BOOK REVIEWS

The Federal Courts and the Federal System. By Henry M. Hart, Jr., and Herbert Wechsler. Brooklyn: Foundation Press, 1953. Pp. lvii, 1445 (plus appendix 454 pp.). $11.00.

The book which turns up real gold in its area of the law is rare enough; those which go further, explore new veins, and present new ways of refining the precious metal are even rarer. This book is one of those latter few. With an inexorable drive toward meticulous and thorough understanding of their subject, the authors have produced a masterful contribution to the literature of the law and of law teaching.

They have wrought substantial changes in the subject generally known as "Federal Jurisdiction"—though more in orientation and depth than in scope.[1] The title is indicative of that shift. Departing from the usual pattern which focuses almost exclusively on the rules for entering and proceeding in the United States courts, this book explores "[t]he jurisdiction of courts in a federal system [as] an aspect of the distribution of power between the states and the federal government."[2] Except as relevant to this theme, federal procedure is turned back to the procedure courses. Brought into the foreground are the intertwined roles of national and state law in our federal system. The object of this book's study is, then, the going structure of our federalism: the choice of which law, national or state, is to govern at particular points in legal relations, the criteria by which that choice is to be made, and where power to make and enforce these choices is to be placed.[3] The lawyer has been aptly characterized an "expert in structure." Certainly there is no more proper grist for his university training than the operating institutions of federalism, with its often subtle, constantly shifting dispersion of power and discretion. For it is of such stuff that the buttresses of democracy are made.

The pattern of presentation has been changed, too, in a manner well signified by omission from the title of the usual prefatory "Cases and Concomitants on . . . ." In the pedagogic controversy over "text-problem" versus "case" methods, the authors have chosen what I would dub the "problem case-prob-

[1] This is particularly true if the limitations of a two- or three-hour course confine one to the "core" of the book: Chapters IV through VIII. (See p. xiii.) I have taught a two-semester-hour course almost entirely from that portion of this book and can testify to its essential self-sufficiency.

[2] P. xi.

[3] This last aspect necessarily involves the distribution of function and authority within our governments as well as problems of judicial administration, and these are treated as subordinate themes.

lem" approach. The book's development is by progression from problem area to problem area. At the heart of each is a principal case (or at most two). Following—significantly, in the same size type—is a compendious Note[4] (or occasionally two or even three) suggesting possible lines of analysis and marshaling the materials which may shed light on the problem. Though the collection of sources is quite comprehensive, the feeling of frustration engendered by a long list of naked citations is absent. The authors have been careful not to make a reference without at least some indication of what the source contains. As a result, the assemblage of material is of substantial aid to the analyst as well as the researcher.

The authors' proffered analyses are presented by series of thought-provoking questions. Consistently these queries raise the significant issues in the problem at hand. Since the field is a developing one, this is a very effective device for presenting it. But issues are not raised merely to be straddled. Most often the authors do have a specific position on the relevant issues and their questions suggest their approach. Indeed, it would seem impossible to achieve the incisiveness and depth here reached without pointed questions. Penetration requires momentum in a precise direction. A rifle is more piercing than a shotgun. It does call for better aim, but the authors' is on the whole excellent. One at times disagrees with them; in a book of this scope this is inevitable. But that in itself only adds to the stimulation and challenge.[5] And the dissenter will generally find that the sources and authorities on which he relies have also been preserved and displayed for ready access.

In only one area do the authors present articulate answers to questions: the power of Congress to limit the jurisdiction of federal courts.[6] The device employed here is essentially a full-blown Socratic dialogue (as distinguished from the incomplete ones in the other Notes)—though here the respondent is the wiser man! What emerges from the "conversation" is an incisive, yet extremely subtle, analysis of a difficult and significant area. Following behind the two speakers, the student is led along many an otherwise unblazed trail through what are too infrequently seen as contiguous fields, and returns with some penetrating insights into the structure and operation of our federal system and the role of the judiciary in it. Hopefully he acquires en route a wise distrust of the easy generalization from a particular decision.

In sum, then, this book comes a long way from the old conception of a casebook as a convenient substitute for the library's reports of selected cases. The

[4] As used in the book and in this review, the term "Note" refers to a comparatively extended treatment of a problem area. In a sense, each consists of a collection of what might elsewhere be considered separate notes.

[5] For a sample of the type of questions, and answers by one who takes a differing view from the authors, in the particular area considered, see the review of this book by Kurland, 67 Harv. L. Rev. 906 (1954).

[6] Pp. 312–40. This Note was published separately as Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953).

meat of this book is in its Notes. Together with the cases, they add up to a deep, thorough and comprehensive treatment of the field. The quantity and quality of scholarship invested here is huge; the analysis is of an order difficult to match anywhere. Yet the fact that all this has gone into a course-book of itself raises some questions.

To begin with, it may be argued that such thoroughness and depth make the book difficult for students. To this the authors demur, on the ground that "oversimplification is no service to advanced students."[7] I agree, though with some qualifications. For one thing, the students themselves must be brought to believe this. They are used to material which is simplified in greater or lesser degree. Considering the infinite depth and complexity of just about every part of law some glossing over is unavoidable; I for one doubt that law schools could (if they would) treat all their courses—or even all advanced ones—in full depth and richness. Probably every course has within it some areas that should be examined intensively, but it seems questionable, to me at least, whether this kind of treatment could be in constant use throughout. On the other hand, I have no doubt that some third-year electives should impel students to extend themselves, to develop their techniques of analysis in depth throughout a whole field. I have particularly in mind courses that cut across usual subject breakdowns in pursuit of deeper understanding of the operating structures of our law. In such studies especially, consistently thorough treatment may reveal a new dimension in the interrelation of seemingly disparate problems. Such an approach provides opportunity to achieve the refinement of previously acquired techniques and the development of new ones—matters too often neglected after the first year. The going institutions of federalism are to my mind excellent objects of such a sustained penetrating study. This book is a magnificent—and well-nigh indispensable—vehicle for such a course.

