

BOOK REVIEWS

COURT OVER CONSTITUTION. By Edward S. Corwin. Princeton University Press, Princeton, 1938. Pp. xi, 273. Price: \$2.50.

A new book by Professor Corwin is always welcome. This book is a study of the work of the Supreme Court as a constitution maker, and the present is a very appropriate time for its publication.

The first chapter undertakes to answer the question of whether or not the Supreme Court gave itself or was given by the Constitution its supremacy over Congress. Mr. Corwin finds, of course, that there is no express grant of such a power in the written Constitution. He also finds that the evidence shows there was no majority sentiment for such a power of judicial review either in the Constitutional Convention or in the ratifying conventions in the various states, and that the only inference of such a power which can be derived from the words of the original Constitution itself will have to be found in the direct prohibitions of the Constitution, which for the most part are in the Amendments. Outside of this, there is no warrant for any inference of judicial power over Congressional legislation. Whether or not the doctrine of judicial review was created in its entirety by the Supreme Court, the scope and quality of the judicial review is entirely the work of the Court. As a consequence, the author's general conclusion is that, as a doctrine of constitutional law, the supremacy of the Supreme Court over Congress is a Supreme Court made doctrine. What he has said with reference to the supremacy of the Supreme Court over Congress might also be said with reference to the supremacy of the Supreme Court over the executive branch of the Federal Government and over the various branches of state governments. On the question posed in this chapter, Mr. Corwin has apparently said the last word. His exposition is so complete and his argument is so convincing that it will be very hard for anyone not to accept his position.

In Chapter II Mr. Corwin considers the question of whether or not, under its power of judicial review, the Supreme Court has been a constitution maker. There is no question that he has given an effective and convincing answer in the affirmative. His proof cannot be denied. However, he has only proven the fact of constitution making; he has not told us what parts of our Constitution have been made by the Supreme Court. The chapter is disappointing because of this omission. It also may be criticized for its lack of reference to other writings upon the subject. Undoubtedly Professor Corwin is familiar with the other writings; but, if he has been influenced by them, he fails to give credit. And he is not generous in referring to other writers.

In Chapter III Mr. Corwin undertakes to supply one of his omissions as to the parts of the Constitution made by the Supreme Court, by endeavoring to show that our dual form of government, or federal system, has been made by the Supreme Court. Yet even in this chapter he does not set forth much of the doctrine of dual federalism, with its corollary of federal supremacy, merely contenting himself with showing that the doctrine of a dual form of government does not mean that in our federal system there have been set up two competing and antagonistic forms of government but rather a single governmental mechanism including both the principle of national supremacy and the principle of voluntary cooperation on the part of the states. He finds many evidences that our Constitution contem-

plates such cooperation; but it must be noted that many of his evidences are provisions in the original Constitution and practices of other branches of the government rather than provisions written into the Constitution by the Supreme Court.

Chapter IV is a devastating critique of the *Pollock* case,¹ and in this chapter Mr. Corwin shows not only that the Supreme Court is a constitution maker but that, in the case of income taxation, it was a very poor constitution maker, its decision being irrational from practically every standpoint and showing a strange motive to convert the direct tax clauses into positive protections of wealth.

In Chapter V he treats of the Constitution as an object of worship; and in the appendix he prints some of the letters of Brutus written by Mr. Robert Yates prior to the adoption of the Constitution with a view to preventing its adoption by presenting a picture of the judicial power that certainly was not accepted in his day and which goes beyond anything which has occurred since his time.

So far as Mr. Corwin has treated the topic of the supremacy of the Supreme Court, or judicial review, he has done a good job. His language is well chosen and his arguments are well made. While he often criticizes the Supreme Court and sometimes shows suspicions of its motive, on the whole he is of the opinion that the doctrine of judicial review, so far as it has resulted in the making of our Constitution, has done much for the survival of the Constitution, not by preventing changes in its original features but largely by replacing them. Where the Supreme Court has made missteps, it has generally failed to keep in touch with majority opinion in the United States. Mr. Corwin thinks that this is the only real danger both to the democratic process and to judicial review. The reviewer certainly agrees with this position.

Hugh E. Willis.†

CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW. By Kenneth C. Sears. West Publishing Co., St. Paul, 1938. Pp. xvi, 800. Price: \$6.00.

Administrative law is becoming of more and more importance in the life of the American people as nation, states and municipalities are being required to perform duties and functions far beyond the traditional concepts and practices of governments even a quarter of a century ago. Within that period the late Elihu Root in his presidential address to the American Bar Association¹ accurately forecasted, in this country, a constant and substantial growth of governmental activities in an effort to meet the economic and social problems of a complex age.

