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BOOK REVIEWS

LIBERTY AGAINST GOVERNMENT. By Edward S. Corwin. Baton Rouge: Louisiana State University Press, 1948. Pp. xiii, 210. \$3.00.

THE CONSTITUTION AND SOCIO-ECONOMIC CHANGE. By Henry Rottschaefer. Ann Arbor: University of Michigan Law School, 1948. Pp. xvi, 253. \$3.50.

"A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. . . . The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." These familiar words from Cooley's *Constitutional Limitations*¹ are quoted in the Foreword to Professor Rottschaefer's book by Dean Stason of the University of Michigan Law School. It can be understood how one thoroughly imbued with such an approach might conclude that, in the years since 1937, Constitutional Law has, in effect, ceased to exist. To these Professor Rottschaefer's advice would be indicated by his Introduction. The theories developed by the Supreme Court in the course of its reformulation of constitutional doctrines "demand careful attention." "They are an essential part of the practicing lawyer's equipment. He must be familiar with them and their use if his advice is to be sound. . . ." Apart from the decisions of the Court itself, the two books here reviewed should prove of the greatest usefulness in supplying a familiarity with, and understanding of, the Constitutional Law now being applied by the Supreme Court. Each, in a fashion complementary to the other, furnishes in addition a historical commentary bearing on the validity of the above quotation from Cooley.

For forty years, and in at least a dozen published articles, Professor Corwin has been discussing the origins and ramifications of the doctrine that "due process of law" operates as a check on the substance of regulatory legislation. *Liberty Against Government* represents a synthesis of these previous studies and the judgment, as of 1948, of our most considerable scholar of the United States Constitution with regard to the favorite topic of his scholarship.

Professor Corwin states in the Preface that the book is an extensive rewriting and revision of his previous studies. This seems to be true largely in detail and minor points of emphasis so far as much of the material is concerned. Certainly there is little in the broad outline and general develop-

1. P. *54 (3d ed. 1874).

ment of the pre-Fourteenth Amendment material which will be novel to those familiar with his previous studies. The volume would be very much worthwhile if it did no more than present in convenient form that which had previously been available only in the several law reviews or, as reprinted in *Selected Essays on Constitutional Law*. This volume does much more, however. The "due-process" material is brought up to date where required. Its relationship to liberty is made much more explicit. An outstanding discussion of liberty as a juridical concept is contained in Chapter One. The several kinds of liberty are distinguished, as are the contrasting claims that are made upon government by the individual in the name of liberty. In nine pages of text there is contained in this chapter the most concrete discussion the reviewer has observed of this much-discussed, but largely undefined term, "liberty." Yet it lacks for nothing in comprehensiveness. "Juridical liberty" is the term chosen by the author to embody the idea of that freedom of action in the individual which is protected by the courts against legislative encroachment through the process of judicial review of the constitutionality of statutes. How it was that the courts could use a phrase like "due process of law," bearing no necessary relationship to the substance of legislation, as a means of invalidating statutes deemed unreasonable because of content, was the problem that stimulated Professor Corwin's early researches. In this book he traces the history of the answer to the problem from the Greeks and Romans in a manner that should delight the detective-story fan as well as the lawyer. "From Cicero to the latest decision of the Supreme Court," he states, "stretches a continuous tradition of two thousand years which asserts that there are rights made of no human hands and beyond the rightful reach of human hands." He demonstrates that it is natural law conceptions of a "higher law" with which purported law must agree to be law at all and of rights that in the nature of things are inviolable which were given lodgment in the due process clauses of the Constitution. The basis was thus provided for invalidating legislation deemed "unreasonable" in substance. The Court has not abandoned this prerogative nor has the test of validity changed greatly in statement. In certain areas it has ceased to accord the protection against governmental action formerly given and has taken away the adverse presumptions at one time said to attach to any interference with vested property rights or liberty of contract. Nonetheless it is more active than ever in protection against governmental infringement of certain personal liberties now deemed "fundamental." Presumptions of invalidity similar to those once protecting "liberty of contract" now seem to attach to regulations touching freedom of speech, press, religious and other fundamental freedoms. Although good reasons have been advanced for this differentiation in the judgment of the validity of statutes,² nevertheless the selection of certain rights for preferred

