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Book Review. Essays in Constitutional Law (Robert G. McCloskey, ed.)

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Professor McCloskey's selection of published essays for a single volume on constitutional law is designed for a general course in the college and, incidentally, for a general sale. The essays include the names of such noted authors as Charles Beard, James B. Thayer, Thomas Reed Powell, Edward S. Corwin, Zechariah Chafee, and Max Lerner. Reflections of Beard and Lerner are most evident in the author's introduction and in the general tone of the book. The essays selected are, for the most part, journalistic, sprightly-written pieces which contain the requisite embellishments satisfying the pretensions of scholarly attainment. Naturally, it would be unthinkable for students of the college to suffer the intellectual burdens of deep and institutional materials in law—that would be too out of line with the other materials of the college curriculum.

Some of the essays make the impressive discovery that the Supreme Court, like the Church, is a human institution. Being human, it must be brought to the low level of humans in a modern society; and the justices must have their collective subconscious dissected in order to show their sufferings from the maladies of a middle-class society. The institution is to be laid bare on the table and chopped into categories quantifying the influences that brought forth this and that decision. Since the Court is human, the institution of law and the legal system and the professional traditions for fulfilling the obligations of law to human development are not to be allowed a share in its work.

And the Constitution—what is that? Surely no one takes that seriously. All who read must know that the Constitution was constructed of some of the puffery in American history, of its being a document ratified and adopted when people believed that ideas and ethical principles, and even idealism about man, were significant and worth living for. Such naiveté was before Darwin and Freud verbalized their reflections we accept as two-dimensional, as truth and scientific discovery.1 Constitutional law, being restricted to the mundane questions of the day, must be stated in the formalism of issues, in the limiting and clouding emotionalism of ideology and ideological conflict. The law drawn from the Constitution, being no more than verbalized justifications for a decision, is whatever the justices say it is; and the justices themselves are mere actors in a drama by which they adjudicate their varying and respective prejudices and the wants and demands of this and that group into the law. It follows by common assent, and no further comment need be given, that whatever the Court formalized as fundamental law prior to the eventful 1937 term is no longer of value. The Court did not comprehend the nature of its task; then, it tried to build a legal system and legal structure as the national law of the Constitution; and now, the Court more properly just struggles out adjudications in the arena of ideological conflict.

In his introduction, the editor notes in passing that "the 19th century . . . achieve(d) a comparatively well-accepted consensus about the Constitution

1 If the insights gained from the reflections of Darwin and Freud be scientific, so are Adam Smith's; the latter's influence on the law's equation of freedom is not eradicated by intellectual disinterest.
and the Supreme Court.”

That ancient Veda, which lies buried in the hieroglyphics of modern constitutional writing, “involved the idea that the Constitution is a fixed and immutable inheritance from the Founding Fathers,” and “the judicial function is that of interpretation” but “does not include the power of amendment under the guise of interpretation.” 3 From the apparent premise that the Constitution changes with the times and the justices’ votes and that there is no building of a legal system in the process of constitutional adjudication, the editor reaches the easy conclusion “that between the time of Davis and Cooley and the time of Sutherland the Constitution had changed greatly in ways that were unauthorized by amendment,” and the ready explanation for this phenomenon is that the judiciary brought about these changes by “responding to the sentiments expressed by a very influential segment of ‘the public.’”

To label the development of national law through constitutional adjudication that evolved between *Lochner v. New York* 5 and *Nebbia v. New York*, 6 and the *Slaughterhouse Cases* 7 and *De Jonge v. Oregon* 8 and *Near v. Minnesota* 9 as changes in the Constitution unauthorized by amendment places an emotional tag upon the growth of the law and surely aids in befuddlement as to the nature of law and the essential tasks of the Court.

