

COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT, by Edward S. Corwin. Princeton University Press, Princeton, 1938. Pp. xi, 273. \$2.50.

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who are not only equipped with thorough knowledge of the existing rules and the techniques of using them, but are also trained in legal history and legal philosophy so as to appreciate the basic functions of law and of the profession.³

This responsibility of the schools, to be sure, is shared by the Bar Examiners, and ultimately by the entire Bar. For so long as archaic questions are asked, so long as bar examinations remain largely memory tests, so long will legal education be narrow. For the pressure of vocationalism on the schools is too great to resist—without the collaboration, at least, of the leaders of the Bar. Failing such cooperation, the vicious circle will continue. Yet there are signs that here and there farsighted scholars and lawyers do exhibit the necessary courage. They will be the long-remembered pioneers in the vitally important movement to improve the Bar, to extend competent legal service to all members of the community who need it, and to attain a more adequate justice.

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COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT, by Edward S. Corwin. Princeton University Press, Princeton, 1938. Pp. xi, 273. \$2.50.

Professor Corwin might well have entitled this book "Court Over Use: A Study of the Constitution as a Springboard." The book so entitled would have made more explicit its dominant theme which seems to be that while the judges who make up our Supreme Court are supposed to be engaged in the mysterious task of interpreting the document, they are actually a branch of our popular government whose most important task since the Civil War, at least, has been to express approval or disapproval of legislation both national and state. It may be true that these judgments are expressed in terms more familiar to lawyers than to laymen and it may be that they are bound in a staggering number of volumes called U. S. Reports but Professor Corwin insists that the judgments howsoever expressed are none-the-less judgments of approval or disapproval akin to those that might be expressed by any group in a smoking room. This is not a new point

3. Especially significant developments have occurred at Columbia, which for some years has taught legal history to first year students, and now requires all third year students to take the course in Legal Philosophy.

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of view in modern times. That it should be expressed with the background of scholarship and facility of expression that are Professor Corwin's is, however, important for this book is designed for a broad range of readers. It will shock many, lawyers and laymen alike, whose judgments on public affairs mirror their own preconceptions. For those who seek understanding of the important part played by the Supreme Court in our scheme of government it will go a long way to dispel the heat of dogma and mythology that have too often obscured the workings of our constitution at the hands of the judges. After all, the work of the court is better judged by what it does than by what it says about what it does. The lawyer must struggle with this last. The layman will be more ruthless in his judgment. The judges are not the only ones who may have reasons for doing a particular thing. The layman will have his, too. And when the mythology is brushed aside that what the court does is but in response to the command of the document then the issue is squarely drawn and the contestants may meet on more equal terms. As Professor Corwin puts it "In the long run the majority is entitled to have its way, and *the run must not be too long either!*"¹ Those words have a familiar sound to those who occupy office in the legislative and executive branches of our government. That they should be addressed to the judicial branch is perhaps the outstanding theme of the author.

The book is concerned primarily with judicial review for it is mostly in this work that the court touches the public pulse. The first chapter develops the ideas that simmered in the background before Marshall in *Marbury v. Madison* established judicial review of acts of Congress as a definite part of our governmental scheme. This is familiar ground yet Professor Corwin has brought to it a fresh emphasis in the light of the President's recent court plan. What are the proper functions of the Congress, the Executive and the Supreme Court in bringing about a conformity between our government in action and the commands of the document? One and all have taken oath to support the document. The approval of an important measure by all is today almost indispensable if it is to become operative.² If the approval of the Supreme Court is just that and nothing more then there is every reason to ask why the approval of that body should be entitled to

1. At p. 127 [*Italics his*].

2. This sentence is, of course, too broad. It does not take account of a presidential veto or of instances in which judicial review is not or can not be sought.

any greater finality or respect than the approval of the other two branches of our government. If the scrutiny of the document to discover its commands has ceased to be a mystery then it is no wonder that other members of the government claim a competence equal to that of those who wear the robes and sit in a temple of their own. When all is going well enough there is little occasion to bother about what is going on behind the doors of the temple but when the judges frustrate the insistent demand that government reach a certain objective then there is little reason for alarm if government talks back to the judges. In this country we generally get what we want if we want it badly enough. More often than not we get it without any quibble from the judges. When the judges make a mistake we may have to wait some time before we get it or we may get it by more devious ways.