To the consternation and alarm of many, there has been an acceleration of such growth since the end of the World War. The intervening years have seen the publication of *The New Despotism*, the 1932 Report of the Committee on Ministers' Powers concerning Lord Chief Justice Hewart's charges of a despotic administrative bureaucracy, and the publication, in the same year, of *Our Wonderland of Bureaucracy*, by the late James M. Beck, former Solicitor General of the United States, and this reviewer. Aroused from its indifference by these publications the Amer-

† Professor of Law, Indiana University.

1. *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429 (1895), *rehearing*, 158 U. S. 601 (1895).

1. (1916) 41 A. B. A. REP. 355, 368.

ican Bar Association, in 1933, created its Special Committee on Administrative Law to make studies of the administration of the laws, and a considerable number of the more progressive State and City Bar Associations have done likewise. Each year these committees are filing an increasing volume of reports with respect to various aspects of the administrative process, and the subject is finding its way into both the editorial and news columns of the daily press. No longer is the subject of administrative law and tribunals solely of academic concern to professors of political science. Somewhat more than half of the approved law schools offer a course of at least one-half year's duration in administrative law. Both the bar and the public in increasing numbers are questioning whether law schools are offering courses in administrative law as a requirement of graduation; whether such law schools are attempting to make the subject a subsidiary course in constitutional law; whether Anglo-American administration of the law may be permitted under the guidance of some law teachers to be patterned on ancient Roman administrative absolutism, efficient though it may have been; and whether, in fact, the approved law schools in America are graduating students equipped with sufficient knowledge of the basic principles of law administration in the United States to intelligently serve as aides to governmental administrators or in private law firms where the practice is such that more or less frequent appearances must be made before National, state and municipal administrators far more in need of light than noise.

Such questionings by men experienced in law, government, and business have, and will, serve a most useful purpose. Basic concepts of law administration are being re-examined in the light of Anglo-American traditions of the supremacy of the law—a supremacy which did not exist under the Roman or Civil Law administrator in whose hands were concentrated legislative, executive, and judicial power—and a supremacy which could not exist without an independent judiciary with sufficient jurisdiction to protect both the government and the citizen from the acts of an administrator contrary to the terms of our Constitution and the statutes in accordance therewith.

Professor Sears was called to the Chair of Administrative Law in the University of Chicago Law School as the successor of the late Professor Ernst Freund, who, in 1911, had compiled his *Cases on Administrative Law* which he revised in 1928. This compilation enjoyed considerable favor in American law schools, and Professor Sears admits in the preface to his compilation that, as the successor of Professor Freund, he used that casebook. However, the considerable post World War increase in administrative tribunals and functions of government as well as the aforementioned questions outside of academic halls made it desirable to re-examine the compilation of cases selected by Professor Freund, and the publishers prevailed upon his successor to undertake the task.

At about this time, Professor Sears was appointed as one of the five members of the American Bar Association's Special Committee on Administrative Law and he served in that capacity during the year 1936-1937. Apparently the intense study which Professor Sears was required to, and did, give to both the theoretical and practical aspects of administrative tribunals and officers during his service as a member of the Committee resulted in his conclusion that an entirely new book, rather than a revision of the Freund casebook, would have to be prepared. This has been done, and an examination of the two books shows the inclusion in the Sears book of but few of the cases found in Freund's.

Some of the growth and changes in administrative law and tribunals within the past quarter of a century are reflected by a comparison of the Freund and Sears casebooks. The former contains fourteen chapters, aggregating approximately 750 pages with index, and containing much material more properly fit for inclusion in a casebook on constitutional law. The latter contains five chapters with an appendix, aggregating approximately 800 pages. The five chapters are respectively entitled: Development of Administrative Law Through the Use of Remedies; The General Nature of Administrative Tribunals and Agencies, the Methods by Which They Function and Are Subjected to Judicial Limitation; Examples of Administrative Tribunals and Agencies in Operation; Officers (with subdivisions on their selection, removal and responsibility); and Government (with subdivisions on the responsibility of local, state and Federal Governments). The other three chapters are likewise subdivided but the chapter headings are descriptive of their contents. The appendix contains much documentary material with respect to the administrative machinery of the Federal Government, forms and rules.

In other words, this casebook is designed to give the student some practical training as to the manner in which the wheels of government go 'round and why they do so. Opinions may differ as to the extent to which Professor Sears has carried out his design, but again a great stride forward has been taken in the selection of material to form the basis of a law course in administrative law and tribunals.² The cases selected are largely from American courts, both federal and state, and the selection contains many modern cases. The material selected from sources other than decisions of the courts will show the law student certain practical aspects of law administration not available in court decisions.

