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Richard E. Shugrue
Creighton University School of Law

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Book Review

Swindler's Book Provides 'Constitutional Roadmap'

Court and Constitution in the Twentieth Century: The Modern Interpretation—By William F. Swindler†

Reviewed By Richard E. Shugrue*

The perennial debate among legal scholars over the most interesting, intriguing and dynamic field of law continues well into the 1970s. Striking new developments in environmental law,¹ domestic relations,² the electoral process,³ civil rights⁴ and so on, may briefly dazzle students, attorneys and jurists, but if there is an underlying thread of law which consistently holds the attention of the entire profession and which leads increasing numbers of persons to espouse their own expertise, it is American constitutional law.⁵

Executive impoundment of appropriated funds,⁶ the impeach-

† New York, N.Y.: The Bobbs-Merrill Co., Inc., 1974. \$12.95.

* Professor of Law, Creighton University School of Law. A.B., 1959; J.D., 1962; Ph.D., 1968, University of Nebraska.

1. *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 94 S. Ct. 2114 (1974).
2. *Magruder v. Magruder*, 190 Neb. 573, 209 N.W.2d 585 (1973).
3. *Richardson v. Ramirez*, 94 S. Ct. 2655 (1974); *Lubin v. Panish*, 94 S. Ct. 1315 (1974); *American Party of Texas v. White*, 94 S. Ct. 1296 (1974); *Storer v. Brown*, 94 S. Ct. 1274 (1974).
4. *Lehman v. City of Shaker Heights*, 94 S. Ct. 2718 (1974); *Morton v. Mancari*, 94 S. Ct. 2474 (1974); *Gilmore v. City of Montgomery*, 94 S. Ct. 2416 (1974); *Bradley v. School Bd.*, 94 S. Ct. 2006 (1974); *De Funis v. Odegaard*, 94 S. Ct. 1704 (1974); *Mayor v. Educational Equality League*, 94 S. Ct. 1323 (1974); *Lau v. Nichols*, 94 S. Ct. 786 (1974).
5. Three examples of the varied opinion one encounters in the area of constitutional law are: *Symposium: Pivotal Decisions of the Supreme Court*, 15 ARIZ. L. REV. 224 (1973); *Men, Women, and the Constitution: The Equal Rights Amendment*, 10 COLUM. J. LAW & SOCIAL PROB. 77 (1973); *Student Symposium: Recent Developments in Individual Rights*, 1973 DUKE L.J. 1036.
6. *State Highway Comm'n v. Volpe*, 347 F. Supp. 950 (W.D. Mo. 1972), modified in part, 479 F.2d 1099 (8th Cir. 1973); *Stanton, History and Practice of Executive Impoundment of Appropriated Funds*, 53 NEB. L. REV. 1 (1974); Note, *The Impoundment Question—An Overview*,

ment issue,⁷ the politics of the judiciary⁸ and an acute awareness on the part of the bar that its every public action is being critically observed⁹ surely contribute to a mounting interest in constitutional law. For in that grand discipline arise more complex questions than in any other, more nooks and crannies in which legal mystery lies, more of the heartbeat of American history and politics, and a singular rhetoric not found in what might mistakenly be called settled disciplines which histrionics are played on a multitude of widely observed stages from Washington to Lincoln.

C. Herman Pritchett has observed that the

Constitution has great value as a symbol of unity for a nation of vast expanse and diverse interests. But as an instrument of government, its language has had to be given life and meaning by the events that have occurred since 1789. Congress animates the Constitution every time it passes a law or holds a hearing. The President construes the Constitution whenever he makes a decision, issues an executive order, or signs a bill into law.¹⁰

Pritchett suggested that the Constitution "is discoverable equally at lower levels, in the routines and customs of public life, in what Justice Oliver Wendell Holmes called the inarticulate premises of a nation and a people."¹¹

For the lawyer, the very center of constitutional government is found in the vast body of case law crafted not only by the Supreme Court of the United States but also by every judicial body including municipal courts¹² which are called upon to rule on the myriad constitutional questions raised daily in their precincts.

40 BROOKLYN L. REV. 342 (1973); Note, *The President and Congress: Impoundment of Domestic Funds*, 3 N.Y.U. REV. L. & SOCIAL CHANGE 93 (1973); Note, 27 RUTGERS L. REV. 201 (1973).

