# BOOK REVIEWS

**The Twilight of the Supreme Court: A History of Our Constitutional Theory.** By Edward S. Corwin. New Haven: The Yale University Press. 1934. Pp. xxvii, 237. $2.50.

To Professor Corwin's brilliant research and writing during the past twenty-five years we owe a very large part of our present understanding of the history of American constitutional law. No one is better qualified than he to expound, in the light of that history, the relationship between currently accepted constitutional doctrines and the so-called New Deal legislation. In the Storrs Lectures delivered at Yale nearly a year ago and now published, this was his objective. In pursuing it, he has given a masterly account of the development of nearly all the important doctrines of constitutional law and of the attitudes and interests which gave rise to them.[1] He predicts, and calls for, considerable judicial self-limitation, but he does not suggest that the Supreme Court will cease to possess and exercise important powers. The title now assigned to the lectures is, therefore, misleading.[2] Accordingly, a somewhat detailed summary of their content will be attempted.

"We are under a Constitution, but the Constitution is what the judges say it is." Having quoted this statement of Chief Justice (then Governor) Hughes, Professor Corwin calls attention to the tenuous connection between the written Constitution and the vast majority of the doctrines of constitutional law. He shows that there exist opposed sets of doctrines (each authoritative) whose existence side by side gives to the Supreme Court freedom to choose whether to sustain or to overturn the New Deal legislation. Historically and from the standpoint of legal reasoning he finds the doctrines which so limit Congressional power as to make that legislation of doubtful validity to be less justifiable than the opposed doctrines. Today, he asserts, national governmental action of the type of the New Deal legislation is essential. He predicts that the social and economic needs of the nation will induce the Supreme Court to apply and extend those of the existing doctrines which make such legislation permissible.

Moreover, he insists that with the Court's freedom to choose there goes inevitably an equally broad moral responsibility. He suggests that "it is the plain duty of the Court to give over attempting to supervise national legislative policies on the basis of

[1] The lectures are drawn, to some extent, from earlier writings of Professor Corwin, particularly Congress's Power to Prohibit Commerce—a Crucial Constitutional Issue, 18 Corn. L Q. 477 (1933) and The Spending Power of Congress, 36 Harv. L. Rev. 548 (1923).

[2] The inappropriate title is probably due to the publisher. He deserves reproach for several other reasons. The placing of the many notes at the end of the volume, rather than at the foot of each page, causes great inconvenience. The citation of cases by volume and page only requires the informed reader to look up dozens of cases which he would recognize were the names of the parties revealed. The constant reference to "J. Roberts," "J. Holmes," etc., offends the ear of the lawyer and unnecessarily perpetuates the belief of lay readers that nearly all judges are named John. In note 54 on page 191, the date should be 1904, not 1934; in line 3 on page 146, the word "more" should be "less."

a super-constitution which, in the name of the Constitution, repeals and destroys that historic document. . . . [Having] done this the Court will be free to assume again the role, so powerfully claimed for it by Chief Justice Marshall, of pillar and supporter of the national power and its supremacy."[3]

It is important that at this time one so fully qualified as Professor Corwin should expound the relationship between accepted constitutional doctrines and the New Deal legislation. He has made an even more important contribution by attempting to interpret the history of virtually the whole of our constitutional law in terms of a few simple ideas and of the pressures of economic groups whose self-interest led them to advocate those ideas.

