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The Living Constitution

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THE LIVING CONSTITUTION*

Of the host of so-called "outlines" and other brief but comprehensive studies that have emerged within the last few years, the reviewer has found Professor McBain's *The Living Constitution* to be by far one of the most satisfying. One reads it with a secure feeling that the author, who is Ruggles Professor of Constitutional Law at Columbia University, is playing fair with his subject. The book lacks the displeasing dogmatism and air of finality which discredits so many of the briefer treatments in this field. No matter how enlightened, every person who reads it will come away refreshed. If not informing to a limited few, it will nevertheless prove stimulating. The book is "adequately brief." Such a scholarly work, although phrased in simple and nontechnical language, is seldom to be found within such a limited compass.

The book is one of the titles in The Workers' Bookshelf, and in the more recently announced The World Today Bookshelf under the editorial supervision of Dr. Charles A. Beard. The series has been planned, in the words of the editors, "to meet the ever-increasing need for short, readable, yet scholarly books, at a moderate price, to provide both stimulus and information for the large and growing number of people interested in the meaning of the world they live in."

This pungent, thought-provoking exposition deals with such significant subjects, in order, as written constitutions, the federal system, bills of rights, the presidential system, checks and balances, the representative system, and judicial control. There is also a short conclusion, a limited bibliographical note, and an adequate index.

It would seem that *The Springfield Republican* has gone too far when it asserts that in *The Living Constitution*, Professor McBain has made "a significant contribution to contemporary political thought . . ." The contribution made is not so much one of materials, political ideas, or theories as one of method of treatment. The author proves himself a master at the too infrequently developed art of summarization and discreet selection. The ability to tear away the fallacies of tradition and misguided sentiment—to blow away the chaff of fiction and leave the kernel of reality—is present here in highly satisfactory measure. This concise and lucid, yet animated, method of treatment—the ability to go to the core of a series of comprehensive subjects quickly yet effectively—impresses the reviewer as Professor McBain's major contribution in the work under consideration.

The book is relatively free from technicalities. It is practical rather than theoretical. It is not a footnoted case study, yet

**The Living Constitution. A Consideration of the Realities and Legends of Our Fundamental Law.* By Howard Lee McBain. The MacMillan Company, New York. 1927. Pages vii, 284. Price \$1.50.

the reviewer ventures the assertion that it will prove more valuable for purposes of orientation than many of the highly documented treatises already available. The book is well written from a literary point of view. The language is clear and often frank, pungent, and highly descriptive, as, for example, at page 222, where Senator Borah is referred to as "our archisolationist, the trouble-making and diplomacy-bungling Chairman of the Senate Committee on Foreign Relations . . ."

Professor McBain delights in poking fun at many of our cherished notions of the Constitution and of government in general. Government is depicted as a human institution, subject to human changes and human frailties. Furthermore, the Constitution is by no means solely that written product of the Philadelphia Convention of 1787. The Constitution must be evaluated in the light of later precedents, usages, and interpretations. Mr. Elihu Root once alluded to "our invisible government,"—a thing quite separate and apart from the government of the Constitution. Professor McBain emphasizes this distinction and proceeds to tear away many of our popularly supported political fallacies and shibboleths. As the subtitle of the study might indicate, the author drives home clearly and forcefully, not to say frequently, the necessity of making a very real distinction between the realities and the legends of our fundamental law. As a result, neither the Constitution nor the government resting upon it can be expected to always run true to form.

It must not be understood for a moment that Dr. McBain would minimize the importance of respecting the Constitution. But he would not blindly deify it. He writes (p. 272) :

The constitution of the United States was not handed down on Mount Sinai by the Lord God of Hosts. It is not revealed law. It is no final cause. It is human means. The system of government which it provides can scarcely be read at all in the stately procession of its simple clauses. Yet its broad outlines are there sketched with deft strokes. Through long unfolding years it has been tried in the crucible of men's minds and hearts. It lacks alike perfection and perfectibility. But it has been found good—exceedingly good. It is not to be worshipped. But it is certainly to be respected. Nor is it to be lightly altered, even if that were possible.