7. Reznick, *Is Judicial Review of Impeachment Coming?*, 60 A.B.A.J. 681 (1974); Van Alstyne, *President Nixon: Toughing It Out with the Law*, 59 A.B.A.J. 1398 (1973); Cox, *Some Reflections on Possible Abuses of Governmental Power*, RECORD OF N.Y.C.B.A. (1973); Note, *Executive Impeachment: Stealing Fire From the Gods*, 9 NEW ENG. L. REV. 257 (1974).

8. Martin, *Courts and Reapportionment: The Exemption of Judicial Elections*, 62 KY. L.J. 43 (1973-1974); Garwood, *Judicial Revision—An Argument for the Merit Plan for Judicial Selection and Tenure*, 5 TEXAS TECH L. REV. 1 (1973); Comment, *One Man-One Vote and Judicial Selection*, 50 NEB. L. REV. 642 (1971).

9. Allen, *New Horizons in Professional Responsibility*, 52 NEB. L. REV. 24 (1972); Marshall, *Professional Responsibility and Constitutional Doctrine*, 48 TUL. L. REV. 465 (1974); *Symposium: Professional Responsibility*, 51 NEB. L. REV. 367 (1972).

10. C. PRITCHETT, *THE AMERICAN CONSTITUTIONAL SYSTEM* 1, (3d ed. 1971).

11. *Id.* at 2.

12. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017 (1959); *Cooper v. Aaron*, 358 U.S. 1 (1958).

The very dynamics of the Constitution result in a knowledge lag on the part of many attorneys who, though exposed to the principles of law in their first year of legal education, have since found it impossible or at least impractical to wade into the vast body of law pouring from state and federal courts each term. Highly specialized—and popular—books, such as Berger's volume on impeachment,¹³ naturally concentrate on one minute slice of constitutional doctrine, so that the broad overview is not generally written nor, if written, does it receive the attention it deserves.¹⁴

There have been exceptions to this rule. Corwin's *The Constitution and What It Means Today*¹⁵ has gone through more than a dozen editions and has been a desk-top bible of constitutional law for attorneys and laymen alike. A popularized version, read by literally scores of thousands of students of government and history, is Corwin and Peltason's *Understanding the Constitution*.¹⁶ Since the death of Professor Corwin in 1963, there has been a genuine need for a concise and modern interpretation of the Constitution with sufficient if not torrential documentation.

Nebraskans might, in light of all this, take a certain pride in the recently published *Court and Constitution in the Twentieth Century: The Modern Interpretation*¹⁷ (hereinafter *The Modern Interpretation*) by Professor William F. Swindler of the Marshall Wythe School of Law at the College of William and Mary.

Professor Swindler was at the University of Nebraska from 1946 to 1956 as professor and director of the School of Journalism. He took his legal training at Nebraska, receiving his degree in 1958 before going to William and Mary that fall. He is now one of the most prolific scholars in the area of constitutional law,¹⁸ hav-

13. R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973).

14. Two helpful volumes not intended to be monumental documents on the Constitution are R. McCloskey, *THE AMERICAN SUPREME COURT* (1960) and B. Wright, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* (1967).

15. E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* (12th ed. 1966) [hereinafter cited as CORWIN].

16. E. CORWIN & J. PELTASON, *UNDERSTANDING THE CONSTITUTION* (3d ed. 1964).

17. W. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE MODERN INTERPRETATION* (1974) [hereinafter cited as SWINDLER].

18. Without reproducing an exhaustive bibliography of Professor Swindler's work, it is sufficient to illustrate the breadth of his scholarship by citing Swindler, *The Supreme Court, The President, and Congress*, 19 INT'L & COMP. L.Q. 671 (1970); Swindler, *Fifty-One Chief Justices*, 60 KY. L.J. 851 (1971-1972); Swindler, *State Constitutions for the 20th Century*, 50 NEB. L. REV. 577 (1971); Swindler, *The Chief Justice and Law Reform, 1921-1971*, 1971 SUP. CT. REV. 241.

ing contributed in a most significant sense to the understanding of the vital processes of American government and law.