This reviewer has no hesitation in stating that in his opinion Professor Sears has done a most excellent job in his selection and arrangement of the material.

O. R. McGuire.†

THE CONTRACT CLAUSE OF THE CONSTITUTION. By Benjamin Fletcher Wright, Jr. Harvard University Press, Cambridge, 1938. Pp. xvii, 287. Price: \$3.50.

The book under review is an exhaustive work, presenting a history of the rise and decline of the contract clause of the United States Constitution, plus an analytical digest of all the decisions of the United States Supreme Court thereunder. The latter occupies the larger portion of the book, and is by far the more instructive. The analysis of the cases discussed is usually sound, often incisive, and on occasion felicitously expressed. This is particularly true of the judgments, in terms of legal principles, as to the net results of the detailed history here recounted. Thus the result of the decisions on private contracts (debtor and creditor) from

† Chairman, Special Committee on Administrative Law, American Bar Association.

2. Two other recent casebooks on administrative law are MAURER, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW* (1937), and STASON, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE TRIBUNALS* (1937). See writer's review of both books in *Book Reviews* (1937) 26 *Geo. L. J.* 173. Two other recent books which could be used as parallel reading in administrative law are BINKLEY, *THE POWER OF THE PRESIDENT, PROBLEMS OF AMERICAN DEMOCRACY* (1937), and LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

*Sturges v. Crowninshield*¹ to *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*² is summed up in the words:

"So far as any general rule may be said to have emerged, it is merely an apparently limited extension of the principle that reasonable modification of the remedy, especially if adequate time is left for compliance, does not constitute an impairment of the obligation of contracts This, it is feared, cannot be much of a guide to legislators. . . . To the legislator is left the privilege of attempting to decide what is reasonable and proper until he is enlightened by the Court."

And the results of an inquiry into the power of the states to amend corporate charters under reservation-clauses are stated thus:

"Alterations are permitted within what the Court considers reasonable limits What is reasonable to one man is not reasonable to another. The pricking out of a line by a slow process of inclusion and exclusion has not yet gone far toward defining the allowable scope of the power to amend. Employing the roving commission which it derives from the due process clause, the Court frequently serves notice that it intends to sink all craft of a piratical, i. e., an unreasonable, nature."

Professor Wright's historical judgments are not half as sound as his judgments on particular cases. He is on solid ground when he criticizes Professor Beard for the statement (quoted from *The Rise of American Civilization*) that "Jacksonian judges from agrarian states broke down the historic safeguards thrown around property rights by the letter of the Constitution and the jurisprudence of John Marshall." He conclusively demonstrates that the Beardian assertion is incorrect in both its halves: The Marshall jurisprudence had nothing to do either with the letter of the Constitution or with the intention of the Framers; nor did the Jacksonian judges break down any safeguards around property rights, whether historic or other. They were no Levellers,—as Professor Wright correctly observes. But that does not make his history any better than the Beardian. He shares with Beard the error of treating the "Marshall Court" as if it were uniform in character throughout; adds the even greater error of treating the "Taney Court" as something uniform throughout; and tops it off by the amazing assertion that the "Marshall Court" and "Taney Court" really constituted one continuous and uniform development,—the latter "consolidating" the achievements of the former under the contract clause.

The reason for this amazing statement,—aside from the error of treating the entire Taney era as something uniform,—is a failure to grasp the true meaning of the *Charles River Bridge* case³ in our constitutional history, which leads Professor Wright to minimize its importance. That great case was not, it is true, an attack on private property, as Professor Beard imagines. But it was a great blow for progressive capitalism,—a declaration of independence which freed our growing capitalist society from the shackles of the "Supreme Conservative's" concept of vested rights which would have made our free development impossible. In that sense the decision was truly epoch-making.

In order to minimize the historic importance of the *Charles River Bridge* case, Professor Wright says: "Furthermore, its influence was not

1. 4 Wheat. 122 (U. S. 1819).

2. 300 U. S. 124 (1937).

3. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420 (U. S. 1837).

felt until after Taney's death." That is flying in the face of known facts. It was certainly not the opinion of either Kent or Story. Kent said: "I have re-perused the *Charles River Bridge* case, and with increased disgust. It abandons, or overthrows, a great principle of constitutional morality, and I think goes to destroy the security and value of legislative franchises." And Story echoed: "The old constitutional doctrines are fast fading away, and a change has come over the public mind from which I augur little good."

