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Book Reviews

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NEITHER PURSE NOR SWORD. BY JAMES M. BECK AND MERLE THORPE. NEW YORK: THE MACMILLAN CO., 1936. pp. xiii, 210.

This volume is by James M. Beck (who died as the manuscript was nearing completion), the great contributor to the study of American government, and particularly the Constitution of the United States, and Merle Thorpe, editor of Nation's Business.

Chapter headings are: Government Adrift; Lost Objectives of the Constitution; The Dissolving Union; Property Rights and the Right to Property; The Law of the People; The Tap Root of Democracy; The Balance Wheel of the Union; The Economic Basis of the Constitution; Economic Freedom and Political Control; Economic and Political Centralism; Expanding Government; Paying the Bills of Government, and Neither Purse nor Sword.

The motivating causes which led to the establishment of the "Union," and the extraordinary success the government of the Union had attained under the Constitution at the close of the first century of its history, because the "ethos" of the people, their intelligence and political consciousness, generated a will and attitude of mind to adhere to the Constitution which established a government of law and not of men, are all briefly and clearly developed in the first chapter. But the shock of the World War tore government loose from its moorings. Government is adrift. The war did not make the world safe for democracy. No social institution has suffered more than democracy in the years that have followed that conflict.

In such periods of stress, attendant upon and following major conflicts, and particularly the economic depression of the past few years, the disposition is to alter forms of government on the ground that they are in themselves inadequate. The political question is always whether the people shall chart the course of government, or whether the government shall mold the lives of the people to its ends. If the latter, then constitutional democracy passes off the stage and autocracy takes its bow in the guise of a benevolent paternalism. Government by law, enacted by an independent legislative body, gives way to the caprice of the executive, and thus is epitomized the success of the ever-present centripetal tendency in government (the tendency to centralize) and the failure of the centrifugal tendency (the tendency to localize). And thus is accomplished the tragedy of failure, for a form of government arises from powers granted to the central authority, all not so granted being retained in the people. The only restraint not yet completely removed is the restraint which may be exercised by the third and co-ordinate branch of government, the judiciary. The authors say in this connection:

> "If the people conceive their government to be a federated republic of limited powers—as they once did—it will remain so. If their imagination portrays it as a unitary socialistic state, it will become so, and no written constitution can prevent it. The Roman Republic lasted as long as the

people willed to maintain it. When Caesar crossed the Rubicon, his act was in itself an event of no great importance. Its significance lay in the fact that it was a violation of a constitutional principle. When that violation was condoned, the end of the Roman Republic was foreshadowed. Similarly, when his great nephew, Augustus,—a smiling, affable, kindly and well-meaning man,—induced the Roman Senate, in a period of great depression, to yield to him its powers for a period of ten years, the Senate never regained them and Augustus and his successors every ten years celebrated the renewal of the concentration of power in one man with a sardonic ceremonial. When the Senate thus delegated its legislative power, the Republic ceased to be."[1]

The authors raise the question of whether the American people are now treading this path in the matter of constitutionalism.

In its short compass, the volume accurately puts historical facts and motivations resulting in the establishment of our form of government, its progress, the veneration generated for it, and then labels the historical incidents, all within the memory of middle-aged persons now living, from which its downfall may be dated, unless the American people still retain sufficient of that very uncommon thing ordinarily referred to as fundamental common sense, which, when properly concentrated and made articulate, will serve as an adequate brake.

The "tap root of democracy" is in the people. The word "democracy" is susceptible of many meanings. As a social ideal, it means simply equality of opportunity, freedom from unfair privilege. As applied to political government, it has a different meaning. Derivatively it means the rule of the people, but practically that means the rule of the majority. The authors state that it is manifest that the men who framed the American Constitution were not unqualified democrats. They did not believe in oligarchy, the rule of the few, nor did they believe under all circumstances in the rule of the majority, which is democracy. They recognized that there were matters which required a collective judgment, as to which the only practicable rule was to accept the will of the majority, in view of the fact that unanimity was out of the question. In this restricted sense, they accepted democracy, not because they believed that any government could be wisely conducted by the massed ignorance of the people

"but wholly from the utilitarian consideration of the obvious necessity that these restricted activities must be the subject of a law, and that it was more conducive to peaceful relations to accept the opinion of a majority, rather than of a minority."[2]

But beyond this restricted field there was and is a large sphere of power in which the Convention which framed the Constitution refused to accept the will of the majority.