Then, the editor moves his introduction “beyond the 19th-century synthesis and the critique which destroyed it,” and to do this, he asks those questions that will move us “towards a modern restatement of American constitutional premises.” 10 First, he asks whether the Constitution (which he equates with constitutional law) is “to be thought of as a practical guide for the conduct of government, or as an ideal? The difference may be important.” 11 He has vaguely in mind something as follows: He understands that the *Ex parte Milligan* 12 rule against the military trial of civilians “has never been honored in practice.” Nevertheless, it is “perhaps desirable for the Constitution to set a bench mark higher than we are likely to reach in practice, on the supposition that the challenge of the ideal will carry us higher than a more practical admonition . . . .” 13 In another question, he asks whether the chief purpose of a constitution is “to facilitate government or to inhibit it?” 14 A closely-connected question concerns “the Constitution’s supposed flexibility, its adaptability to circumstances.” 15 And, finally, the editor asks “what kinds of values the Constitution is designed to embody” and some questions about the role of the Supreme Court. For this, and for other questions of law, the editor is most interested in the justices’ responsiveness to

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2 P. 4.
3 Pp. 4, 5.
4 P. 5.
7 83 U.S. (16 Wall.) 36 (1873).
10 P. 10.
11 P. 14.
12 71 U.S. (4 Wall.) 2 (1866).
13 P. 14.
14 Ibid.
15 P. 15.
public opinion, from a "concurrence with public opinion, arising from the fact that judges are themselves members of the public." 16

The selected essays on constitutional law are divided into two parts, the nature and development of American constitutionalism and the modern Constitution. Four essays are included under the nature and development—namely, Charles Beard’s "The Supreme Court—Usurper or Grantee?" 17 the scope portion of James B. Thayer's "The Origin and Scope of the American Doctrine of Constitutional Law," 18 Thomas Reed Powell’s "The Logic and Rhetoric of Constitutional Law," 19 and Max Lerner’s "The Supreme Court and American Capitalism." 20 Each of the essays is more like a polemic; each is a period piece.

Chapter one is judicial review and the intent of the framers. For this, we look to "the man who is unquestionably among the greatest and most influential of American historians." 21 In this fuzzy essay, Beard finds some oblique references to statements made by a sprinkling of the more influential patriots who participated in the constitutional convention which he uses calculatingly to support an abstract, and somewhat mythical, power in the Supreme Court to hold the Congress, the President, and the member states which compose the nation within the bounds of the language of the Constitution. Beard's concept of judicial review, the variance concept, which appears to assume that the Constitution was constructed of legal principles instead of powers and limitations of governments, is taken from Number 78 of The Federalist. 22

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as fundamental law. It must, therefore, belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred, or in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

In contrast to the Beard concept of judicial review followed by the editor, there is no general authority in the judiciary, nor has there ever been an attempt to exercise a general authority, to corral the varied actions of government under the language of the Constitution. In form and in substance, judicial review, in its proper perspective, contains the indicia of a modern-day prerogative writ, a remedy of form and substance to formulate and to apply basic principles of law to the enforcement of government action. Involved in judicial review is the development of law in the adjudication of litigated cases, and a brief array of desultory comments on the making of the Constitution in an effort to make of judicial review a political process to limit the

16 P. 16.
18 P. 63, reprinted from 7 Harv.L.Rev. 129 (1893).
19 P. 85, reprinted from 15 J.PHIL., PSYCH., & SCIENTIFIC METHOD 654 (1918).
20 P. 107, reprinted from 42 Yale L.J. 668 (1933).
21 P. 21.
22 P. 30.
theoretical powers of government so misses the point that it constitutes a fictionalizing of the essential purpose and structure of law.

Professor Thayer's essay is concerned primarily with the application of judicial review. Application followed the more traditional grounds of a prerogative writ. It would not be used except in circumstances in which there was no other possible alternative. Conditions of its exercise constitute significant concepts of constitutional law. The "ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not." According to Thayer,23

The judicial function is merely that of fixing the outside border of reasonable legislative action, the boundary beyond which the taxing power, the power of eminent domain, police power, and legislative power in general, cannot go without violating the prohibitions of the constitution or crossing the line of its grants.

As already suggested, the Court exercises this authority of fixing the outside border of the Constitution only when necessary to apply and to enforce basic principles of law. The Court's function is not to lay down a true meaning, in the sense that there is only one possible meaning to the language of the Constitution, notwithstanding that language prescribes "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the government for a redress of grievances." And references to the sayings of the colonial statesmen, whose prestige has been constructed upon the beliefs and prejudices of historians, will not be enough to make our political and religious concepts of personal freedom coincide with the basic legal principles that must be formulated in the adjudication and enforcement of private rights and personal liberty.

