

1990

Book Review: Corwin on the Constitution: Volume Three: on Liberty Against Government. Edited by Richard Loss; Spheres of Liberty: Changing Perceptions of Liberty in American Culture. by Michael Kammen; Liberty, Property, and Government: Constitutional Interpretation Before the New Deal. Edited by Ellen Frankel Paul and Howard Dickman.

Herbert Hovenkamp

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>

 Part of the [Law Commons](#)

Recommended Citation

Hovenkamp, Herbert, "Book Review: Corwin on the Constitution: Volume Three: on Liberty Against Government. Edited by Richard Loss; Spheres of Liberty: Changing Perceptions of Liberty in American Culture. by Michael Kammen; Liberty, Property, and Government: Constitutional Interpretation Before the New Deal. Edited by Ellen Frankel Paul and Howard Dickman." (1990). *Constitutional Commentary*. 404.
<https://scholarship.law.umn.edu/concomm/404>

CORWIN¹ ON THE CONSTITUTION. VOLUME THREE: ON LIBERTY AGAINST GOVERNMENT. Edited by Richard Loss.² Ithaca, N.Y.: Cornell University Press. 1988. Pp. 258. \$31.50.

SPHERES OF LIBERTY: CHANGING PERCEPTIONS OF LIBERTY IN AMERICAN CULTURE. By Michael Kammen.³ Ithaca, N.Y.: Cornell University Press. 1989. Pp. xiv, 180. \$9.95, paper.

LIBERTY, PROPERTY, AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL. Edited by Ellen Frankel Paul⁴ & Howard Dickman.⁵ Albany, N.Y.: State University of New York Press. 1989. Pp. 288. \$57.50, cloth; \$18.95, paper.

*Herbert Hovenkamp*⁶

These three books offer widely scattered perspectives on the meaning of "liberty" in American legal and political discourse of the past two centuries. The Loss edition of Corwin is the third volume in a series, and reprints a dozen essays that Corwin wrote between 1912 and 1952. Kammen's *Spheres of Liberty* is a paperback reissue of a book originally published in 1986. Paul's and Dickman's *Liberty, Property, and Government* is a collection of essays, some new and some previously published, by constitutional scholars and historians.

Edwin S. Corwin, whose teaching and writings spanned fifty years, was one of the great scholars of the American Constitution during the first half of the twentieth century. Richard Loss and Cornell University Press perform a valuable service by reprinting Corwin's constitutional scholarship. Loss's introduction is something of a disappointment, since it offers little analysis or critique of Corwin's theory, and nothing to place Corwin in historical perspective. But Loss does a rather good job of summarizing the argu-

1. The late Edwin S. Corwin was a Professor of Political Science at Princeton University from 1905 to 1946.

2. Independent scholar.

3. Newton C. Farr Professor of American History and Culture, Cornell University.

4. Deputy Director of the Social Philosophy and Policy Center, Professor of Political Science, Bowling Green State University.

5. Research Associate, Social Philosophy and Policy Center, Bowling Green State University.

6. Professor of Law, University of Iowa.

ments of the pieces contained in this volume, which include many of Corwin's most famous writings on substantive due process and the Bill of Rights.

One of the most memorable of these writings is "Social Planning under the Constitution," first published in 1932, where Corwin carried the progressive critique of substantive due process to its apogee, arguing that the real culprit was John Fiske, the widely read popularizer of Herbert Spencer who, Corwin claimed, was responsible for the Social Darwinism on the Supreme Court. Corwin simultaneously attacked both the Supreme Court and the social scientists gathered at a meeting of the American Political Science Association, where the essay was delivered as an address, for being too preoccupied with methodology and models, and not enough with function. Social planning, he argued, required less of the former and relatively more of the latter. In general, Corwin's critique of the pre-New Deal and New Deal Supreme Court focused on its lack of tolerance for governmental experimentation—its failure to recognize that, as he put it, "if you would make an omelet you must break some eggs." Perhaps most important, Corwin argued that all firms who do business in more than one state ought to be considered as within the jurisdiction of the federal government under the commerce clause, respecting nearly all their activities. Over the next decade Corwin became a powerful advocate of federal supremacy in economic regulation.

