Supreme Court and Supreme Law. Edited by Edmond Cahn. (Bloomington: Indiana University Press, 1954, pp. ix, 250. List of cases and index. $4.00.)

When one knows what a document says and means, then one may intelligently determine whether the document should be amended to conform with what one prefers that it say and mean. First, there must be power to amend. Second, of course, someone must determine the document's meaning. With respect to the power to amend, the United States Constitution provided for its own amendment. The picture remained to be completed, and, in 1803, Chief Justice John Marshall, in determining who should determine what the Constitution means, announced that the natural and intended instrument for this purpose was the Supreme Court. In *Marbury* v. *Madison,* John Marshall held that, since the Constitution did not warrant Congress' enacting a statute conferring upon the Supreme Court the authority to issue writs of mandamus to public officers, the statute so enacted was null and void. Thus did the Supreme Court, fourteen years after ratification of the Constitution, first assert its power of judicial review of the validity of acts of Congress.

This book is commemorative of that occasion. Coincidentally, the year 1953, when the portions of the volume were first assembled, was also the tercentennial of the first modern written constitution—Oliver Cromwell's Instrument of Government. Professor Edmond Cahn, the editor, professor of law at New York University, has collated and assembled in this book a series of short discussions, papers, and major articles delivered at a group of meetings at the New York University School of Law in 1953. The contributors are a distinguished lot of constitutional lawyers indeed, including, in addition to Professor Cahn, Professors Willard Hurst, formerly of the University of Wisconsin, now of New York University; Paul A. Freund, Fairchild professor of law, Harvard; John P. Frank, associate professor of law, Yale; Ralph F. Bischoff, professor of law and assistant dean, New York University School of Law; and also Charles P. Curtis, a member of the Massachusetts bar. The purpose of the writers was to study the effect of judicial review on American history since *Marbury* v. *Madison.* Specifically, the questions to be answered, according to the preface (p. viii), were: "What

practical, working differences does judicial review make in the contemporary American scene? Has the Supreme Court exercised its power to determine constitutionality too extensively or too narrowly, with wisdom or imprudently? By passing on the validity of laws and executive actions, in what directions does the Court turn the dynamic force of the Constitution?"

As a collective scholarly articulation of the one hundred years' history of judicial review, the book is excellent. However, no one remotely familiar with the problems of contemporary constitutional law will be surprised to find that the writers generally have difficulty assaying the effect of judicial review and that there is an undercurrent of dissatisfaction with some aspects of judicial review as it has sometimes been exercised. Professors Freund and Hurst seem most lenient and satisfied of all, the former excusing the Court (and blaming Congress) for the failure to enforce the civil rights guaranteed by the Civil War amendments, the latter urging that the Court's standing in the way of social legislation in the 1930's lasted only two years, which shows that the Court cannot long deny urgent demands of policy. Professor Frank is dissatisfied with the Court and its handling of civil liberties, and Professor Cahn and Curtis are dissatisfied that the Court has not done more to declare the "immanent component" in constitutional law. Actually the words "immanent law" were used only by Curtis but seem not dissimilar to the import of Professor Cahn's statements. The closest proximity to unanimity to be found in these essays is in the general consensus that the Court has failed to preserve basic liberties, and in the consensus that judicial review cannot be adequately evaluated in the absence of sufficient available factual information. Unanimity on the former is certainly a serious indictment of the Court after one hundred fifty years' experience; unanimity on the latter is certainly a serious indictment of legal scholarship and its persistent failure properly to delve into facts in order intelligently to evaluate the impact of a doctrine upon a people. Professor Hurst particularly laments this lack of factual information in the first footnote of his article in Chapter VI (pp. 216-217).

Professor Cahn's introductory essay, "An American Contribution," is a brilliant historical piece of work. Tracing the history and content of other written constitutions, he develops the thesis that the United States Constitution and

judicial review together have evolved a flexible instrument capable of molding itself to the changing currents from 1787 to 1953. Likewise, Professor Freund approvingly refers to the written constitutional provisions as being couched in "calculated generality," thus making for "pragmatic as against nominalistic judgements" (p. 87). *Marbury* v. *Madison* announced the supremacy of the judiciary, including the finality of the decision of the Supreme Court and the peculiar function of the Supreme Court as the instrument through which congressional enactments are tested against the Constitution as an image of the American culture. In concluding his essay, Professor Cahn correctly states (p. 25): "[*Marbury* v. *Madison*] introduced an unending colloquy between the Supreme Court and the people of the United States, in which the Court continually asserts, 'You live under a Constitution but the Constitution is what *we* say it is,' and the people incessantly reply, 'As long as your version of the Constitution enables us to live with pride in what *we* consider a free and just society, you may continue exercising this august, awesome, and altogether revocable authority."

Charles P. Curtis further carries out the thought of the Court as the mirror of the American scene, and alleges that whatever vagueness there is about present constitutional conceptions, it is due more to the Court's failings than to the founding fathers. Thus, he says, the Court has been inadequate to the task of defining properly the "immanent law" (a Whiteheadian term), which, to Curtis, is the consensus of Americana. The Court must search for this "immanent law," much as Savigny would have us search for our *Volksgeist.* In the face of the general assumption that the "immanent law" is strictly Anglo-American, Professor Cahn points out, possibly justifiably, a caveat that American society contains a "high proportion of individuals who do not share Anglo-Saxon origins" (p. 63).

Throughout the volume, one finds the contributors tacitly accepting the conception that Supreme Court decisions in the area of judicial review should be pragmatic, with due considerations to be given the consequences. This is particularly true in the remarks of Professors Freund and Frank, although Professor Bischoff registers some shock over the possibility that the Court has "succumbed to the flexible logic of the pragmatist, using legal concepts and precedent only as support for desired ends" (p. 79). If pragmatism has indeed taken

hold, this will not sit well with those who regard the written Constitution as itself containing all the fundamental legal principles, the search for which is the primary task of the Court and was, in the past, the key to the unaniminty of that bench.

The most serious criticisms of the Court may be found in the three short discussions immediately following Professor Cahn's introduction. They have to do with status to challenge constitutionality (Bischoff); political questions (Frank); and review of facts in constitutional cases (Freund). In addition, there seems to be a general feeling that the Court is amiss in denying to itself sufficient power to hear constitutional cases, or, after hearing, to decide them in the broadest sense. Such self-limitations as the insistence of an actual "case or controversy" in the traditional sense, narrow requirements of "standing to sue," the refusal to hear "political questions," development of the rule of the "presumption of constitutionality" of acts of Congress—all are deplored by many of the writers here. Professor Freund, however, favors the conventional lawsuit, and worries lest anything else would permit the Court to decide abstract questions rather than tangible legal problems.

The book is a mine-lode of ideas and is skillfully devised. Indeed, it may very well have an effect so far as working changes in the exercise of judicial review in the future. Certainly it can be said that the contributors to this volume and the Indiana University Press are to be congratulated on providing such a valuable addition to an important portion of our constitutional history.

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The Governors of Ohio. (Columbus: The Ohio Historical Society, 1954, pp. xi, 196. Illustrations. $3.00.)

Few states possess a handbook containing brief biographical sketches of all their governors. Such a reference guide, if properly compiled with an eye to completeness and objectivity, is an invaluable aid, not only to citizens generally, but also to librarians, newspapermen, business firms, and pupils and scholars. The Ohio Historical Society, carrying on its tradition of service, once again has made a worthwhile contribution with its collection of the lives of the governors of the Buckeye State.