2. Of freedom of thought and speech Justice Cardozo has written that "one may

treatment and the rejection of others when the touchstone is no more definite than "due process" illustrates the persistency of the natural law concept. As an aside here it may be noted that the failure of Mr. Justice Black in *Adamson v. California*³ to enlist the support of his colleagues, even those who dissented with him in "pinning down" due process to the rights listed specifically in the first eight amendments to the Constitution indicates the present acceptance of the idea. Nor does Professor Corwin seek to "sell" the idea that the approach should be abandoned. He merely describes, reserving adverse comment for particular results achieved with this judicial instrument.

In Chapter Two Professor Corwin presents in a most fascinating manner the Roman and English origins of juridical liberty. The source of the American constitutional tradition is found in Cicero's effort to render in legal terms the conception of universal order held by the Stoic philosophers. Cicero ascribed the binding quality of civil or positive law to its being in harmony with "natural law" defined as "right reason, harmonious with nature, diffused among all." Professor Corwin traces this natural law limitation on positive law (the "higher law" doctrine) through John of Salisbury, Magna Carta, Bracton, the common law of England itself, Fortescue, Coke and others. The idea that there is a law superior to and controlling the rulers and in fact all political authority is repeated again and again. The knowledge of this law is the peculiar mystery of judges and lawyers. Important developments in specifying certain natural rights and limitations on legislative power under the Social Compact theory were contributed by John Locke in his *Treatise on Civil Government* (1691). When written constitutions were prepared in America it was a logical development, Professor Corwin asserts, that the writings of Locke, Coke and others would influence the absorption of higher law concepts into the constitutions through the process of judicial review. With the same background England arrived at Parliamentary supremacy. The absence of a written constitution emanating from the people appears crucial in this respect.

In Chapter Three there is traced the absorption of natural law doctrines

say that it is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U. S. 319, 327, 58 Sup. Ct. 149, 82 L. Ed. 288 (1937). In the "famous footnote" in *United States v. Carolene Products* Chief Justice Stone suggested "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." 304 U. S. 144, 152, n. 4, 58 Sup. Ct. 778, 82 L. Ed. 1234 (1938). Compare the contrasting opinions of the justices in *Kovacs v. Cooper*, 69 Sup. Ct. 448 (U. S. 1949), particularly Justice Frankfurter, 69 Sup. Ct. at 455.

3. 332 U. S. 46, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947). "And I further contend that the 'natural law' formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. . . . it [the formula] subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power." Black, J., dissenting, 332 U. S. 46, 68 at 75.

in this country in the period before the adoption of the Fourteenth Amendment. Vested rights were protected against legislatures under the "contract clause" and otherwise but the opposing power of regulation (police power) also flourished. Before the Civil War a state court had invalidated on the basis of a "due process" clause a statute deemed to interfere with vested rights because of its substantive content. The United States Supreme Court decision in the *Dred Scott*⁴ case contained a similar statement in judging the Missouri Compromise unconstitutional. Chapter Four traces liberty under the Fourteenth Amendment. "Vested rights" came under the protection of "due process" by 1890 where confiscatory regulation of property could be asserted. Detailed consideration is given to the development of the "liberty of contract" theory which was not adopted by the Supreme Court until more than thirty years after the Amendment became effective, in spite of the repeated efforts of counsel in the interim. State courts made use of it by 1885. The high tide of this doctrine, which in effect made legislative interference with a purported liberty of contract in the field of labor relations presumptively invalid, ran from *Lockner v. New York*,⁵ in 1905, to *Morehead v. New York ex rel. Tipaldo*,⁶ in 1936.

Turning to the modern scene Corwin indicates the interests and values that are given preferred status today. One gathers that he questions if some of these are worthy of the importance attached to them and of the doctrines developed for their protection. He concludes with a brief notation as to the increased use of the Fourteenth Amendment as a gauge of fair procedure and of the partial reanimation of the powers of Congress under section 5 of the Amendment.

