

BOOK REVIEWS

CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT. By Charles Warren. Boston, Little, Brown & Company, 1925, pp. xii, 308.

In view of the many discussions of the relation of the judicial power to unconstitutional legislation, it might have been doubted whether another volume on this subject would be worth while; but this doubt is completely dispelled by this book, and the many persons who have read with pleasure and profit Mr. Warren's "The Supreme Court in United States History" will find a similar satisfaction in this new volume.

It presents a discussion of the justification for the Court's authority to deal with unconstitutional legislation, not only from the viewpoint of history and of constitutional theory, but also with reference to the manner in which the Court has exerted this power in the decision of cases. The historical considerations adduced in support of the power amount almost to a demonstration and constitute, it is believed, easily the best available presentation of this phase of the question. The natural development of the theory from colonial ideas is traced, and special confirmation of the belief that the Court was intended to exercise such power is shown to exist in the attitude of the early Congresses. Among other things the author points out that even in the very first Congress recognition of the power is implicit in Section 25 of that most important act, the Judiciary Act of 1789; and the correctness of his conclusion is emphasized by the fact that it was not until the bitter partisan discussions over the Alien and Sedition Laws and the Circuit Court Act of 1801, and the decline of the Federalist party, made the question of the Court's power a practical political issue that any real attack upon its existence developed.

Mr. Warren points out, as Mr. Justice Holmes has done,¹ that an important distinction exists between the action of the Court with respect to Congressional legislation and its action with respect to State legislation, a distinction often overlooked in popular discussions of the Court's power. The tendency to overlook or ignore this distinction leads to confusion of thought and unfounded criticism. In the latter part of the book is included a careful discussion of the cases in which the Supreme Court has held acts of Congress unconstitutional; and, as will readily appear from a study of the cases, the instances of importance in which the power has been exercised adversely to Congressional legislation are relatively few, and by this pragmatic test the justification for the Court's authority is definitely strengthened.

On the other hand, it is a matter of some regret that the discussion of cases in which the Supreme Court has held unconstitutional State legislation is relatively limited; and while it seems clear that many of the arguments against the Court's power in its relation to Congressional legislation are inapplicable to State statutes, and while our dual system of government seems to require that some Federal authority should be in a position to pass on the validity of State statutes,

¹ Collected Legal Papers, pp. 295-296:

"I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think that the Union would be imperiled if we could not make that declaration as to the laws of the several States."

it is believed that there is room here for further discussion, and it is to be hoped that the present author will not overlook the opportunity.

There is included in the volume a discussion of the proposals to require more than a majority of the Court in order to invalidate legislation, and the further proposal to permit Congress, under certain circumstances, to re-pass legislation even in the face of an adverse decision of the Court; and the inherent weakness of these proposals, including their inapplicability to State laws, is carefully analyzed. In addition, the lack of candor frequently found in arguments against the power of the Court, and in support of modifications thereof, is indicated with definiteness.

Not the least interesting part of the book is the chapter dealing with "Labor and the Supreme Court," wherein the cases affecting labor are carefully and candidly discussed. The author concedes the weakness of the decisions in the *Lochner*², *Adair*³ and *Coppage*⁴ cases, but points out that, even so, the basis for criticism is limited, and, in part, has nothing to do with the matter of the constitutional validity of legislation.

To the reviewer, strongly imbued as he is with the importance of the Court's power and its essential place in the American system, there is one problem that presents difficulties of no little seriousness and upon which further discussion might be desired. The point is this: many of the principles by which the Supreme Court undertakes to determine the validity or the invalidity of legislation are not only indefinite, but involve considerations so closely resembling political considerations that some decisions seem to turn more on questions of policy than on questions of law, and it is obvious that decisions of the Supreme Court of the United States are not expected to constitute expressions on the part of its members of their views with respect to matters of policy. But in the *New York Bakeshop Case*⁵, the Court condemned the New York statute largely on the theory that a law limiting the hours that persons might work in bakeries had no real or substantial relation to the promotion of public health. In the first decision of the *Legal Tender Cases*⁶, the Court held the act unconstitutional because, in its opinion, the addition of the quality of legal tender to bills of credit did not constitute a means appropriate to the carrying on of the Civil War. In determining whether State laws affecting interstate commerce do or do not constitute direct burdens thereon, the Supreme Court invokes the principle that the State may not regulate interstate commerce in a matter of national concern, that a matter of national concern is one that requires, for its proper regulation, a uniform system. How is the Court to know that interstate commerce requires, for its appropriate regulation, a uniform system rather than a diversified system? This question closely resembles the character of question which is supposed to be debated in the legislative hall. Under the Due Process clause, the principle seems to be whether the law is arbitrary; and this is frequently tested by the question whether, while ostensibly passed to accomplish

² *Lochner v. New York*, 198 U. S. 45 (1905).

