

EDWARD S. CORWIN AND THE AMERICAN CONSTITUTION: A BIBLIOGRAPHICAL ANALYSIS. By Kenneth D. Crews.¹ Westport, Conn.: Greenwood Press. 1985. Pp. xiv, 226. \$35.00.

THE PRESIDENT, OFFICE AND POWERS 1787-1984: HISTORY AND ANALYSIS OF THEORY AND PRACTICE. By Edward S. Corwin.² Fifth Revised Edition by Randall W. Bland,³ Theodore T. Hindson,⁴ and Jack W. Peltason.⁵ New York: New York University Press. 1984. Pp. xxii, 565. Cloth, \$45.00; paper, \$20.00.

CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT. By Louis Fisher.⁶ Princeton, N.J.: Princeton University Press. 1984. Pp. xviii, 372. Cloth, \$40.00; paper, \$8.95.

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Edward S. Corwin, the leading American constitutional commentator of the first half of the twentieth century, bequeathed a rich legacy. He authored or co-authored twenty books, over sixty articles in professional journals in history, law, and political science, 150 book reviews, and a large miscellany of short notes, articles in popular and "high brow" publications, and other items.⁸ During

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8. I base these figures on the listings in K. CREWS, *EDWARD S. CORWIN AND THE*

his career, he was a frequent subject of news reports and a sought-after source of instant constitutional analysis; and since his death in 1963 his scholarship has continued to be consulted. Who of us does not turn to the Library of Congress's annotated *Constitution of the United States*, still based significantly on Corwin's 1953 edition?⁹ Who has not had occasion to use *The President, Office and Powers* and marvel at its richness? His writings, moreover, have been the subject of several critical studies.

Constitutional scholars are indebted to Kenneth D. Crews and Greenwood Press for bringing out what is likely to remain the definitive Corwin bibliography (even though Crews himself notes that a few other items are likely to surface). The compilation also identifies writings about Corwin, both during his career and since his death. Not least, Crews has provided a short (48-page) biographical introduction, drawn partly from oral interviews and the Corwin archive at Princeton, that makes fascinating reading for anyone in the academic business. Its contents range from tidbits to serious insights into the scholar-teacher.

We learn, for example, that Corwin's afterhours bull sessions with law students, while he was a freshman in college, helped fire his lifelong interest in constitutional law. By 1900, when he gained his bachelor's degree from the University of Michigan, his undergraduate mentor, Andrew C. McLaughlin, himself one of the early "greats" in the constitutional field, concluded, "I cannot teach this young man anything; he already knows all about the subject." In 1905, fresh with a Ph.D. in American history from the University of Pennsylvania, Corwin was one of the initial group of preceptors that Woodrow Wilson brought to Princeton University, as part of his effort at curricular reform. Almost from the beginning, however, Corwin had significant differences with the future President. This divergence carried into Wilson's presidential years, when Corwin, by then a full professor at Princeton, proffered the advice that Wilson should invoke national supremacy through concluding a treaty with Japan in order to resolve tensions created by California's mistreatment of Japanese immigrants. In a personal letter to his protégé, Wilson pointedly refused, asserting, "I do not feel by any means as confident as you do as to the power of the Federal Gov-

AMERICAN CONSTITUTION: A BIBLIOGRAPHICAL ANALYSIS (1985) [hereinafter cited as CREWS], and have omitted short notes from the count of scholarly articles and books compiled after Corwin's death from the book count. For slightly different figures, see E. CORWIN, *THE PRESIDENT, OFFICE AND POWERS 1787-1984*, at xi (R. Bland, T. Hindson, & J. Peltason 5th ed. 1984) (revisers' introduction) [hereinafter cited as CORWIN (5th ed.)].

9. See LIBRARY OF CONGRESS, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* (1973).

ernment in the matter of overriding the constitutional powers of the states through the instrumentality of treaties" Notwithstanding such differences, Corwin was probably disappointed at not receiving a position in the Wilson administration.¹⁰

From the same era, Corwin's attraction to Teddy Roosevelt's New Nationalism foreshadowed his welcoming of Franklin D. Roosevelt's New Deal, which he proclaimed the test of "the capacity of the Constitution to absorb a revolution." The New Deal also gave his scholarly expertise greater practical outlet, including a stint with the Housing Office of the Public Works Administration and a consulting (if partly unwitting) role in shaping the Court-packing plan.

