Book Reviews

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

WITH a learning embellished by a wit and irony that make the book a delight to read, Professor Corwin has given the *coup de grace* to some of the more fashionable theories of the American Constitution. Essentially, he has shown that in the long run the doctrines laid down by the Supreme Court are, and must be, the expression of the economic necessities the Court confronts. It may delay; it may evade; it may hinder. But every constitutional limitation is the child of the spending power. In the long run, judicial review must give way before the imperious obligations that power imposes.

It would be difficult to do justice to the attractiveness with which this momentous theme is expounded. Professor Corwin brings a philosophy to his history, and he makes the one illustrate and illumine the other with a penetrating insight it would be difficult to overpraise. The implication of his book, if I mistake not, is as simple as it is important. Once the United States had decided to accept political democracy, it was impossible, it was also unwise, to use the doctrine of judicial review to prevent the application of its consequences to the field of industrial organization. His own inference is not merely the vital one that a wise Court will not interfere with the Roosevelt legislation. It is the still more important general thesis that a Court is always mistaken in seeking to hinder the effort of the legislative authority to adapt the power of the nation to the facts of the economic environment.

The argument is worked out with a wealth of detail derived from the whole history of the Court. For the most part, perhaps, it is implicit, rather than explicit, in the fascinating summary Professor Corwin makes of the judicial doctrine embodied in the two hundred and ninety volumes of the decisions. But it is an unmistakable argument. And I think that it is perhaps worth while here to submit some of the inferences it seems to me to contain, because they are of great importance to anyone who seeks to discover the probable future of American constitutionalism. I ought, perhaps, as an outsider to apologize for treading in a domain where a foreigner ought always to dwell uncomfortably. My excuse is, I hope, the sufficient one that Professor Corwin raises issues of the first importance not only for the United States but also for any political community which is anxious to preserve the substantial reality of constitutional forms. And this has become an issue of such decisive importance for Western civilization that the mechanics of its preservation need all the possible discussion they can arouse.

With this apology made in due form, my inferences are the following: (I) in any industrial community of the modern type, the centrifugal tendencies must always be subordinated to the centripetal. Because of this, the institutions which embody the national power must, in the long run, be successful if the community is to exploit its resources successfully. Because of this also, any division of powers which seeks to inhibit their success will, sooner rather than later, fail to work. I draw from this the conclusion that Dicey was right when he argued that federalism is always a stage on the road to unification.

(II) I infer, secondly, from Professor Corwin's argument that in any modern industrial society the legislative power is, and, if it is healthy, must be, supreme. Otherwise it follows that there is no adequate way either of taking emergency action in a crisis, or of realizing the popular will. If I am not mistaken this was the sound canon of constitutionalism with which Mr. Justice Holmes approached his task. The Court, he thought, must act in accord with the mental climate of its epoch. If it did other-

wise, it was, in fact, substituting its private prejudices for the judgment of those by whom the nation had decided that it wished to be governed. The only national legislation a court like that at Washington should reject was patently outrageous legislation.

(III) Any epoch in which what Dean Clark terms "an aloof judicial tribunal" substitutes its discretion for that of the legislature is one in which institutional readaptation is required. No great nation, with problems to solve commensurate with its greatness, will submit the control of its policy to a majority of nine men who cannot be called to account for their actions. Where fundamental disharmony of this kind persists, the time has come for constitutional revision.

(IV) It follows that the doctrine of judicial review, where it touches basic matters, is workable and authoritative only in times of prosperity, or in those where no great emergency attends upon a decision adverse to legislative action. For the Supreme Court to thwart Congress at other times is fatal to the esteem in which it must be held in order to maintain its authority. Since any attempt in this direction is bound to prove futile, the part of wisdom for the Court is to recognize that in all major matters it must seek to follow, and not to annul, legislative decisions. Otherwise, on past experience, it calls down destruction certainly upon itself, and possibly upon others beyond its own sphere.

