

THE RIGHTS OF PROPERTY. By *Bernard Schwartz*,* New York: The Macmillan Company, 1965. Pp. 452. \$12.50.

This is the third volume to be published of Professor Schwartz' projected five-volume "comprehensive commentary on the Constitution." The first two volumes dealt with the federal system and the scope and allocation of federal power. In this book, Professor Schwartz attempts to set forth an authoritative doctrinal statement of the current status of private property and private economic activity in the constitutional scheme. Because it is not a book on the Supreme Court or on the nature of constitutional adjudication, it does not speak in the language of power, compliance, neutral principles or politics. Nor does it attempt rigorously to deal with the social value of private property or with problems of allocation of resources. Its premise is a simple one: that there is a constitutional law of property which may be set forth with clarity and precision. It is, in a word, a book of "law."

This is not to suggest that the book contains no personal views of its author on what the law ought to be. Starting with the premises that "it is the Due-Process Clause, more than any other organic provision, that has maintained the 'just poize' between Authority and Liberty,"¹ Professor Schwartz finds "disquieting elements in the swing of the judicial pendulum from *Adams v. Tanner* to *Ferguson v. Skrupa*."² The swing to which he refers is, in a general way, the swing from a view of due process which permitted the Court to substitute its own social and economic beliefs for the judgment of legislative bodies to one which bars the striking down of legislative acts (at least in the sphere of economic regulation) unless hopelessly unreasonable. To Professor Schwartz, the sustaining by the Court, in *Kotch v. Pilot Commissioners*,³ of a Louisiana pilot-certification statute which had the effect, though not the declared purpose, of creating a family monopoly in the piloting business in New Orleans, was more an act of "judicial abdication" than judicial self-restraint.

"The danger," according to Professor Schwartz, "is that, under the present approach to questions of substantive due process—with the property right always placed in the scale as an individual interest and,

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1. SCHWARTZ, *THE RIGHTS OF PROPERTY* 27 (1965) [hereinafter cited as SCHWARTZ].
2. SCHWARTZ 91. Compare *Adams v. Tanner*, 244 U.S. 590 (1917) (state law forbidding collection of fees from employees by employment agencies held a denial of due process), with *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (state law forbidding non-lawyers to engage in debt adjusting business held not a denial of due process).
3. 330 U.S. 552 (1947).

as such, necessarily outweighed by the social interest in the opposite side of the balance—the line between valid and invalid governmental action is becoming increasingly blurred.”⁴ If, of course, one takes the view that statutes which the Court affirmatively sustains are, by definition, at least constitutionally “valid,” if not wise or democratic, the Schwartz objection becomes one that the line between valid and invalid governmental action is becoming too *sharp*. Yet, if Professor Schwartz is unhappy (perhaps only mildly so) with the Court’s current preparedness to sustain “invalid” (unconstitutional?) governmental action, he is nonetheless aware of the fact that he is standing between the horns of a dilemma; for in his discussion of *Skrupa*, he states, “to draw the line between regulatory and prohibitory action is for the courts to intrude into the realm of legislative value judgments and to make the criterion of constitutionality what the judges believe to be for the public good.”⁵

But why, in view of Professor Schwartz’ expressed discontent with the current relegation of substantive due process in the economic regulation field to a mere check upon legislative irrationality, must his book be called merely a book of “law”? One answer is that at no point in the book do the author’s views emerge as more than a tristful wishing for something better. What that something better might be is simply not disclosed. About the only proposal which he makes is that the institution of private property be recognized as a “social interest” and, hence, given more weight in cases involving property rights.

If balance we must, should we not place on the individual’s side the importance of the institution of property in the free society? The vindication of property rights themselves may, in other words, be stated in terms of social interests. The society which has a clear interest in furthering the general progress and the individual life also has an interest in securing property rights insofar as they contribute to the advance of such interests.⁶

But who is the “we” who must do the balancing? Is it “we the people” or “we the Supreme Court”? If it is to be the latter, as we may safely assume is Professor Schwartz’ choice, how is the balancing process to go forward? Are there available objective criteria or trend information by which the Supreme Court may determine when a legislature has failed to give sufficient weight to the social interest in private property?

4. SCHWARTZ 232.

5. *Id.* at 91.

6. *Id.* at 233.

Are statutes to be read on their face, or are legislative motives to become relevant? Is it Professor Schwartz' view that the Court is legitimating "bad" legislation in cases where it could have avoided doing so, or is it his view that the Court should affirmatively strike such legislation down? If the latter, can Professor Schwartz point to the constitutional principle which would justify such action? Professor Schwartz does not attempt to answer these questions. In fact, he does not even pose them. Because he does neither, his book makes no serious contribution to discussion of what Professor Freund once termed "the major issue of our time, how far economic community is essential to human freedom."⁷

A second, and probably more important, reason why *The Rights of Property* must be taken as a book of "law"—the term is by no means intended pejoratively—is simply that the "law" is the chief object of its focus. Some indication of the amount of law which the book attempts to cover is revealed by its statistics. Of its 452 pages, 80 are devoted to footnotes (2585 of them). The table of cited cases (of which there are 1133) runs 29 pages, and the index 14. Page 438 is blank, leaving, therefore, 328 pages for the main text or commentary. Thus, the average number of footnotes and case citations for each page of text is 7.9 and 3.5, respectively. Since Professor Schwartz tends to avoid string citations, almost every case cited supports a separate statement of law in the text. Measured, therefore, in dollops of law, the book is about as comprehensive as anyone could ask.⁸