By the post-World War II period, however, Corwin questioned the growth of presidential power and the waning of state authority. But his opinions did not fit into any of the conventional ideological grooves, as he proved when he co-chaired the committee that directed the successful effort to block the Bricker Amendment. By restricting treaties and executive agreements, the proposal would arguably have assuaged some of Corwin's latter-day concerns, yet he held fast to earlier commitments in this area. Also, though neither an avid fan of civil rights nor an advanced civil libertarian, in 1951-52 he joined an unpopular local effort to protect the rights of the "Trenton Six," a group of New Jersey blacks charged with murder. Finally, because the confusion did not end with his death, it bears underscoring that Corwin's first name was *not* "Edwin," an appellation that bedeviled him throughout his life. (It rhymed with Corwin.)¹¹

All told, perhaps the most intriguing episode was the boomlet to place the Princeton professor on the Supreme Court. Corwin had given the New Deal public scholarly support, both by arguing for the constitutional adequacy of the new agencies and by questioning the Court's freeswinging role. By the mid-1930's, moreover, he had emerged as one of the nation's most quoted constitutional authorities; hence, as FDR's troubles with the Court grew, public speculation centered on an appointment for the academician. Not least, Corwin himself was well aware of the prospect. "He joked

10. CREWS, *supra* note 8, at 1-15. (The quotation from McLaughlin is at 5; the one from Wilson, at 12.)

11. *Id.* at 7-10, 23-48. (The quotation about the New Deal is at 23.) In a brief foreword, Alpheus T. Mason, a Corwin student and colleague and his successor in the McCormick Chair of Jurisprudence at Princeton, adds two other gems: Corwin claimed never to have spent more than eight weeks on anything he wrote; and, by Mason's reckoning, he put in no more than a half-hour's preparation for an undergraduate lecture, going in with a few scribbled notes. *Id.* at ix.

with students about joining the Court," Crews reports, "and reporters and friends approached him with the idea incessantly."¹²

Then came the announcement of the Court-packing plan, in February 1937. In particular, Corwin's appearance before the Senate Judiciary Committee, as the administration's lead-off "expert witness," offered him an opportunity to solidify support for nomination to a seat when one fell vacant. But the hearing did not provide the forum Corwin had expected—the role of witness did not allow the intellectual repartee produced by Socratic exchange in the classroom. Then, too, his examiners noted his own late conversion to the merits of enlarging the Court, which made him look opportunistic and marked him as a partisan. The Court plan failed, the appointment never came, and a degree of embitterment set in. In 1940 the professor proclaimed his support for Wendell Willkie on the ground that the two-term limit was part of the American constitutional tradition; and with the introduction of the Lend-Lease Bill at the beginning of 1941, Corwin described Roosevelt's power as assuming the shape of "truly royal prerogative."¹³

The Court episode may lend credence to the adage sometimes applied to academicians, that power corrupts and the absolute lack of power corrupts absolutely. (Some may ask whether the observation also applies to Corwin's shift during the Wilson Presidency, when he came out for Charles Evans Hughes in 1916 and later sided with Henry Cabot Lodge in the fight over the League of Nations.)¹⁴ But I wonder whether Corwin was as disappointed as Crews and others suggest. He knew too much about Court appointments to have harbored many illusions about his own chances, whatever the speculations in the press. He possessed no political base; and not only did he have no judicial experience—this master of the Constitution was not even a certified lawyer. Furthermore, his later intellectual and political shifts were not entirely unheralded by earlier commitments. Certainly, too, new events—which raised new questions and challenged the adequacy of old answers—must compete as factors explaining his altered outlook.¹⁵

One product of Corwin's later years was *The President, Office and Powers*. First appearing in 1940, it was revised in 1941 and,

12. *Id.* at 26.

13. *See id.* at 26-32; Garvey, *Scholar in Politics: Edward Corwin and the 1937 Court-Packing Battle*, 31 PRINCETON U. LIBR. CHRON. 1 (1969).

14. *See* CREWS, *supra* note 8, at 12-15.

