

Washington University Law Review

Volume 1971 | Issue 1

January 1971

Review of “Court and Constitution in the Twentieth Century, The New Legality,” By William F. Swindler

John F. Dobbyn
Villanova University School of Law

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [Constitutional Law Commons](#)

Recommended Citation

John F. Dobbyn, *Review of “Court and Constitution in the Twentieth Century, The New Legality,” By William F. Swindler*, 1971 WASH. U. L. Q. 139 (1971).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol1971/iss1/9

This Book Review is brought to you for free and open access by Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

second, the intrinsic weaknesses of zoning as a tool to control, rather than merely to permit, development of a given type.

At this point Mandelker disappoints his reader, who hopes to be presented in the book's concluding pages with a program of reform. But the author demurs. He seems to believe that solutions to these dilemmas will require heroic measures—measures which he doubts American society is presently ready to accept. Although he makes some cursory comments on proposals such as general programs of public acquisition of undeveloped lands, the author seems content, for the present, to have delineated the problems.

Unfortunately, the book is not a highly readable one. The author's hope, expressed in the introduction, that the book will prove attractive and useful to urban planners and other professionals, seems unlikely to be fully realized, for the prose is often difficult to follow, particularly in those portions analyzing trends in judicial decisions. The strong hand of an experienced editor would have been welcome here. And the discussion of the statistical evidence of factors bearing on zoning decisions in King County was rough sledding for this reviewer, in part at least, because of its manner of presentation; the reader is sorely tempted to pass over the elaborate tables of figures and hurry on to the textual discussion of results.

But these minor flaws should not discourage the serious student of zoning, for Professor Mandelker's slim volume will yield generous insights not available elsewhere. *The Zoning Dilemma* is a genuinely valuable contribution to the literature of American planning law.

DALE A. WHITMAN*

COURT AND CONSTITUTION IN THE TWENTIETH CENTURY, THE NEW LEGALITY. By William F. Swindler.¹ Indianapolis: Bobbs-Merrill Co., Inc., 1970. Pp. 479. \$12.95.

In a sense, the Supreme Court is like a multi-sided prism in that when light is cast on any of its facets, it is reflected, defused and refracted to illuminate all of its facets. William Swindler has cast the light of his own peculiar inquiries upon the court and its jurisprudence in a way that

* Visiting Professor of Law, North Carolina College Law School.

1. Professor of Law, Marshall-Wythe School of Law, College of William & Mary.

provides extremely beneficial illumination to students of the court both within and without the legal profession. His success is unusual because most attempts at writing for a combined lawyer and layman audience result in a compromise that says little of value to either.

The present volume is the second of two dealing with Court and Constitution in the 20th Century. The author has divided his treatment of the subject between the Old Legality, 1889-1932, and the present New Legality, 1932-1968. He approaches the subject as both an historian and lawyer, and while I have no intention of degrading his capacity in the latter sense, I find that his greatest contribution is in his perspective as an historian.

In this volume, he traces the evolution of Supreme Court law through three major developments. He begins in 1932 with the basic contribution of the Hughes Court, the revolution in judicial thought that overcame the prior doctrines of severe constitutional restraint on the powers of the legislature under the *laissez-faire* philosophy. Renunciation of these restrictions on legislative action led to a stream of affirmations of the second round of New Deal legislation after 1937 and opened vast possibilities for legislative treatment of the country's ills that had previously been foreclosed by the Court's conservative construction of the constitution.

The second stage of development occurred during the Stone and Vinson years. Once the concept of broad rather than restricted power in the legislature survived its birth and infancy in the Hughes years, it faced the growing pains of adolescence under Stone and Vinson. The entire body of interpretive case law had to be overturned and replaced with rulings consistent with the new theories.

The third development involved the reversion to restraints upon government action, but this time with a different focus. The Warren Court acted not to rein in governmental attempts to meet the needs of the people, but to prevent governmental action from threatening the rights of the individual.

The major difference between a strictly legalistic approach and Swindler's historian-political scientist-lawyer approach lies in this: the lawyer is prone to consider the court a consistent entity, and to limit his investigation of Supreme Court law to an analysis of the stream of reasoning that flows from consecutive Supreme Court opinions. From this, the lawyer abstracts trends and directions of "Supreme Court Philosophy." In this narrow sense, Mr. Swindler has added little to the wealth of existing analysis.

