

committee's ranking GOP member, William McCulloch, brush aside their objections to use of the commerce clause as "superficial." The Whalens also fail to mention the probing discussion of the constitutional issue in the Senate Commerce Committee, for a synopsis of which interested lawyers must still look to Gerald Gunther's constitutional law casebook.

These authors also ignore several other legal issues. For example, *The Longest Debate* provides no evidence about whether Lino Graglia was right when he charged that the legislative histories of Titles IV and VI show that the Department of Health, Education and Welfare and the federal courts violated the intent of Congress when they interpreted the Act as requiring action to achieve racial balance in the public schools.<sup>20</sup> Nor does this book shed any light on the issue of whether an agreement to deprive someone of rights created by Title II can be punished as a violation of the civil rights conspiracy statute.<sup>21</sup>

These are questions that have troubled judges and legal scholars, but they are not the sorts of things which interest the Whalens. Consequently, their book is likely to be dismissed by lawyers as useless, while it is rejected by historians as incompetent. These passionate amateurs have recreated the drama of one of the great congressional battles of the twentieth century, but they have not written a satisfactory legislative history of the Civil Rights Act of 1964. Apparently, such a book is, as Senator Everett Dirksen might have said, an idea whose time has not yet come.

**POWER AND POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW.** Edited by Myres S. McDougal<sup>1</sup> and W. Michael Reisman.<sup>2</sup> Dordrecht, Netherlands: Martinus Nijhoff. 1985. Pp. xi, 460. \$96.00.

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These essays were written to honor Eugene Rostow on his 70th birthday and imminent retirement (in 1984) from the Yale Law

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20. L. GRAGLIA, *DISASTER BY DECREE* 47-51 (1976).

21. The FBI thought that it could be, but the United States District Court for the Middle District of Georgia ruled otherwise in *United States v. Guest*, 246 F. Supp. 475, 485 (M.D. Ga. 1964). See generally Belknap, *The Legal Legacy of Lemuel Penn*, 25 *How. L.J.* 467, 480, 508 (1982).

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School. Their authors are friends of Rostow, many of them also his colleagues and some his former students as well. The essays are "as diverse as his interests," extending beyond topics of constitutional law and jurisprudence to the conduct of foreign policy and nuclear strategy. I shall limit my review to several essays that treat issues of constitutional law, for I have neither the space nor the competence to discuss most of what appears in this interesting collection.<sup>4</sup>

In *Unraveling the Tangled Threads of Substantive Due Process*, Professor Frank R. Strong challenges the general belief that due process in English and American law prior to the fourteenth amendment meant only procedural due process and, consequently, that the substantive interpretation given to that amendment's due process clause was a break with tradition. Professor Strong argues that substantive due process, as a protection of property rights, goes back to the Magna Carta and that, as received in America at the time of independence, it was the basis for attacks on government actions expropriating real and personal property or establishing monopolies. According to Strong, it took much of the nineteenth century for substantive due process to be fully received into American law; by the time it was, ideas alien to the English heritage had entered with it. The most notable was "liberty of contract," which made substantive due process an obstacle to "legal, economic, and social reforms." At this point, in 1900, Strong concludes his study with the promise of a sequel.<sup>5</sup>

Professor Strong is more successful in showing that English and American law was solicitous toward property prior to the fourteenth amendment than in showing that it used substantive due process to any significant extent as an instrument of that solicitude. His evidence does not establish that, prior to the amendment, due process or the law of the land (its equivalent) was the "common" basis for attacks on laws that took away property. Strong himself finds it "passing strange" that Jefferson and other early Americans did not express their opposition to monopoly in terms of due pro-

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4. For the reader's information, I cite the other essays in this interesting volume, noting again that my failure to discuss them is unrelated to their quality: William L. Morison, *The Viable Vision for the Volatile Society*; W.W. Rostow, *Planning for Freedom Revisited*; John N. Blum, *United Against: American Culture and Society During World War II*; Gary J. Simson, *The Role of History in Constitutional Interpretation*; Raymond Aron, *The Politics of Human Rights*; Lung-Chu Chen, *Human Rights and the Free Flow of Information*; Roger Errera, *Reflections on Extradition in French Law*; Philip Bobbitt, *Deterrence and American National Security*; and Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Process of Effective Power*. Owen M. Fiss, Louis H. Pollak, and Herman W. Liebert furnished personal sketches of Eugene Rostow.

