and monopoly are interchangeable terms—or rather, that monopoly is what results from unfair competition, and that "normal methods of business development" will never produce monopoly or anything dangerously resembling it. Finally, though he is nowhere explicit about it, by "normal" methods Mr. Wickersham seems to intend Manchester methods on their good behavior—Manchesterism developing a cop-consciousness. The "legal" side of these subjects—meaning by this the author's reviews of court decisions, and of the series of decrees entered in the trust cases—Mr. Wickersham has handled interestingly and with the competence born of his own distinguished share in the great prosecutions he discusses.

P. S. M.

The Judicial Veto

The Judicial Veto, by Horace A. Davis, Boston: Houghton, Mifflin Co. $1.00 net.

THE majority of writers nowadays approach the subject of judicial review either as critics or apologists. Mr. Davis blends both capacities. For while in his opening chapter he administers the conventional verbal castigations to the court for the Dartmouth College decision and *Lochner v. N.Y.,* in the ensuing chapter he emerges a true-blue conservative, holding that the courts are not only "competent to construe our constitutions" but that "they are the best tribunals we could devise for the purpose" (p. 32). But just because this is so, just because judicial review is so worth saving, it is necessary, he urges, to improve the method by which the constitutional touchstone is applied. "The courts have always prided themselves on the fact that their annulment of legislation is merely an incident of their decision of a case before them for adjudication. No method of reviewing legislation could possibly be less correct on principle and less an object of pride" (p. 24). For one thing, lawsuits are not carried on with a view to establishing correct constitutional principles, but to further certain very immediate objects of the parties to them. Again, the procedure in such cases often prevents the court from learning the real premises upon which the legislature has acted, with the result that the judges have recourse to preconceived ideas and maxims. Finally, the interest most at stake, that of the public, if not entirely ignored, is reduced to "a matter of incidental argument" (pp. 24-7). The result is "an intolerable political situation" (Pref.) for which a remedy must be devised; and this remedy must take cognizance of the fact that "the state is as much interested in the annulment of a law as in its enactment" (p. 31).

What then, is Mr. Davis' remedy? It exhibits the following features: first, that a statute should be treated as law till declared void; secondly, that immediately the constitutional question is raised, it should be certified to the highest court of the state; thirdly, that at the trial of the constitutional question, members of the legislature should be allowed to be present and to address the court; fourthly, that when a statute has been once declared void the state should submit to be cast in damages for the injuries which private persons have suffered from its operation; fifthly, that no statute should be overturned except by a substantially unanimous bench (p. 33).

Apparently the most important feature of this scheme in its author's estimation is the fourth, which is based on the supposition that judges are most reluctant to overturn [illegible] the consequence of their doing so is to disadvantage themselves. New York courts have overturned twenty-seven per cent of all statutes reviewed by them, of the tax measures which they have reviewed they have disallowed but seven per cent. The phenomenon is striking, but it is more than doubtful whether Mr. Davis has hit on the correct explanation of it. The majority of statutes annulled in recent years have succumbed to the rather vague test of "due process of law." But in the case of taxation measures, the primary requirement of due process, which is representation, is secured by the mere existence of the legislature. Furthermore, while a court might be reluctant to hamper the state in the collection of funds necessary to keep government going, it does not at all follow that it would be similarly reluctant to assess damages against it.

But, waiving these questions, let us consider the remedy itself. It appears to me to be for the most part quite useless. To begin with, it is apparently confined to cases which are brought up under the state constitution, to those cases, in other words, in which a decision adverse to the power of the state is readily remedied by constitutional amendment. Again, in order to place the right of the individual to compensation by the state beyond peradventure in such cases as it was available, it would be necessary to repeal the Eleventh Amendment. But more important still is the fact that an infraction by the legislature of the most valuable personal rights would be unassessable in pecuniary terms. Finally, it is difficult to believe that a court would derive more enlightenment from an *enquête par tourbe,* such as Mr. Davis proposes, than from a well-drawn brief, such, for instance, as that which Mr. Brandeis, acting as *amicus curiae,* filed with such notable results in the case of *Muller v. Oregon.* Probably most of the benefits anticipated by Mr. Davis from his proposed reform could be secured more economically by resort to the system, already in vogue in several states, by which the legislature is permitted to consult the court beforehand as to the constitutionality of proposed measures. Where, however, the constitutional question is raised with reference to existing statutes, the suggestion that it be immediately certified to the highest court from the court of first instance might prove valuable. The proposed requirement of substantial unanimity before a statute can be annulled is already in force in Ohio.

The last two-thirds of his volume Mr. Davis devotes to a discussion of the question whether the forefathers intended that the Federal courts should have the right to pass upon the constitutionality of acts of Congress. In brief, his theory seems to be that this function was intended for the state courts, subject only to such review by the national Supreme Court as was in fact provided for by the twenty-fifth section of the Act of 1789. Pursuing this line, Mr. Davis concludes that those who voted for the Act of 1789, including several former members of the Philadelphia Convention, must be set down as opposed to the theory of a power inherent in the Federal courts to pass upon the validity of acts of Congress.

The thesis is untenable; not only did the cases covered by the twenty-fifth section of the Act of 1789 not exhaust, as Mr. Davis assumes, the category of cases "arising under this Constitution, the acts of Congress," and the national treaties, but even as to such cases as were embraced by it there was no constitutional reason why the judicial power of the United States might not have been, if Congress had so decreed, exercised originally instead of upon appeal from state courts. But if this argument from principles which were explicitly avowed at the time is unconvincing to Mr. Davis, let him turn to the contemporary debate in the

voicing the theory which he rejects, who, however, shortly afterward both spoke and voted for the Act of 1789.