While *The Modern Interpretation* can certainly be read as a *vade mecum* of modern constitutional law, it would be a disservice to Swindler's brilliant scholarship not to acknowledge that it is but a small part of a powerful trilogy beginning with the *Old Legality 1889-1932*¹⁹ published in 1969 and *The New Legality 1932-1968*²⁰ which came off the press the following year. It is safe to say that Swindler's contribution to understanding the American Constitution is hardly limited to these three volumes. One can scarcely pick up a journal devoted to the monumental issues of constitutional law without seeing an article by him. The very latest in the avalanche of legal periodicals, the *Hastings Constitutional Law Quarterly*, contains his provocative commentary "The Executive Power in State and Federal Constitutions."²¹ He was invited to write in that journal along with retired Justices Tom C. Clark and Arthur J. Goldberg and Charles L. Black, Jr., Luce Professor of Jurisprudence at Yale.

Because of the pervasive influence of Corwin's *The Constitution and What it Means Today*, it is inevitable that Swindler's *The Modern Interpretation* will be compared with Corwin's standard work. Corwin's book, the longer of the two, begins with the preamble and annotates the Constitution directly and throughout the text. It is a very formal exposition, relying significantly on the decisions of the Supreme Court of the United States throughout the history of American judicial review. Corwin himself reminds the reader that just as the Constitution is a living document, susceptible to constant reinterpretation, therefore, each progressive edition must contain the more recent decisions of the high court.²²

Swindler's plan for his book is better. He indicates in his prefatory remarks that there are "two separate commentaries on the Constitution in the pages which follow."²³ Let him describe the plan:

The first, occupying pages 4-55, is a literal reprint of the original text, divided into historical periods and with accompanying back-

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19. W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY THE OLD LEGALITY 1889-1932 (1969).
 20. W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY THE NEW LEGALITY 1932-1968 (1970).
 21. Swindler, *The Executive Power in State and Federal Constitutions*, 1 HASTINGS CONST. L.Q. 21 (1974).
 22. CORWIN, *supra* note 14, at v-viii.
 23. SWINDLER, *supra* note 17, at xv.

ground notes which illustrate the changing character of the document over parts of three centuries

The second commentary or interpretation, occupying the major part of the book, is a clause-by-clause analysis of the Constitution in terms of the most recent decisions of the Supreme Court. Where, as in certain instances, the judicial understanding of a clause remains unchanged from its nineteenth-century interpretation, this is made clear. The main emphasis of this portion of the book, however, is on recent decisions—i.e., post-1937—which have expressed the contemporary Court's view of the passage in the text.²⁴

This scheme, which Swindler employs successfully, permits the reader to browse in the book to refresh his rusty historical memory or alternatively to use it as a ready reference to acquaint himself with a constitutional doctrine. Naturally, the exposition is far from exhaustive. A lawyer briefing an "Establishment of Religion" case, involving the permissibility of an allegedly innocuous prayer recited before a kindergarten snack, would find that Swindler's book does not tell much. The total allusion to *Engel v. Vitale*,²⁵ the now-famous 1962 school-prayer decision, is: "And in 1962 the Court held unconstitutional under the 'establishment' clause a non-denominational prayer approved by the New York state regents."²⁶

Similarly, if one is seeking to determine the fine distinctions in the rules applicable to the giving of the so-called Miranda²⁷ warning to a criminally-accused, he would find that Swindler says:

[I]n *Miranda v. Arizona*, the Court summarized the various cases on self-incrimination in a declaration that "the Fifth Amendment privilege . . . serves to protect persons in all settings in which their freedom of action is curtailed from being compelled to incriminate themselves." In 1971, in a case widely discussed as a limitation on the Miranda principle, Chief Justice Burger for the Court held that even if a statement could not be admitted as evidence as part of the prosecution's case in chief, because of its having been obtained without complying with Miranda standards, it could be introduced to impeach defendant's credibility.²⁸

24. *Id.*

25. 370 U.S. 421 (1962).

26. SWINDLER, *supra* note 17, at 173. This is troublesome in light of the most recent court decision considering religious exercises in public schools, such as *Grossberg v. Deusebio*, 42 U.S.L.W. 2653 (E. Va. June 7, 1974), in which Judge Merhige ruled that the inclusion of an invocation and benediction in a public high school graduation ceremony violates neither the Establishment nor the Free Exercise clause in light of the purpose and effect test enunciated in *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

27. *Miranda v. Arizona*, 384 U.S. 436 (1966).

