can do is to suggest where one may best begin his research. If it does this comprehensively and

\(^{32}\) 294 U.S. 587 (1935).
\(^{33}\) 336 U.S. 933 (1950).
\(^{34}\) 170 U.S. 213 (1889).
\(^{35}\) 369 U.S. 186 (1962).
\(^{36}\) 328 U.S. 549 (1946).
\(^{38}\) 376 U.S. 1 (1964).
\(^{39}\) 377 U.S. 533 (1964).
\(^{40}\) 377 U.S. 713 (1964).
\(^{41}\) See SCHWARTZ, Vol. II at 551 ff. Compare, for example, Schwartz's statement of the "two principal issues . . . presented for decision" in *Baker v. Carr* with the three issues—jurisdiction, standing, and justiciability—that the United States Supreme Court chose to decide.
accurately, it has done its job. This, Rights of Person has generally done.

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Archibald Cox begins this brief and incisive study of the Warren Court by recalling that "de Tocqueville wrote more than a century ago that hardly a political issue arose in the United States that was not converted into a legal question and taken to the courts for decision."

So it was then and so it is today. Americans, unlike any other people, are in the peculiar habit of committing their most critical social, economic, political, and philosophical questions to legal actions so that the judiciary may participate in their resolution. Over the decades, the judiciary has helped resolve these critical issues, while storms have arisen in the American polity over the direction in which the judiciary has led. Lawyers and political scientists, as well as members of the Supreme Court itself, have joined in the fray to attempt to answer the question: What is the proper role of the Supreme Court in the American governmental and political system? Should the Justices ignore the political aspects of their task—the public consequences of their decisions? Should they ask themselves the question "What substantive result is best for the country?" Or should they be content to answer the question "What is the decision according to law?" Different Courts have leaned in different directions, and the dilemma remains.

This book is an attempt by a former Solicitor General of the United States (1961-1965), who is presently a professor at Harvard Law School, to show that the Supreme Court under the Chief Justiceship of Earl Warren has met the dilemma head on and solved it in an acceptable manner. Professor Cox admits that his view may be prejudiced. One who sits in the Supreme Court almost daily awaiting oral argument or the delivery of opinions, he tells us,

... [a]quires both admiration and affection for the Court and for all the justices. The problems with which they deal are so difficult, the number