(V) If these inferences are correct, the power of judicial review in the United States is only an exceptionally dramatic instance of the power inherent in English judicial tribunals in their work of statutory interpretation. The former works in a half-explicit medium; the latter work subject to the knowledge that, in the long run, the King in Parliament will have its way. The English tribunals try to compel an act of Parliament to work in the traditions of the Common Law. They can only do so so long as they do not, in that compulsion, outrage the predominant mental climate of their time. Where they have attempted that compulsion, as in the Taff Vale case for example, they have been necessarily overridden by a further act of Parliament.

It is in the light of these inferences that I read the vital conclusions Professor Corwin has reached. For good or ill, the American people has authorized its representatives to embark upon the task of regulating private business in the United States. It will not, as he says, "resign the ultimate voice as to matters of vital social importance to the consciences of nine estimable elderly gentlemen." It is the more unlikely to do so when, as will be evident to any one who reads the dissenting opinions in the Gold Clause cases, four, at least, of them have in their heads a theory of property rights which assumes that these rise superior to world depression and national need. It is fortunate that the range of judicial discretion at the disposal of the Court is wide enough to enable it to escape from the disasters to which men like Mr. Justice McReynolds so excitedly invite it. Judicial review can never have been intended to make the Constitution inaccessible to those changes which are the condition of its preservation. If the Supreme Court were to take that view, it would not long remain a supreme court. That, I take it, is the essential lesson Professor Corwin has brilliantly sought to teach. I hope that Mr. Justice McReynolds' colleagues, at least, will learn it.

HAROLD J. LASKI†

London, England.

ESSAYS IN CONSTITUTIONAL LAW. By W. P. M. Kennedy. New York: Oxford University Press. 1934. pp. xv, 183.

IN THESE essays, reprinted from various law journals and other publications, Professor Kennedy of Toronto University deals for the most part with two themes:

†Professor of Political Science, University of London.

the relations between the central and provincial governments of Canada, and the Statute of Westminster of 1931.

The British North America Act of 1867 (the basis of the Canadian constitution) was framed under the shadow of the American Civil War. Believing that the theory of state rights had much to do with bringing on that unhappy conflict, the "fathers of federation" sought to profit by American experience. In the distribution of legislative powers they accordingly made it their avowed purpose to strengthen the federal government and to limit as closely as possible the autonomy of the provinces. Departing from the precedent set in the United States, they assigned residual powers to the Dominion instead of to the provinces, the former being empowered "to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects . . . assigned exclusively to the legislatures of the provinces". Although there is ample evidence, which the author educes, to show that British as well as colonial statesmen of the time intended this general residuary power to cover all subjects which might in the future become of national importance, the Judicial Committee of the Privy Council, applying strict rules of statutory construction and allowing no weight to historical reasons, by a series of decisions confined the power to cases of great national emergency. The real residuum of powers in practically all other instances rests with the provincial legislatures under their exclusive power over "property and civil rights in the province". In Canada, as in the United States, "the most cherished aims of the founders have (thus) been nullified", for while in the latter which "began with a theory of state rights" there has been an "ever increasing growth of federal power", in the former which "began its political existence with the scales heavily weighted in favour of the central authority" the provinces now "enjoy powers almost greater than those of the states of the American union."

A further modification in the relative powers of the Dominion and the provinces has occurred through the reduction to practical unimportance of the federal veto over provincial legislation. While the question of the constitutionality of legislation was usually left to the courts, the Dominion government, for many years after federation, disallowed provincial statutes as being "inequitable, unsound in principle, or destructive of private or contractual rights". Gradually, however, the federal cabinet ceased to act as a moral censor of provincial legislation. The change, as Professor Kennedy points out, runs parallel with the establishment by the Judicial Committee of the principle that within the sphere exclusively assigned to them by the British North America Act the provinces are sovereign, and of the rule that abuse of a valid power can not legally be asserted against the use of the power, (a rule which has even enabled the provincial government, as the author shows in one of the essays, to tax federal instrumentalities, and vice versa). The federal veto remains as a legal power, but it is unlikely that any Dominion cabinet will again dare to exercise it.