³ *Adair v. U. S.*, 208 U. S. 161 (1908).

⁴ *Coppage v. Kansas*, 236 U. S. 1 (1915).

⁵ *Lochner v. New York*, *supra* n. 2.

⁶ *Hepburn v. Griswold*, 8 Wall. 603 (1870).

a certain public purpose, the Court, in spite of the view of the legislature, can say that it has no real or substantial relation to that purpose.

A mere recital of these illustrations of principles announced and applied by the Court indicates the narrowness of the line which divides the judicial power from the political power in this class of cases; and naturally invites discussion of the principles which determine when a political question begins to take on a judicial complexion.

The quality of the work done by Mr. Warren, both in this volume and in his others, engenders the hope that he will continue his study of the Supreme Court, a subject always fascinating to the lawyer, and made doubly so by this author because of the ease and clarity of his style which, with its excellent English, renders his books almost as interesting to the layman as they are sure to be to the lawyer.

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FEDERAL INCOME TAX. By George E. Holmes. 6th Ed. Indianapolis, Bobbs, Merrill Co., 1925, pp. 1592.

It is essential that the practicing attorney of today have some knowledge of the income tax and how it is computed, assessed and collected by the Federal Government, with its bearing on transactions which arise daily, such as the sale of property, reorganization of corporations, etc. Not only must he be familiar with the latest Revenue Act (1924) which affects most of the present day transactions, but he is frequently called upon to give advice concerning prior acts in so far as they affect past transactions, since most of the tax questions that are being litigated at the present time arise not under the 1924 Act but under the 1916, 1918 and 1921 Acts.

Mr. Holmes' work on "Federal Taxes" is one of the very few text books on Federal income tax. While entitled "Federal Taxes," the book is confined generally to income tax, other Federal taxes being referred to or discussed only in so far as they relate to the determination of net income, or bear on questions pertaining to the computation of income tax.

The latest edition of Mr. Holmes' book contains the principal provisions relating to income tax of the various revenue acts from 1913 to 1924 inclusive, together with the more important provision of the 1909 Act imposing an excise tax on corporations. It embodies not only references to the principal decisions of the courts pertaining to questions arising in connection with the imposition of taxes, but to all of the decisions of any importance appearing in the Weekly Treasury Bulletins up to Bulletin No. 49 of 1924. These latter decisions include Solicitor's opinions, Treasury Decisions, Rulings of the Income Tax Unit, amendments to Articles of Regulations, etc.

The author in a clear, concise manner sets forth the law as it has been applied by the Commissioner of Internal Revenue in the light of the regulations promulgated by the Commissioner and in the light of court and departmental decisions interpreting the various revenue acts. Examples are given throughout in order to illustrate various points, and the latest act is frequently compared with prior laws to show clearly the changes which have been made therein.

The work appears to be particularly well indexed, which is an important feature of any text book, especially to the legal practitioner, for although a much needed proposition of law with the citation of cases in support of it is contained within the covers of a text book, it is of no use if it cannot readily be found.

Mr. Holmes' latest edition on Federal Taxes presents a thorough and exhaustive study on the part of the author, and will prove a valuable addition to any up-to-date law library.

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SUPERSTITION OR RATIONALITY IN ACTION FOR PEACE? By A. V. Lundstedt, Professor of Civil and Roman Law at the Royal University of Uppsala. London, Longmans, Green & Co., 1925, pp. 235.

This book, the author states in the preface, is intended as an attack on current theories of jurisprudence. It is primarily an attack on recent efforts to promote the growth of order and law in international relations, but as a foundation for his views as to international law the author discusses also the fundamental bases of municipal law.

