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## Book Review of Court and Constitution in the Twentieth Century

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## BOOK REVIEW

COURT AND CONSTITUTION IN THE TWENTIETH CENTURY. BY WILLIAM F. SWINDLER. Indianapolis and New York: Bobbs-Merrill Co., Inc., 1969-70. Vol. I: pp. 458. \$11.50. Vol. II: pp. 579. \$12.95.

It requires boldness to undertake a review of this two-volume work by Professor Swindler of the Marshall-Wythe School of Law at The College of William and Mary. He has written a history of the nation's constitutional development, centered on the constitutional interpretation by the United States Supreme Court, for the period 1889 through 1968, beginning with the Fuller Court and concluding with the Warren Court. This is a prodigious task, and it is evident that an extraordinary amount of research and devotion have gone into the effort. Professor Swindler has given us the fruit of a very rich and mature scholarship. The documentation and appendices as well as the understanding and knowledgeability portrayed in the text leave no doubt concerning the author's thoroughness of research and intimate acquaintance with the materials. Apart from the text itself, the book contains some distinctive and valuable special features. Each of the volumes includes five appendices: A—Brief biographical sketches of Court personnel during the period in question, including also the Attorneys General and Solicitors General; B—Proposed constitutional amendments; C—Statutes on the federal judiciary; D—Selected Acts of Congress; E—A concise digest of the principal constitutional cases in chronological order. In addition each volume includes a selected bibliography.

Although the main focus in these volumes is on the Supreme Court, Professor Swindler has not confined himself to a treatment of the currents in the case law represented by its decisions. He has placed his study of the Court in the context of the general political, and to some extent social and economic, history of the nation, and in the context of the relationship of the Court to the President and the Congress. The result is that his account extends far beyond the formal legal materials.

A threshold observation is that Professor Swindler is gifted with an extraordinarily lively and vivid style of writing. A one-time journalist who turned to the law and has become a constitutional lawyer, historian, and teacher, Professor Swindler's felicitous style of writing, well adapted

to historical presentation, imparts a unique quality to these volumes. This is one of the most interesting books written about the Supreme Court and constitutional history that has appeared for some years, and it is both engrossing and highly fascinating reading. This is high praise, indeed, for a book dealing with legal matters and in part covering ground others have already trod.

It is not possible within the confines of this review to do full justice to Professor Swindler's two-volume work. At most this reviewer will point up its general features and hopefully induce the reader to get a first-hand acquaintance of his own.

The entire period treated by Professor Swindler, ranging from 1889 to 1968, breaks conveniently into two parts, each the subject of a separate volume. The first volume is subtitled "The Old Legality, 1889-1932," the second, "The New Legality, 1932-1968."

The use of these terms is understandable. Despite changes and occasional departures from the prevailing view, the period from 1889 to 1932 was generally marked by a conservatism in constitutional interpretation. It is enough to say that during this period the Court applied both (a) a doctrine of dual federalism which operated to restrict the legislative powers of the federal government and the states, and hampered the federal government in its attempt to deal with problems of growing national importance, and (b) a rigorous interpretation of substantive due process to protect property and economic liberty in order to give constitutional sanction to the presuppositions of a laissez-faire order. The combination of restricted interpretation of federal powers, particularly the commerce power, and the restraints imposed on the legislative power to protect freedom of contract and property, operated to give private business and industry a large constitutional freedom in which to conduct their operations immune to effective public regulation. To be sure, there were some aberrations during the period, and there were expectations of reform during the Wilson Administration, but these did not materialize, and the Court continued to have a conservative majority through the early New Deal days. The appointments of Justices Holmes and Brandeis and later Stone and Cardozo did foreshadow changes of a substantial character, but these changes were not achieved until the days of the Hughes Court.

The second volume begins with the advent of the New Deal, points up the early defeats of the Administration at the hands of the still predominantly conservative Court, and then recounts the now familiar story of the transformation which began after President Roosevelt pro-

posed his Court packing bill. The almost unbroken story since then is of the development of an interpretation which has abandoned dual federalism and economic liberty as important constitutional values, and has stressed as paramount the values which the Court finds central in its understanding of a democratic society. This trend culminates in the enlarged emphasis by the Warren Court on personal liberty, protection of the accused, freedom from discrimination, freedom of expression and the political rights which inhere in a democratic society. In breaking down the successive periods of the Court's constitutional development, the author, in his second volume, identifies the later Hughes Court with release of legislative powers from the limitations placed upon it in the earlier period, the Stone Court with a whole series of reinterpretations to implement the new premises, and the Warren Court with a period of extraordinary constitutional development which placed the emphasis on personal liberty as the effective restraint on the expanded legislative powers.

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.

Particularly helpful are the historical introductions to the several chapters which point up the political and social matrix for the judicial development. Mention may be made, for instance, of the chapters in Volume I which give the background of the labor and agrarian movement which challenged the conservative order in the closing decades of the last century. The chapter on the national experiment with prohibition and the forces behind the effort to deal with the problem by constitutional amendment is highly illuminating.