28. SWINDLER, *supra* note 17, at 200.

And:

While *Miranda v. Arizona* raised a substantial amount of debate over the broad linkage of the Sixth Amendment and Fifth Amendment guarantees . . . , with resulting efforts at limitation by both Congress and Court, the continuing tenor of judicial application of the specific clause in this Amendment suggests that it has become accepted as a fundamental and persuasive right.²⁹

In the area of obscenity, Swindler's exposition is more thorough,³⁰ though no less dated by virtue of the June, 1974 decisions, and especially the decision reviewing the Georgia determination that the film *Carnal Knowledge* is obscene.³¹ The return to the contemporary community standard of *Roth v. United States*,³² which Swindler says was accomplished in *Miller v. California*³³ and *Paris Adult Theatre I v. Slaton*,³⁴ resulted not in the application of community norms, but rather in the potential transformation of the Supreme Court's conference room into a screening theatre for allegedly obscene movies.³⁵

Finally, in the area of impeachment, Swindler sets forth only the barest outline of the monumental debate (which continues through 1974) over the questions of what is an impeachable offense and what are the boundaries of so-called executive privilege,³⁶ thereby tantalizing the reader, perhaps, into far more thorough investigation.

Each of these examples illustrates two observations about the Swindler book. The first is that Swindler, like Corwin before him, had no intention of painting a picture of the Constitution with a detailed line. Swindler's own scholarship is testimony enough to the kind of depth investigation of various subject matter which would satisfy the thirst for knowledge of the brief writer or serious student of the law. *The Modern Interpretation* is crafted in broad

29. *Id.* at 211-12.

30. *Id.* at 178-80.

31. *Hamling v. United States*, 94 S. Ct. 2887 (1974); *Jenkins v. Georgia*, 42 U.S.L.W. 5055 (U.S. June 24, 1974).

32. 354 U.S. 476 (1957).

33. 413 U.S. 15 (1973).

34. 413 U.S. 49 (1973).

35. Mr. Justice Brennan observed in his *Jenkins* dissent:

After the Court's decision today, there can be no doubt that *Miller* requires appellate courts—including this Court—to review independently the constitutional fact of obscenity In order to make the review mandated by *Miller*, the Court was required to screen the film *Carnal Knowledge* and make an independent determination of obscenity *vel non*.

42 U.S.L.W. 5055, 5058 (U.S. June 24, 1974).

36. SWINDLER, *supra* note 17, at 80-82.

brush strokes and is not intended to be a thorough investigation of every constitutional principle.

The second is the frustration which every author—and especially those who comment on the American constitutional process—faces: the obsolescence of the material, or at least some of it. Perhaps obsolescence is the wrong word; “dated” might be better. It could be particularly embarrassing to a writer who claims that his work is a thorough updating of constitutional doctrine. The latest decision of the Supreme Court considering the *Miranda* warnings is a case in point. The Court in *Michigan v. Tucker*,³⁷ through Justice Rehnquist, pointed out that the defendant had not been advised of his right to appointed counsel, but indicated that it was the posture of the justices that this advice and the rest of the *Miranda* package were merely “protective guidelines” and “these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.”³⁸

Mr. Justice Douglas, in his dissent, took vigorous exception to this position:

I cannot agree when the Court says that the interrogation here “did not abridge respondent’s constitutional privilege against self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* We held the “requirement of warnings and waiver of rights [to be] fundamental with respect to the Fifth Amendment privilege,” 384 U.S., at 476, and without so holding we would have been powerless to reverse *Miranda*’s conviction.³⁹

Sweeping generalities about developments in the rights of the criminally accused lead inexorably to misunderstanding or confusion regarding the specific application of doctrine to given cases. Surely Swindler had no intention of confounding his reader; but if *The Modern Interpretation* is read as a hornbook rather than as the guideline it is, that could be the result. Such a careful and distinguished scholar as Swindler would never imagine that one would read his seven pages on the sixth amendment rights of the accused as a definitive and exhaustive analysis of the monumental developments from *Powell v. Alabama*⁴⁰ in 1932 to the present.

If there is a flaw in this book, then, it is not Professor Swindler’s, but it results from the unsophisticated reading of the material and a failure to appreciate the shading and tones of constitutional development, the massive commentary thereon and the reality of

37. 94 S. Ct. 2357 (1974).

38. *Id.* at 4890.

39. *Id.* at 4896.

40. 287 U.S. 45 (1932).

the dynamic process which seemingly overnight can alter the direction of constitutional doctrine.