15. *See* CORWIN (5th ed.), *supra* note 8, at xvi-xvii (revisers' introduction). In particular, however much he supported a Presidency adequate to protect national security, Corwin cringed at the long-run implications of the war-produced merging of executive and legislative authority through the medium of delegatory legislation. *See, e.g., id.* at 297; CREWS, *supra* note 8, at 37-39.

after his formal retirement in 1946 at age 68, went through further revisions in 1948 and 1957. The last of these editions consisted of 313 pages of text and 181 pages of notes, themselves a mine of extended citations, collateral commentary, and relevant documents. The organization was topical, the seven chapters covering "Conceptions of the Office," "The Apparatus of the Presidency," "Administrative Chief," "Chief Executive," "Organ of Foreign Relations," "Commander-in-Chief in Wartime," and "Legislative Leader and 'Institution.'" The prose was vintage Corwin—pithy and sometimes biting (following Mencken, FDR became "Roosevelt II")—and the substance of the book combined the insights of political philosophy with aptly chosen historical evidence. Nor did it neglect traditional legal sources; although court decisions per se by no means dominated the account, in Corwin's hands they sprang to life. Overall, *The President* was informed by a sense that the Presidency was a fit unit for study—it made a difference (for good and ill), and it had a dynamic character which defied formulaic approaches. A reader cannot help but be impressed by the mature learning it incorporates; surely Corwin's breadth of scholarship, especially in his early years, played a role here.¹⁶

In the 1957 edition, Corwin offered this summary assessment of the factors producing the Presidency of the mid-1950's:

- (1) social acceptance of the idea that government should be active and reformist, rather than simply protective of the established order of things; (2) the breakdown of the principle of dual federalism in the field of Congress's legislative powers; (3) the breakdown of the principle of Separation of Powers as defining the relation of President and Congress in lawmaking; (4) the breakdown of the corollary principle that the legislature may not delegate its powers; and (5) the impact on the President's power as Commander-in-Chief . . . of two world wars and the vastly enlarged role of the United States in the international field.¹⁷

Yet, despite his concerns about the heritage of Roosevelt II and the growing impact of presidential personality on the power of the office, he remained bullish about American democracy.¹⁸ What is perhaps equally intriguing is the insight this passage provides about Corwin's conception of constitutional scholarship, for he prefaced his listing—and note again its first item—with the remarkable com-

16. Not only does Crews's bibliography disclose Corwin's versatility within the constitutional area; it reveals that in 1907, for example, he edited a general history of Scandinavia, and in 1916 published *French Policy and the American Alliance of 1778*, an expanded version of his 1905 Ph.D. dissertation in American history at the University of Pennsylvania. See CREWS, *supra* note 8, items A3 & B1.1.

17. E. CORWIN, *THE PRESIDENT, OFFICE AND POWERS 1787-1957*, at 311-12 (4th rev. ed. 1957).

18. *See id.* at 312. He seemed less hopeful, however, about the impact of the Presidency on personal rights.

ment that it explained the office “so far as it is explicable in terms of American constitutional law and theory.”¹⁹

This classic has now been reissued in a fifth edition, but, as the three revisers admit, the revision is limited in scope. Although repaginated, the text and notes of the 1957 edition remain unchanged. A new eight-page introduction assesses Corwin’s life and work, and postscripts of three to nine pages apiece (including updated bibliographies) have been appended to each chapter.

The result is adequate but hardly dazzling. Not that the decision to leave the core of the 1957 edition untouched was wrong, for the revisers are surely correct in remarking that “only *Corwin* could revise *Corwin*.”²⁰ Nor, by my reckoning, do the postscripts omit many, if any, of the most significant developments in the Presidency since the late fifties. Instead, the letdown comes because, juxtaposed against the original text, the new material seems awfully thin. For example, Corwin conveyed a good deal about the impact of presidential personality—especially that of Roosevelt II—on the constitutional growth of the office, but the new additions give the reader little comparable feel for Lyndon Johnson or Richard Nixon, each of whom possessed fascinating personal traits that unquestionably influenced the modern constitutional order. To be sure, one postscript surveys the recent analytical literature on presidential character and style,²¹ but this is hardly a substitute for ongoing attention to the interaction between personality and institutional change. Similarly, the court cases that enter into the updates appear as titles and summaries of holdings—not as the contests involving real people and events that Corwin skillfully wove into *The President*—and other major documents receive similarly flat treatment.