Beneficent though the services of the Judicial Committee may have been to the provinces in rescuing them from the inferior status which the "fathers" assigned to them, the author believes that their powers have now been strengthened to the point where there is danger of the Canadian federation being transformed into a loose confederation of states. There is need, in the interests of national cohesion, for some retracing of steps, and since the appeal to the Judicial Committee survives—in the final analysis simply because "the vast majority of Canadians wish it to survive"—the necessary retrocession can only come through constitutional amendment. This, however, implies a measure of willingness and cooperation on the part of the provinces which has not yet been forthcoming. The problem is a delicate and urgent one, and Professor Kennedy discusses its various aspects temperately and incisively.

The Statute of Westminster, the outcome of the Imperial Conferences of 1926 to 1930, was designed to make clear the status and powers of the Dominion. Unimpressed by the encomiums bestowed upon it by enthusiastic commentators, the author regards the Statute with very lukewarm approval. His greatest fears are that it "will be the precursor of legalism in inter-commonwealth relationships". He believes that the problems of the British Commonwealth of Nations are "most profoundly those of statesmanship and not of law," and that faith in a common allegiance, in common cultural traditions, and in a common political and religious liberty will be sufficient for the future as it has been in the past. On this note Professor Kennedy closes an interesting, learned, and admirably written little volume.

WILLIAM H. WYNNE.†

New Haven, Connecticut.

LIQUID CLAIMS AND NATIONAL WEALTH. By Adolf A. Berle, Jr., and Victoria J. Pederson. New York: Macmillan Company. 1934. pp. xvi, 248.

THIS book treats of one of the striking phenomena of present day economy. As its authors say, it is an "exploratory" essay only— not an "explanatory" one as the publishers have it upon the paper cover; and, being conceived in the "scientific" spirit, it presents merely data concerning "liquidity," though the authors have fortunately been unable to refrain wholly from giving their subjective impressions of the material. That the study is out of the ordinary, and valuable, however, should go without saying, following as it does the truly excellent work upon the corporation and private property in which one of the authors, Mr. Berle, had a hand. As to its unusualness, at least, we are left in no doubt, for it is stated in the preface that a study of this sort falls well "outside the normal path of any law school—save only Columbia, or possibly Yale, where it is recognized that law is a manifestation of life . . . " Perhaps this is quite accurate; at all events the point is not to be discussed. So, what of the value of the work?

The heart of the study lies in the finding that the ratio of "net liquid claims" to "national wealth," according to the authors, increased from 16% in 1880 to a high point of 40% in 1930. Compared with this, though the authors disavow any intentions of drawing conclusions therefrom in terms of cause and effect, the ratio of urban to rural population increased from 22.6% in 1880 until in 1933 it stood well in excess of the rural population. In both cases the big drive came during the first two decades of this century, though the trend in each has been rapid and steady since then, at least up until 1930. And while the ratio between liquid claims and wealth appears to have fallen off since then to 34% in 1933, it would seem incontestable that the process has if anything been accelerated in recent years. One of the disquieting features of the depression has been the steady effort on the part of banks and the larger industrial concerns, at least, to put their affairs into an increasingly liquid position.

The significance of this growth in "liquidity," of course, depends in part on what is meant by the term. The early portion of the book is devoted to definition, reaching the conclusion that what is said to be the businessman's notion of the matter should be adopted. According to this the "liquid" claim has two dimensions, first it must admit of ready realization in cash, and second the amount of cash realized must have some relation to the supposed value of the claim. No question can well be raised as to the time requirement, though as is pointed out this may vary with different types

†Research Associate, Yale School of Law; of Gray's Inn, Barrister-at-Law.

of claims. The price aspect, however, causes trouble, the authors being forced to adopt the phrase "going price" to convey their meaning and to avoid various economic connotations of the term value. Possibly the matter of price cannot be avoided. But certainly the ability to convert an asset into cash promptly, at whatever price, is much more nearly of the essence of liquidity in the point of view of the man in the street than that the price should meet some indefinite test of value. Stocks have continued "liquid" in this sense, though at a price, throughout the depression.

