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## Review of “The Commerce Power Versus States Rights,” By Edward Corwin

Maurice H. Merrill  
*University of Oklahoma School of Law*

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## BOOK REVIEWS

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

It seems most appropriate that I should be starting to give formal expression to the thoughts engendered by this little volume on the very evening that the press brings to us the news of a presidential proposal for federal judicial reform envisaging the intromission of new members to the Supreme Court. For whatever measure of support this suggestion may in the end command, we may be sure that its genesis is due to deep-seated conviction in many quarters that heretical doctrines have governed the majority of the Court in some of the more significant decisions of the past quarter-century. Taking as his slogan "Back to the Constitution," Professor Corwin appears as the champion of those who bring the accusation of heresy.

The argument is strikingly and efficiently presented. In his opening chapter, Professor Corwin presents the contrast between *Gibbons v. Ogden*<sup>1</sup> and *Hammer v. Dagenhart*,<sup>2</sup> pointedly asking, "How come?" Our author, of course, does not descend to the vernacular. His query is, "How did the Court ever get from the one to the other—what were the steps?" But the more expressive provincialism comes much closer to representing the startled surprise with which he feels we should gaze upon the result of this "century of progress" in judicial interpretation of the Constitution. The "doctrinal antecedents"<sup>3</sup> of the later decision he puts in the form of six propositions which have been advanced from time to time. To the demolition of these propositions the major portion of the volume is devoted. The work is thoroughly and completely done, with a painstaking analysis and a laborious historical investigation from which every trace of flippant detraction or carping criticism is absent.

To me it seems difficult to say that Professor Corwin does not prove his case. Opinions, of course, will differ upon so controversial a point, and every reader must weigh the argument in the scales of his own reason by the weights of the available data. But the framers of the Constitution have told us in the preamble that their purpose was to secure the blessings of liberty not to themselves alone but to their posterity, through the government which they established. To preserve liberty, a governmental organization must be strong enough to combat effectively every combination by which freedom may be menaced. A structure in which regulatory power over some of the most consequential areas of human activity is paralyzed, not by express constitutional provisions but by vague implications, hardly can be an efficient defender of freedom against strong organizations which may build themselves cities of refuge in the no-man's land of "dual federalism." Must we believe that the fathers of our nation intended such a result?

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1. 9 Wheat. 1 (1824).
  2. 247 U. S. 251 (1918).
  3. P. 18.

Whatever his views as to the correct interpretation of the Constitution, no student of our public law can afford to ignore the argument presented by Professor Corwin. The book should be read and pondered by every lawyer and law student. Those who are convinced by his presentation will find themselves confronted by yet another question: What can be done about it? It is significant that our author is distrustful of the effectiveness of "the gross, fumbling hand of Amendment,"<sup>4</sup> and urges that "we must still trust the Court, as we have so largely in the past, to correct its own errors," a trust which he tells us has been "justified by the event."<sup>5</sup>

Norman, Oklahoma.

MAURICE H. MERRILL.†

**SUBSIDIARIES AND AFFILIATED CORPORATIONS.** By Elvin R. Latty. Chicago: The Foundation Press, Inc., 1936. Pp. xxvii, 225.

To a now substantial segment of the legal profession, analysis and prediction of judicial behavior in conceptual terms is suspect. Concept-smashing is no longer news. Indeed, so far has the process developed, so prosaic has it become, that its purpose and limitations have become obscured. Some persons have ignorantly projected the process far beyond its reasonable scope. These persons have observed that lawyers and judges talk in concepts and that these concepts can be smashed, and they have proceeded to ridicule any ordered attempt to investigate and interpret those portions of human behavior with which the lawyer and judge are familiar.

Generally, there has been a great deal of concept-smashing, but very little use has been made of the virgin material disclosed by the process. It was fairly easy to indicate, after conventional concepts were smashed, that judges decide cases on the basis of hunches. It was even possible plausibly to define the hunches in terms of the judge's digestion and economic background, variously weighted. In addition, a few persons have proceeded from smashed concepts to an explanation of judicial behavior in terms of psychology or folk-ways. It has not been possible, apparently, to define these terms or to test their applicability and utility in any field with which the law is concerned; or the persons who have submitted these explanations have been so ignorant of relevant areas of conduct as to be unable to make a convincing effort. This more erudite-sounding explanation, therefore, has been little more satisfactory than the "hunch" theory.

A few persons have made a systematic endeavor to develop a method of utilizing the facts and behavior that remain after conceptualism is smashed. Notable among these is Underhill Moore. And notable also is the work that has been done in the field of vicarious liability. Particularly deserving of mention in this connection are the law review articles on the subject by William O. Douglas. In these articles conventional concepts used in talking about vicarious liability for the purpose of dealing with legal issues are smashed. But Mr. Douglas does not rest with performance of that useful

4. P. 265.

5. *Ibid.*

† Professor of Law, University of Oklahoma.