As a general survey of holdings in the areas of economic regulation and eminent domain, the book is likely to be a valuable tool to practicing lawyer and law student. Unfortunately, much of the text discussion follows a style annoyingly similar to that of *Corpus Juris Secundum*. Something of the flavor of this style is captured in this fragment (complete with the author's footnote numbers) from pages 82-83:

That gambling is an evil which the law may rightfully stamp out is no longer an open question.⁶⁰⁰ And this is true of all forms of gambling—whether card⁶¹⁰ or dice playing,⁶¹¹ wagering on horse races,⁶¹² lotteries,⁶¹³ or more sophisticated forms such as options to buy or sell commodities at a future time⁶¹⁴ or the purchase and sale of stocks on margin.⁶¹⁵

7. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 39 (1961).

8. Unless one asked for a discussion of the restrictive covenant cases (*e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 [1948]), the sit-in cases (*e.g.*, *Bell v. Maryland*, 378 U.S. 226 [1964]), or cases arising under Title II of the Civil Rights Act of 1964 (*e.g.*, *Katzenbach v. McClung*, 379 U.S. 294 [1964]), none of which are referred to in the text.

Putting aside the objection that the first four citations are to state court decisions, and putting aside the question whether trading in commodities futures and margin sales are really merely sophisticated forms of the "evil" of gambling, one must wonder why it was necessary for Professor Schwartz to say more than that the prohibition of gambling is clearly within the reach of a state's police power. Is this comprehensiveness for comprehensiveness' sake, or does the author seriously believe that the information he has provided will be useful?

One thing is clear: that by devoting a substantial part of his book to what may be termed the trivially-true of constitutional law, Professor Schwartz has denied himself the opportunity of giving serious attention to matters of substance. Thus, to the critically important question of when noncompensable "regulation" under the police power ends and compensable "taking" of private property begins—a subject which was carefully, though by no means exhaustively, explored in a 41-page article by Professor Joseph L. Sax in *The Yale Law Journal* about a year ago⁹—Professor Schwartz is able to give only three pages of text.¹⁰ With that little space to work in, it is not surprising that the treatment is thin to the point of being elliptic. For example, immediately following a two-paragraph discussion of *Goldblatt v. Town of Hempstead*,¹¹ a 1962 Supreme Court decision which sustained, as a noncompensable regulation under the police power, a local ordinance which had the effect of preventing appellants from continuing their previously lawful use of their property for mining purposes, Professor Schwartz writes: "It is thus clear that government may destroy or diminish values by assertion of the police power without the necessity of making compensation for the loss." The word "thus" would seem to imply that the statement is based upon the immediately preceding discussion of *Goldblatt*, but that cannot be true because the Court clearly stated in that case that "there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question."¹² If Professor Schwartz' statement is intended to mean no more than that regulation under the police power which produces a reduction in property value does not always (or even usually) require payment of compensation, it is unobjectionable. But if it means that

9. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

10. SCHWARTZ 263-66.

11. 369 U.S. 590 (1962).

12. *Id.* at 594.

diminution of value produced by regulation can never constitute a compensable taking, it is plainly wrong.

In the same three-page discussion, Professor Schwartz devotes a paragraph to discussion of the so-called air-easement cases—*United States v. Causby*¹³ and *Griggs v. Allegheny County*.¹⁴ In both cases, property was held to have been taken by reason of the low flight of airplanes over it—military planes in *Causby* and private planes using a government-owned airport in *Griggs*. Immediately following the text discussion of these cases, appears the following sentence:

Yet, it is clear, under the discussion earlier in this section, that if the owner's right to use such space above his land had been eliminated by a reasonable regulation promulgated under the police power (as by a zoning ordinance or an ordinance restricting building heights), he would not be entitled to any compensation.¹⁵

Does Professor Schwartz mean that government may obtain air-easements without paying compensation by simply "regulating" them into existence? It must be assumed he does not; for that view is simply untenable. Yet, should a non-lawyer be expected to know that the sentence cannot mean what it seems to mean?

The introduction of the non-lawyer into this review is quite pertinent, because there can be no doubt but that Professor Schwartz' commentary is directed largely to him. In his opening preface to his commentary, Professor Schwartz stated his "assumption that the working of the Constitution is more than the private preserve of the legal profession." It was, he said, his "faith" that even the more difficult subjects which his commentary would have to cover "need not be obscured in the technical vacuum of legal language." They can, he said, "be presented in a readable fashion and in a manner that makes clear their significance to those interested in the operation of what Gladstone once termed 'the most wonderful work ever struck off at a given time by the brain and purpose of man.'"¹⁶

The Rights of Property is a hornbook on the constitutional law of property. As hornbooks go, it seems a good one. But it must be doubted that the "wonderful work" which is the Constitution will ever be found within its covers.

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13. 328 U.S. 256 (1946).

14. 369 U.S. 84 (1962).

15. SCHWARTZ 266.

16. SCHWARTZ, *THE POWERS OF GOVERNMENT*, x (1963).

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