But his scope is far more expansive than that, and as a result his contribution is extremely valuable. He analyzes the developments in Court philosophy, not strictly in terms of a chain of Court opinions, but in terms of the full effect of the pushes and thrusts of personalities and circumstances on the individual minds of each of the justices. He dissects the simple, deceptive image of the Court as a unit into nine separate minds (pedestrian to brilliant), political philosophies (conservative to liberal, as each of those terms is defined at a given stage) and personalities (vacillating to dominant). Taking each justice as a separate cell, he analyzes the background and basic make-up of the individual, the practical considerations that led to his appointment and confirmation to the bench, and finally the relative position of influence to which this cell naturally gravitates in relation to each of the other eight cells, depending upon the specific gravity of its mind and the valence of its personality. Once he has accomplished this extremely skillful dissection, he never lapses into the carelessness of homogenizing these nine individual units into the undefined conglomerate—the Court. He consistently deals with each issue and decision in terms of nine distinct reactions and conclusions. The reader is kept constantly aware of the individuality of each member of the court. Mr. Swindler is particularly illuminating in his treatment of Justices Hughes, Stone, Roberts, Brandeis, Cardozo, Frankfurter, Jackson, Black and Douglas.

One effect of the book is to leave the reader with a greater appreciation for the tenuous nature of a 5 to 4 decision. If a decision of the Supreme Court is more accurately defined as the result of nine separate forces rather than the harmonious product of a committee, then the replacement of one justice by another whose political persuasions lead him to push or pull in a different direction can have an immediate effect on the result.

But this book is far more than just another volume on the Supreme Court or its law, even in this expanded sense. The full thrust of the Court's decisions on Commerce Clause power or Fourteenth Amendment guarantees cannot be fully appreciated as abstract concepts of law. Mr. Swindler adds the flesh and blood that brings these rulings to life and gives them context and meaning. His treatment of the Court is nicely interwoven with the other elements that color the making and effect of its decisions. For example, he pays close attention to the other two branches of the government. As with his treatment of the Court, he recognizes that the influence of either the presidency or Congress depends less on the nature of the offices themselves than on the character

of the individuals populating them. He deals not so much with Congress as with particularly dominant Senators and Congressmen, and his wealth of anecdotal material at various points of crisis makes the book a fascinating way to gather valuable perspectives.

The interplay between President Roosevelt and his backers and enemies in Congress and on the Court is superbly told with a pleasing taste for drama as well as accuracy. The force of the presidency is also clearly made a function of the force of Roosevelt, Truman, Eisenhower, Kennedy, Johnson, or Nixon as an individual. He confesses to a disagreement with Tolstoy's theory that history moves as a glacier, impervious to the actions or ideas of individuals and he documents his point of view well.

My conclusion is a wholehearted recommendation of the work. It ties together so many elements with such finesse and skill of editing that the whole is substantially greater than the sum of its parts. The book makes a genuine contribution for lawyer or layman.

JOHN F. DOBBYN*

LAWYERS FOR PEOPLE OF MODERATE MEANS. By Barlow F. Christensen. Chicago: American Bar Foundation, 1970. Pp. 313. \$6.95.

How's that again? "Lawyers for People of Moderate Means"? Is this book for real? I mean, isn't it silly to think of "lawyers" *for* "people of moderate means"? Lawyers are for the rich, who've got a choice, and for the poor, who haven't got a choice. Oh! It's put out by the American Bar Foundation—sounds like the American Bar Association. Must be about how us working folks are going to pay for a lawyer when we have to get one, like for a divorce, or to buy a house, or to get disability compensation or to go bankrupt. Of course, we don't have much choice—they've got us over a barrel. Yeah, I see. The title goes on: "some problems of availability of legal services." Availability? Hell, the phone book's full of them. Ah, well, there isn't much I can do about it anyway. If they want to be more available, let them. But if they think I'm going to want to hire them, they're wasting their time.

* Associate Professor of Law, Villanova School of Law.