

**THE DOCTRINE OF
JUDICIAL REVIEW: ITS
LEGAL AND HISTORICAL
BASIS AND OTHER ESSAYS**

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649563852

The Doctrine of Judicial Review: Its Legal and Historical Basis and Other Essays by Edward S. Corwin

Except for use in any review, the reproduction or utilisation of this work in whole or in part in any form by any electronic, mechanical or other means, now known or hereafter invented, including xerography, photocopying and recording, or in any information storage or retrieval system, is forbidden without the permission of the publisher, Trieste Publishing Pty Ltd, PO Box 1576 Collingwood, Victoria 3066 Australia.

All rights reserved.

Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

This book is sold subject to the condition that it shall not, by way of trade or otherwise, be lent, re-sold, hired out, or otherwise circulated without the publisher's prior consent in any form or binding or cover other than that in which it is published and without a similar condition including this condition being imposed on the subsequent purchaser.

www.triestepublishing.com

EDWARD S. CORWIN

**THE DOCTRINE OF
JUDICIAL REVIEW: ITS
LEGAL AND HISTORICAL
BASIS AND OTHER ESSAYS**

THE DOCTRINE OF JUDICIAL REVIEW

ITS LEGAL AND HISTORICAL BASIS
AND OTHER ESSAYS

BY

EDWARD S. CORWIN

Of the Department of History and Politics, Princeton University

*"The history of law must be a
history of Ideas."—MAITLAND*

PRINCETON UNIVERSITY PRESS
PRINCETON

LONDON: HUMPHREY MILFORD
OXFORD UNIVERSITY PRESS

1914

TO MY WIFE

PREFACE

In the preparation of another volume, not yet published, I have encountered a number of questions involving controversies important to the student of American Constitutional History, an extended consideration of which however in those pages I felt to be out place. The following studies present my conclusions with regard to these questions, and the grounds of them. In the principal essay, I have endeavored to present judicial review as the outcome of a view of *legislative* power which arose in consequence of the astonishing abuse of their powers by the early State legislatures but which was first appreciated for its full worth by the Convention that framed the Constitution of the United States. Incidentally I have, I trust, laid to rest that most inconclusive "explanation" of judicial review which dwells on the idea that a legislative measure contrary to the constitution is not law and never was. The alleged explanation totally ignores the crucial question, which is, *Why is it the judicial view of the constitution that legislative measures have to conform to?* The article on the Dred Scott Decision treats of the most dramatic episode in the history of judicial review, though one that is by no means the best illustrative of the spirit of the institution. The study entitled "We, the People," approaches the time-honored controversy over Secession and Nullification from what is shown to be, I submit,

the point of view of 1787. But the verdict arrived at with reference to the rights of the States in relation to the Constitution is not without import for some present-day issues, as is shown in the paper on Some Possibilities of Treaty-Making. The paper on the Pelatiah Webster Myth deals with a question of less practical significance, but yet one of real ethical importance. For if history has any function to perform it is that of endeavoring at least to make correct assessment of the motives and services of men.

In the preparation of this little volume I have become the debtor of Professor Evans Holbrook, editor of the Michigan Law Review, for valuable editorial assistance in putting the first study into final shape. My especial thanks are also due to Mr. Walter Cottrell of the Princeton University Library staff and Mr. B. A. Finney of the University of Michigan Library for numberless courtesies.

I should also take this occasion to point out to the reader that when the word "constitution" is capitalized in the following pages it refers to the national Constitution, but that at other times it refers to this or that State constitution or signifies constitution in the generic sense. The distinction becomes at times of some importance.

EDWARD S. CORWIN.

Ypsilanti, Michigan
Sept. 11, 1914

CONTENTS

	PAGE
I. MARBURY v. MADISON AND THE DOCTRINE OF JUDICIAL REVIEW.....	1
II. "WE, THE PEOPLE"	81
III. THE PELATIAH WEBSTER MYTH	111
IV. THE DRED SCOTT DECISION	129
V. SOME POSSIBILITIES IN THE WAY OF TREATY-MAKING	161