Professor Powell's logic and rhetoric of constitutional law no doubt was amusing, and quite exciting really, when read before the meeting of the Association in 1917 or 1918, although there is missing any reference to the words of the Vermont farmer. But one good story is included:25

When Senator Tillman of South Carolina was recognized, he complained: "I am tired of hearing what the Supreme Court says. What I want to get at is the common sense of the matter." To which Senator Spooner rejoined: "I too am seeking the common sense of the matter. But, as for me, I prefer the common sense of the Supreme Court of the United States to that of the Senator from South Carolina."

The essence of Powell's essay is that while "immortal principles fly their standards in judicial opinions," the application of such principles is made practical in light of what is fair, reasonable, and appropriate to the circumstances of the case.26 In the state power versus the commerce clause cases, for example, the problem to be solved "is whether the promotion of the local..."
needs of the state justifies the interference with interstate commerce which such promotion entails.”

One might infer from the Powell essay that the decision-making process is comparatively simple and nonprofessional instead of being extremely complex, containing, as it does, an admixture of history and law and the adjudication of the Court's authority from the Constitution with the circumstances of the particular case. Powell is inclined to oversimplify the various factors of decision-making to some transactional or subjective phrase like “private interests against competing interests,” though he is adept always in showing that the particular adjudications may have been made partially or solely from some undisclosed and sometimes even from subconscious assumptions.

It is said that Lerner's piece on the Supreme Court and capitalism is a “brilliant essay.” The Lerner essay is a paraphrasing and generalizing of Beard on the Constitution and of Walton Hamilton on the work of the Supreme Court during the “substantive due process-freedom of property” days. According to Beard, economics was the dominant, if not controlling, influence in the making of the Constitution (thus it sought to preserve the freedom and power not of the individual's status, but of the dominant class in private property). For Walton Hamilton, law is a guise purposed to cloud the actual factors triggering the judicial determination. In Lerner's hands, law is politics which has been shaped and structured by the nation's economic development. He describes a nexus between the Court and the institutions of capitalism. This is a plausible, though much too pat and superficial, explanation of the work of the Court in the period 1890 to 1930, the period about which he is writing. But Lerner's is not a Gustavus Myers, Marxist-type, deterministic interpretation, which finds the Constitution has been shaped for class power control of the society, though Beard's Economic Interpretation of the Constitution (1913) comes close to a determinist explanation.

Reading Lerner's essay reminds one of some congressional committee and Senate floor analyses of the Court in the present day; when the Court requires that the basic principles of law be applied to the use of the processes of government power against the communists as with other criminals, the Court is accused either of favoring communists or of making democracy safe for the communists. The analogy is not quite apt, because Lerner is writing of a longer era instead of a few years or a few cases. But it is not accurate to assimilate the work of the Court to corporate power any more than it is to assimilate the requisite of a fair trial to favoring criminals. The formation of substantive due process laid the legal foundation of civil rights, for the basic principles of the liberty of property have evolved to include the liberty of speech and assembly and religion, and equality, and fair trial, and the freedom of other institutions as well. The editor of these essays does not recognize the law's evolution. New applications and new problems, any change connotes revolution.

In part two, the editor makes a selection of essays reflecting the approach of the Court to some of the key problems of modern constitutional law. The first is Stern's "The Problems of Yesteryear—Commerce and Due Proc-

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27 P. 90.
28 P. 102.
29 See Gustavus Myers, History of the Supreme Court (1913).
ess,\textsuperscript{30} which epitomizes the popular notion of the constitutional journalists, who limit their study and understanding to the results of specific cases and conclude that the Supreme Court has withdrawn from large areas in the category of economic regulation. The thesis is that the national government may now use its granted powers to regulate the economic problems of this and that industrial segment of the economy and so may the states. There is comparatively no judicial review as to substantive due process, and what little there is under the commerce clause turns solely on transactions or factual circumstances, as there are no controlling legal principles from which to derive legal standards for adjudicating actual cases. The field has opened wide; many choices are open to the Court any way it determines to go.

Next is Professor Corwin's "The Passing of Dual Federalism."\textsuperscript{31} His, too, is about the big revolution, with the consequence that the Constitution has been transformed from a constitution of rights to a constitution of powers, but like the headline over a newspaper column, the revolutionary shift portended in the introductory paragraphs is not supported by the remainder of the essay. Instead, what is shown by the Corwin essay is simply that experience has eradicated some of the noted misconceptions of the Constitution. A national government of enumerated powers as a canon of constitutional interpretation that subjected national powers to the limitations of the tenth amendment was attacked from the beginning and should have been effectively extinguished by \textit{McCulloch v. Maryland},\textsuperscript{32} for such a canon of interpretation played havoc with separation of powers and presumed a capacity in the judiciary it did not have by requiring the judiciary severely to invade the powers and functions of the Congress.

