THE COURT AND THE CONSTITUTION

IN *The Warren Revolution* (Arlington House, $7), L. Brent Bozell has written a tough and knotty book that challenges all our preconceptions, whether radical or conservative, about the place of the Supreme Court in the division of the powers. I found it enormously stimulating and enormously unsettling. If Mr. Bozell is right in his contention that "judicial review" of legislative acts was no part of the intention of the Founding Fathers who wrote the Constitution, then it follows that the Warren Court has usurped some dangerous powers. In such case, we live under a judicial tyranny.

A conservative or a libertarian, looking at the Warren Court's decisions alone, will naturally be inclined to applaud Mr. Bozell's thesis. What business have the judges telling the states how to run themselves? But, projecting Mr. Bozell's thinking back into the Rooseveltian Thirties, when Congress was busy passing some legislation that seemed plainly unconstitutional on its face, what becomes of the libertarian's contention that the judges were a craven lot when they decided that "a switch in time saves nine"? What Mr. Bozell is saying is that the judges exceed their power whenever they challenge legislative supremacy, even in cases when the legislators go beyond the Constitution. Under this construction, all our criticism of the court for failing to put an end to New Deal excesses in the Nineteen Thirties becomes irrelevant. Personally, as a veteran of the older wars that pre-date Earl Warren, I find this hard to take.

In short, if Brent Bozell is right, the old contest between those who want the Supreme Court justices to be strict constructionists and those who want them to be loose constructionists

is entirely beside the point. They shouldn't be passing definitive judgment on what the legislators do at all.

Education and Religion

Waiving the desirability of correct judicial review for the moment, let us look at Mr. Bozell's reading of the historical record. The Warren Court has acted on the tradition that Charles Evans Hughes was right when he said, "We are under a Constitution, but the Constitution is what the judges say it is." Mr. Bozell spends some time on his proof, which seems irrefutable to me, that, under the Tenth (or States' Rights) Amendment, the individual states should be in full control of their educational establishments and their laws covering voter qualification, provided they maintain "a republican form of government."

The Congress that passed the Fourteenth Amendment, which guarantees "equal protection" of the laws to all U.S. citizens, had no manifest intention of interfering with local schools or of telling the states how they were to apportion the voting for both houses of their legislatures. In fact, the same Congress that voted for considering the Fourteenth Amendment also established schools in Washington "for the sole use of . . . colored children," which is an indication that the "equal protection" clause was only intended to cover such things as the enforcement of contracts, the right to sue, the right to give evidence, to inherit, purchase, lease, sell, hold, and convey property, and to enjoy security of person and ownership. This is not to say that segregated schools are a good thing; it is only to say that under the Tenth Amendment it is the business of the separate states to handle things not constitutionally assigned to the Federal authorities.

Disregarding the intention of Congress in proposing the Fourteenth Amendment, the Warren Court decided to make its own law about application of the equal protection clause to things that had been left to the states under the Tenth Amendment. It also translated the words, "Congress shall make no law respecting an establishment of religion," to mean that states should not make such laws, either. As for state sedition laws, the Warren Court argued in *Pennsylvania* v. *Nelson* that "Congress has intended to occupy the field of sedition" – and this despite the fact that the author of the Federal anticommunist act, Congressman Smith of Virginia, has said explicitly that he had no thought of interfering with

the right of the states to pass antisedition laws on their own.

Mr. Bozell reviews the Warren Court misinterpretation of the Constitution with evident distaste for the whole business. But his argument against judicial review would be the same even if Congress had passed some flagrantly unconstitutional laws and the Warren Court had then proceeded to throw them out.

No Final Arbiter

What Mr. Bozell contends is that there is no "final arbiter" of the Constitution. He goes deep into history to show that, far from inheriting a tradition of judicial review from Coke in England and from the experience of the colonies before the Revolution, we had, actually, absorbed the opposite idea of legislative supremacy. Even Coke, he says, devoted the best part of his career to expounding the right of the English parliament to make whatever laws it chose to make; his early championship of the Bonham case, which could be interpreted as putting the courts above parliament, was just a tantalizing aberration.

In the eleven years between the Declaration of Independence and the framing of the Constitution there were allegedly nine instances in which the courts of the states presumed to sit in judgment on what the local legislators had done. But when Mr. Bozell began to look into these instances in detail, he found that only one of them actually proves what the supporters of judicial review say of them all. In 1787, just when the Founders were about to meet in Philadelphia, a court in New Bern, North Carolina, actually proclaimed that one of North Carolina's legislative acts must "stand as abrogated." This, says Mr. Bozell, "was a form of words never before uttered from a judicial bench in America, or for that matter in the Anglo-Saxon world." When Richard Spaight, one of the North Carolina delegates to the Constitutional Convention, heard of the decision, he wrote home to denounce it as "usurpation of authority" and "contrary to the practise of all the world." So, if Spaight acquainted other delegates with the decision of the New Bern judges, he would hardly have helped prejudice them in favor of setting up a Supreme Court of the United States with full power to negate Congress. Mr. Bozell spends a lot of time on the meaning of the Supremacy Clause in the U.S. Constitution, and reaches the conclusion that the Founding Fathers intended to let the judges of the separate state courts be the guardians of the Constitution

in case of conflict between state and national laws.

In the Course of Time

If the Supreme Court was not intended as a "final arbiter," but merely as a court to render judgments in cases as they affected individual litigants, aren't we left with a final fuzziness that leaves the Bill of Rights at the mercy of legislators? Perhaps we are. But James Madison, among others, thought we could live with it. The authors of the *Federalist Papers* thought that the natural processes of tension and competition among the various public authorities would finally settle things. If Congress were to pass bad or unconstitutional laws, it would be finally disciplined by the people. Or the courts might simply refuse to punish someone who had been victimized by an unconstitutional act, and Congress would be forced to reconsider its own behavior. Out of the tensions imposed by the workings of checks and balances, out of the stresses, strains, rivalries, and competitions of the consensus society, a "final" decision would emerge.

Was Madison naive in supposing this? Is Mr. Bozell naive in following Madison? Well, suppose that the Supreme Court had not forced the integration issue. Isn't it likely that the individual states – yes, even Alabama and Mississippi – would have found their way to recognizing the brotherhood of man without being told they must do so with all deliberate speed? Mr. Bozell says that in a consensus society some things had best be left to the "flexibility of the fluid constitution," which allows "our various governmental structures to absorb and reflect the diverse shifts in community consensus that are going on down below." And the question he finally asks is "whether the Warren Revolution is in the best interests of the American commonwealth, and, if not, what weapons are available for the Counter-Revolution?" ◈

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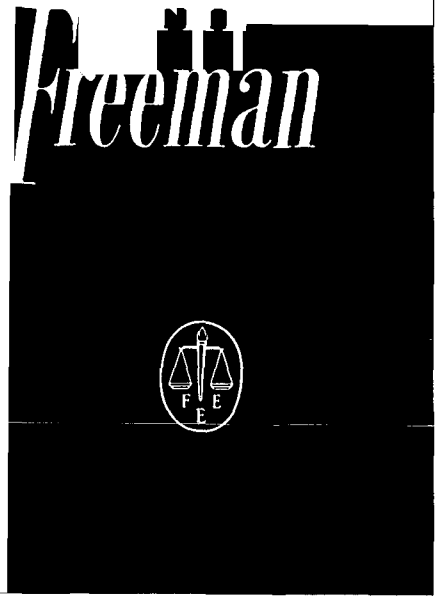

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