Nor is the book entirely free from serious errors of legal doctrine, or misapprehension of the doctrines involved in the cases discussed. Professor Wright tells us,—in an apparent endeavor to bolster up his historic theory,—that

"It was during this [Taney] period that the Court, for the first time, applied this clause to contracts between the states and the federal government."

He then proceeds to discuss three cases dealing with the Cumberland Road.⁴ It so happens, however, that those cases had nothing to do with the contract clause, and that clause is never even mentioned in any one of the three opinions.

In an earlier portion of the book, in discussing Marshall's decision in *Providence Bank v. Billings*,⁵ Professor Wright says:

"The Providence Bank claimed that the state had by this tax impaired the obligation of its contract with the corporation. Counsel for the bank also relied upon the doctrine in *McCulloch v. Maryland* of the exemption of government instrumentalities from taxation. Marshall refused, however, to *extend either* of his doctrines so as to hold this tax invalid." (Italics supplied.)

Marshall never announced any such general doctrine. And the notion that a government could not tax *its own* instrumentalities is so utterly absurd that no responsible jurist or statesman could possibly entertain it. Nor was any such doctrine considered apart from the question of contract.

Professor Wright devotes a whole chapter to a discussion of the cases stemming from *Gelpcke v. Dubuque*,⁶ dealing with the problem of the Impairment of Contract by Judicial Decision. In the course of this discussion he says:

"Of course, the point of view of the Court is that it is exercising its right and duty to use its own judgment, as it always does, 'in reference to the doctrines of commercial law and general jurisprudence' when the law is unsettled."

The fact is that these cases had nothing whatever to do either with doctrines of commercial law or with "general jurisprudence", and the Court never made such a claim. The decisions were based entirely on certain decisions of the state courts in question, held by the Supreme Court to constitute contracts which could not be violated by subsequent decisions. Further on in this discussion the author says:

"It would seem that the Court could much more satisfactorily have defended its action in almost all of the cases considered in this chap-

4. *Searight v. Stokes*, 3 How. 151 (U. S. 1845); *Neil, Moore & Co. v. Ohio*, 3 How. 720 (U. S. 1845); *Achison v. Huddleson*, 12 How. 293 (U. S. 1851).

5. 4 Pet. 514 (U. S. 1830).

6. 1 Wall. 175 (U. S. 1863).

ter if it had avoided any reliance upon the contract clause. Instead, it should have asserted its right, in cases coming from the lower federal courts, to exercise its own judgment as to the construction of state constitutions and statutes."

This is a truly amazing statement. The right which Professor Wright says should have been exercised by the Supreme Court has always been disclaimed by that Court, and is expressly prohibited by statute. *The only exception claimed by the Court is in cases coming under the contract clause,*—which the author says they should *not* have relied on in order to claim this right.

In a concluding chapter Professor Wright attempts to develop a historic theory which accounts for the *rise* of the contract clause as a safeguard of property rights by the fact that it coincided with the general ideas of the developing American community on the subject; and for its *decline* by the rise of the due process clause to take its place. We have our doubts as to both branches of this theory, but a book-review is hardly the place to discuss so important a subject. By way of caution, however, we must note one detail. In connection with the discussion of particular cases there are scattered throughout the book certain remarks apparently intended to furnish the body of fact upon which the judgments of the concluding chapter are based. Among these occurs the following statement, in connection with the famous case of *Green v. Biddle*,⁷ in which the United States Supreme Court, in 1823, upset the decisions of the state courts of Kentucky with respect to land titles:

"Kentucky promptly answered. Governor John Adair in a message to the legislature declared that the decisions in this litigation struck at 'the right of the people to govern themselves'. Resolutions were passed by heavy majorities hinting at forcible resistance to the mandate of the Court. *However, the resentment gradually subsided.*" (Italics supplied.)

But Professor Wright omits to say that *Green v. Biddle was never recognized as law in Kentucky, and was never followed by the state courts.* One wonders what more effective form "resentment" could have taken if it continued instead of "subsiding".

Louis B. Boudin.†

THE LAW OF NATIONS. By Herbert W. Briggs. F. S. Crofts and Co., New York, 1938. Pp. xxix, 973. Price: \$8.00.

This casebook is the most convenient to handle which the reviewer has seen, and should prove a favorite for classroom use. But the fact that it is not as bulky and unwieldy as most law books does not mean that the print is small or hard to read, or that the editor has been unlawyerlike or parsimonious in his presentation of material. The learned notes which he prints as part of the text are very valuable, as is the introductory chapter on the nature of international law; and all the customary topics are adequately dealt with in orthodox fashion. The reviewer would have welcomed inclusion of material on judicial assistance and letters rogatory, a topic recently introduced in international law casebooks; but is glad that

7. 8 Wheat. 1 (U. S. 1823).