Professor Corwin devotes one chapter to the mistake the judges made when they decided the *Pollock* case³ in 1895. We had to wait until 1913 before we had a federal income tax. That was a long wait. Other mistakes have been made and we have had some long waits before they were corrected. After all, a constitutional mistake may be described as a constitutional decision that flies in the face of what turns out to be a persistent demand that a particular objective be attained in some way. Sometimes the mistake is corrected by constitutional amendment, as in the case of the Eleventh and Sixteenth Amendments, sometimes by constantly distinguishing the unhappy decision, to mention only the *Knight* case,⁴ sometimes by the rude process of overruling, to mention only the *Adkins* case,⁵ and sometimes other statutory schemes are devised to achieve the objective sought in the invalidated measure, to mention only the *Butler* case.⁶ Professor Corwin has put all this well when he sums up his pointed criticism of the *Pollock* case. "Judicial review undoubtedly means," he says, "... some slowing down of the processes of government. . . . It is a device . . . for inserting in the democratic process one further, final step in the discussion, clarification, rationalization of public policy. . . ." In the *Pollock* case "the Court ceased to be a part of the democratic process for the time being, and set itself up against

3. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895), 158 U.S. 601, 15 S.Ct. 912, 39 L.Ed. 1108 (1895).

4. *United States v. E. C. Knight Co.*, 156 U.S. 1, 15 S.Ct. 249, 39 L.Ed. 325 (1895).

5. *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923).

6. *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477 (1936).

7. At pp. 208-209.

that process, in behalf of a powerful interest which deserved no such intervention."⁸

Another chapter is devoted to The Court as Molder of the Federal System. Emphasis is placed where it should be placed and that is on the idea that we are not living in a land where two governments are in competition for the occupation of disputed fields but rather that federal activity for the most part is designed to augment and sometimes induce state activity in a great variety of instances. The dominant idea is that our federal system is one of cooperative action. This idea is worthy of even fuller treatment than Professor Corwin has given it. The lawyer will want to know how familiar commerce clause doctrines can be squared with the idea that the existence of federal power may be dependent upon whether it does or does not augment valid state laws. It may be that the judges are simply more willing to approve federal activity when it conforms to state policy. The federal lottery, white slave, stolen automobile and kidnaped persons statutes are familiar examples. Convict-made goods have recently been thrust into the constitutional foreground. Professor Corwin is disturbed by the child labor case⁹ and is confident that the convict-made goods cases¹⁰ have consigned it to the constitutional junk heap.¹¹ Doubtless it will soon go that way but it is far from clear that the convict-made goods cases point inevitably in that direction. There is a basic distinction between the two types of statutes though Professor Corwin does not see it that way.¹² Under the convict-made goods type of statute any state may permit convict-made goods of any origin to be made and sold within its borders and any state where they are made still has extrastate markets in those states which do not forbid sale. In the same way states that forbid sale are protected against extrastate goods. Thus, two groups of states, two types of interstate markets, may co-exist. This is not possible under the child labor type of statute. Under the first type the statute gives a full measure of cooperation to those states that wish to cooperate. Under the second type the interstate market is maintained as a single unit and it is barred to all states that do not conform. There is a difference where the policy involved is a matter of difference among the

8. At p. 209.

9. *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101 (1918).

10. *Whitfield v. Ohio*, 297 U.S. 431, 56 S.Ct. 532, 80 L.Ed. 778 (1936); *Kentucky Whip and Collar Co. v. Illinois Central R. Co.*, 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270 (1937).

11. At p. 155.

12. At p. 155.

states. It matters not at all when the states stand as a unit, or nearly so, on the policy in question. It may not be easy to conform these two kinds of cooperation with what the court talks about but if there is inarticulate judicial wisdom here it is wisdom that has escaped Professor Corwin.

In an appendix the author has reprinted a series of letters published in the *New York Journal* in 1788 and signed "Brutus." They are, as Professor Corwin says, the most thorough examination of the power of the Supreme Court under the constitution that was made prior to the adoption of the constitution. "Brutus" was worried about the power of the court. He was certain that it would result in the complete subversion of the legislative, executive and judicial powers of the states¹³ and he thought it more than likely that the judges would be eager to extend their powers for as their business increased so would their pay.¹⁴ "Brutus" had some curious notions about the processes whereby the document should be interpreted but then "Brutus" should be read. In the light of today some of his forebodings make "Brutus" a prophet of no little accuracy.

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13. At p. 238.

14. At p. 241.

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