Of more interest is the discussion concerning the qualities of liquidity. Two quite distinct types of claims, equally spoken of as liquid by the business man, are contrasted by the authors, the one being said to have "real" liquidity, and the other "artificial." The first, as represented by the merchant's bill of exchange, is traditional; the second, of which the corporate share certificate is typical, while newer, has come to have tremendous importance. Each is liquid in different senses. The first looks to payment at maturity, though it has a perhaps equally important saleability feature, while the second depends almost wholly upon this latter quality. So also, underlying one is ordinarily a transaction spoken of as self-liquidating, that is the flow of goods from producer to consumer, while the transaction giving rise to the other is a relatively stationary investment affair having little similarity to the first.

The foregoing distinctions are significant enough, no doubt, but the name "artificial" is given to the share transaction for the further reason that its "liquidity" is dependent upon elaborate market machinery. One perhaps may doubt whether the amount of machinery to support the share market is any greater than that employed in the discount market, particularly when it is considered that the Federal Reserve Act provides machinery in addition to any available to the share certificate, whereby the bill of exchange may be converted directly into currency, the ultimate of pure liquidity. And, of course, to the extent that it is assumed that share liquidity is a "result" of market machinery the converse is probably true. That is, the liquid character of the share certificate has itself been the reason for the development of market facilities, although there is little market recognition of this fact.

But these matters of definition and classification are after all only of secondary importance—something for the economist to refine and rework at his leisure—for fine distinctions in terminology are not made necessary by the data which the authors have presented. The study in large part is a comparison of certain broad statistical categories, bank deposits, insurance company cash surrender obligations, stocks and bonds. Of course these have been broken down to some extent, but no effort has been made to go beneath the surface in the banking situation, for example, and to determine statistically what amount of bank holdings in any given year were "liquid," as that term is here defined. While bank deposits may broadly be considered liquid so long as the bank remains open, still this cannot conceal the fact that under the surface they may be rapidly becoming anything but liquid, as is witnessed by what was happening during the period between 1920 and 1930, for example. No doubt such an effort would be impossible of execution on any broad scale. But in the absence of such a study it is not possible to draw conclusions of much moment as to the relative liquidity of the bill of exchange, the share certificate or the real estate mortgage as a supporting security.

It is perhaps enough for one book, however, to make the general point that the tendency toward increased liquidity is a matter of significance. The effort to make commercial paper negotiable, though one of the first important steps in the process, was by no means the last. The nonassessable share with limited liability, only recently made negotiable, illustrates a further development. But the same process has been going on in many other fields not noticed by the authors. In commodities, for example, where once it was only the "staple" which had "liquidity," the steady

trend toward standardized, packaged, advertised and trade-marked goods has greatly increased liquid values, perhaps more than is fully realized. In fact, real estate, alone of our principal assets, has offered substantial resistance, though even here the insurance obligation and in many cases the share certificate has constituted a rough, though partial, translation of its value into liquid form.

Granting that the whole technical and economic advance of the last century (a faily large concession) has been made possible by the ability to mobilize and direct financial resources readily, a result of liquidity, what of it? The authors are wisely silent at this point; the scientific approach has no answer to such questions. There are intimations, it is true, that the structure is "fragile," that "liquid property is dangerous property," and in the concluding chapters a few considerations of how to stabilize and support the structure are discussed. But there are no Veblenesque references to any forces moving in the background which may more readily control affairs in their own interest where property has become highly liquid. The system is not questioned. In fact, the general reader will probably put the book down unaffected in his faith that man's security here below consists in "an abundance of things possessed," the more "liquid" the better. All in all it is a good book, stimulating and well written, but not as well done as the treatise upon the corporation.

ROSCOE T. STEFFEN.†

New Haven, Connecticut.

CASES ON EVIDENCE. By Edmund M. Morgan and John MacArthur Maguire. Chicago: The Foundation Press, Inc. 1934. pp. xxxi, 1232.

THIS book covers an amazing range of material. It bears the unpretentious title, "Cases on Evidence." The editors may have been motivated by modesty in giving their work that label, or they may have wished to make, at least, its title simple. But if a label on a preparation is to give a credulous public any indication of the contents within, the editors have laid themselves open to a prosecution for employing the confidence game. The reviewer feels it his duty to serve the trusting student and the unsuspecting instructor with a caveat, and to inform them that the editors have resorted to various artifices and legerdemains to pack within the covers of this book materials of a type no self-respecting "casebook" should include.