5. The sequel was F. STRONG, *SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE* (1986).

cess. It seems quite plain, however, that they saw no connection between the two. In all of his declamations against the great monopoly of his day, the Bank of the United States, Jefferson never charged that it violated constitutional due process, although he did note that it was inconsistent with state laws that specifically prohibited monopoly.<sup>6</sup>

Does substantive due process owe more to American sources than to English? "Life, liberty, and property" are more evocative of the Declaration of Independence than of the Magna Carta and the common law; indeed, the fourteenth amendment's framers consciously fashioned it from the Declaration's truths.<sup>7</sup> The American notion of rights—"unalienable," made "secure" by government—requires government to justify deprivations of them, and, it seems to me, the burden of proof upon government increased as the Declaration's influence deepened and spread.

In *The Great What-Is-It: The 'War Power,'* the late Professor Joseph W. Bishop questions the use of the phrase "war power." He notes that this term doesn't appear in the Constitution, and he doesn't think it helps us "to classify constitutional problems." But Bishop proceeds "to divide"—that is, to classify—situations in which war powers issues have been raised, and he seems quite comfortable in his treatment of them. The expression was used, apparently for the first time, when Lincoln reported to Congress in July 1861, on his need "to call out the war power of the Government."<sup>8</sup> If Bishop had been seriously interested in the meaning of the phrase (I suspect he was not), he might have looked at the actions to which Lincoln referred. He might then have consulted William Whiting's *War Powers Under the Constitution of the United States*, published in 1864, noting especially the distinction the author makes between the "War Powers of the *President*, and Legislative Powers of *Congress* . . . ."<sup>9</sup> I think the trail leads back to Locke's "federative power" of the executive, "the Power of War and Peace,"<sup>10</sup> and from there it goes forward into article II of the Constitution.

But Bishop handles the war powers well enough in his own way, and he is pretty tough-minded about it. "Whatever the understanding of the framers may have been," he accepts history's verdict

6. See *Opinion, Feb. 15, 1791*, in 3 WRITINGS OF THOMAS JEFFERSON 145-53 (A. Lipscomb & A. Bergh eds. 1904).

7. See CONG. GLOBE, 39th Cong., 1st Sess. 2459, 2510 (1865-66) (statements of T. Stevens and G. Miller in the House of Representatives).

8. *Message to Congress in Special Session, July 4, 1861*, in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 426 (R. Basler ed. 1953).

9. W. WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES at i (10th ed. 1971).

10. J. LOCKE, SECOND TREATISE OF GOVERNMENT at para. 146 (1690).

that the power to make war is essentially an executive function. He doubts that the War Powers Resolution of 1973 will have its intended effect of restraining presidential warmaking. And he suggests that the Supreme Court could deny the doctrine of military necessity in *Ex parte Milligan* because the need for the doctrine had passed when it rendered its decision in 1866.

Bishop does display some tenderness towards the courts. He places the main blame for measures taken against Japanese citizens and aliens in the Second World War on President Roosevelt, his military commanders, and Congress, not on the Supreme Court for its decisions in *Hirabayashi* and *Korematsu*. If the Court had stood against them, he says, it might have provoked a "constitutional crisis"; in other words, I suppose, the Court faced high risks of defiance or retaliation. Perhaps there is some inconsistency between this appraisal and Bishop's willingness (greater than my own) to trust the courts ("only the courts") to separate pretended from real emergencies and to decide when they should and should not control the actions of the other branches.

Bishop's essay cuts a wide swath: conscription, committing the armed forces to combat, and wartime and other emergency actions that would be unconstitutional in ordinary times. To do so adequately would require more than the eleven pages of text that the author devotes to it.

In *The Nature of Judicial Review*, republished from the *Yale Law Journal*,<sup>11</sup> Harry H. Wellington defends judicial review against the charge that it is undemocratic (he prefers the euphemism "countermajoritarian"). Wellington observes that all branches of government have undemocratic features, by constitutional design (e.g., Senate apportionment) or practice (e.g., the influence of congressional staffs). He considers such features to be a virtue, for they enable government to protect "longer range concerns." He also finds judges more virtuous than other officials, for they can best "examine the views the community expressed in calmer moments" and thus best express "the moral ideals of the community."