"It believed that the individual, even though he were 'Athanasius against the world,' had rights against which even the views of the majority should not prevail; that a man, by virtue of his God-given attributes as a

1. P. 9.
2. P. 82.

> human soul, had rights which could not be justly invaded by the State. To these reserved rights of the individual they declined to apply the principle of democracy, preferring to preserve what was to them the nobler principle of individualism."[3]

And thus the Constitution is an expression of individualism. But, as the authors have it, the Jeffersonian interpretation of democracy which took root in a decade after the Constitution was adopted, when Thomas Jefferson came into power, has completely dominated the minds of succeeding generations and is "consciously or unconsciously the doctrine of America today." And the cardinal doctrine of the Jeffersonian political philosophy was the rule of the majority, as the one sure guardian of the rights of man. But the framers of the Constitution put a great curb on unlimited democracy by writing into the fundamental law a Bill of Rights, by which the framers of the Constitution refused "to put upon the brow of the people the crown that they had taken from the brow of the monarch," and the Bill of Rights stands today "as a great dike against the inundation of unlimited democracy;" but, as the authors say, "it cannot be questioned that with the changed 'ethos' of the people, these limitations are gradually losing their strength."

"The balance wheel of the Union," the Supreme Court of the United States, is one of the three departments of government. The Supreme Court of the United States on May 27, 1935, rendered three decisions, one invalidating the Industrial Recovery Act, another holding unconstitutional the so-called Frazier-Lemke Bankruptcy Act; the third limiting the presidential power of removal. On less than seventy previous occasions had it rendered opinions invalidating laws passed by Congress and approved by the President. Many of these involved questions of slight importance or public interest, free from the atmosphere of political controversy and of little practical importance. Consequently, the authors declare, that May 27, 1935, may be compared to that momentous day in 1857 when the Court handed down its decision in the Dred Scott case. They say:

> "It is a most encouraging fact that not only did these decisions fail to create the bitter resentment which followed the Dred Scott decision, and later the decision in the Income Tax Cases, but that the people bowed without protest to the judgment of the Court. The public reaction to them is the most encouraging manifestation in recent years of the citizen's sense of political responsibility.[4]
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> "Many thoughtful Americans had begun to doubt whether the American people had a sufficient sense of constitutional morality to insure the perpetuity of the Constitution."[5]

The authors probably would at this date make the same statement, because they are referring to the "people," whose "ethos" seems still to be made up of a will to preserve our form of government. If this be true, then the Supreme Court, which has "neither purse nor sword" to influence adherence to its decisions, still stands

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3. P. 82.
4. P. 98.
5. P. 99.

in the minds of the people as the enduring bulwark against invasions of the Constitution. But this cannot be assumed. It must be a fact and it must be affirmatively known. As is stated by the authors in the closing paragraph:[6]

> "What is needed is an intelligent appraisal of the State of the Union, a spirit aroused to the active support of our institutions, the citizen awakened to the realities that he alone is the custodian of his own destiny, and that this responsibility has not been, and cannot be, delegated to his political agents. This responsibility is indeed great. If he fails, the American tradition of ordered liberty under law, the culmination of man's greatest effort to be a free spirit, will, in very truth, be homeless; it will be a tradition without a country. New life and meaning must be given to the admonition that eternal vigilance still remains the price of liberty."

All thoughtful citizens and those who desire to become citizens should read and re-read this volume, and understand and ponder the great truths so briefly and yet so eloquently set forth therein. It should be required reading in every course on government in every school in the United States.

Kansas City, Missouri — JOHN F. RHODES

YOUR WILL AND WHAT NOT TO DO ABOUT IT. BY RENE A. WORMSER. NEW YORK: SIMON & SCHUSTER, 1937. pp. xxi, 215.