Another misconception of enumerated powers as a canon of constitutional interpretation that the purposes of the national government were limited and few has likewise been extinguished through experience. The taxation and appropriation powers, for example, are as independent as they are extensive; the former is not limited to revenue nor by the states' powers to tax or to regulate, and the latter is not limited to the promotion of the other granted powers or to any explicit list of subjects. Congress may use either or both in the general welfare, to prohibit child labor, to license business, or to subsidize mothers of children born out of wedlock.

The postulate of enumerated powers is not a canon of constitutional interpretation for the Court to divide the powers between the nation and the state, as two sovereigns supreme and independent in their respective spheres. And experience and growth is a molding not a remolding as alleged. In its totality, federalism is first and foremost a responsibility of those branches of government responsible for the administration of the constitutional system, not generally of constitutional structure as matters of adjudication by the courts. If the implied or reserved powers of the states were presumed to override the national powers over this or that subject or object of government, the judicial power would constitute a political process of dividing and allocating powers of government and of invading the responsibilities and functions of the legislative and the executive. In the final analysis, the states are benefited in having the total spectrum of powers for use until the Con-

\textsuperscript{30} P. 150, reprinted from \textit{4 VAND.L.REV.} 446 (1951).
\textsuperscript{31} P. 185, reprinted from \textit{36 V.A.L.REV.} 1 (1950).
\textsuperscript{32} 17 U.S.(4 Wheat.) 316 (1819).
gress acts, without having been allocated specific powers and deprived of the rest. And the states have had great influence over the functioning of the national government, to the extent both of attempting secession in the war between the states and of almost a century of noncompliance with the resulting fourteenth and fifteenth amendments. Thus, the basic concern is not any weakness in the states, for their powers likewise have expanded, to even greater heights than those of the national government, as the states and local governments are concerned with living and not solely with social security.

Beginning with chapter seven, on international agreements and constitutional amendments, through chapter twelve, on judicial control of criminal procedure, the volume of essays moves to a higher level of selection. Exception to this higher level is the essay on the separation of church and state and excerpts from Judge Learned Hand in the *Dennis* case. In fairness, the editor selected Father Murray’s essay on the separation of church and state not because of the depth of scholarship in the foundations of law, but rather because the essay accomplishes two purposes important to the objectives of this volume: it raises most of the main issues that have been presented by the church-state relationship controversy, and it deals with them in terms that can hardly help provoking an intellectual reaction, whether hostile or concurring.

The editor’s explanation for selecting the Murray piece presents a main question about this volume of essays. The urge to controvert the development of constitutional law tends to insulate the subject from its institutional moorings of evolving from basic principles of law.

It is not easy to ascertain the bases of Murray’s writing, for it contains little of constitutional law. Murray gives various strawman-type reasons for the Court’s determinations in the *Everson* and *McCollum* cases and puffs away at these for many pages. In those cases, the Court determined it would not be a party to the use of the judicial power to enforce attendance at religious services and sectarian teachings, notwithstanding that such enforced attendance is made a part of the state’s system of public education. Those cases are far from the holding, however, as charged in the Murray essay, that the government may give “no aid of any kind to religion in any form” as the legal standard for enforcement of the basic principle enunciated in the clause that the Congress and the state shall make “no law respecting an establishment of religion.” There has been no determination invalidating the government’s financial contribution, and it would be difficult for the Court to make such a determination. For the time being therefore, Murray can debate his side of this question without making unnecessary charges against the Supreme Court; thus far, such contributions may violate constitutional policy in terms of our traditions, but they may not necessarily violate constitutional law. Trained in the canon law, for which no limits

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33 P. 295, reprinted from United States v. Dennis, 183 F.2d 201 (2d Cir. 1950).
34 P. 316, reprinted from 14 LAW & CONTEMP.PRb. 23 (1949).
35 P. 312.
are recognized to its authority, Father Murray understandably does not com-
prehend that constitutional policy and constitutional law are quite different
in substance and foundation. And it is stretching those cases far for the
Church to express so much concern over “the juridical status, within the
American system of education, of the nonprofit school with religious affilia-
tions. . . .”39 In fairness, however, it can be said that the opinions in
these cases do extend considerably beyond what was necessary for their de-
termination, far into history and tradition, policy and the good life, which
the Court might well have left to those with greater knowledge and under-
standing and opportunity to discuss such matters.

