December 1927

The Living Constitution

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Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol34/iss1/26

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BOOK REVIEW


Professor McBain’s book is an attempt to state briefly and realistically for the benefit of the intelligent man who is not a lawyer just what our constitution is. The worship of the constitution in the last few years has become somewhat of a religious festival. Civic and uplift organizations have united on constitution day to pay their respects to this venerable document in words which are somewhat vague but nevertheless mouth-filling and sonorous. A knowledge of law, government, or constitutions in general has not been a requisite for comment on the United States Constitution. High school students have been urged to contribute their ideas on this document by offers of lucrative prizes and public acclaim to the one who presents the most analytical essay. In such a contest a knowledge of law and government or political science has been a distinct handicap. The Constitution of the United States has become in the popular mind a mystical religious symbol.

Since the above represents the prevailing state of mind concerning the constitution, Professor McBain’s book comes at a very opportune time. It is based on a sound conception of the function of the Constitution and discusses the Bill of Rights, the Federal System, the Presidential System, the System of Checks and Balances, and the Representative System, briefly but adequately.

In the first chapter on the written Constitution Professor McBain distinguishes between the American and the British Constitutions on the familiar ground that the British Constitution is unwritten. He states however, that the prevailing idea that the unwritten British Constitution is more flexible than the rigid written American Constitution, is not based on fact; that the American Constitution has been much more easily amended, as for example in the matter of the prohibition amendment than the British Constitution was in
the matter of woman's suffrage or changing the rotten borough system of England. He states that it has taken much more agitation and delay to change the unwritten Constitution than the written American Constitution.

We venture a respectful dissent from Mr. McBain's analysis here. While the phrase "unwritten constitution" has behind it the very respectable authority of Bagehot and Lord Brice, nevertheless, we are convinced that no such thing as an unwritten constitution exists. If it can be said that the body of customs, usages and precedents which make the form of a government, constitutes a constitution, then it follows that no government was ever without a constitution and that the Indian tribes had as rigid and unflexible written constitution as the British government has today. It further follows that America has two constitutions, one written, consisting of the constitution amendments, and the Supreme Court decisions, and another unwritten, constituting the vast body of customs and usages which Congress could change but refuses to. It might be said to be part of our unwritten constitution that senators should wear trousers due to the fact that it would require almost a revolution to pass a law requiring them to wear pajamas at meetings of the Senate.

In his analysis of the federal system, Mr. McBain speaks of the encroachment on the states rights through the power of Congress over interstate commerce. He dissents from the decision upholding the Reed bone-dry law of 1917 on what seems to us the sound theory that states such as New York, which do not desire to enforce any prohibition law are left completely unfettered, yet states which desire to pass a prohibition law of a less rigid character are dictated to by Congress in the manner of the law which they may pass. He criticises the further indirect encroachment on states authority created by acts for the improvement of agriculture, education, road-building, public health, and so forth, and by federal aid projects.

On his chapter on the Bill of Rights he comments on the decisions regarding searches and seizures under the prohibition law. If, he states, the Supreme Court had held that the motor car might upon probable cause, though without a warrant, be stopped and searched there would
have been no such protest as occurred over the granting of an unlimited right to search motor cars without a warrant. He also points out that the so-called padlock practice of enforcing the prohibition act actually results in compelling the defendant to default in a civil action by virtue of a threat of criminal prosecution and that this is the real reason for the success of these padlock cases. In other words, out of fear of the results of criminal prosecution the offender is compelled to barter away his constitutional right. The author thinks this is just ground for complaint.

The book is clear, and while it discusses the various aspects of the Constitution very briefly, nevertheless it is comprehensive. It fills a very needed place in the bibliography of constitutional law.

—T. W. A.