There are many strengths. One is that the book is well-written—so well-written that a reader can speed through it in just a few hours and come away from it refreshed and stimulated. In this respect *The Modern Interpretation* is like all Swindler's writing: clear, coherent, and clever without trying to impart the magisterial sniffery which Corwin seemed to take such great joy in doing. One would never find Swindler saying, for instance:

Finally, I wish to draw attention to the fact that I have not succumbed to the recent fad of speaking of Congress as "the Congress." The original Constitution, to be sure, employs the latter terminology, inherited from Confederation days, but no President from Washington down ever did so prior to F.D.R.; nor any Chief Justice prior to Chief Justice Warren⁴¹

Swindler retains the journalist's knack for succinctness as well as his skill for capturing the assignment, flavor and all, and telling his story well. This assignment is particularly difficult when there have been hosts of commentaries terse and verbose over nearly two hundred years.

One frustration in many legal tomes is the absolutely atrocious indexing. Swindler must have sensed that, for *The Modern Interpretation* has a fine index, with just a few lapses, and these are hardly glaring omissions.⁴² Included is a reference to the proposed equal rights amendment, which helps to make the book a truly modern interpretation.⁴³

The book, to be sure, was never intended to be a major contribution to legal literature, as were its predecessors in this trilogy. For in *The Old Legality* and *The New Legality* Swindler had gone all out to explore every facet of constitutional growth in that period of immense development of the American economic, social and political fabrics; expounding, explaining and criticizing what had happened in the best traditions of superb scholarship and concluding, as only a writer totally immersed in the subject could, that

[t]he restlessness of minorities, ethnic and economic, domestic and foreign; the outward expansion of human ambitions toward the universe which space technology was opening; the impact on world society of now near-instantaneous communication and in-

41. CORWIN, *supra* note 14, at ix.

42. One wishes, for example, that Swindler had provided a bibliography of textual materials cited. Perhaps it is out of a sense of modesty that he did not, for he cited himself in the footnotes nearly 50 times.

43. SWINDLER, *supra* note 17, at 260.

credibly rapid transportation—and withal, the chronic state of crisis arising from the challenges which these changes presented to all orthodoxy—these were prospects of the seventies which would be little affected by a change of Presidents or Chief Justices. From Fuller to Taft, the Court majority had sought to perpetuate a particular philosophy in a system of constitutional interpretation. From Hughes to Warren—and now beyond—the Court had come to accept the fact that constitutional interpretation was simply a continuing search for rules which were both appropriate and relevant in the fact of successive and continuing challenges.⁴⁴

The Modern Interpretation has none of the drama and little of the depth of its two predecessors. But if it was designed to serve as a constitutional road-map, pointing out only the landmarks, bringing the traveler over a lengthening constitutional journey up to date on new construction without pointing out every valley and mound along the way, it has surely succeeded. It is neither case-book, treatise nor hornbook. Rather, it is a compendium of leading decisions and explanatory notes and observations by a truly outstanding scholar.

The Modern Interpretation fills a vacuum, for a student who desires a ready reference as a companion to his study of constitutional law, for the practitioner who only occasionally is confronted by a knotty problem in constitutional law and, indeed, for the layman whose understanding of the field has grown rusty by time and disuse. Nevertheless the serious constitutional scholar will want to read the entire trilogy, for its depth, its sensitivity to the total governmental and political process in this century and, most of all, to sample the brilliant writing style of a man who combines a career as an incisive journalist with that of a careful constitutional scholar. *The Modern Interpretation* is but the proverbial tip of the iceberg in William Swindler's prolific bibliography. And like that iceberg's exposed surface, it is an important landmark in identifying a vast body of knowledge undisclosed to the casual observer.

44. SWINDLER, *THE NEW LEGALITY 1932-1968*, 353 (1970). Professor Paul Kauper of the University of Michigan, reviewing the first two books in the trilogy stated:

The story told by Professor Swindler is not new. What adds novelty and special value to his treatment is that he puts this development in the context of the total historical forces of the periods in question, including the general political development, the differences between the major political parties, and the relationship of the Court to Congress and the President. The treatment of the extra-judicial factors and the fascinating new historical data uncovered by the author impart a distinctive value to these books. Kauper, *Book Review*, 12 *WM. & MARY L. REV.* 703, 705 (1971).