BOOK REVIEWS

COURT OVER CONSTITUTION. By Edward S. Corwin. Princeton: Princeton University Press, 1938. Pp. xi, 273.

In style and content this book is, of course, of the high quality which we have come to associate with Professor Corwin's name. Nevertheless, it presents its difficulties to the reviewer. The subtitle is "A Study of Judicial Review as an Instrument of Popular Government." Now, to treat this theme with any approach to completeness would take a volume of at least a thousand huge, finely printed pages exploring myriad aspects of our social, economic, and political history. In two hundred thirty-one small pages our author is not going to give us anything of that sort, and he knows his constitutional law too well to attempt it. What he has done is to combine in a single volume a series of little essays, each dealing with some aspect of judicial review, but connected by no stouter thread. Independent treatment of each essay seems a more fruitful approach to the book than any attempt at unification.

The first chapter on The Court as a Curb to Congress takes us over the old familiar trail of the ancient dispute whether judicial determination of the constitutionality of congressional enactments was intended by the Framers. Professor Corwin refines this general question into two, more specific in character, as to the *scope* of judicial review and its *effect* or *finality*.[1] In seeking the answer to these queries, he takes us for a survey of the expressed opinions of various worthies, not only among the Framers and their contemporary laborers in the vineyard of our public life, but also among statesmen of a later day. For Professor Corwin the net result of this, and of a consideration of the antecedent philosophy and practice, seems to be that doubt remains whether supremacy of the judges over Congress in the interpretation and application of the Constitution was envisaged by the Framers. I confess that I am less moved to doubt upon the face of the record. The investigations of Beard[2] and the surveys of Haines[3] have seemed to me convincing. It does not alter my conviction to be reminded that, from time to time, the Framers and their contemporaries spoke inconsistently about the matter. We all know how public men are apt to suit their argument to the exigencies of the moment. It is the effect of all the evidence that we must look to, and, to me, that cumulates in favor of the legitimacy of judicial review. It is not the least weight in the balance that Robert Yates, in those "Letters of Brutus" which Professor Corwin makes available for us in the appendix, should have accepted judicial supremacy as a part of the governmental system he was opposing as implicitly as did Hamilton, its advocate.

All this is not to question the propriety of Professor Corwin's observations upon the "finality" to be accorded the Court's constitutional interpre-

1. The italics are the author's.
2. Beard, *The Supreme Court and the Constitution* (1912).
3. Haines, *The American Doctrine of Judicial Supremacy* (2d ed. 1932).

tation. If there were need for further demonstration at this day,[4] I take it that the *Tompkins* case[5] clearly establishes it as the doctrine of the Court that the Constitution really *is* "the supreme Law of the Land,"[6] and that past error will not be persisted in when once the judges are convinced thereof. This being true, no one who is convinced that a particular interpretation is heretical may rightly be charged with *lese-majeste* for urging the soundness of his own views upon the country or for seeking to secure the conduct of government accordingly.

The second two essays deal interestingly with certain aspects of the Court's interpretation of the Constitution. In the first, emphasis is laid, and rightly, upon wise judicial review as a factor in making it possible for a government organized under the document of 1787 to function acceptably for the nation of 1938. In the second, he traces the course of decision centering around problems of national and state cooperation. With most that is said I find myself in accord, but upon certain points I feel impelled to dissent. For one thing, I never have liked the phrase, growing in popularity among certain of our public law writers, which refers to the judges as makers of the Constitution. No doubt it is useful to bear in mind that the judges do bear the responsibility for wisely reading the broad phrases of our fundamental law in the light of the problems of today. But elsewhere I have suggested the paramount necessity of referring all constitutional decisions back to the texts upon which they depend, of sticking to the proposition that the Constitution, and not the judges' will, is the paramount thing.[7] This seems to me still to be truth. And if that be so, there is also, I think, both error and danger in the preachment that the guiding principle of constitutional decision must be that "In the long run the majority is entitled to have its way, and *the run must not be too long either.*"[8] No doubt, as a maxim of political wisdom, this is true, but, as a canon of constitutional judgment, it is another matter. Some things—the prohibition of the tax on exports, for example,—are so uncompromisingly set out that no amount of popular clamor would justify judicial interference with them. Where broad principles or vaguely general standards are involved, however, the verdict of intelligent, sober professional and public opinion may throw light upon the correctness of decision and stimulate a re-examination of positions which have met disapproval. It is as the product of a reconsideration so induced that I would interpret the recent cases, to which Professor Corwin refers, rather than as a sop to the popular Cerberus.

The next chapter is devoted to a revisiting of the *Pollock* case.[9] We have traveled so long a road since that ill-starred litigation that many readers are likely to approach this with a sense of fresh adventure. For

4. See Sharp, Movement in Supreme Court Adjudication—A Study of Modified and Overruled Decisions (1933) 46 Harv. L. Rev. 361, 593, 795.
5. Erie R. R. v. Tompkins (1938) 304 U. S. 64.
6. U. S. Const., Art. VI.
7. See Merrill, Judicial Supremacy in a Time of Change (1935) 20 Iowa L. Rev. 594, 604.
8. P. 127. The italics are Professor Corwin's.
9. Pollock v. Farmers' Loan & Trust Co. (1895) 157 U. S. 429; (1895) 158 U. S. 601.

such there is value in the painstaking exposition of the decision's weakness, alike in history and in law, and in demonstration of the extraneous considerations which seem to have been brought to the Court's attention with effect. As a statement of the sinister effect of what the great Thayer called "petty judicial interpretations,"[10] this part of the essay is superb. Less stimulating, and much less useful, is the speculation as to the identity of the vacillating justice whose shift in position defeated a national income tax for so many years. After all, his error has been corrected. The decision stands recognized as one of the Court's few deviations from the path of sound constitutional interpretation. Why not murmur, *"Requiescat in pace,"* and cease to trouble ourselves?

In the final chapter, entitled The Constitution of 1787—A Sesquicentennial Note, we encounter a little essay which, setting forth the deep veneration for the Constitution which has characterized America's political behavior from the beginning, undertakes to evaluate the respective contributions, to this worship, of the sense of historical continuity and of the consciousness of deliberate creation. Professor Corwin makes a strong case in defense of Gladstone's encomium upon the work of the Fathers as an original accomplishment, as against over-emphasis upon the heritage derived from the mother country. But I think he would be the first to admit that we must not fall into the other error of denying altogether the importance of that heritage.

Finally, our author appears to suggest that we have turned from this devoted worship to a more pragmatic attitude which appraises the Constitution in the light of the manner in which it serves our national needs. If I understand him correctly, I am impelled to disagree. It does not seem to me that blind and unquestioning reverence characterizes the earlier years, nor that sheer pragmatism is the dominant note of the present. From the beginning we have coupled with reverence for the instrument a readiness to question interpretations which we thought of doubtful validity or to cure by the amending process such defects as seemed beyond correction by an appeal to the reason of the document's judicial interpreters. Is any more than this discernible even in the turmoil of the immediate past?

Then there is the appendix, made up of extracts from three of the "Letters of Brutus," setting forth with remarkable prescience many of the features of judicial guardianship of the Constitution as in fact it has developed. These extracts whet one's appetite for more of these little known comments by Judge Yates. If he displayed equal prevision of the working of other portions of the constitutional machinery, it would be invaluable to have the entire series made generally available in our libraries—preferably in a single volume with the Federalist.

MAURICE H. MERRILL.†

10. See Thayer, Our New Possessions (1899) 12 Harv. L. Rev. 464, 469.

† Professor of Law, University of Oklahoma.