

The Twilight of the Supreme Court (Book Review)

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BOOK REVIEWS

Editor—ALEXANDER A. MERSACK

THE TWILIGHT OF THE SUPREME COURT. By Edward S. Corwin. New Haven: Yale University Press, 1934, pp. xxvii, 237.

The resort to the past and the bygone to explain the present and foretell the future is as common in jurisprudence as it is in other fields of human thought. Yet there is a lurking danger ever present. History is so full of details that the process of selection among them must in the end be arbitrary. Moreover, our absorption in the problem of putting together the chronological jigsaw frequently detracts our attention from the current of new social forces. Who can doubt that the economic crisis which began in the fall of 1929 and which we are told again and again is the deepest and most far-reaching experience of its kind, has begotten consequences which will in some way affect even the inner cloister of the Supreme Court of the United States.

Presumably, Mr. Corwin has avoided the pitfalls which beset the historical method. This will appear very readily when we examine his conclusion. He says:

"So I assert once again, and I do not see how the conclusion can be successfully gainsaid, that in approaching the major questions of constitutionality which it will presently be required to pass upon, the Supreme Court is vested with substantially complete freedom of choice whether to sustain or to overturn the New Deal."

This conclusion is essentially in accord with views that have been expressed for nearly twenty years by forward-looking constitutional interpreters. Mr. Corwin has therefore performed a great service to constitutional law by demonstrating that the historical analysis of Supreme Court decisions leads to precisely the same conclusion as that obtained by the more analytical process which has been in vogue in recent years.

I do not mean to indicate by all this that Mr. Corwin has in any sense created the impression that his views involve any doctrine of causality which will enable us to explain the opinions of Sutherland by those of Marshall. On the contrary, Mr. Corwin has been very careful to confine his historical material as far as that is reasonably possible to the pure process of description. He has divided the period from 1789 to date into three major parts, the first ending with the death of John Marshall, the second reaching down till 1910, and the third still going on. One gets the impression that Mr. Corwin feels that the doctrines of the first period, ending with the death of Marshall, were better, more wholesome, even more logical than those of the long period beginning with the death of Marshall and ending in the year about 1910. This reviewer agrees, but of course would be hard put to it to give a convincing demonstration of why we are right. It was John Marshall who established in constitutional law the doctrine of judicial review. His conclusions were essen-

tially satisfactory to modern critics because he was of the opinion that a Constitution to endure must be adapted to the various crises of human affairs. Had he been an advocate of the proposition that the Constitution must be interpreted in letter and spirit in the manner in which it was designed by its framers without taking into account the changing world, his doctrine of judicial review would in the end have proved as pernicious in the first period which Mr. Corwin deals with as it did in any subsequent period.

One puts down this very excellent little volume with a feeling of satisfaction which is entirely unjustified by reality, for the fontes of conduct are very seldom explained by the examination of the details of particular acts. Only a hint is given by Mr. Corwin of the wider historical forces which stood behind the judicial decisions of every age. Mr. Corwin would be the last one probably to maintain that any judicial decision can be independently explained or understood and that behind every court action stand the social, economic and the political forces of the day. Yet his book reads as if the history of constitutional law resulted from a clash of judicial views with regard to juristic theory. I am certain that Mr. Corwin did not intend to convey this impression but it is there for the uninitiate who comes to the book with that impression in mind to carry away with him.

But a reviewer should in reality discuss the book he is reviewing as the lawyers say, on the merits. Few contributions to legal science and particularly to the science of American constitutional law were more appropriately timed. It comes to us when men's minds are beset by strong doubt and when their opinions are wavering on these very issues which Mr. Corwin discusses. He has performed a signally important and useful work, with a degree of excellence which is well nigh inimitable. His research is indeed consistently careful and his division of the history of constitutional law into the three periods is definitely original and very helpful in understanding the course and current of constitutional theory. Students of constitutional law might do very well to add this little volume to the slender worthwhile sources which now exist. For indeed outside of the periodicals there is only Beveridge and Warren. But I say without hesitation that Mr. Corwin's contribution adds a useful third to the two mentioned books.

An instance of careful analysis is the author's treatment of the child labor cases. The effort of Congress to prevent the transportation of articles manufactured by child labor often leads the unwary to assume that such matters have been left to the states. But here Mr. Corwin shows that the earlier decisions have left the states impotent to act, for the states may not burden interstate commerce by regulating transportation into or out of a state. The result is that such articles cannot be interdicted by the Congress or the states. That the result is absurd is of course eloquent testimony to the error of these decisions.

I have said all these superlative things about Mr. Corwin's book in spite of the fact that I happen to be a reviewer with a grievance. It would have been pleasant to find mentioned even in a footnote my own pamphlet entitled "The Dilemma of the Supreme Court." I find it more difficult to condone Mr. Corwin's failure to cite my articles in the *Harvard Law Review* dealing with the doctrine of political questions when he makes his reference to that

subject on page 111. Of course, that subject has very little to do with what Mr. Corwin is writing about, but since he did mention political questions and footnote *Luther v. Borden*,¹ it would have been graceful to add a reference to my articles. But perhaps he never saw them.

Mr. Corwin's book is highly recommended to students, lawyers and laymen.

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THE POWERS OF THE NEW YORK COURT OF APPEALS. By Henry Cohen. New York: Baker, Voorhis & Co., 1934, pp. lxxii, 551.

In 1902 a studious and scholarly young lawyer felt that the important changes in the jurisdiction of the Court of Appeals in 1894 and in 1896 were not fully apprehended by the Bar. He believed, also, that the large body of the law defining the jurisdiction of the Court of Appeals should be made available in ready form and would be helpful in many ways. Therefore, he wrote a book, published by Banks & Co., in 1903, entitled "The Jurisdiction of the Court of Appeals of the State of New York." His name was Benjamin N. Cardozo. He now graces the Supreme Court of the United States. Previous to that, as everyone knows, he had been a great judge, later a great chief judge of the Court of Appeals of this state. Cardozo's book was a gold mine on the subject concerning which he wrote. My own copy is so tattered and threadbare that I am quite ashamed of its condition.

Of course, every lawyer should know the powers of the Court of Appeals, particularly because failure to comprehend them frequently has resulted in fatal damage to the interests of a client. The pitfalls of practice in that court are numerous. The law on the subject should be clear. It is the exact opposite. The jurisdictional limitations, stated so tersely in the Constitution and in the Civil Practice Act, are so complex and abstruse in their application in everyday practice, that even the lawyer most familiar with the law on the subject, oftentimes feels a doubt. Thus, recently in a case a motion for leave to appeal was denied because it was unnecessary.² Yet, counsel deemed it wise to advise the making of the motion in order to be perfectly safe. Since there was some doubt whether the decision of the Appellate Division would be regarded as a judgment of modification, from which there is the privilege to appeal as matter of right, to play safe was better than to weep afterwards.

In 1928 Mr. J. Alvin Van Bergh of the New York Bar wrote a book on the same subject, published by Baker, Voorhis & Co. He attempted in this book to incorporate the statutory and judicial changes in the quarter century which had elapsed since the publication of Judge Cardozo's work. I recall

¹ 7 How. 1 (U. S. 1849).

² Baker v. Polygraphic Co., 264 N. Y. 457, 191 N. E. 512 (1934).