

## The Commerce Power Versus States Rights (Book Review)

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## BOOK REVIEWS

THE COMMERCE POWER VERSUS STATES RIGHTS. By Edward S. Corwin. Princeton: Princeton University Press, 1936, pp. xi, 276.

For years prior to the depression, there has been opinion in the United States, both responsible and irresponsible, to the effect that the power of the Supreme Court to declare federal legislation unconstitutional should be regulated or nullified. As a result of the depression, views have been voiced to the effect that the Supreme Court had made of itself a stumbling block in the proper functioning of our economic system; that the Court had placed the weird appellation "unconstitutional" on any law that it found to be distasteful; that its decisions had strengthened "big business" and had helped to emphasize the powers of dynamic wealth. Some even tried to prove that the Court in the past had made of its startling errors "*un fait magnifique*".

It would seem that in the presence of this criticism the Supreme Court would be sensitive in the proper exercise of its great power and would hardly act so arbitrarily that even members of its own court would be alienated by a determination of the majority of its judges. Dissenting opinions are known in judicial pronouncements, but scathing rebukes of a nature heretofore unknown are to be found in the recent cases, *United States v. Jones*<sup>1</sup> and *United States v. Butler*.<sup>2</sup> In the latter case, the Court held the Agricultural Adjustment Act<sup>3</sup> unconstitutional; and if the doctrine of *stare decisis* should be observed by the Supreme Court, farm and agriculture have completely and permanently been withdrawn from federal control by this far-reaching decision. When we are mindful of the great proportion of our population engaged in agriculture, this decision with its broad and drastic pronouncements must now be reckoned among those few judicial acts that are to govern the destiny of the American people. Inspired by a greater confidence than wise men are taught ever to enjoy in matters of political economy, the majority in this case spoke its command; but the minority judges did not remain inarticulate. From Judge Harlan F. Stone's dissenting opinion, this excerpt is taken:<sup>4</sup>

"The suggestion that it (the Federal purse) must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument. So may judicial power be abused. \* \* \* Courts are not the only agency of government that must be assumed to have capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any

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<sup>1</sup> 298 U. S. 1, — Sup. Ct. — (1936).

<sup>2</sup> 297 U. S. 1, 56 Sup. Ct. 312 (1936).

<sup>3</sup> 7 U. S. C. A. § 601 (May 12, 1933, Ch. 25, Title I, 48 Stat. 31).

<sup>4</sup> *United States v. Butler*, 297 U. S. 1, 56 Sup. Ct. 312 (1936).

assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, 'to obliterate the constituent members' of 'an indestructible union of indestructible states' than the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nationwide economic maladjustment by conditional gifts of money."

Now comes this labor of Professor Corwin to declare disappointment at the presumptuous conduct of the Supreme Court in matters of interstate commerce. In the volume under review, it was the purpose of Professor Corwin to establish, first, that the Supreme Court by its recent decisions has denied to Congress the absolute right to pass laws with regard to interstate commerce when the sole congressional motivation for such enactments has been the promotion of the general welfare, and secondly, that the Supreme Court has arrogated to itself the right to make the legislative motive and the feasibility of a federal statute regulating trade between the states the judicially enforceable test of validity.

It need hardly be said here that according to all established and recognized standards, the wisdom of an enactment is a problem solely of the law-making body, and the interpretation of the enactment is inherent in judicial function; that the only proper basis on which the Supreme Court can declare a statute to be invalid is that it is contrary to the Constitution.

Students of law and of political economy who will read this volume by Professor Corwin will probably determine that he has established both of his propositions. One could almost omit all of Professor Corwin's notes and comments and take the excerpts of decisions that he quotes and from such cases reach the view that the Supreme Court in recent years, without any basis to be found in precedent, has taken to itself the power of which Professor Corwin complains. It would hardly seem the function of a court to be guided by its pleasure in determining the validity of a statute passed by the law-making authority of the country, and yet, very little more can be said of these arbitrary views of the Supreme Court declared in recent years on the subject of the commerce power and states' rights.

Beginning with *Gibbons v. Ogden*,<sup>6</sup> decided in 1824, it was declared by the Supreme Court, speaking through Mr. Chief Justice Marshall, that the power of the Court is plenary with regard to the commerce among the several states, and that the regulation of such commerce is vested in Congress as absolutely as though this were not a confederation of states, but were a unitary government. This view of Chief Justice Marshall was followed even with regard to legislation that was enacted by the Congress, not as a means of regulating interstate commerce itself, but in order to regulate the subject matter of that commerce; and thus, the Supreme Court held the statute with regard to lotteries to be

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<sup>6</sup>9 Wheat. 1 (U. S. 1824).

constitutional<sup>6</sup> and expressed the same view with regard to the White Slave Traffic Act.<sup>7</sup>

Until 1918, it was common opinion among lawyers that under the declared views of the Supreme Court, Congress was made the sole judge of the feasibility of any statute that regulated interstate commerce. In that year, however, came the decision of the Court in *Hammer v. Dagenhart*,<sup>8</sup> in which the Supreme Court held a federal statute unconstitutional which sought to regulate the movement of goods made by child labor and sent on an interstate passage. And beginning with that decision, two roads were broken by and for the Supreme Court in matters of interstate commerce; and no lawyer can now reasonably foretell on which path the Supreme Court will be found in its effort to determine the validity of a particular statute. It may be the road of *Gibbons v. Ogden*<sup>9</sup> or the road of *Hammer v. Dagenhart*.<sup>10</sup>

Thus, in effect, the Supreme Court has created for itself the power to nullify federal statutes that regulate interstate commerce, when the particular statute is obnoxious to the views of a majority of the judges.