The remaining essays in constitutional law concern international agree-
ments and constitutional amendments, the constitutional powers in the Office
of the President, freedom of speech, and criminal procedures and judicial
control—and, oh yes, we must not omit the Constitution and racial equality
that has served so nicely to pull away the mask of America's superiority to
the world. The first is the excellent treatment of the treaty power by Pro-
fessor Sutherland.40 The fact that the function of treaty-making is an inde-
pendent and extensive power makes it no different from any other power,
the main difference being that it has never been subjected to the enumerated-
powers concept as a canon of constitutional interpretation. Neither does this
mean that the treaty power is not subject to judicial enforcement and there-
by to the limitations of basic legal principles, be they drawn from the Con-
stitution or from longer experience and even more basic documents.

The powers of the President are nicely weighed by Professor Corwin in
his article on the steel seizure case.41 The self-inflicted wounding of that
great office by the steel seizure was the consequence of inadequate and un-
professional lawyering in the Attorney-General's office and White House
staff, though it is quite possible the President and his immediate staff would
accept no other kind of legal representation. The seizure and the bypassing
of the Taft-Hartley Act were unsupportable as a proper and legally valid
administering of the Office of the President. These resulted from the habit
of basing the authority for executive orders upon the Constitution and laws
of God and country, and upon the powers vested in the President as the
Commander-in-Chief of the armed forces. The burden of Corwin's showing
is that the President's powers are not limited to those brief provisions of the
second article of the Constitution, and the executive’s act without statute
is not invalid solely because the Congress has power to legislate over the sub-
ject. But when the President’s orders are made the subject of law for ju-
dicial enforcement, they must likewise be subject to qualification and limita-
tion by basic principles of law, though Corwin suggests that the Court prob-
ably would not venture “to traverse a presidential finding of ‘serious’ emer-
gency which was prima facie supported by judicially cognizable facts.
. . . .”42 A second strength of Corwin's essay is that as the Congress

39 P. 331.
40 P. 216, reprinted from Sutherland, Restricting the Treaty Power, 65 HARV.L.
Rev. 1305 (1952).
41 P. 257, reprinted from Corwin, The Steel Seizure Case: A Judicial Brick With-
out Straw, 52 COLUM.L.REV. 53 (1953).
42 P. 273.
has the authority to accept, it also has the authority to reject the President's uneasy entry into the area of nonstatutory law-making when circumstances require such precipitous action.

There are three essays selected on free speech, Professor Chafee's delightful and stimulating review of Meiklejohn's Walgreen lectures, Professor Nathanson's comment on the misapplication of the clear-and-present-danger test in the communist trials, and brief excerpts from Judge Learned Hand's opinion in the Dennis case. Chafee's debate with the noted philosopher and academic innovator, Alexander Meiklejohn, is that the latter sought to accomplish the impossible with constitutional law, to make of constitutional law an invasive subject of control, to equate constitutional law with the absolute of what one person thought was sound constitutional policy. Law is equatable with religion and philosophy just to a point, as the legal standards formulated to adjudicate the particular case inevitably must reflect the limiting role of the Court to enforce fundamental principles of the Constitution as basic principles of law. Meiklejohn objected to the clear-and-present-danger standard, because it incorporated the recognition that under extreme circumstances, supported by judicial findings of such extreme circumstances, there might be a judicially-enforced policy of government to restrict discussion of public issues. Meiklejohn wanted no legal standard other than the literal reading of the first amendment, that the Government "shall make no law." Discussion of other than public issues, such as art and religion and extreme philosphic doctrines of scientific postivism, was to be subject to legal standards formulated from the authority of due process of law rather than from the first amendment. A first holding that the artist and philosopher were subject to state's control but the college president was not, because he spoke on public issues, however, would find Professor Meiklejohn at the head of the parade in reaction.

