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## Review of “Storm Over the Constitution,” By Irving Brant

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## Book Reviews

AMERICAN FAMILY LAWS, by *Chester G. Vernier*. Vol. III, Husband and Wife, pp. xxix, 684; Vol. IV, Parent and Child, pp. xxi, 491. California, the Stanford University Press, 1935, 1936.

In 1931 there appeared the first volume of Professor Vernier's projected five-volume work on American Family Laws. Devoted to the contract to marry and to marriage, it was followed a year later by Volume II which dealt with the law of divorce. The two volumes under review will be followed by a final one dealing with incompetents and dependents.

The later volumes follow the same admirable pattern as the original one, previously noted in these pages.<sup>1</sup> As a reference work, with its comprehensive treatment of statutes and its useful citations to the literature as well as to cases, it is uniquely valuable—the sort of thing without which adequate study of American law is impossible. Admirably clear in outline, the work is equally clear in its presentation of the material within each section. Brief textual treatments are followed by references and frequently by tabular presentation of the statutes. For the practitioner who wishes quick, accurate statement of the law of a particular jurisdiction the new volumes, like their predecessors, are by far the best tool available. For the scholar who seeks comparative material there is no substitute for Professor Vernier's work.

It is not alone in the provision of a reference tool, however, that Professor Vernier makes his contribution. His critical comments and constructive suggestions lend interest to his volumes as books to be read. They are the shrewd observations of a socially-minded lawyer rather than the products of sociological research. No legislator or planner of the family law of the future would wish to overlook them.

In short, Professor Vernier has performed a difficult, important, self-assigned task superlatively well. It is difficult to comment at length upon it because the work itself says the last word.

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STORM OVER THE CONSTITUTION, by *Irving Brant*, with an introduction by *Henry A. Wallace*. Indianapolis, the Bobbs-Merrill Company, 1936. Pp. 294.

American constitutional literature receives an important addition in Mr. Brant's book. The author develops the thesis—not entirely new but still far from widespread in its acceptance—that the Federal Government, the creation of Hamilton's statesmanship, must and can under the Constitution be harnessed to the service of Jefferson's democratic ideal. Such, indeed, has been the course of history since Jefferson signed the Louisiana Purchase, notwithstanding the steady opposition of the advocates of states' rights whom economic self-interest has successively projected on to the political scene. Confronted by twentieth-century economic problems which have called

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<sup>1</sup> Book Review (1932) 18 St. Louis L. Rev. 89.

forth an outburst of Federal legislation under the New Deal, the national government, however, finds itself face to face with Supreme Court decisions which cause "the powers of Congress to become narrower in constitutional theory than they had been at any time since the Articles of Confederation were in effect. In opposition to the majority of the Supreme Court, the author established the foundation of the New Federalism in the views of the Fathers and demonstrates in striking fashion the legislative character of the Court's constitutional "interpretation."

Mr. Brant has examined the constitutional debates and the writings of the Fathers afresh. He has discovered, as Warren and others did not, that the delegates of the small states to the Constitutional Convention, after winning equal representation in the Senate, did not continue their opposition to strong Federal powers. They became, on the contrary, ardent nationalists. Although the large-state delegations went through an opposite reversal of attitude, the disputes thereafter related to degrees of centralization of power, none of which even approximated the weak creation of later states' rights doctrine. With unanimity as to the meaning of the Constitution and with the opposition of only four intransigents as to policy, the framers believed, as Brant shows by quotation after quotation, that the taxing power, the spending power, and the power over interstate commerce were broad, complete, and superior to all conflicting state legislation or powers. The doctrine of "implied limitations upon the express powers" had not been thought of. In holding as it has recently, the Supreme Court, with whatever justification in the attitude of ratifiers and populace or in later policy, has misinterpreted the document which the Convention produced. Franklin Roosevelt and not Mr. Justice Roberts is the intellectual and spiritual heir of the Fathers in matters of government.

In tracing the course of Supreme Court decisions with the resultant narrowing of Federal powers, Mr. Brant is consistently accurate. Except for a slight over-statement in regard to the effect of the *Hoosac Mills* decision upon the bare spending power, one finds nothing at which to cavil. For lawyers as well as for laymen, the book supplies an excellent summary of the constitutional situation and a powerful argument for its correction. Its style is striking, but the author remains free from bitterness or unfairness.

The remedy, according to the author, lies in wiser constitutional interpretation by a more liberal Court. To bring about this result a self-conscious democracy "must consistently elect presidents who will appoint Supreme Court justices in sympathy with. . . the people's legitimate desires." This does not mean, as Mr. Brant is careful to point out, that the Court should be made up of progressives in the political or economic sense, but rather of justices who are liberal "in principle" even though at the same time, like Mr. Justice Holmes and Mr. Justice Stone, they happen to be conservatives. The point is that they must be willing to let the democracy have its way. This remedy for present ills, of course, is admirable if it is practicable. One question, however, whether the voters in presidential elections can be expected to keep a distant objective so clearly in mind. It is doubtful, moreover, whether the liberal "in principle" can always be

recognized even by the best-intentioned president, years in advance of his wielding the highest authority in the land. The triple hazard of failure on the part of the electorate, the president, or the appointee seems too great a risk to run in constructing a democratic system to function in the presence of the cataclysmic changes which the future probably holds in store. The process of constitutional amendment, which the author rejects as impracticable, seems necessary, not to correct the work of the Fathers, but to eliminate the frequent frustration of that work through judicial review of acts of Congress. A tribunal so far removed from the scene of action and so irresponsible politically as the Supreme Court simply cannot respond consistently to the need of the times. As the author himself says, "The quick and fierce political revolt of the people is a better protection against undue centralization of power than any 'thus-far-and-no-farther' uttered by a judge." In the long run there can be no other reliance. Those who look upon the Court as a protection against a fascist or communist dictatorship simply do not reckon with the forces that are at work in times of crisis.

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