Without dogmatically holding ours to be simply a government of laws and not of men, the author nevertheless argues that "no other people on earth is or ever has been governed under so many and such elaborate laws as we acquiesce and apparently rejoice in." And he continues that "none of us has reason to complain of a dearth of written rules for our governance. In point of number of rules ours is superlatively a government of laws."

The popularly accepted distinction between so-called flexible and rigid constitution, as determined by the ease or difficulty of the amending process, breaks down when viewed in the light of reality, contends Professor McBain. In proof of this point, it is shown that some of the constitutions, which from an examination of the process of amendment provided would appear to be

most rigid, have been most frequently amended. The flexibility and rigidity of constitutions "derive from factors that lie largely, if not wholly, outside the letter of the amending process."

Mr. McBain takes issue with those who hold that the expansion of governmental powers in this country has come principally through judicial interpretation of the Constitution. The expansion, on the other hand, has come largely through statutory elaboration by Congress, "particularly under the elastic commerce clause . . . The courts have merely followed where Congress has led; they have merely permitted what Congress has prescribed." As regards our federal system, the author feels there is no cause for alarm at the prevailing tendency toward centralization of power in the national government. The states continue to be the repository for such a great bulk of powers that federalism is not "vanishing or even weakening in any marked degree, despite the prevailing notion to the contrary."

The President is commonly looked upon as the Chief Executive of the nation. However, party and other developments have made of him a Chief Legislator rather than a Chief Executive, contends the author. The President's time is so taken up with functions relating to legislation that little time remains for him "to star as Chief Executive." Moreover, the electorate has shown such great interest in the legislative accomplishments of the administration that the President runs for reelection on his record as a legislator rather than an executive.

The British system comes in for comparison and evaluation in various connections throughout the work. For example, although the British Cabinet is legally thought of as being subject to instant dismissal by a dissatisfied House of Commons, yet actually "the Damoclean sword above its head is suspended not upon a hair but upon a chain forged of the stout steel links of machine politics." And again, "cabinet responsibility is a threadbare legal conceit. At most it bespeaks a relationship that blossoms into reality only in high emergency, only in last resort. A Prime Minister sprung from a substantial majority sits his seat as firmly and as irresponsibly as any President."

After discussing such subjects as bills of rights, checks and balances, and the representative system, Professor McBain launches his case in favor of judicial review. The power of the courts to declare laws of Congress unconstitutional is, he contends, "America's unique contribution to the science of politics." Speaking of the court's acquisition of the power to review congressional legislation, however, the author holds the word "usurpation" to be a misnomer. As regards five-to-four decisions, the Supreme Court comes in for some mild criticism. "Judges are wont to say, when about to wield the judicial axe, that this is an awful, a solemn, power, never to be exercised in case of doubt," and then proceed to declare the statute void by a vote of five to four! Nevertheless, the author stresses the importance of the so-called "judicial veto," and declares that this supremacy of the Supreme Court "is the capstone feature of the

entire system" (p. 237), although some readers may experience difficulty in the light of a similar statement expressed at page 7 that the *national constitution* constitutes "the capstone of our entire system or scheme of government."

It is needless to go farther other than to say that the student who wishes to read of the relatively modern developments of padlock practise, prohibition searches and seizures, government by injunction, contempt of court, the recall of judicial decisions, and a number of other timely subjects will find here a critical, brief, and satisfactory treatment, based directly upon the existing facts and surprisingly free of bias.

The book carries an appended announcement of the place and purpose of The Workers' Bookshelf which is perhaps a bit too ambitious on the part of the editors. It should also be noted in this connection that Professor McBain is referred to at what would be page 287, if numbered, as Ruggles Professor of *International Law* at Columbia University rather than of Constitutional Law. By and large, however, the reviewer has nothing but praise for this effective, significant product of Professor McBain's mind and pen.

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