The first two lectures, "Dual Federalism versus Nationalism, and the Industrial Process" and "The Property Right versus Legislative Power in a Democracy," are concerned with the hundred and fifty year controversy over the division of power between the nation and the states and the limits of governmental power to interfere in economic affairs. From the outset, two sets of antithetical ideas are found: nationalism (Professor Corwin's more descriptive name for the centralistic tenets of the Federalists) and dual federalism (his name for the opposed views of the Anti-Federalists; law as the expression of the popular will and law as discoverable just rules). Marshall's nationalistic decisions were a brake upon Madisonian and Jacksonian dual federalism. These decisions created a set of constitutional doctrines to which the Court could and did return when, following the Civil War, we became socially and economically a single nation. The Taney court's dual-federalistic decisions (without which the Union might not have possessed sufficient flexibility to survive the period of westward expansion with its creation of states of unequal economic maturity) created a set of opposed doctrines. Meanwhile, Marshall's higher law doctrine of vested rights and the later Fourteenth Amendment due process clause doctrines (given a laissez faire content by the pressure of interests desiring to prevent governmental regulation) were countered by the doctrine of the police power, derived from the Jacksonian idea of popular sovereignty. The existence of these sets of opposed authoritative doctrines converted precedent from an obstacle to judicial freedom of choice into a shield for it.

The judges realized that the basis of American prosperity was national and that if forty-eight states were permitted to subject business enterprise to differing regulatory measures this prosperity would be jeopardized; moreover, they became indoctrinated with capitalistic laissez faire principles. Consequently, in order to strike down state regulatory legislation under the commerce clause as well as under the Fourteenth Amendment due process clause, they expanded the concept of commerce among the states. But in the field of national power their laissez faire convictions led not only to the very doubtful holding that the due process clause of the Fifth Amendment limits Congress in matters of substantive law as the due process clause of the Fourteenth Amendment limits the states, but also to the invocation in the first *Child Labor Case*[4] of dual-federalistic doctrines to restrict congressional power under the commerce clause. Yet the Court, in other recent decisions, recognizing the necessity under modern conditions that business enterprise be subjected to governmental regulation and that this regulation be coextensive with the national scope of business itself, has involved popular sovereignty and police power doctrines traceable to Jackson and the

[3] Pp. 182–183.

[4] Hammer v. Dagenhart, 247 U.S. 251 (1918).

Taney court and nationalistic doctrines traceable to Marshall.[5] These doctrines, Professor Corwin believes, will predominate in the constitutional law of tomorrow.

In the third lecture, "'A Government of Laws and Not of Men' in a Complex World," Professor Corwin traces the presently accepted concepts of legislative, judicial, and executive power to their origins in the opposed views of law as expressions of will and discoveries of just rules and in the American version of Montesquieu's doctrine of the separation of powers. The theory that the discretionary power of the state is lodged in the legislature alone and must stay there, derived in part from colonial distrust of the executive power, is shown to have little relation to the distribution of power now sanctioned by the Supreme Court. Modern analysis reveals that judicial power itself involves freedom to choose and therefore legislative discretion. A rule that legislative power is non-delegable would strangle the legislature in a complex and changing society and result in the utmost minimization of governmental control. Actually, the Supreme Court's present doctrine, while forbidding one legislature to diminish the powers of its successors, permits the delegation of legislative power whenever necessary for its effective exercise. The Court's decisions have sanctioned the exercise by the executive of vast discretionary powers; "the net result is that our constitutional law and theory today ascribes to the President an indefinite range of 'inherent' powers, places these beyond the reach of Congressional curtailment, enables the President to receive and exercise delegated legislative powers of indefinite range, and attributes to him all nonjudicial discretion which either the Constitution or the laws of Congress permit."[6] In the field of judicial review of delegated legislation, Professor Corwin predicts that the very necessity for expert particularization of general policies which calls for delegated legislation must gradually lead the Court to choose from among the many authoritative formulas those doctrines which confine its role to comparatively modest dimensions.

The final lecture is concerned with the spending power of Congress. Hamilton believed that the clause empowering Congress to levy taxes to provide for the general welfare meant what it said; Madison believed that it authorized expenditures to promote only so much of the general welfare as was embraced in the specific legislative powers vested in Congress. Professor Corwin recounts the Court's avoidance of the issue and the growth of Congressional action justifiable only under the Hamiltonian view. He points out that Congress, with an unlimited spending power, can evade all restrictions imposed upon it by the Court in the name either of dual federalism or of laissez faire higher law. Therefore, he concludes, even if the Court refuses to abandon those doctrines it has failed to ensure their effectiveness.