The work, indeed, contains cases—many and well-chosen ones; but it also has, in abundance, materials in the form of problems, notes and text statements. The problems are particularly disquieting. They are inserted at frequent intervals and consist of brief statements of the facts of cases together with the holdings of the courts and the citations. Sometimes these problems are grouped in simple clusters, but here and there they are classified with titled sub-headings. Ordinarily they bear the simple heading "Problems" and are unadorned with notes—notes, as a rule, are attached as footnotes to cases—but, at times they are called "supplementary notes"; occasionally there are problems with supplementary notes and footnotes, and footnotes to notes and supplementary notes; here and there a note is raised from its lowly position to a place in the sun and becomes a problem, and so on until the study of problems and supplementary problems and notes becomes a problem, and evidence itself becomes a problem study. The reviewer admits that this is not a fair appraisal of the book. He confesses the trouble is in himself, that he has become overwhelmed with the complexities of a modern civilization, and that he often is apt to yearn for the simple life. He, however, agrees heartily with the statement in the last paragraph of the editorial preface of the book that a detailed study of evidence "may help bring about the simplification which must come if the courts are to survive effectively."

†Professor of Law, Yale University.

A distinct feature of the book is the modernity of its materials. If Thayer's *Select Cases on Evidence* of 1892 could return to being, it would be startled with the fashions of its grandchild. There must be nothing in heredity after all, for there is no resemblance between the two. This selection abounds in recent cases, large numbers of them having been taken from opinions given during the last ten years, and often, indeed, from opinions of the last year. The reviewer has never read a finer selection in any casebook. The arrangement and sequence of materials is excellent, and the exhaustive citations to periodical literature add substantially to the usefulness of the work.

The size of the book—it contains twelve hundred and thirty-two pages—is subject to criticism, as the editors were well aware, and they engaged, in their editorial preface, in a persuasive defense of its bulk. Reference has been made to one of these defenses. In another place their defense is raised to a level on which there can be little disagreement. "We think," they state, "the choice is between teaching evidence carefully, patiently, even somewhat elaborately on the one hand, and on the other sending to the bar neophytes whose fumblings will swell the dreary digest columns." On the next page they present a more realistic contention, albeit they here slip to a lower level, for ready knowledge of the rules of evidence. These rules, it would seem, are a bag of tricks for the initiated. "The arts of a learned profession," they say, "have fatal attraction." Then is quoted a brief description of a trial scene from Warren's *Ten Thousand a Year.* "Clearly," say the editors, "this is such fun that the initiated will not easily tolerate its abolition."

The reviewer has the highest admiration for the scholarship, industry and ingenuity shown in the fashioning of this casebook. It is, in fact, a casebook de luxe. It reveals what an extraordinary amount of material can be crowded into a book, but it also shows the limitations of the case method of study. The question is fairly raised, can cases, or cases plus the abbreviated statements of the facts of cases, ever supplant text material? Further, is it desirable to weight a casebook with problem statements? Is not the instructor who uses this book likely to find himelf so involved in a maze of materials, provided for him by the editors, that he must lose that personal touch which every instructor should give his course? If it is desirable, as the editors contend, that the course on evidence should be covered in extenso, is this the best way to do it, or would it be better to resort frankly to sending the student to good text materials for a part of the course? A note in the book, on page 46, is suggestive. After citing *Wigmore on Evidence,* it is stated that his work "contains the best published discussion of testimonial narration, elaborating many points barely suggested in the condensed statement here presented." After all, it is impossible to supplant *Wigmore on Evidence* with a casebook. This, no doubt, the editors would freely admit. The questions here raised are not intended as adverse criticisms. The reviewer asks them in the hope that they will be taken up for serious reflection and discussion by law teachers. He adds, if the question of pedagogy be settled in favor of this work, that this is the finest casebook he has ever examined.

Urbana, Illinois. ALBERT J. HARNO.†

†Dean of the School of Law, University of Illinois.