† Member of the Bar, New York City.

the editor does not adopt the popular innovation of treating the law of war as a type of procedure for settlement of international disputes. The rights and duties of belligerents and neutrals under existing international law are properly to be regarded as in themselves substantive rights or duties and not merely as procedural steps toward the enforcement of other pre-existing rights. As was to be expected from a scholar of his attainments in that field, Professor Briggs offers a thorough treatment of the law of war.

Likewise meritorious is the editor's policy of selecting by preference the decisions of international tribunals rather than those of local courts, and of excluding domestic law topics such as nationality regulations.

Of course there may be disagreement with the editor's decision regarding various minor points of arrangement or selection. For example the reviewer does not see why the chapter on Aliens which follows that on the Law of Treaties should not have been included in the succeeding chapter on State Responsibility, or else in that on Nationality. It would also be convenient if in every instance when one case is included under more than one topic it were printed the first time, and referred to later, rather than vice versa. The table of cases should be at the back of the book with the index rather than at the front with the comprehensive table of contents which repeats the names of the cases printed in each chapter. Less than a dozen misprints or errors were noted, the most amusing being the translation of *Selbsthilfebehandlung* on page 677 as "act of appropriate justice" rather than as "act of self-help".

Edward Dumbauld.†

BOOK NOTES

THE FEDERAL DEATH TAX. By John E. Hughes. Callaghan and Co., Chicago, 1938. Pp. xiv, 519. Price: \$10.00.

Admittedly, a proper understanding of the Federal Estate Tax is important to any practitioner who deals with trusts, estates, wills, or inheritance. But the dearth of authoritative comment upon the federal rulings and the rapidity with which these rulings are distinguished, overruled, or forgotten, force most lawyers to rely upon one of the standard tax services to guide them through the maze of statutes, amendments, regulations, and decisions.

Consequently, there is a real need for an analytical discussion of the cases dealing with federal death taxation. *The Federal Death Tax* attempts to cater to that need. Included therein is a brief summary of the constitutional scope of the federal taxing power, a more extended treatment of the valuation of property for estate tax purposes, and a detailed analysis of what constitutes a taxable interest of the decedent and how the Revenue Act is administered. In addition, there is a chapter dealing with the complementary gift tax.

Obviously influenced by the tax service method of presenting material, the author always gives the statutory provision involved, then the treasury regulation interpreting this provision, and then the rulings upon it. The book thus becomes a sort of permanent tax service, which is valuable because it is prepared by an experienced tax attorney who gives

† Counsel, Antitrust Division, Department of Justice.

his views on controversial topics. But because it is a permanent volume, a loose-leaf tax service is a necessary adjunct thereto for its optimum use, for current decisions invalidate much of the discussion before the ink has dried on the pages.¹

Myer Feldman.†

FEDERAL TAXES ON ESTATES, TRUSTS AND GIFTS 1938-1939. By Robert H. Montgomery. The Ronald Press Co., New York, 1938. Pp. xi, 511. Price: \$7.50.

With the passage of a new federal revenue act workers in the field of taxation have come to expect a new edition of *Federal Taxes on Estates, Trusts and Gifts*. It is necessary to revise the old edition so frequently because our nation is still groping for a tax system that is efficient, fair, and easy to administer, and our taxing act consequently undergoes considerable change biennially. Furthermore, new decisions quickly relegate tentative conclusions to the incinerator of useless theory.

Perhaps the most useful function served by the periodic appearance of this book is the collection and brief discussion of recent cases under the portion of the Revenue Act which they interpret. The accountant may thus pick his way with more confidence through the obscure provisions of the Revenue Act, and the lawyer is referred to cases which may serve as a beginning in his analysis of the particular portions of the taxing statute in which he is interested. Of considerable aid in the use of this book are the Index to Articles of Regulations, Index to Treasury Department Rulings, and Index to Decisions.

Myer Feldman.†

† Gowen Memorial Fellow, University of Pennsylvania Law School.

1. For instance, since the publication of this book the Supreme Court has overruled the Circuit Court of Appeals for the Seventh Circuit in holding constitutional the provision of the Revenue Act imposing an estate tax on conveyances, made after its enactment, in which the settlor reserved a life income. *Helvering v. Bullard*, 303 U. S. 297 (1938). The case of *Bowers v. Commissioner*, 90 F. (2d) 790 (1937), discussed at page 71, has also been reversed. *Helvering v. Bowers*, 303 U. S. 618 (1938).