If there is a weakness in its pedagogy, it lies in another direction. The questions posed as to any problem vary in difficulty and significance: some may be answered fairly easily; others are calculated to open up long lines of thought. The student requires some guidance to let him know before class when the obvious answer is really just that—and when it is not. At times, the signs are clear. The very explicit titles heading each Note are generally quite helpful. But some further indications from the authors might not have been amiss. Considering the lucidity and economy of their "straight text" in those few areas where such treatment was used, perhaps a freer interlarding of textual statements is indicated. In any event, this difficulty is not a particularly substantial one (and can be alleviated by some advance word from the individual instructor); indeed, to some extent it seems to add to students' satisfaction when, on review, they comprehend more fully the pattern they had not wholly appreciated before.

The other objection based on presentation of the fruits of so much effort, both

[7] P. xv.

research and analytical, in course-book form has to me much more substance. That is, the format tends to hide the light under a bushel: since the comments and critique are not generally presented in a fully articulated form, they are less accessible to lawyers doing research on a problem. A partial answer to this, as far as this book is concerned, is simply that it just isn't quite so. Though the analysis is presented by way of question series, anyone who has sat through a "case-method" law class realizes how effectively ideas may be conveyed in that manner. Indeed, in a field like this one, where many of the basic questions are yet unresolved, that method has distinct virtues. I do know that when I referred several colleagues to this book as bearing on problems they had, their reactions were uniformly of a high degree of satisfaction.

What does remain of the objection to the form of publication is that the practicing bar is habituated to ignoring course-books. If that should happen to this book—if it found its way into wide professional use only as those who studied it in law school entered the practice—it would be a substantial loss both to the bar and to the development of the law in this area. The book was prepared with the practitioner in view, albeit somewhat secondarily.[8] The index and table of contents are substantially more elaborate than generally found in course-books and, though perhaps somewhat less detailed than those of a good treatise, should certainly prove adequate. The exertion of whatever extra effort might thus be involved will yield the researcher in its pages perhaps the two most important things he could demand: an introduction to the significant questions and available analyses in his area, with that perspective which a practicing lawyer rarely has time or detachment (though he may often have occasion) to develop; and a comprehensive collection of valuable leads into decisions, statutes and secondary sources. In short this would make an excellent desk book for any lawyer who has a significant amount of practice in federal courts or involving federal matters. Throughout the field of its coverage it is one of the best reference tools I know, and in some areas about the only one with any real thoroughness.[9]

In any event, if the argument about accessibility to the practicing bar is to be heeded, it means either that the authors should have produced both a text and a course-book, or else the former in preference to the latter. That the authors have not seen their way to do both may well be regretted. But if the choice must be in the alternative, I for one cannot quarrel with their election. The primary job of both authors is with their students, and a treatise is still not as satisfactory as a book like this for a searching kind of course. And who is to say to a teacher that the long-range influence of his work via his students is to be spurned for more immediate effect on current cases?

But all this notwithstanding, when one sees a product of this caliber, one

[8] P. xii, xv.

[9] For example, litigation against the United States Government, Chapter IX.

nevertheless hopes for its widest possible influence. That this may not be immediately realized is hardly a reflection on the book. The longing is rather a recognition of unusual merit. As to this book, such longing is most highly justified.

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McCarthy and His Enemies. By William F. Buckley, Jr., and L. Brent Bozell. Chicago: Henry Regnery Company, 1954. Pp. 413. $5.00.

This volume is the development of a theme expressed by Christopher Fry's mayor in *The Lady's Not for Burning*:[1]

> "That's enough!
> Terrible frivolity, terrible blasphemy,
> Awful unorthodoxy. I can't understand
> Anything that's being said. Fetch a constable.
> The woman's tongue clearly knows the flavour
> Of *spiritu maligno*. The man must be
> Drummed out of this town."

Buckley wrote another book which Regnery published.[2] This is more of the same.

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Law and Social Change in the U.S.S.R. By John N. Hazard. Published under the auspices of the London Institute of World Affairs. Toronto: The Carswell Company, Ltd., 1953. Pp. xxiv, 310. $4.50.

Soviet Law in Action. By Boris A. Konstantinovsky. Cambridge: Harvard University Press, 1953. Pp. x, 77. Paper, $1.50.

In all questions relating to the Soviet Union there are two preliminary questions: have you got information and how accurate is it? Direct information as to the policy of a law is always most difficult to come by in all autocratic governments, and of these not least in the Soviet Union. It has to be inferred from textbook statements of legal doctrine, from legislation and from the reports of decided cases. The peculiar difficulty with the Soviet Union lies in three circumstances: first, even such relatively innocuous information as that concerning law, even private law, is kept as far as possible from the outside world, and the interval before release seems to be increasing; secondly, some legislation is kept secret until it needs to be applied; and thirdly, the coverage of law reports is

[1] Page 26 (Oxford U. Press, 2d ed., rev., 1950).

[2] See Kurland, Book Review, 47 Nw. U. L. Rev. 408 (1952).