Some of the most interesting chapters in the book have to do with the relations between the Supreme Court and the Congress and the President. With respect to the latter, the chief item of interest is the President's appointive power. Professor Swindler provides some very interesting vignettes of the political process at work in Supreme Court appointments. Those persons who believe that political factors should be excluded in appointments to this judicial office will be disappointed to find the well documented portrayal of the political considerations

which influence the Executive in making his choices. It is quite clear that Presidents generally have attempted to appoint to the Supreme Court men who would have the "right" point of view. This is understandable in view of the role played by the Supreme Court in constitutional policy-making and the authority with which it can inhibit legislative policies and interfere with presidential prerogative. One of the most intriguing stories is that of the great influence Chief Justice Taft exercised in the appointment of new associate justices to the Supreme Court during the period of his incumbency. Probably the most exciting and dramatic episode on the relationship of the President and the Court, however, arose during the New Deal days when President Roosevelt decided on the Court packing proposal as a means of infusing the Court with new blood to get the kind of Court he wanted to review the New Deal legislation. The story has been told before but Professor Swindler tells it again in a fascinating and dramatic way. It is evident that President Roosevelt grossly miscalculated the temper of the country on this matter, and it must be considered one of his great political mistakes. But while losing the battle, he won the war, since it may be supposed that this challenge to the Supreme Court played its part in the new interpretations which followed shortly thereafter.

The author devotes substantial attention to Congressional reaction to the Supreme Court's decisions, particularly in the recent decades during which a substantial part of Congress, incensed by the direction of the Court's decisions, was resorting to various methods of curbing the Court.

Since the author is concerned with all of the organs and agencies that contribute to constitutional development, and appreciates the role played by advocates on both sides in shaping constitutional doctrine, he gives due attention to the attorneys representing the governmental and opposing interests in key cases and the thrusts of their arguments. As he observes in a number of instances, the Court simply adopted arguments advanced by counsel. The government frequently lost simply because its position was poorly presented, while the competing private interests were represented by some of the ablest counsel of the day.

A thoughtful and preceptive chapter in Volume II is devoted to a discussion of the competing Black-Douglas and Frankfurter-Jackson philosophies of judicial review. This is a particularly useful juxtaposition of persons and ideas since it represents the difference between the activist and the self-restraint approaches to constitutional interpretation. While the Frankfurter-Jackson philosophy goes back to Holmes, Brandeis and Stone and has a respectable pedigree, the main thrust of the

Warren Court has been to give solid support to the Black-Douglas activism which sees judicial review as an opportunity and responsibility to give effect to those values which the justices find central to our constitutional order. In light of the changes which have recently taken place in the Court it seems probable that the activism which distinguished the Warren Court will now be curbed and that the Court will be content with a more modest conception of its role.

If one thing emerges very clearly from the author's treatment of the subject, it is that the Supreme Court is very much involved in politics in the large sense. The Court deals basically with large political and social policy questions, although they are wrapped up in the form of legal problems and come before the Court as questions of constitutional interpretation arising under language broad enough to admit of wide differences in construction. Certainly, the varieties of construction that have been given to the Constitution over the years suggests that there is no fixed interpretation. The trend of interpretation at any one time is a cyclical affair which may mark the response of a given set of justices, with their own conception of constitutional values, to any given problem in the setting of that day. The dominant social and economic philosophy of the day and the value preferences of individual justices play a compelling role in constitutional interpretation.

The Court has considered itself emancipated from *stare decisis*, and that it is free to serve as a continuing constitutional convention if it regards its task as that of accommodating the Constitution to new forces in American life and of serving as an organ for voicing the changes in the national conscience. One may question this approach, and whether basic shifts in constitutional policy should not be the responsibility of the organs of government directly responsible to the people, who are the ultimate source of constitutional power.

Professor Swindler states that he has attempted to be as objective as possible but, as he admits, his own point of view is well manifest in the book. It is evident that he views with considerable approval if not enthusiasm all the developments of recent years which, in his opinion, have marked the maturing of our constitutional interpretation. This maturity gives us what he calls the new federalism, with its emphasis on the breadth of legislative power and its concern with the protection of individual rights. On the whole his own approval of this course of liberal interpretation does not detract from the soundness of the book, though he may not always do full justice to the critics of the Court's activist role. In his evaluation of constitutional arguments there is an occasional

slip, for instance, when he says that the argument that Congress had no power of its own to outlaw the poll tax for federal elections was specious or at least tenuous.<sup>1</sup> This is a casual treatment of the important constitutional question whether the power of Congress to regulate time, place and manner of elections carries with it the authority to prescribe qualifications. Indeed it has been only recently that the Court dealt with this question.<sup>2</sup> On the whole, however, the book is accurate in its portrayal of the cases and their results. Again, it should be kept in mind that the author is concerned with the broad sweep of history and does not purport to present a text on constitutional law.

The author comes to the conclusion that the Court has finally given expression to the promise of the Constitution, but this formulation avoids basic questions since it rests on assumptions both as to what the Constitution intended and the role of the Court in the constitutional system. Whatever admiration may be felt for the conclusions reached by the activist Warren Court, it should not obscure the consideration that it too has been reading things into the Constitution, and that the results now reached under equal protection are no more compelled or required than those reached in an earlier day through interpretation of the due process clause.

It is quite clear that Professor Swindler views with approval the rise of what he calls the new federalism, which as far as this writer can tell is a term designed to describe a structure of government in which the states play a modest, subordinate role and are subject to extensive control by both the Congress and the Supreme Court. If it is federalism at all it is of a highly diluted form. But perhaps we have reached the stage of our national development where federalism as a constitutional division of authority is no longer a viable proposition. In any event, it was not the writer's function in this case to write a treatise on federalism and its continual usefulness in our constitutional system. He has faithfully written the story on the collapse of federalism in the recent decades and this is enough for his purpose.

These are books of extraordinary value, large in their conception, superb in their execution, rich in their scholarship and perception. They are a valuable contribution to the literature on the subject, and deserve wide attention and a large audience.

PAUL G. KAUPER\*

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1. W. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY* 288 (1969).

2. See *United States v. Arizona*, 91 S. Ct. 260 (1970), dealing with the power of Congress to prescribe an eighteen year voting age for federal and state elections.

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