Kammen's book, originally given as the Curti lectures at the University of Wisconsin, is a study of the rhetoric of "liberty" in American legal and political discourse. Writing with broad strokes, Kammen argues that "liberty" has carried different meanings at different times, and that over time it fit into three models of state policy and individual right. The first was the notion of liberty and authority, and of the sanctity of property rights, that dominated early American political thought. The second was the nineteenth century model of "ordered" liberty. The third was the explicit association of liberty with concepts of justice and equality that characterize twentieth-century American thought.

Intermixed with Kammen's essays are several photographs of American icons depicting notions of liberty contemporary to the period. Most are likenesses of Lady Liberty. Almost no discussion of the icons is integrated into the text, but at the end of the book is a short note giving factual material on their origin.

Kammen's book is mainly about elite thought rather than popular culture, and the icons add little to his arguments. The most interesting is LiFran E. Fort's drawing of the head of the Statue of

Liberty with obvious African features, "The Other Liberty." But the very selection of twentieth-century icons seems to undermine, rather than establish, Kammen's case. The nineteenth-century icons displaying Lady Liberty are objects of popular culture, such as plates and weather vanes. Liberty and equality, or the "alternative" liberty of discrete and insular minorities, apparently appears only in the *avant garde*. Afro-American statues of liberty have not, to the best of my knowledge, become a dime store item.

Kammen's book can also be faulted for overlooking large movements that contributed much to the concept of liberty during various periods. For example, there is almost nothing about Scottish "Common Sense" Realism in America, even though today we are inclined to believe that it was the most prominent American Protestant ideology of the first half of the nineteenth century. The Scottish Realists' concept of the "instructed conscience" was an essential part of ordered liberty from the 1760s to at least the time of the Civil War. Likewise, Kammen's discussion of the substantive due process era is uninspired, largely stating the traditional progressive critique of the period, which has always been inclined to view the Supreme Court's statements of liberty of contract as the Liberty Bell ringing false. Overall, Kammen lacks a strong sense of the place of classical political economy in nineteenth- and early twentieth-century American concepts of liberty. In the nineteenth century "liberty" was, if nothing else, an economic concept.

These oversights may result from the fact that Kammen strives so hard to find unified, coherent meanings of "liberty" within each era. But liberty as a concept has a spatial, or interest group, dimension that is at least as important as its temporal dimension. As a result, the concept of liberty is less uniform within an era than this book suggests. The American labor movement, political economists, Federalists, Jeffersonians, abolitionists, secessionists, know-nothings, New Dealers, and Civil Rights activists all have widely differing concepts of "liberty"—and the importance of these different perspectives often dwarfs the importance of the mere passage of, say, fifty years.

But any book of less than one hundred and eighty pages, given as three lectures on a concept as broad as "liberty" over two centuries, is bound to be selective. My criticism may be no more than the common reviewer's complaint that he would have selected some different things. Kammen presents an imaginative, coherent outline of a concept whose importance lies in its ability to change and to reflect the values of widely differing interest groups.

Not all the essays in *Liberty, Property and Government* are con-

cerned primarily with constitutional interpretation *before* the New Deal, as the title implies. For example, Glen O. Robinson's interesting analysis of "Evolving Conceptions of 'Property' and 'Liberty' in Due Process Jurisprudence" includes a lengthy discussion of post-New Deal cases and scholarship. The post-New Deal discussion is important to Robinson's point, however: faithfulness to history in constitutional interpretation does not mean rediscovery of an "original" intent, but rather continuity with the past. He argues that, yes, history is important in constitutional decisionmaking, but the history of thirty or forty years ago is often much more important than the history of the constitutional convention or of the ideas of eighteenth-century thinkers.

In an interesting essay Mary Cornelia Porter surveys the scholarship about *Lochner*—orthodox, progressive, and revisionist. As she notes, the Progressive critique of the *Lochner*-era Court generally assumed a pro-business, anti-labor bias that does not survive close scrutiny. More importantly, although *Lochner* itself may have been "dead wrong," "Lochnerizing" with respect to property and other constitutional rights is probably unavoidable. In a well crafted discussion of economic liberty, Republican values and anti-trust, Tony Freyer argues that the flexibility inherent in antitrust's rule of reason and the ambiguity of the framers' intentions concerning economic matters worked together to give something to everyone. The combination created a delicate but tenable balance that permitted legislators to define the margins of both liberty and economic control. In an essay on Republicanism and railroads Alan Jones traces the history of both railroad failure and railroad victimization of shippers such as farmers, and the great debates about the need for legislative control.