Here is a book which lawyers will find interesting and perhaps profitable as well. While written for laymen the attorney will find suggestions for the perfection of his craft, though with some of the ideas there may be individual disagreement. At any rate it is well to realize what one's clients may be reading, just as the man who has already too many friends should peruse How to Make Friends and Influence People so that he may protect himself against book-learned wiles and synthetic affability. A few section headings will indicate the scope and tone of the volume: Come Clean With Your Attorney, Put It All in Your Will, How to Save Guardianship of Property, When You Get Married, Your Residuary Estate, Are You Charitably Inclined, That Awful Rule Against Perpetuities (The Lawyer's Nightmare), What Taxes Will Your Estate Have to Pay, Investments in an Estate. The lightness of style is enhanced by slightly Thurberish drawings, many of them illustrating the plight of persons whose relatives failed to leave well-considered wills.

Mr. Wormser is a member of the New York Bar and he treats the problems chiefly in the light of the law of that state. There are proper caveats that the rules may be different in other jurisdictions. Lawyers need not be concerned that the book will rob them of professional business. The author insists that an attorney should be employed both as counsellor and as draftsman of the will. The only specimen will covers twenty-two pages and is designed for a special situation of a man of considerable means. The legal and extra-legal devices which may obviate the necessity of a will and administration are soft-pedaled. Short wills are dis-

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6. P. 205.

couraged and the prospective testator is urged to make a rather complicated settlement of his property. Perhaps something may be said for this in the case of a person of wealth. The reviewer's only real criticism is that little attention is given to the matter of the small estate. For example, there is no suggestion of the advisability of the man with minor children leaving everything to his trusted and capable spouse (if such she be) in order that the restrictions of guardianship may not hamper the family's economic readjustment upon death of the bread-winner. Possibly the author did not have in mind such small fry. But even one of the latter will have easy fun reading this book and planning for the disposition of his property if and when his ship comes in.

University of Missouri Law School THOMAS E. ATKINSON

AMERICAN CONSTITUTIONAL LAW. BY CHARLES W. GERSTENBERG. NEW YORK: PRENTICE HALL, INC., 1937. pp. xii, 742.

This is a serious attempt by the author and his publisher to produce as a classroom tool a book combining the virtues of both a text and a casebook on Constitutional Law, and to do this in compass sufficiently brief to meet the needs of the law student whose daylight hours are mainly occupied with other employment. Obviously this is a difficult task, but the attempt has more nearly succeeded than any other to which this writer's attention has been called.

The book is really two books in one, a textbook and a casebook. Of its 717 pages (exclusive of an appendix containing the constitution, and of a brief table of cases), 277 pages are devoted to a pretty accurate, though necessarily brief and summary, treatise on constitutional law, while the remaining 437 pages are given over to selected cases.

The textbook material is surprisingly good. Its brevity is partially compensated by the great mass of footnote material in smaller type, constituting on an average about one-half of each page. In this respect, Part I, containing the textbook material, is in striking contrast to Part II, containing the selected cases. Here note material is almost entirely wanting, and the student is left to discover related cases and historical background by reference to the author's treatment in Part I.

It is obvious that in a four-hundred-page casebook on so enormous a subject as constitutional law many whole topics had to be omitted and others treated with extreme brevity. For example, there is no chapter on the drafting and adopting of constitutions, state or national, and Chapter I, "Amendment of the Constitution," consists of but a single case (*United States v. Sprague*) and occupies but four pages of the casebook. Chapter II, "States and Territories," covering nine pages, embraces only two cases, *Coyle v. Smith* and *Balzac v. People of Porto Rico.*

In general, good judgment seems to have been used in the selection of cases. However, one is left to wonder how the student is to get any adequate idea of the extent to which the Interstate Commerce Commission may now control intrastate rates by reading the three-page extract from the Shreveport case given on pages 448-451 or footnote 38 on page 123 of the text. While the Transportation Act of

1920 is mentioned and the *C. B. & Q.* case cited, the statute is not cited nor is the substance of the case sufficiently set out to enable the student to grasp its real significance.

A fairly satisfactory table of contents is given, but there is no index, and the table of cases does not embrace the cases summarized in the text, the footnotes, or in other cases.

On the whole, the reviewer believes that it is the best work that he has seen for a brief course in Constitutional Law, where the class is largely composed of students who have little time for preparation and library study. Its defects are mainly those arising from its brevity, which in turn is an unavoidable concomitant of the part-time law school.

Southern Methodist University Law School C. S. Potts