Somehow—I am not certain of the reasons—we need more able advocacy of humanistic ethics, such as Meiklejohn's essay, critical of the workings of the institutions of law, and we need less of the rasping, destructive-of-the-very-existence-of-the-legal-institutions essays such as Murray's. At least, the one adds to our insight and understanding while it emotes across the spectrum of our readings, while the other is grievous in that it lacks so severely the foundation of intellectual integrity. But, apparently for the selection of the essays of this volume, the criterion was that the essay provoke, and the basis of the provocation was not so much a consideration.

In significance and depth of analysis, John Raeburn Green's essay on criminal procedures and judicial control, entitled "The Bill of Rights, the Fourteenth Amendment and the Supreme Court," is the top essay of the volume. It was written for a chapter in an honorific volume for Max Radin, apparently never completed for publication. Mr. Green surveys the institutional development of the so-called fair-trial rule, from Slaughterhouse and Twining, the substantive due process principle of liberty, Gitlow v. New

43 P. 281, reprinted from 62 HAB. L.REV. 891 (1949).
45 P. 385, reprinted from 46 MICH. L.REV. 869 (1948).
York, the beginning of the selected application of the bill of rights to life, liberty, and property, and, finally, from the power of dictum in the opinion as justification for the rejection of double jeopardy in *Palko v. Connecticut*.

Rejection of double jeopardy as due process was based upon the flat rejection of the eighteenth-century strait jacket by which the bill of rights was characterized. The fair-trial rule was substituted for the bill of rights as authority for law in place of the right against self-incrimination, search and seizure, and the right to counsel. The consequence of such a rule shows up clearly in cases like *Betts v. Brady* and *Louisiana v. Resweber*, in a purposely-fashioned vagueness of having no rule or legal principle, as contrasted with a case like *Powell v. Alabama*, in which the Court developed an acceptable, desirable, and understandable legal principle and standard for administering the constitutional system. The so-called fair-trial rule constitutes the administration of law at its worst. As it purposely avoids the formulation of any principle of law or legal standard, each adjudication mires the Court in a number of competing and different interpretations and misinterpretations of the record and details of the case. Each determination is purely subjective and arbitrary and wholly unpredictable. There is no institutional development of the law in the area. One result is a critical acceptance by the lower courts of the administration of law under our constitutional system.

Part of the basis for the fair-trial rule misconceives the constitutional system of national law; the law applicable to the national government is different from that which is applicable to the states. The consequence is just the opposite of that stated; the fair-trial rule, in fact, constitutes a far more severe interference with the administration of criminal justice in the state courts and, more than that, the interference is incalculable. As there is no law, there are no directions. If a conviction based upon evidence secured by force through the use of the stomach pump is to be reversed, it should be because it violates a basic principle of law or a legal standard formulated from the principle in a clear precedent, and not because the use of force against the person shocks one's conscience. If the prohibition of self-incrimination is thought not to be a basic and fundamental principle of law, then a substituted legal principle must be formulated to enforce the legal principles incorporated in the bill of rights amendments.

What is sought by Mr. Green is the high professional work a good lawyer is wont to expect of the Supreme Court—for it to be in fact, not just in theory, a court of law in the great tradition. He does not wish to bind the Court to an eighteenth-century strait jacket, which is more an epithet than a justification for such unprofessional administering of the nation's legal system as Green describes.

The volume of essays in constitutional law by Professor McCloskey leaves much to be desired, though part two on the modern Constitution has a higher

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52 See *Rochin v. California*, 342 U.S. 165, 172, 72 Sup.Ct. 205, (1952): "This is conduct that shocks the conscience."
quality of selection than part one on the nature and development of American constitutionalism. Part one gives a warped foundation for part two. The thesis of part one that the basis of the adjudications before the modern Constitution has been rejected and discarded portrays an unawareness of what is fundamental in the development of law; that which McCloskey calls the law of the modern Constitution is being built on the institutional development of those adjudications he assumes to be discarded. Apparently, he assumes that the law of the first amendment, equal protection, and the bill of rights amendments have no connection with the private property, freedom of contract era of due process of law, that *Lochner v. New York* is a world, if not an age, apart from *Gitlow v. New York*. The selection of the essays has been guided by the editor's approach to constitutional law. Obviously, an editor of a volume of published essays is circumscribed by what actually has been published of high quality, and thus the volume ought to be limited to those subjects in which good articles are available.

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