Paul L. Murphy's piece on Holmes, Brandeis, Pound and sociological jurisprudence presents the Progressive critique in its purest, unrevised form. Murphy appears to assume that all Gilded Age and Progressive era economic regulation was in the public interest, and that the Supreme Court was tinged with an anti-labor, pro-business, classical economic bias that led it to undermine such statutes or construe them narrowly. This view is conventional, and not wholly mistaken. But it fails to account for the many regulations that were upheld, and for the evidence that at least some of these regulations had important, harmful effects—not merely on the propertied classes, but on others as well. In a similar vein, an essay by Harold M. Hyman on judicial protection of property rights during the Reconstruction era traces the traditional story of the Supreme Court's weakening of the Civil War Amendments, culmi-

nating in the infamous 1873 decision in the *Slaughter-House Cases*. The result, he argues, is that by the end of Reconstruction (1875) the amendments had come to mean far less than the Lincoln vision for them during the Civil War period.

Undoubtedly the most controversial essay in this collection is Richard A. Epstein's "The Proper Scope of the Commerce Power," which argues that federal power asserted under the commerce clause should be limited to activities that actually involve two or more states, such as interstate movement. Epstein would roll back interpretation of the commerce clause to something resembling its status at the turn of the century or earlier. Using largely doctrinal analysis, he argues first that "commerce" was intended to refer only to trade or transportation among the states. Surprisingly, Epstein does not include even a single reference to his great and equally controversial predecessor at Chicago, William W. Crosskey, who in *Politics and the Constitution* argued at great length that the natural meaning of "commerce" in the late eighteenth century was "things commercial"—or all sorts of business activities, including manufacturing and labor relationships.⁷ Surely Crosskey has not been so thoroughly discredited that his name is no longer even worth mentioning in this debate. Likewise, Epstein can be faulted for ignoring some important decisions. For example, he fails to mention the turn-of-the-century opinion by Justice Peckham, the champion of *Lochner*, in *Addyston Pipe and Steel Co. v. United States*,⁸ which held that the commerce power trumps liberty of contract. Thus the Sherman Act permitted Congress to condemn price-fixing among manufacturers (not transporters), even though the right of private parties to agree about price lay at the heart of freedom of contract.

Elsewhere in this volume Harry N. Scheiber counters Epstein's work. Looking principally at eminent domain, Scheiber argues that the regulatory state was much more pervasive and robust in early American history than Epstein admits. The new classicists do not have history on their side.

In one sense these are extremely different books. Corwin was a constitutional scholar and historian writing almost exclusively about Supreme Court decisions and entirely in the language of lawyers. Kammen is a cultural historian looking at a much more eclectic array of sources, only one of which is judicial opinions. The authors collected in *Liberty, Property and Government* represent a mixed assortment of methods and ideologies.

7. 1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 84-114 (1953).

8. 175 U.S. 211, 228-30 (1899).

But what comes through all three books is the clear thesis that many forms of American discourse have exhibited a rhetoric of "liberty," and that the rhetoric of lawyers and judges is not all that different from the rhetoric of slaves, preachers, legislators, presidents, popular authors, and people of letters. Corwin often criticized the Supreme Court for reading its particular concept of liberty (such as "liberty of contract") into the Constitution. But clearly there are many concepts of liberty, the Constitution permits a range of concepts, and—in that respect at least—one concept is perhaps as good as another. Inevitably, the Court will read some concept of liberty into the Constitution.

This is not to say that Corwin was wrong in rejecting the Court's effort to tie "liberty" to freedom from economic regulation during the substantive due process era. But, as both Kammen and Porter argue, the twentieth-century concept that ties liberty closely to substantive ideas about equality and justice is no closer to the concept of liberty that prevailed at the time the Constitution was written. The Supreme Court of the turn of the century knew, as does Epstein, that liberty of contract produces inequalities of power and wealth, but the Justices nevertheless wanted people to be "free" to pursue their own welfare without restraint. Alexander Hamilton made a similar argument to the Constitutional Convention.⁹

Kammen's discussion of Corwin's own accommodation of "liberty" and "equality" is incisive.¹⁰ In the early 1940s Corwin argued that liberty and equality must be juxtaposed against each other—one could have more of one only by having less of the other. Thus the governmental function was always to balance the two against each other. But a decade later Corwin professed to find no such tension. Liberty and equality traveled in tandem, the right to equal treatment by the state being liberty's most important ingredient. On the question of liberty, Corwin himself had become a non-interpretivist.

9. Kammen at 42.

10. *Id.* at 168-69.