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Book Review: From Confederation to Nation: The American Constitution, 1835-1877 by Bernard Schwartz (1973)

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FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION, 1835-1877. By Bernard Schwartz. Baltimore: The Johns Hopkins University Press, 1973. Pp. xi, 243. $10.00.

From Confederation to Nation is a constitutional history of the United States in the nineteenth century. To be more exact, it is an examination of the operation of the Federal Constitution from 1835 (the year of John Marshall's death) to 1877 (the end of Reconstruction). Although the book is rather short (only 243 pages, including index), it is packed with information and analysis. None of the important American constitutional developments of the period is excluded from discussion. The thesis of the book is that between 1835 and 1877 the United States was transformed from a loose confederation with a weak central government into a nation whose central government possessed both the military strength to restrain rebellious states from leaving the Union and the political authority to protect individual rights from abridgment under color of state authority. In overview, the book is a successful effort to support this thesis by tracing constitutional developments between 1835 and 1877. According to Professor Schwartz, these developments were so significant, and the transformation of government so momentous, that "[t]he four decades after Marshall's death can be considered as a virtual continuing constitutional convention . . . ."[1]

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1. B. SCHWARTZ, FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION, 1835-1877, at x (1973) [hereinafter cited as SCHWARTZ].

Professor Schwartz approaches the progress of the Federal Constitution from two directions. On one hand, he explores constitutional developments within each of the three branches of the federal government. On the other, he examines separately the principal constitutional crises of the era: slavery, secession and Civil War, and Reconstruction.

There is little in *From Confederation to Nation* that is startling or new. The basic assumptions underlying the book are widely held. These assumptions include: that John Marshall's principal achievement was in laying the legal foundations for the supremacy of the central government; that the Taney Court, unlike the Marshall Court, elevated the public interest above property rights; that for most of the period Congress outshone the office of President in terms of power and prestige; that the military defeat of the Confederacy changed Marshall's exposition of federal supremacy from a theory to a reality; and that the efforts of the Radicals and their supporters to secure justice and equality for the ex-slaves failed not simply because of unfavorable decisions by the Chase Court but also because the nation had become disenchanted with the Reconstruction program. Thus, the merit of the book does not lie in the originality of its ideas. Rather, the book is valuable because, in a brief number of pages, it points out and analyzes with considerable perspicacity the main constitutional problems which faced this country between the fourth and eighth decades of the last century. Professor Schwartz' felicitous prose style is also worthy of mention.

Of the portions of the book on the development of constitutional litigation in the Supreme Court, the portion exploring the pre-Civil War Taney Court's expansion of the power of the states is the best.[2] There is also a good assessment of a little-known but important post-Civil War decision of the Supreme Court regarding the legality of secession.[3]

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2. At one point, Professor Schwartz notes that the term "police power" came into vogue as a result of the opinion of the Chief Justice in the License Cases, 46 U.S. (5 How.) 504 (1847). SCHWARTZ 15.

3. SCHWARTZ 133-34, 166-68. The case was Texas v. White, 74 U.S. (7 Wall.) 700 (1869). In *White*, an original proceeding for injunctive relief restraining payment of certain United States bonds owned by the state of Texas prior to the Civil War but alienated by the Confederate Texas state government, the Chase Court found it necessary to determine the legal effect of Texas' ordinance of secession by which the state purported to leave the Union in 1861. It was held that the ordinance was a complete

From Confederation to Nation depicts the office of President as quite weak during most of the period. There were, according to Schwartz, only three strong Presidents during the period: Jackson, who strengthened the office by exercising his power to discharge subordinate executive officers, as well as the veto power; and Polk and Lincoln, who made extensive use of the President's powers as Commander-in Chief of the Armed Forces. It would be difficult to question this assessment of the Presidency.

While Congress was the predominant branch of Government for most of the period, *From Confederation to Nation* shows that Congress was in a state of decline. The immortals—Clay, Webster, Calhoun, Benton—were surrounded by a mass of venal, gross, half-witted fellow legislators. Brawls and drinking bouts on the floor were not uncommon.

I found the chapters on the *Dred Scott* case,[4] the Civil War,[5] and Reconstruction[6] to be the most interesting of the book. In view of the ever-burgeoning Watergate scandal, the materials in the book on executive privilege,[7] the President's power to discharge subordinates,[8] and the impeachment of Andrew Johnson[9] are highly relevant.

Fianlly, two criticisms are in order. Early in the book Schwartz quotes from Jackson's message which vetoed the rechartering of the Bank of the United States—a message perhaps authored by Taney—and then describes the quoted language[10] as "comparable to the nega-

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nullity, "utterly without operation in law." *Id.* at 726. The Court reasoned that once Texas joined the Union it lost the power ever to withdraw:

> When . . . Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Id.

4. SCHWARTZ 107-30.
5. *Id.* at 131-59.
6. *Id.* at 160-216.
7. *Id.* at 71-74.
8. *Id.* at 44-46.
9. *Id.* at 174-79.
10. [E]very man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and

tive version of the [equal protection clause] which was adopted over thirty-five years later."[11] It is arguable that this linking of the 1832 message and the 1868 amendment is simplistic. Jackson clearly was referring to the dangers posed to a representative governmental system by huge concentrations of private wealth seeking governmental favors; the language of the fourteenth amendment, on the other hand, was directed at protecting the rights of the freedmen. Also, Schwartz views the decision of *Luther v. Borden*[12] by the Taney Court as an application of the judicial doctrine of self-restraint, which involves a recognition that courts cannot resolve political questions. Actually, the decision was less a deference to other political institutions than a manifestation of the federal judiciary's hostility to the legitimate political grievances of the Dorr movement.[13]

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> the potent more powerful, the humble members of society—the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their government. . . . If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing.

Quoted in id. at 8.

11. SCHWARTZ 8.

12. 48 U.S. (7 How.) 1 (1849).

13. *See* Schuchman, *The Political Background of the Political-Question Doctrine: The Judges and the Dorr War*, 16 AM. J. LEG. HIST. 111 (1972).

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