"The Fourteenth Amendment may thus be restored in time to the use for which it was primarily intended when it was first adopted. Meantime, the due process clause thereof will have furnished the core of a vast body of jurisprudence much of which has within the last decade been consigned by the tribunal that elaborated it to the limbo of things outlived. Whether the same tribunal's recent doctrines will prove more viable in the long run only the long run can tell. Some of them appear likely to undergo sharp challenge in no remote future."⁷

The moral, if any, of both Professor Corwin's and Professor Rottschaefer's books is that the protection afforded by the Constitution has changed in content more than once in our history and there is no reason to believe that that process of change will not continue. The Supreme Court and the Constitution will not serve to prevent loss of liberty if there is not sufficient concern for general liberty in the dominant political group. Professor Rottschaefer's words seem cogent: "No group can expect that limiting

4. *Scott v. Sanford*, 19 How. 393, 15 L. Ed. 691 (U. S. 1856).

5. 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937 (1905).

6. 298 U. S. 587, 56 Sup. Ct. 918, 80 L. Ed. 1347 (1936).

7. P. 168.

the economic liberty of another group for its benefit will endure forever."⁸

Professor Rottschaefer's book is not limited so narrowly in subject matter as *Liberty Against Government*, nor does it dig so deep historically. Essentially it is a text covering the central problems of Constitutional Law. The chapter headings indicate its scope: "Development of Federal Powers Prior to 1933," "The Expansion of Federal Powers Since 1933," "The Expansion of State Powers Since 1933," "The Protection of Personal and Property Rights," "Some Implications of Recent Trends." The writer does not appear as a protagonist of a particular philosophy. He does not view with alarm. The cases are presented, analyzed, and forecasts are made against a background of events as well as of legal precedent. Viewed so, the New Deal Revolution seems to be much less of a revolution so far as the Supreme Court is concerned. This does not mean that there is not frank recognition of the fact that new sets of values have been injected into constitutional theory. It is the opinion of the reviewer that an excellent job has been done in seeking to show the accommodation within recent years of the presumably conflicting elements of stability and flexibility in constitutional development. As a text on Constitutional Law, this book is much more readable and enlightening than Professor Rottschaefer's *Horribook* on the subject published in 1939. Perhaps he would be willing to fill a real need and prepare a complete text using the approach of the lectures embodied in this book.

PAUL H. SANDERS *

ZONING LAW AND PRACTICE. By E. C. Yokley. Charlottesville, Va.: The Michie Company, 1948. Pp. xviii, 514. \$12.00.

Mr. Yokley, the First Assistant City Attorney of Nashville, Tennessee, and for ten years in its legal department, has, notwithstanding his heavy official duties, found the necessary hours for writing a serviceable volume enriched by his own experience with the legal problems of zoning. Anyone in the active practice knows how difficult it is, with the demands and interruptions of "the cares that infest the day" to think and to dig sufficiently so that a scholarly treatise may be produced. And municipal law officers will echo Mr. Yokley's plaint that the "work of a member of a city legal department is regular and tedious leaving little time for . . . independent research or writing."¹ Nevertheless, the book represents eighteen months of personally directed research followed by nine months of effort on the manuscript. This contains decisions so late as March, 1948.² Indeed, Mr. Yokley seems to have piled Ossa on Pelion with case references. Professor Williston, in

8. P. 236.

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1. Preface, viii.
2. Preface, viii, ix.

