

Introduction

By TOM C. CLARK*

The Constitution of the United States was purposely cast in broad language so that it might, through interpretation, be adapted to the changing needs of the human condition. Its strength, flexibility, and vitality as an enduring charter of freedom stem from the incomparable wisdom and statecraft of the Founding Fathers who devised a unique process for constitutional adjudication by vesting “the judicial power of the United States . . . in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.” This judicial power extended “to all cases, in law and equity, arising under this constitution”¹ This is not to say that ours is a government by lawsuit, but rather that litigation is the vehicle by which the fundamental principles rooted in our Constitution are given content and relevance in each generation. In short, constitutional adjudication is the genius of our democracy and its noblest attribute. We need only examine a quintet of historic opinions by the great Chief Justice, John Marshall, to support this conclusion.²

It has not, however, always been true that the caliber of constitutional adjudication has measured up to these landmark decisions. For example, less than fourscore years after the monumental works of Marshall, the Court decided the *Dred Scott* case,³ which was regrettable if not “pernicious,”⁴ for it was a contributing cause of the Civil War. Whether the War between the States could have been avoided by a more foresighted constitutional adjudication, one cannot say with certainty; but it may have been our last clear chance to avoid that bloody conflict. Again the judicial process was tested and found wanting in

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1. U.S. CONST. art. III.

2. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

3. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

4. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan J., dissenting).

the Civil Rights Cases;⁵ and during our own time there is an example of constitutional decision-making gone haywire in the cases involving the infamous Executive Order 9066.⁶ Thankfully, decisions such as these are in the clear minority and have been offset by the many courageous decisions of the Court.⁷ However, they cannot be forgotten. Rather than merely lamenting these isolated misjudgments, we should recognize the dangers to liberty inherent in them and be ever vigilant to avoid succumbing to prevailing exigencies, which could warp the Constitution beyond recognition.

The students, the faculty, and the administration of Hastings College of Law have determined that a need exists for a forum to discuss and debate constitutional issues. They have concluded that while there is a galaxy of fine law reviews which cover the ever expanding horizons of the law, there is none which focuses exclusively on constitutional law. I agree that we sorely need a first class, authoritative publication that can serve as a constitutional avant-courier, as did the illustrious *Federalist Papers* nearly two centuries ago. As a consequence there is now a new star in the constitutional firmament known as *The Hastings Constitutional Law Quarterly*. I predict that it will help fashion the constitutional adjudication of the future.

The Editors have assembled a distinguished array of contributors for this inaugural issue; and as perhaps a lure to the readers, have provided a commentary section wherein topical matters are aired in a less conventional format than that of most law reviews. The topics run the gamut of current problems facing the nation including, of course, "The Question of Impeachment" which is covered by my former Supreme Court brother, Arthur J. Goldberg. With his usual flair, Arthur enumerates the reasons for the lessons of this dark episode in American history. Charles L. Black, Jr., Henry R. Luce Professor of Jurisprudence, Yale University, contributes another timely article covering the problems incident to the separation of governmental powers, entitled "Achieving a Working Balance of American Political Departments." In fitting sequence comes "State Executive Power," an illuminating and interesting article by Professor William F. Swindler

5. Civil Rights Cases, 109 U.S. 3 (1883).

6. 7 FED. REG. 1407 (1942). See *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

7. See, *inter alia*, *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *In re Gault*, 387 U.S. 1 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Baker v. Carr*, 369 U.S. 186 (1962); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Youngstown Sheet & Tube Co. v. Sayer*, 343 U.S. 579 (1952).

of the Marshall-Wythe School of Law, College of William and Mary, recognized authority in this field. The President of the American Bar Association, Chesterfield Smith, gives us a personal interview on "Disciplining the Bar." In his pungent style that lays the wallops where they are deserved, Mr. Smith makes the reader sit up and take notice of the most disgraceful aspect of our profession.

These commentaries are followed by lead articles by another group of stars: Robert G. Dixon, Jr., Assistant United States Attorney General, Office of Legal Counsel, "Newsmen's Privilege by Federal Legislation: Within Congress' Power?"; Professor Peter Sperlich, Professor of Political Science, University of California, Berkeley and Attorney Martin Jaspovice, "Grand Juries, Grand Jurors, and the Constitution"; Professor Jack Bonnanno, Hastings College of the Law, "The Constitution and 'Liberated Community Property in California'—Some Constitutional Issues and Problems Under the Newly Enacted Dymally Bill"; and Professor Ann Fagan Ginger, Hastings College of the Law, "A Data Bank on Constitutional Rights?"

Over the years, Hastings College of the Law has had many distinguished professors and graduates. Associated with it have been many prominent and highly respected individuals such as Chief Justice Traynor. Hastings has been in the vanguard of innovative programs in legal education. Its College of Advocacy and Criminal Law Clinic are notable examples. Now Hastings has given us the *Constitutional Law Quarterly*. I am delighted that it is with us and extend my best wishes and high hopes for its success.