The "real anxiety" over judicial review, says Wellington, is about its finality: constitutional decisions seem to be irreversible. Wellington believes, however, that this problem is easy to overstate. Often decisions do no more than affect the means by which government acts, and not the substance of its actions, as when courts strike down laws for vagueness or impose procedural rules as in *Miranda*. But what is to be done about judicial "mistakes"? Some mistakes,

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11. 91 YALE L.J. 486 (1982).

Wellington says, can be avoided if judges will refrain from deciding issues whose effects they cannot see clearly. Other mistakes pose a more serious problem: they occur when judges misinterpret the community's moral ideals. Wellington hopes that judges will then correct themselves, as he thinks the Supreme Court did in modifying (I would add, only slightly) its broad ruling in *Roe v. Wade*. To assist judges in keeping judicial review in line with popular opinion, he encourages "political activity" by those who favor and oppose judicial decisions, even to the point of "resistance." "Our law," he says, "must be based on consent."

Professor Wellington does not justify judicial review on traditional grounds, and for good reasons. He could not agree with Hamilton's thesis in *The Federalist* No. 78, that the power to strike down laws is safe because it involves only the exercise of "judgment." Wellington believes that judges do exercise "will" in making law, and that they should continue to do so. Nor could he argue, like Marshall in *Marbury*, that judicial review is (or should be) employed to maintain the limits in the Constitution, and then only when legislative acts are "expressly forbidden" by it, for the Constitution does not figure in Wellington's view of constitutional interpretation. He does seem to paraphrase *The Federalist* when he speaks of government examining and expressing the community's views in its "calmer moments"; but he thinks this task is best done by the courts, whereas *The Federalist* assigns it—the task of serving "the cool and deliberate sense of the community"—to the people's elected representatives.<sup>12</sup>

I might put the difference between Professor Wellington and the founders this way: Professor Wellington makes judges the servants of the people, while the founders made them the guardians of the people's Constitution. I wonder whether Wellington's conception of the Court's role serves the people as well as the framers' conception.

I come to my last essay, Professor Charles L. Black's *On Reading and Using the Ninth Amendment*. When Justice Jackson was asked about this amendment, he could not, he later related, remember what it was, nor could he remember ever having heard an argument based on it.<sup>13</sup> Professor Black undertakes to remedy this deficiency. The amendment provides that, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or

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12. THE FEDERALIST No. 63, at 425 (J. Madison) (J. Cooke ed. 1961); see also *id.* No. 35, at 221 (A. Hamilton), and No. 71, at 482-83 (A. Hamilton).

13. R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 74-75 (1955).

disparage others retained by the people.” Black asks, as Jackson had done earlier, what these other rights could be. To Jackson, but not to Black, unenumerated rights were a “mystery.” The “two best sources” for drawing them forth, Black says, are the Declaration of Independence and the Constitution’s preamble. Now the Declaration also refers to unenumerated rights—“life, liberty, and the pursuit of happiness” being “among” other inalienable ones—but this is not what catches Black’s eye. Rather he is interested in the meaning that might be teased from words like “liberty” in the Declaration.

Black finds a model for enumerating rights in Justice Washington’s inquiry into the privileges and immunities clause of article IV in *Corfield v. Coryell*. But Black does not want to confine ninth amendment rights to those “which are, in their nature, fundamental; which belong of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States . . . .”;<sup>14</sup> and he certainly does not want to rummage about in old documents for them. He thinks the ninth amendment was designed to enable us to discover its unenumerated rights for ourselves.

Black’s method is a way of “reading” not just the ninth amendment, but the entire Constitution. More precisely, it is one of two favorite ways of changing the Constitution without seeming to do so. When you encounter general terms in the document, you can say that the framers were “vague” or you can say that they intended their meaning to “evolve” (perhaps both), and you have your excuse for giving the terms your own (or “the community’s” or “modern-day”) meaning. Black, a thoughtful man, recognizes that the ninth amendment is a more plausible vehicle for doing this than the due process clause or other “bizarre” methods. And to what end? Nothing short of “a general system of human-rights constitutional law.” And Black, also a kindly man, softens his rebuke of the founders (with their “negative 18th century” understanding of rights) by crediting them with realizing and planning for their own future supersession. What then was the point of having a Constitution?

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14. 6 F. Cas. 546, 551 (C.C.D. Wash. 1823) (No. 3,230).