Volume 40 | Issue 1 Article 23

December 1933

Government by Judiciary

Jeff B. Fordham
West Virginia University College of Law

mended, as aiding in the complete treatment of the point under discussion. There is no index to the book, but due to the complete treatment of the material therein contained in the Table of Contens the lack of one is not felt.

It is believed that this casebook will prove not only of value to law students as a means of instruction to them, but also to the attorney in general practice. An attorney using the book in his practice will have to note the caution given by the author in the preface, — that all the cases in the book are not the last authority on the particular point for which cited. With the aid of a good citator this difficulty is easily overcome, and the assistance upon questions of criminal procedure to be derived from the use of the cases in this volume will greatly outweigh that small drawback.

It is to be regretted that occasionally one has difficulty in making out a line or two upon a reading of the cases and of the notes, but this seems to be an inherent difficulty in turning out a book by the method used in presenting this one to the public, and in no place is the trouble so pronounced that it prevents one from using the book to good advantage.

The collection of law in this casebook upon criminal procedure in West Virginia is so complete and so excellent that the interested public may well look forward to a similarly complete volume, by the same author, upon the criminal law, — as distinguished from the law of criminal procedure, — of the state.

—CHARLES P. WILHELM.

Harvard Law School.

GOVERNMENT BY JUDICIARY. By Louis B. Boudin. New York: William Godwin, 1932. Two volumes. Pp. xvi, 583, 579.

The extent of the power exercised by American courts over political and constitutional questions is appreciated by a scant few of our citizens. One may venture to suggest that the average lawyer has reflected little upon this important element in our political life, which his profession has, partly as advocates and partly as judges, brought to its present stage. Whether judicial review of legislation and the position of dominance which it has given the courts under our constitutional system is or is not desirable is a problem of solemn significance to the electorate, about which it should be fully and correctly informed.

Judicial review has been quite active of late in West Virginia. Within the past eighteen months the West Virginia Supreme Court of Appeals has declared not less than nine acts unconstitutional.[1] At the present writing the state is facing a crisis as a result of the latest such decision.[2]

Mr. Boudin has come out boldly with the first comprehensive attack upon what he terms the "judicial power". He devotes two volumes to "proving" that we live under a constitution different not only from what the Framers intended but also from what Marshall said it was.[3] Despite this argumentative method[4] and an occasional inaccuracy[5] the work is something to be reckoned with by the student of our constitutional system. It is a bit too much for lay readers but one could expect little else in an analytical legal study. Although the author demonstrates his capacity for forceful, attractive expression, he has made the going difficult by his method of "proving" his point by extended quotations.[6] He develops his thesis by a more or less chronological study of United States Supreme Court cases. Early state precedents are considered along with colonial and English materials simply by way of brushing them aside as of no support to Marshall in *Marbury v. Madison.* This phase of the argument is elaborated in appendices to the first volume. Unquestionably the early state decisions are not strong authorities and did not, any more than *Marbury v. Madison,* establish the doctrine with all its modern implications, but the chief justice was obviously not bound by precedent in considering the existence of the power under the Federal Constitution, a new situation. Mr. Boudin exerts himself most strenuously to make it clear that *Marbury v. Madison* was in fact a complete Jeffersonian conquest over the Supreme Court and that the chief justice deliberately resorted to dictum to set out his theory of judicial review as a mere paper

[1] State *ex rel.* Baker v. County Court of Tyler County, 164 S. E. 515 (1932); Bedford Corp. v. Price, 166 S. E. 380 (1932); Moates v. Cook, 167 S. E. 137 (1932); Danielley v. Princeton, 167 S. E. 620 (1933); Milkint v. McNeeley, 169 S. E. 790 (1933); LaFollette v. Nelson, 170 S. E. 169 (1933); Stand v. Sill and See, Buckeye Savings and Loan Association v. Smith, Tax Amendment Cases (all not yet reported, 1933).

[2] Tax Amendment Cases (decided Sept. 19, 1933, rehearing denied Oct. 27, 1933).

[3] I, p. xi.

[4] Mr. Boudin has made a point in declaring in his introduction that there is no such thing as disinterested scientific work but that does not explain his failure, for example, to notice that constitutional decisions of which he approves are none the less exercises of the "judicial power".

[5] This has been sufficiently noticed by Wright, Book Review (1932) 45 HARV. L. REV. 1271.

[6] I, p. xiii.

threat to Jefferson and his party. Those familiar with the Warren and Beveridge treatments of the subject will find this an interesting, if not, to them, an acceptable, contrast.