The author's conception of law is that of rules of conduct which are actually enforced by physical force applied by the community or state. These rules have nothing to do with justice or a common sense of duty to society which are, in the author's view, only the effect of the enforcement of the law through a long period of time. The justification for a criminal law is that it is absolutely necessary for the existence of organized society. The conduct denominated criminal would be destructive of society if practised by the greater number of individuals; it would be so practised were it not for the enforcement of the criminal law by punishment and the criminal law is therefore necessary for the community. The essence of law is force: the sole reason people do not commit crimes is that those who do commit them are punished. The basis of the particular rules so enforced is the "public welfare," but how we are to ascertain whether any particular rule actually does contribute to the public welfare he does not tell us, and the belief that it does so, according to his theory, is simply a result of its imposition by force. In the instances he discusses he says that it is "self-evident" that these rules are for the public benefit.

Holding these views as to the nature of law, the author denies there is any such thing as international law, because there is "no Law of Nations in the sense of rules enforced consistently and without bias by an external power." The existence of rules universally recognized as having the force of law does not mean a true international law for Professor Lundstedt; common consent cannot be a source of law according to him. Law is only something that is "enforced irresistibly and consistently"; it can only be obtained in the international field "by an International Court of Justice equipped with irresistible power and absolute authority But this in its turn demands the establishment of a world-parliament. This again would mean that the nations of the civilized world would submit to a superior power—that is to say, that they would really be combined in a state-system."

Professor Lunstedt will not recognize any international law that does not appear with all the trappings and accessories of the most developed municipal system. Athena must spring fully armed from the head of Zeus. Needless to say, this does not happen in the realm of fact as distinguished from mythology. There is much that is timely in Lundstedt's criticism of jurisprudential theories. It is well to emphasize the fundamental function of a criminal law in the face of the prevailing tendency to focus attention too exclusively on the individual crime and criminal; it is well to call attention to the reciprocal effect of the law itself on the social consciousness, but in so doing to ignore completely the growth or development or evolution—whichever term one may prefer to use—both of legal rules and of social needs and conditions is to construct another abstract theoretical system as arbitrary and as divorced from real life as some of the theories of jurisprudence which Professor Lundstedt so caustically criticizes.

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CASES ON THE LAW OF TRUSTS. By George P. Costigan, Jr., Professor of Law in the University of California. American Casebook Series. St. Paul, Minn., West Publishing Co., 1925, pp. 1017.

Professor Costigan by this volume has added to the already considerable list of case books which he has supplied for the use of the law-teaching profession. Of these the reviewer has taught from those on Wills and Contracts, and it is therefore with particular relish that this book on Trusts is received.

Trusts is a field in which comparatively few case books have appeared, although one at least of those which have appeared has been a landmark to legal scholars and to its influence Mr. Costigan renders graceful acknowledgment in his introduction.

The arrangement in this book is, in the main, familiar, although the author introduces certain new classifications which should prove very helpful, as for instance, in distinguishing trusts from partnerships, Mr. Costigan treats briefly of the so-called "Massachusetts Trust" under which form many businesses are carried on in some parts of the country.

A separate section is used to differentiate between trusts and specifically unenforceable contracts, where the courts in handling the relations of the parties to an agreement for sale of land, so often use language pertinent to trusts and in some aspects, notably with regard to the proceeds of insurance policies, actually treat the situation as a trust relationship, although one doubts whether a vendor, who made a "secret profit" by buying in the agreement of sale, would be held to account.

Of peculiar interest to Pennsylvanians is the use in the section distinguishing trusts from debts of the case of *Adams v. Kuehn*, wherein the court attempts to summarize the peculiar attitude of our courts which, having failed to follow *Lawrence v. Fox* and thus permit a creditor beneficiary to sue upon a contract to which he is not a party, have distinctly stretched, in some situations, the law of trusts, as did the English courts at one time for like reasons to make such a person *cestui que trust*.

The author states that less than one-third of the cases have appeared in prior works, and one agrees with him when he feels that these important cases could not have been omitted. Many of the new cases have been very recently decided and cover a wide range of jurisdictions.

The foot-notes, as has been the case with other books on this subject, are peculiarly full, as in fact it appears to be the present tendency in most case books, and the references to law review articles and notes are extremely comprehensive and, of course, more valuable to the average student than a mere reference to cases.

The reviewer had hoped to find in a new case book a fuller treatment of the various taxation aspects of trusts, which are nowadays so important. There is much to be said, naturally, for the view that these matters have little to do with the theory of trusts, yet unquestionably they are often and increasingly the motive for the creation of trusts and hence of practical importance to the practicing attorney in advising his clients.

While the proof of a case book is in the teaching, one who teaches from the author's case books on Wills and on Contracts feels that this is an eminently teachable work which is as great a contribution to this field as those works are to theirs.

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