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The Need for Constitutional Reform (Book Review)

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statutes making it a capital offense to steal a pair of breeches, but a statute cannot constrain a jury to pronounce unjustly the irretrievable judgment.

We recall a celebrated case at Pevensey: * * *

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THE NEED FOR CONSTITUTIONAL REFORM. By William Yandell Elliott. New York: Whittlesey House, McGraw-Hill Book Co., Inc., 1935, pp. xi, 286.

Thanks are due to Prof. Elliott for defining with such clarity and directness the major political problem which confronts us. The complexities and demands of an industrialized civilization have overwhelmed a governmental system fashioned by a simple society in accordance with ideas that were derived from an even earlier and more primitive economy. With force and particularity, Prof. Elliott establishes the inadequacy of our political machinery, its inability successfully to order and direct the bewildering forces of modern life. There is clearly a need for constitutional reform.

But, if Prof. Elliott's clinical findings are accurate, his diagnosis lacks the penetration one may expect from him and the remedies which he prescribes are far from enough to effect a cure. For him the chief vice is patronage. While one may readily concede that this is a vexatious evil, it scarcely deserves the major role ascribed to it. Even the complete eradication of patronage and the firm establishment of both appointments and promotions on the basis of merit will not take us far towards a solution of our problem. Patronage, rather than being a prime cause, is itself only a resultant of the operation of the hidden forces which have brought into existence the powerful party machines that dominate our political life and bend public officers to their will. A thorough understanding of the character and workings of these forces, to be gained only by searching inquiry, is preliminary to any effort at reform.

Nor can I subscribe to the criticism of our legislatures and to the doctrine that salvation lies in the elevation of the executive. I retain a great regard for our legislatures. It is difficult for me to see how we can preserve political democracy without making sure that the formulation of major policy shall continue in the hands of representative legislative bodies. Before we pin our faith altogether to the executive, let us remember the blunders that we have witnessed in that department. There is nothing in recent administrations to inspire any great confidence either in executive capability or in its wisdom. The major mistakes of recent régimes may be attributed to executive policy rather than to a Congress which has ofttimes yielded reluctantly to the demands of insistent administrative officers. Much that has been written and said to discredit our legislatures comes from sources that are too obviously interested to be swallowed whole.

Rather than subordinating the legislative branch to the executive, we would do better to integrate the two. The check and balance system of which, curiously enough, we are so proud, is far more responsible for inefficiency and

impotence in the conduct of the public business than is patronage. The time will soon come when it must give way before the demand for public authority that can act promptly and decisively.

Prof. Elliott recognizes the important role which is played by groups united by a common interest and that the needs of such groups must be reflected in public policy. It is a pity, therefore, that he did not direct his talents to a study of the means for permitting organized groups direct participation in governmental processes without need of recourse to insidious lobbying. A great many of the shortcomings of our legislators are due not to any perversity but simply to the fact that it has become physically impossible for them to represent their constituents properly. Within almost any legislative district there is to be found every variety of economic and social interest, ofttimes in sharpest conflict on every important issue. Just how can the representative speak for these divergent groups in the legislative halls? Perhaps the time has come to re-examine the whole structure of our representative institutions, resting as they do on a geographic division of our people. That may have served in an earlier day when the bulk of the population in any given area was fairly uniform in economic interest and, therefore, in fundamental outlook. It is questionable whether such a division has validity in an industrial community. A system of representation fitted to the actualities of present-day life would make government a more responsive social instrument and should go far to eradicate the surreptitious pressure by special groups of which the author so justly complains.

So, too, Prof. Elliott realizes that modern conditions require that control over social policy be taken from the courts. Yet his proposal to have the Supreme Court declare laws unconstitutional only by a two-thirds vote would not accomplish the result. It would still mean that every legislative and administrative act would have to be submitted to judicial scrutiny before there could be assurance of validity. Judicial supremacy was accepted in this country because it insured maximum protection of individual freedom and private property in answer to the requirements of a young people eager to exploit the resources of a virgin continent. Under modern conditions it is fast becoming an anomaly and may soon prove to be more of a hindrance than an aid. Its continuance in our constitutional system will stand in the way of developing a government capable of dealing adequately with the complexities of our present society. It will undoubtedly come hard, but the necessities of our changed life will compel a sharp restriction on the scope of judicial review.

The major proposal advanced by Prof. Elliott is that the states as we now have them be abolished and that in their place the country be divided into a few large administrative regions. Such a program has much to justify it in economic fact. Yet we cannot wait for a solution of the problems that are pressing until so startling a change has been effected. Were he to attempt to translate his proposal into effective law, Prof. Elliott would find more than the office holders of the several states arrayed in opposition. I doubt that any considerable body of public opinion is prepared for the destruction of our states.

In fact, I do not believe that there is immediate chance of any fundamental reform through constitutional amendment. For reasons that are not quite clear, the temper of the American people seems set against it, as witness the

difficulties encountered by the child labor amendment. Any movement for constitutional change would only divert our energies from the immediate tasks for many years to come.

The students of our political system, it seems to me, should undertake the finding of a way whereby, under existing constitutional forms and in line with accepted judicial precedent, it would be possible to integrate national and state authority in the furtherance of a broad program of social control and reform. Little has as yet been done on this problem. I am satisfied that with thought and patience it can be solved.

Prof. Elliott's book may well prove to be the needed stimulus to the making of the effort. It is a challenge and a call to action.

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LAW AND THE LAWYERS. By Edward Stevens Robinson. New York: The Macmillan Company, 1935, pp. xi, 348.

In Dean Pound's seminar on jurisprudence at the Harvard Law School, we used to talk a good deal about the utilization of the sciences in the development of a sound jurisprudence. My recollection is dimmed by the passing years, but I have the impression that we agreed that the most important was the science of economics. The thesis, however, of the present volume is that it is "a fundamental principle of the new philosophy of law to recognize that every important legal problem is at bottom a psychological problem and that every one of the many traditions about human nature which are to be found in legal learning needs to be gone over from the standpoint of modern psychological knowledge." This view, however, is not quite as remarkable in a book about law written by a psychologist as it would have been in a psychological analysis of the law written by a lawyer.

We think that the philosophy of the law ought to be descriptive in that it ought to tell how law is made. The practical man, quoted by the author, who wanted to know whether the author was talking "about how judges ought to think or * * * simply speculating about how they do think," had raised a very serious and important question which must be answered before the field of jurisprudence is definitely delimited. We are of opinion that jurisprudence must tell us how judges do think, how decisions are reached, how statutes are made and how administrative acts are determined. The possibilities are not infinite and can even be described within the short compass of a book review.

There are still among us the naive who believe that law consists of a fixed body of rules and principles upon which judges, legislators and administrative tribunals draw in making decisions. This is the philosophy of many laymen unequipped with a technical knowledge of the law. It is the philosophy which many law students in law schools share, and who do not hesitate to articulate their disappointment as the various courses of study unfold before them.