a recent account of his Law School days,³ mentions that Dean Langdell's first case books, contracts and sales, printed every English case (with an occasional New York, Massachusetts or United States Supreme Court case) involving the legal principles covered by these tomes. Mr. Yokley seems to have had a similar ambition to include, in his treatise, as many cases as possible that refer in any way to his subject. He might well have omitted some trial court decisions and some citations adduced in support of propositions that are obvious, elementary and only slightly relevant to zoning.⁴ A number of leading cases, almost always adverted to in detailing the history of zoning, are omitted—e.g., *Hadacheck v. Sebastian*,⁵ where, by a harsh exercise of the police power, retroactive zoning prohibiting further use of a brick yard, entailing heavy loss to the owner, was sustained. *Welch v. Swasey*,⁶ with only the United States citation supplied, appears in a note⁷ that regulations dealing with the height of buildings are a proper exercise of the police power. But, for those interested in esthetics, including the late Justice Holmes, this much cited case is a favorite as a filip to the proposition that a regulation, otherwise justifiable, is not invalidated because esthetic considerations may have entered into the reasons for its promulgation.⁸ A number of modern interesting cases and articles on esthetics and limitations on character and use of signs and billboards likewise are absent.⁹ Neither is there a bibliography, or much discussion in the book or reference to law review and other articles, compendiums, or to A. L. R. and other annotations, or to any but two or three textbooks.¹⁰ Chapter 14 on airport zoning omits mention of Charles S. Rhyne's admirable "Airports and the Courts" (1944), published by the National Institute of Municipal Law Officers, and also omits all of the splendid list of books, court decisions and law review articles, etc., appearing in "Airport Zoning" by J. Nelson Young, of the College of Law at the University of Illinois.¹¹ *Fortuna v. Zoning Board of Adjustment*,¹² one judge dissenting,

3. 8 Harvard Law School Record, No. 2, pp. 1, 4 (Feb. 16, 1949).

4. E.g., § 111, ¶ 2, p. 210; § 183, ¶ 2, p. 368 and n. 32. The Wisconsin case cited and discussed in more than a page of text (§ 83, p. 153) does not seem so "interesting" as the author thinks, because the result is obvious, in view of there having been an express authorization in the ordinance which permitted buildings, of which the structure involved was one, for public utility purposes in any location reasonably necessary for the public convenience and welfare. § 162, ¶ 1, p. 321.

5. 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348 (1915). This case is followed in *Queenside Hills Realty Co. v. Saxl*, 328 U. S. 80, 66 Sup. Ct. 850, 90 L. Ed. 1096 (1946) (also omitted); also in *Du Page County v. Henderson*, 83 N. E. 2d 720 (Ill. 1949) (sustaining a county zoning ordinance).

6. 193 Mass. 364, 79 N. E. 745, 23 L. R. A. (N.S.) 1160 (1907), *aff'd*, 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923 (1909).

7. P. 283, n. 10.

8. Cf. YOKLEY, § 4, p. 5.

9. *City of New Orleans v. Pergamet*, 198 La. 852, 5 So. 2d 129 (1941); *Kelbro v. Myrick*, 113 Vt. 64, 30 A. 2d 527, 531 (1943) [largely based on an article, *Wilson, Billboards and the Right to Be Seen from the Highway*, 30 Geo. L. J. 723 (1942)]; *Vermont Salvage Corps. v. Village of Saint Johnsbury*, 113 Vt. 341, 34 A. 2d 188 (1943); *Eubank v. City of Richmond*, 226 U. S. 137, 33 Sup. Ct. 76, 57 L. Ed. 156 (1912).

10. Sec. 8, pp. 8-9.

11. 46 UNIV. OF ILL. BULL. No. 29, p. 73 (Dec. 1948). This appeared too late for

allowed a variance on the ground of "unnecessary hardship" in order to avoid traffic congestion and permitted a substantial addition to a garage in an apartment house district. The opinion appeared too late for inclusion. But one wishes Mr. Yokley had given us more discussion of the kind shown in the adverse criticism of this case in the Harvard Law Review.¹³