I also have several narrower complaints. The Economic Stabilization Act of 1970, the reader is told at one point, “was enacted . . . by the use of *concurrent* resolution . . .”—a clear mistake which is compounded by the howler that Corwin, because he approved the use of concurrent resolutions as legislative vetoes, “would have urged” this constitutionally unknown method of enacting a law.²² Just over a page later, in a discussion of the War

19. *Id.* at 311. In the 5th edition, the comments discussed in this paragraph are at 358-59.

20. CORWIN (5th ed.), *supra* note 8, at xi.

21. *See id.* at 32-34.

22. *Id.* at 194-95 (emphasis added). For the Economic Stabilization Act of 1970, see Pub. L. No. 91-379, 84 Stat. 799 (1970). The postscript also incorrectly cites the act as 83 Stat. 377, which is the same incorrect citation that is included in the secondary source that the postscript cites in its short discussion of the act. *See* CORWIN (5th ed.), *supra* note 8, at 194 & nn.3-4. For a brief history of the Act and subsequent amendments, see L. FISHER,

Powers Resolution, one discovers that "[a]fter ninety days, Congress may pass a concurrent resolution calling on the president to withdraw American troops."²³ Only two postscripts later does an accurate summary of the measure appear, including the now-invalidated provision for congressional veto of a military action *within sixty days*.²⁴ And at least in the review copy I received, page 154 is missing, replaced by a reprint of page 153. Readers will have to turn to page 132 of the 1957 edition to find the omitted text. But to conclude on a more positive note, the new bibliographies are useful—even if Nelson Polsby becomes Nelson Polsky in one entry²⁵—and the revisers' introduction is informative.

Louis Fisher has provided a truer successor to Corwin's *The President*. A revision of his *The Constitution Between Friends*, Fisher's *Constitutional Conflicts Between Congress and the President* is an integrated whole, and the new title, if less catchy, is more accurate. (The earlier heading came from an alleged incident involving Grover Cleveland and a Tammany chieftain; when the President explained a veto as the result of his constitutional objections, the politician queried, "What's the Constitution between friends?"²⁶) Fisher, on the contrary, takes the Constitution with refreshing seriousness.

To be sure, he devotes little space to discussing how to interpret the document, and readers will find no agonizing over "interpretivism," "noninterpretivism," and the like. He instead sets the stage by quoting Lord Bolingbroke's analysis of the English Constitution as "an assemblage of laws, institutions and customs."²⁷ This leads him immediately into a thoughtful portrayal of the American "constitutional setting," which, he argues, allows for several modes of interpretation and growth. Indeed, it is only constitutional change through blind legislative acquiescence in executive initiatives that draws his ire.²⁸

The remainder of the book is a topically organized, thoroughly

CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 114-15 nn.50-53 (1985) [hereinafter cited as FISHER].

23. CORWIN (5th ed.), *supra* note 8, at 196 (emphasis added).

24. *Id.* at 299-301. As the revisers mention in passing, the WPR's provision for veto by concurrent resolution was almost surely overturned by *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983). For a useful review, see Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 AM. J. INT'L L. 571 (1984).

25. See CORWIN (5th ed.), *supra* note 8, at 36.

26. L. FISHER, *THE CONSTITUTION BETWEEN FRIENDS: CONGRESS, THE PRESIDENT, AND THE LAW* at v (1978), which also includes another version of the tale. I note that the preface to the new edition omits the episode.

27. FISHER, *supra* note 22, at 3, (quoting from C. MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 3 (1947)).

28. See *id.* at 3-27.

up-to-date discussion of most of the subjects covered in *The President*. Some further chapter highpoints: "Appointment Powers" (chapter 2) includes attention to the little-studied intricacies of both recess appointments and the separate category of temporary appointments. Fisher concludes that the "appointment power operates in a framework of studied ambiguity, its limits established for the most part not by court decisions but by imaginative accommodations between the executive and legislative branches."²⁹