Professor Corwin asks the question that necessarily arises upon a comparison of Marshall's opinion in *Gibbons v. Ogden*<sup>11</sup> and Day's opinion in *Hammer v. Dagenhart*:<sup>12</sup> "How did the Court ever go from the one to the other; what were the steps?" And then Professor Corwin replies: "The answer is that there were no steps; the method of the Court was never so pedestrian. Rather is it to be compared to that of those Chinese rivers which occasionally abandon courses they have followed for centuries and proceed to plow a channel to the sea at sharp angles to the other. Only in the case of the Court, while a new channel was cut, the old one continued in use."

Many of us have seen or read the play "Of Thee I Sing" with its queer explanation of the manner in which the judicial function is exercised by the Supreme Court. That, however, was meant to be a jocular satire, not a political document; its purpose was to entertain, and entertainment is permissibly achieved by overtones. Hardly was it to be expected that a conservative and recognized authority on constitutional law such as Professor Corwin, would speak with such veiled irony concerning the exercise of authority by the Supreme Court. And if it should be concluded that his criticism was too severe, the conservative pen of Chief Justice Hughes, who dissented in the *Railroad Retirement Board* case,<sup>13</sup> gives countenance to the treatment that the Supreme Court received at the hands of Professor Corwin. To give but a single quotation from the opinion of the Chief Justice: "What sound distinction, from a constitutional standpoint, is there between compelling reasonable compensation for those injured without any fault of the employer, and requiring a fair allowance for those who practically give their lives to the service and are incapacitated by the wear and

<sup>6</sup> *Champion v. Ames*, 188 U. S. 321, 23 Sup. Ct. 321 (1903).

<sup>7</sup> *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281 (1913).

<sup>8</sup> 247 U. S. 251, 38 Sup. Ct. 529 (1918).

<sup>9</sup> *Wheat*, 1 (U. S. 1824).

<sup>10</sup> 247 U. S. 251, 38 Sup. Ct. 529 (1918).

<sup>11</sup> *Wheat*, 1 (U. S. 1824).

<sup>12</sup> 247 U. S. 251, 38 Sup. Ct. 529 (1918).

<sup>13</sup> *Railroad Retirement Board et al. v. Alton Railroad Co. et al.*, 295 U. S. 330, 55 Sup. Ct. 758 (1935).

tear of time, the attrition of the years? I perceive no constitutional ground upon which the one can be upheld and the other condemned."<sup>14</sup>

To those who have always hoped for the curtailment of the Supreme Court's power, this volume of Professor Corwin's will serve as aid and comfort. There are others, however, who in weighing the strictures against that tribunal, will at the same time recall the strength of the Supreme Court of the United States in sustaining the individual's right of freedom of action (*Stromberg v. California*);<sup>15</sup> its recognition of the freedom of the press against state limitation or regulation (*Near v. Minnesota*);<sup>16</sup> its intervention in the Scottsboro case (*Powell v. Alabama*).<sup>17</sup> Not only in the matter of civil rights but in its effort to safeguard economic freedom has the Supreme Court justified the esteem which it enjoys in the American mind, and while the Court is condemned by some of its own members and by its friends for its decisions in the Agricultural Adjustment Act<sup>18</sup> and Railroad Retirement Act<sup>19</sup> cases, its great service in the N. R. A. case<sup>20</sup> which was decided by a unanimous court, must not be overlooked.

It would therefore take far more heinous conduct on the part of the Supreme Court than that outlined by Professor Corwin before thinking men should be willing to join forces with those who would end the power of the Supreme Court in matters of legislation. Nevertheless, it must be recognized that political institutions are not born into life with prestige, and that an attained prestige, however great, can easily be dissipated.

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CORPORATE REORGANIZATIONS. Three volumes. By John Gerdes. Chicago: Callaghan & Co., 1936, pp. xlv, 1-816; pp. xix, 817-1760; pp. ix, 1761-2859.

BANKRUPTCY FORMS AND PRACTICE. By Abraham I. Menin and Asa S. Herzog. New York: Clark Boardman Co., Ltd., 1936, pp. ix, 871.

Following the commercial debacle of 1929, a demand arose throughout the country for legislation to alleviate the distressed condition of the business world, saddled with debts and obligations incurred in the halcyon days of 1928 and 1929.

This demand first found expression on March 3, 1933, in the enactment of Sections 73, 74 and 75 of the Bankruptcy Act for the relief of the individual business man and farmer.

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<sup>14</sup> *Id.* at 384.

<sup>15</sup> 283 U. S. 359, 51 Sup. Ct. 532 (1931).

<sup>16</sup> 283 U. S. 697, 51 Sup. Ct. 625 (1931).

<sup>17</sup> 287 U. S. 45, 53 Sup. Ct. 55 (1932).

<sup>18</sup> *United States v. Butler*, 297 U. S. 1, 56 Sup. Ct. 312 (1936).

<sup>19</sup> *Railroad Retirement Board et al. v. Alton Railroad Co. et al.*, 295 U. S. 330, 55 Sup. Ct. 758 (1935).

<sup>20</sup> *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 Sup. Ct. 837 (1935).

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