One steeped in orthodox interpretations of our judicial and political history must certainly be disquieted by Mr. Boudin's startling capacity for finding influences in our national life no one else has noticed and his independent interpretations of events and historical movements. The author's independence in this behalf sometimes runs out of bounds, in fact. He tells us, for example, that the well-known case of *Sturges v. Crowninshield*[7] was what brought on the "Jacksonian Revolution" of 1828 and purports to sustain his point with an elaborate discussion of a remote phase of Kentucky history.[8]

Mr Boudin is not sufficiently critical of the authority of other writers or judges as to matters of fact or points of law where their conclusions fitted into his scheme of confounding the opposition.[9] The same is true in respect to his adoption of legal doctrines. Thus, though mercilessly analytical and realistic in his treatment of Supreme Court decisions which he disapproves, in criticizing *Gelpcke v. Dubuque*[10] he seizes eagerly upon the highly artificial notion that when a court overrules itself it does not change, and thus make, the law, but simply expounds what has been the law all the time.[11]

In treating the period 1837-1857, which he calls the period of confusion, Mr. Boudin finds the extension of the admiralty jurisdiction of the United States to inland waterways to be a beautiful refutation of the notion that the meaning of the Constitution is permanently and unalterably that which the framers put into it. The sample is in point but Mr. Boudin's conclusion that "practically, the meaning of the Constitution is that which the majority of the Supreme Court for the time being choose to give to it'"[12] is too broad. The author himself has made the significant point that one of the worst criticisms of judicial review is the fact that under *stare decisis* a ruling on a constitutional question

[7] 4 Wheat. 122 (1819).
[8] See c. xiii.
[9] The author calls John W. Davis the "official spokesman of the legal profession" in quoting Davis' presidential address before the American Bar Association as if to say that Davis was speaking the view of the whole American bar. See II, p. 23.
[10] 1 Wall. 175, 17 L. ed. 519 (1864).
[11] II, p. 350.
[12] I, p. 463.

becomes in most cases irrevocably imbedded in the Constitution.[13] This means that Mr. Boudin would have been more correct had he substituted the word "potentially" for "practically" in the above-quoted statement. He ignores, moreover, the practical fact that in the extension of federal admiralty jurisdiction the court was simply accepting an extension that Congress had already made and the still more significant point that it is only in the borderline cases, apart from such exceptional matters as due process clauses, that the court even passes upon constitutional questions. The notion that on occasion the court has given the Constitution a different meaning than the Framers is, however, not to be denied. The author makes this point again, of course, in discussing the due process clauses.

The *Dred Scott* case, which is treated at great length, is labeled the turning point in the development of the judicial power. Mr. Boudin's position is that up to that time the only basis for the judicial power was the notion that a legislative act which Congress had no power under the Constitution to enact was a nullity. That case, he says, was the first in which the Supreme Court exercised the power of judicial review as we know it to-day. It is true that Chief Justice Taney resorted to the due process clause to declare invalid the Missouri Compromise but the author's conclusion that this set the style for subsequent cases is little more than an ingenious guess because, as he says himself, the case being in popular disfavor was little cited.

The second volume is devoted largely to a highly critical dis section of the better known constitutional decisions of the Cour since the *Dred Scott* case. The author is at his best in his analyse. of these cases. He has not failed to point out weaknesses, not for the first time in most instances, however, both in the theory and in the exercise of judicial review. This treatment is excellent as far as it goes but is inadequate to the extent that it leaves the reader without any enlightenment upon what ought to be done about the situation. Doubtless the author would have us embrace the Jacksonian notion that each department of the government must settle constitutional questions for itself, leaving it to the voters to provide checks upon abuse of power. But not even this much is clearly articulated. Mr. Boudin, moreover, fails to give any separate consideration to the problem of federal review of

[13] See esp. II, p. 512.

state legislation, which involves the whole great problem of allocation of powers under our federal system.

Thus, while the work is an extremely valuable criticism of the "judicial power", the difficult assignment of making out a case for some positive adjustment in our system which will exclude or modify judicial review remains to be done.

—JEFF B. FORDHAM.

West Virginia University.

A HISTORY OF WEST VIRGINIA. By Charles Henry Ambler. New York, N. Y.: Prentice-Hall, Inc. 1933. Pp. 622.

A few decades ago, it was almost impossible for one to obtain precise information as to the settlement and growth of West Virginia. In more recent times, a steady flow of literature has appeared, with the publication of "scores of historical monographs and papers, together with numerous source materials," — which, as the author explains in his preface, has made possible and desirable a new history of the state. Dr. Ambler has succeeded very well in describing the main features of its progress, both in the early past and of late years, without becoming involved in intricacies of detail that might serve to confuse or district attention from the broad lines of West Virginia's development. If the scholar seeks further enlightenment on any of the manifold phases of the subject, the comprehensive and thorough working bibliography will suffice for any ordinary research.

The characteristics of a book, most important to the reader in this day and age, are interest and clarity. In both, the present volume meets the requisite standard. It is intended to be serviceable both to historian and to layman, — a perilous project for any author. Yet there is the presentation of a well-balanced picture, comprising in ample fashion the entire period from the aborigines down to the legislative session of 1933. Institutional beginnings, in "Tidewater" Virginia as well as in Allegheny Highland, are clearly sketched. One finds an outline of political and economic life, in all its social background, rather than simply a bare collection of events and personalities.

More specifically, customs and environment of the people are described in vivid style, whether the period be pioneer or post-