Next, a detailed review of the removal power (chapter 3) reveals that the "decision of 1789," as Corwin labeled it,³⁰ did not involve a neatly defined choice between three or four distinct positions on who could remove executive officers, as is so often stated, and in the end it settled little—witness the disputes in our own century. In this connection, interestingly, Fisher gently chastises Corwin, pointing out that when the Supreme Court handed down *Myers v. United States* (1926),³¹ Corwin levied a telling attack on Chief Justice William Howard Taft's use of logic and history, and particularly his claim that the President could remove *any* executive officer. Such rigid rules would not do. Yet Corwin himself was distinctly uneasy at Justice George Sutherland's use of the term "quasi," in *Humphrey's Executor v. United States* (1935),³² to describe the blending of judicial and legislative functions in the Federal Trade Commission. "[I]f a Federal Trade Commissioner is not in the executive department, where is he?" Corwin asked. "In the legislative department; or is he, forsooth, in the uncomfortable half-way situation of Mahomet's coffin, suspended 'twixt Heaven and Earth?" And when it came to the controversy over loyalty removals in the 1950's, Corwin relied on none other than *Myers* to support the President's "overriding power" to fire suspected employees, without regard to due process.³³ Further disputes under Carter and Reagan involving Inspectors General and Civil Rights Commissioners are only some of the most recent episodes; and the record fairly well establishes that Congress has ample resources both to protect the tenure of officeholders (as in the case of "whistleblower" Ernest Fitzgerald) and to force removal (as with Veterans Administration head Robert P. Nimmo in 1982).³⁴

29. *Id.* at 59.

30. CORWIN (5th ed.), *supra* note 8, at 101-02.

31. 272 U.S. 52.

32. 295 U.S. 602, 628-29.

33. For Corwin's views that are discussed in this section of FISHER, *supra* note 22, see Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353 (1927); CORWIN (5th ed.), *supra* note 8, at 104-108, 431 n.109.

34. See FISHER, *supra* note 22, at 60-98.

In the area of legislative power, Fisher pairs problems of delegation (chapter 4) with the range of veto options open to Congress (chapter 5, which also reviews the intricacies of presidential vetoes). He is not troubled by extensive legislative delegations and, aside from the efforts of the Old Court in the 1930's, finds that the judicial response has been largely captured in Robert Cushman's syllogism:

- (1) *Major Premise*: Legislative power cannot be constitutionally delegated by Congress; (2) *Minor Premise*: It is essential that certain powers be delegated to administrative officers and regulatory commissions; (3) *Conclusion*: Therefore the powers thus delegated are not legislative powers.³⁵

The real question, Fisher stresses, is how to control delegated authority, a task now made more difficult by *Immigration and Naturalization Service v. Chadha* (1983).³⁶ Not surprisingly, he adds his voice to those criticizing the decision as "play[ing] fast and free with history" and at odds with the true interests of *both* political branches. "No one should underestimate the ingenuity of Congress to think up devices that will be more cumbersome for the President than the legislative veto," he cautions. Possibilities include requirements for specific approval of spending deferrals or reorganization plans through *joint* resolutions, grants of authority more limited in time (thereby forcing the executive branch to seek frequent renewals), and creative use of appropriations procedures to get informal commitments from agency heads.³⁷ (More about this in a moment.)

When it comes to "power over knowledge" (chapter 6), Fisher's book reveals tensions between constitutionally rooted interests. Most likely, these tensions cannot be resolved. Congressional investigatory power and protection of Congressmen and their aides under the speech or debate clause are essential to the legislative process, yet each may threaten citizens' rights, and at its core each has proved immune from judicial check—a reality Fisher notes but downplays. On the other side, courts have recognized executive privilege, which at *its* core (particularly in matters involving foreign affairs) seems immune from legislative or judicial inquiry. But Fisher's overall assessment points ultimately to congressional supremacy if matters ever are pushed to extremes, for there remains the impeachment process, the "most solemn form" of the congressional investigatory power; and here, against a determined Congress, there would be no check. Fisher keeps this prospect in the background, however, as a kind of tacit prod to acceptance of the pat-

35. *Id.* at 100-101 (footnote omitted).

36. 462 U.S. 919.