The generalizations Professor Corwin has ventured are broad. But abstraction and speculation about the significant are of the essence of history. This interpretation of our constitutional history is the fruit of years of thinking by a master of the field. Perhaps Professor Corwin's forecast of the future function of the Supreme Court is colored overmuch by his hopes and by his beliefs about what that function ought to be. Surely baseless is the thesis attributable to him because of his consent that the lectures be published under their present title—a thesis which he does not otherwise advance. De-

[5] Nebbia v. New York, 291 U.S. 502 (1933) and the line of cases extending from Southern Railway Co. v. United States, 222 U.S. 20 (1911) and the Shreveport Case, 234 U.S. 342 (1914) to Stafford v. Wallace, 258 U.S. 495 (1922) are illustrative of these decisions.

[6] P. 147. Much of this statement is based upon Myers v. United States, 272 U.S. 52 (1926).

cisions handed down since the delivery of the lectures seem to indicate that so much judicial self-limitation as he does predict may not occur. *Borden's Farm Products Co. v. Baldwin*[7] indicates, if the *Gold Cases*[8] do not, that the Court will not refrain entirely from interfering in economic affairs. *Panama Refining Co. v. Ryan*[9] seems to presage greater judicial control over subordinate legislation than Professor Corwin envisages. *Mooney v. Holohan*[10] shows that the Court can still find new procedural guaranties in the due process clauses. But, notwithstanding the implications of these cases, the climate of opinion, legal and non-legal, which made possible such decisions as the *Minimum Wage Case*[11] and the first *Child Labor Case*[12] seems to have altered. Today it appears to be certain that the Supreme Court will uphold legislation which the Court of yesterday would have deemed violative of the fundamental rights of individuals and corporations and of the reserved powers of the states. It is doubtful that Professor Corwin anticipated a greater revolution in constitutional law than this.

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**Illinois Civil Practice Act Annotated (with Supplement).** Oliver L. McCaskill, Editor-in-Chief. Chicago: The Foundation Press, Inc. 1933. Pp. XV, 664. $10.00.

The Illinois Civil Practice Act confronted the lawyers of Illinois of January 1, 1934, with most of the awe-inspiring generalities of the typical codes. True, some of the most scarey of the stuffed shirts had been omitted: law and equity were not to be jeopardized by an operation removing their "distinctions," and the substantive law rights of many trustees, such as assignees for collection, and partial assignors, were not put to the test of legal battle by that ghost-like "real party in interest." But these attempts at debunking are at least partly offset by the inclusion of most of the more recent code reforms, and these have often been couched in the same types of glittering generalities that have proved so vexing to common law lawyers.

True, many another bar had faced a new practice code without effective text-book aid, and had survived—but how awkward and how disappointing had been those first skirmishes. Few took consolation in the fact that the code suffered more than the lawyers; no friend of the code applauded when so often the court, too blind to see the "spirit of the code" or perhaps too dazzled by the generalities, could find nothing behind the bold front other than "an imbodiment of the rules of pleading as they existed, with some omissions and numerous imperfections."[1]

The committee on Civil Practice Act of the Illinois State Bar Association, with laudable understanding, recognized that the enactment of the act has not terminated its duties. The effectiveness of the reforms lay not in the generalities of the act, nor even in the rule making power given the Supreme Court by the Act, but in the friendly

[7] 55 Sup. Ct. 187 (1934).

[8] Norman v. Baltimore and Ohio Railroad Co., Nortz v. United States, and Perry v. United States, all decided February 18, 1935.

[9] 55 Sup. Ct. 241 (1935).

[10] 55 Sup. Ct. 340 (1935).

[11] Adkins v. Children's Hospital, 261 U.S. 525 (1923). [12] 247 U.S. 251 (1918).

[1] Justice Barculo, in Alger v. Scoville, 6 Hon. Prac. (N.Y.) 131 at 140 (1851).