At other points, too, Mr. Davis' argument is open to serious question, and especially is his handling of evidence calculated on occasion to evoke protest from a humane reviewer. Thus on page 54—to cite a single instance—Luther Martin of Maryland is quoted as follows: "Whether, therefore, any laws or regulations of the Congress . . . are contrary to or not warranted by the Constitution rests only with the judges who are appointed by Congress to determine; by whose determination every state must be bound." Plainly this testimony flies straight in the face of Mr. Davis' thesis. Nevertheless Mr. Davis claims it as so much grist to his mill, because, forsooth, Martin opposed the Constitution!

But, indeed, Mr. Davis seems finally to discard his own thesis. For on page 3, which was written after the essay just reviewed, he writes: "The fact seems to be that the judicial review of legislative action appealed to the people as a natural and convenient method of deciding apparent conflicts between the fundamental law as expressed in the written constitution and the occasional law as expressed in acts of Congress or of state legislatures." What clearer admission could one exact that the attack on judicial review on historical grounds has failed?

EDWARD S. CORWIN.

The Saturday Evening Post

A FRENCH savant, presumably ignorant of the price paid for the advertising pages in the *Saturday Evening Post,* might be the very critic to estimate its peculiar American contribution to international letters. His Parnassan detachment from our commercial life would make criticism possible. He would not be unprepared to find exotic if crude excellences. And there would be a certain humor in the contact of M. Jenesais, in his black-ribboned eye-glasses, with the A. B. Wenzelled and George Randolph Chestered school of fiction. We should like to reprint his well-enunciated article as it might have appeared in *Le Mercure de France.* Its careful phrasing could not be reproduced in English. But a rough translation of a few important paragraphs might be something like this:

"Emancipated from old-world literary aristocracy, a new genre school has arisen in America. But as in America the peasant class has almost vanished before the bourgeoise, so this genre school concerns itself with the life of the ordinary citizen, the overshadowing *businessman,* his wife, his sons, his daughters. So faithfully does it reproduce his concern over dollars and cents, his naïve affairs of the heart, his puritanism, his feverishly active but limited imagination, his abounding yet superficial good humor, his delight in argot, that it is scarcely exceeded as a revelation of a people by the peasant studies of Daudet or by the emanations of inbred, cloudy Russian pessimism in Turgenev or Dostoevsky.

"The subject matter is as broad as it is shallow. While no writer has penetrated to deep places of the soul, or perhaps even to the soul itself, the stories flash over characters in all parts of bourgeois life, from the climbers for purchasable social rank and the millionaire tradesmen and politicians, to Jewish clothing merchants and apprentices in mercantile offices. It is doubtful if in all this array there is one personality who has not something hate, there has grown up a new dominant motive—the bourgeois trading instinct.

"Romance is not lacking, but it is the romance of gaining vast fortunes at a stroke, or of moving in the specious glitter of electric signs and expensive cafés. Imagination of a high order is used in depicting picaresque commercial trickery, especially if it be on a large scale and involves advertising. We are turned out, bewildered, delighted and debauched, into a shifting market-place. Our depression at the vulgarity of the subject-matter is more than compensated by the cleverness of the writers. One is beguiled by the combination of grossness and esprit, by the style as of a slim-footed dancer of the American trot.

"After reading hundreds of these stories, the critic becomes eager to find the genius who was father to such a prevalent school. Surely it was a great man indeed who first had not only the cleverness to depict this life, but the heart to interpret it and the soul to criticize it! For in all these writers there is lacking the profound essence of genius. The spirit brooding over humanity, charming out its warm blossoms and night odors, revealing it by a devastating thunderbolt, pouring over it the healing of his rain, mocking it with a leaf-turning wind, scourging it with cold hail—what should not such a man do with these Americans?

"Nowhere occurred the precision combined with élàn which marks the style of the master. Nowhere was the half-concealed glint of satire in the eye. Robert Chambers, George Chester, Montague Glass, Ralph Paine—each has originated a medium of fiction; none has originated an idea or a philosophy.

"Can this be a school without a master? What a revolutionary, perhaps monstrous idea! The trouble with even a self-conscious school of writers is that it is too like a school of fish. Dexterous, full of flashes, spurting from one feeding ground to another, it nevertheless lacks dignity. These individuals are together because they could not be alone. Yet most schools have the justification that they sprang from artists. It is so—to paraphrase a great American—that mankind is enabled to hitch behind the wagon that is hitched to a star.

"Is it that these American writers represent the life of trade unconsciously, because they belong to it? Are they simply the taller cacti on the desert of shallow emotion, exemplifying, rather than interpreting their milieu? Truly a disturbing triumph for intellectual democracy! One hardly knows whether to call it literature at all. With such a flat and literal realism before us, even the most pessimistic of European writers seems hopeful on account of the nobility of the soul which stands apart and observes. Yet, with the Americans, the observing faculty may find its place in the mind of the reader. Just as we feel a charm in our un-selfconscious folk songs, reflecting the simplicity of the people, so in this more extensive simplicity they may forgive the glitter for the glamour, and laugh while they deplore.

"Nevertheless it is to be hoped, for the sake of the Americans themselves, that a virile school of writers will arise, who shall speak with their own voices. One would like to see through the eyes of genius the *Comédie Humaine* as it is in America. If all literature should be merely a depiction of the average by the average for the average, it would doubtless achieve a large circulation, but its creation would have little more function in the life of the ages than the amusing antics of a kitten chas-