The author is content to state¹⁴ that a zoning ordinance which excluded churches from residential districts was arbitrary and unenforceable, with a citation in the footnote of three supporting cases, one of which is *State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph*,¹⁵ but he might have mentioned that this case was later distinguished in *State ex rel. Hacharedi v. Baxter*,¹⁶ where mandamus was denied to compel the Zoning Board of Appeals to issue a permit for a private parochial school in a residential area, and it was there pointed out that, in the earlier case, the church authorities had been told the location of a site in the later proscribed district would be satisfactory when they bought the property, and no other site seems to have been available. The *Baxter* case should have found a place also in Chapter 13, "Injunction and Mandamus," because seemingly the writ of mandamus would have issued had there been a gross abuse of discretion.¹⁷ In the *Joseph* case,¹⁸ it was shown that while, in the leading case of *Village of Euclid v. Ambler Realty Co.*,¹⁹ the zoning validated ordinance excluded churches from single and two-family residential districts, the Euclid zoning ordinance was upheld only in its general scope. The annotation of the earlier Ohio case²⁰ points this out, and that, in a number of comprehensive zoning ordinances, churches are permitted only in certain residential districts. There is little discussion of possible reasons for exclusion, such as noise from church bells and automobile horns, traffic congestion due to crowds, heavy automobile travel and difficulties of parking before the beginning and clearing the streets at the end of the religious services.²¹ It would seem that "zoning to require off-street parking facilities for new buildings"²² might offer a

inclusion, but will be found excellent supplementary reading. The pamphlet contains valuable appendices I-XI, pp. 46-72, Appendix I, p. 46, containing the model state airport zoning act of November 7, 1944, the fifth model drafted and recommended by the National Institute of Municipal Law Officers, the Civil Aeronautics Administration and the United States Department of Commerce; II, p. 54, a table of statutes for airport zoning; III, p. 55, a model airport zoning ordinance, etc. See also Wolf, *Airport Approach Zoning*, 17 U. OF CIN. L. REV. 327 (1948).

12. 95 N. H. 211, 60 A. 2d 133 (1948).

13. 67 HARV. L. REV. 327 (1948).

14. Sec. 15, p. 16.

15. 139 Ohio St. 229, 39 N. E. 2d 515 (1942).

16. 148 Ohio St. 221, 74 N. E. 2d 242 (1947).

17. YOKLEY, § 171, p. 340.

18. 139 Ohio St. at 242, 39 N. E. 2d at 521.

19. 272 U. S. 365, 47 Sup. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016 (1926).

20. 138 A. L. R. 1287, 1289 (1942).

21. Sec. 183, p. 367.

22. NEW YORK STATE BUREAU OF MUNICIPAL INFORMATION, REPORT 2908 (1947) referred to in *The American City* (April 1947).

partial solution. That would permit churches in residential districts provided they furnish off-street parking requirements; and would help compromise certain of the difficulties and conflicting desirables involved. The *Euclid* case, while frequently referred to by Mr. Yokley, is not given the attention it merits. Procedurally, it might have been noted that many applicants, contrary to the ruling in the *Euclid* case,²³ who have not first applied for a building permit and exercised their administrative remedies by appeal both to the Zoning Board of Appeals for relief and even to the Planning Commission and Council to amend the zoning ordinance, have been rebuffed by the courts for failure preliminarily to exhaust their administrative remedies.²⁴ The author might have noted that the *Euclid* case also indicates that zoning finds an analogue in the law relating to nuisances.²⁵

To what extent the authority creating the zoning ordinance is itself bound by it, is not discussed except in a bare statement that a village has no right to violate its own zoning ordinance by the erection of a municipal garage.²⁶ But it may be questioned if the general rule is that way. In *City of Cincinnati v. Wegehoff*,²⁷ where the city built a fire house in a residential district, while the zoning ordinance expressly excepted the city from its operations,²⁸ the opinion states it was not really necessary that it should have done so for the same result to follow. Ordinarily, general words do not include the sovereign or its agencies that partake of the nature of sovereignty. For this reason, too, one may differ with the author in approving cases where an attempt to exclude schools from a residence district has failed²⁹ and where a zoning ordinance prohibiting private schools in a district where public schools were permitted was held invalid. It is not too difficult to see a difference between private schools and public schools required under the Constitution to be maintained and thus constituting structures placed by the sovereign authority, exempt from zoning restrictions.