37. FISHER, *supra* note 22, at 178-83. (The quotations are at 179 & 181-82).

tern of accommodation which he again argues has been, and should continue to be, the dominant pattern in the constitutional order.³⁸

In theory, “the power of the purse” (chapter 7) is a little like the impeachment power in theory. Aside from a handful of restrictions on areas or objects for which money can be spent (or not be spent), appropriations are entirely discretionary with Congress—even for so-called entitlement programs—and could be a weapon of enormous significance in interbranch conflicts. But the appropriations power in practice has become a loose cannon, or worse, despite a rich history of budgetary reforms (and Fisher carefully chronicles these efforts). Congress, largely for ill, has checked executive control over large areas of the budget, but the need for legislative majorities to approve annual figures has in turn largely eliminated effective spending controls within Congress. Meanwhile, Presidents have found their way around a variety of clear legislative budgetary mandates, and now *Chadha* has opened more loopholes for the President. Indeed, Fisher’s stance itself indicates the seriousness of the problem, for he pretty much throws up his hands. The reality, and one fundamental enough to have constitutional significance, is that “[r]ecent budgetary practices have brought transformation without progress, expertise without mastery, and information without understanding.”³⁹

Through no fault of his own, Fisher’s treatments of “treaties and executive agreements” (chapter 8) and “the war power” (chapter 9) are perhaps the least revealing, but only because the subjects are common staples in most discussions of the *constitutional* dimensions of executive-legislative conflict. He manages nonetheless to offer relatively fresh glimpses, noting, for example, the recent practice of including Senators and Representatives on diplomatic negotiating teams; the nugatory status of the Logan Act in light of such activities as citizen Nixon’s 1976 trip to China, Ramsey Clark’s 1980 visit to Iran, and Jesse Jackson’s travels in the Middle East and Latin America; and the probable desuetude of the War Powers Resolution’s less well-known relative, the National Emergencies Act of 1976. Among areas that will likely see further development, he includes the de facto roles of the House in approval of treaties, of the Senate in the termination of treaties, and of both Houses together in controlling executive agreements. His evaluation and analysis of the War Powers Resolution is fair-minded, concluding

38. *See id.* at 184-220.

39. *See id.* at 221-51. (The quotation is at 251.) Earlier, in his discussion of the veto power, Fisher discounts the worth of a presidential item veto to solve the problem. *See id.* at 159-62.

that whatever problems *Chadha* has created for the control mechanism established by the WPR, the real difficulty is congressional wavering in the face of presidential reluctance to comply forthrightly with the Resolution's provisions.⁴⁰

Specialists, I suspect, will find little that is new in those sections of *Constitutional Conflicts* that focus on their own areas of expertise, and in some instances one may quibble over details or question broader interpretations.⁴¹ On balance, Fisher's sympathies obviously lie with Congress, so that, for instance, when he urges interbranch accommodation in order to solve conflicts over access to knowledge, he also cautions that although it may be proper for the *judiciary* to bow to executive claims of privilege based on national security and cognate considerations, the *legislature* should hesitate before showing similar deference.⁴² But one reason for this slant may be that Fisher, like Corwin before him, perceives executive aggrandizement as the current wave, despite the blip of reaction that Watergate produced. Certainly his verdict of relative congressional impotence regarding enforcement of the War Powers Resolution evidences little optimism. And even his sanguine assessment of Congress's post-*Chadha* options is less convincing in light of his acknowledgment that our national legislature seems simply unable to get its budgetary house in order.

On the whole, *Constitutional Conflicts* is a successful attempt to probe America's "constitutional enterprise," to borrow a term from Professor Harris, who nicely captures what I take to be Fisher's unstated premise when he writes, "The [Constitution's] words narrate the polity into existence and, as its working principles unfold, the polity becomes a kind of large-scale text in its own right."⁴³ Without doubt, anyway, Fisher sees the constitutional enterprise as a "complex of relations between text and polity, word and structure," to draw again on Harris's formulation.⁴⁴ For this reason, Edward Corwin would welcome *Constitutional Conflicts*.

40. See *id.* at 284-325.

41. Were I feeling more quibblish, I would do more than mention that one of his citations does not really support the referenced text; compare *id.* at 109, text associated with n. 30, with Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *YALE L.J.* 1 (1973).

42. See FISHER, *supra* note 22, at 218-20.

43. Harris, *Bonding Word and Polity: The Logic of American Constitutionalism*, 76 *AM. POL. SCI. REV.* 34 (1982).

44. *Id.* at 44. For the sake of clarity, however, it needs noting that Fisher avoids the kind of theoretical analysis which Harris undertakes.