In Chapter 13, entitled "Injunction and Mandamus," the two subjects are referred to as "two equitable remedies, of ancient origin, well known in the common law,"³⁰ and it is assumed that "the average practitioner is familiar with the equity practice as respects both of these remedies."³¹ Under the heading, "The Function of Mandamus in Zoning Law,"³² there is a reference to "the equitable remedy of mandamus." To the ordinary practitioner, these characterizations will be deemed inadvertent, since mandamus is a remedy

23. 272 U. S. at 386.

24. *Central Trust Co. v. Cincinnati*, 62 Ohio St. 139, 143, 23 N. E. 2d 450, 453 (1939).

25. 272 U. S. at 387-88.

26. P. 199, citing, n. 20, a New York case.

27. 119 Ohio St. 136, 162 N. E. 389 (1928).

28. 119 Ohio St. at 137, 162 N. E. at 390.

29. YOKLEY, § 195, pp. 383-84.

30. Sec. 166, p. 328.

31. *Ibid.*

32. Sec. 171, p. 338.

at law and a common law prerogative writ;³³ and admirers of Coke will recall his heroic, but ill-advised resistance to equitable impingements on the common law.

In the past half century or so, during which zoning in any real sense has found a place in local government agencies in this country, a spate of cases has resulted and many new problems are constantly arising. So, a book of reasonable size cannot be all-inclusive and touch on all of these.

But, there might have been some discussion of the interdependence of zoning and planning, rather than the single sentence: "'Zoning' and 'Planning' are not interchangeable terms and do not cover identical fields of municipal endeavor, notwithstanding that 'planning' embraces 'zoning' and that 'zoning' may not entirely exclude planning.'" ³⁴ Because of the growing tendency to include minimum floor area provisions in revisions of zoning ordinances, a discussion of *Thompson v. City of Carrollton*,³⁵ sustaining the requirement of minimum floor area in a residence zone, and the opposite decision, *Senefsky v. City of Huntington Woods*,³⁶ would have been useful. So would have been comment on important current devices, such as local retail divisions in multiple dwelling districts, with neighborhood shops and services limited to the ground floor and overlays, that is, regulations restricting particular uses to special areas with different boundaries from those in the regular zoning districts.³⁷

The principal usefulness of Mr. Yokley's book will be as a reference work. The book is well printed and bound and has an attractive and convenient format. The sample comprehensive zoning ordinance used in a city of substantial size; a very good Chapter 11, on appellate procedure, and forms included in Chapter 16 of both original and appellate proceedings should be helpful as starting points for those not too familiar with zoning procedures. There is a complete table of cases³⁸ and a very good index.³⁹

Many reviewers and critics have inferiority complexes. So, they find it necessary to point out defects. Following this tradition, fault must be found with the author's occasional misspellings,⁴⁰ grammatical lapses,⁴¹ informal

33. 34 AM. JUR., *Mandamus*, § 4 (1941).

34. Sec. 1, p. 2.

35. 211 S. W. 2d 970 (Tex. Civ. App. 1948).

36. 370 Mich. 728, 12 N. W. 2d 387 (1943).

37. *Gilchrist Realty Corp. v. Village of Great Neck Plaza*, 85 N. Y. Supp. 2d 41 (Nov. 1948) [with comment in Williams, *Zoning and Planning Notes*, *The American City*, p. 121 (March 1949)]; and *122 Main Street Corp. v. City of Brockton*, 34 N. E. 2d 13 (Mass. 1949) (amendment to a zoning ordinance prohibiting height of less than 27 feet and of less than two stories in a central business area, invalidated).

38. Pp. 428-65.

39. Pp. 467-515. The index would be easier to use if page as well as or in place of section references were given, especially as some of the sections are long—e.g., § 86, pp. 161-70; § 29, pp. 37-41.

40. E.g., p. 155, "Pemlico" (Pimlico); p. 5, removal of "loan" (loam); p. 26, n. 10 "Slate" (State).

41. P. 146, § 78, first sentence.