REVIEWS

CONSTITUTIONALISM AND THE CHANGING WORLD. Collected Papers by C. H. McIlwain. New York: The Macmillan Company, 1939. Pp. viii, 312.

IN this volume Professor McIlwain has gathered together a number of essays and addresses on a variety of subjects, all of which deal with some phase of constitutionalism or its history. There is a considerable range in the dates at which the papers were originally published. The essay on "The Tenure of English Judges" goes back to 1913. The two dealing with Magna Carta were published in 1914 and 1917 respectively, and to one of these the author has added a supplemental note referring to more recent works on the subject. Most of the essays, however, have appeared within the last five years. Their subject-matter is drawn in part from the history of the English constitution and in part from American history. In addition to the two essays on Magna Carta already mentioned, there are two that discuss phases of the controversy between Parliament and the King in the seventeenth century, one on the Massachusetts Charter of 1628–1629, and one entitled "The Fundamental Law behind the Constitution of the United States." Three of the papers have to do with the concept of sovereignty or its history; three deal with the present dilemmas of political liberalism. Taken as a whole, the volume abounds in that ripe historical scholarship which we have learned to expect in all that Professor McIlwain writes.

Though the subjects range over some six centuries of Anglo-American constitutional history and extend from historical interpretation to the analysis of abstractions such as "sovereignty" or "liberalism," the book has no lack of unity and makes no impression of diffusion. What holds it together is the unity of Professor McIlwain's interpretation of constitutional government, rooted in his understanding of its historical development, which he applies to his analysis of legal abstractions and which, he feels intensely, supplies a clue to the present conflict between liberty and despotism. The essential issue in this conflict, as Professor McIlwain conceives it, is between arbitrary or extra-legal power and authority defined by law. Against this conception he sets two fallacious views of constitutionalism: one, the belief that liberty can be secured by weak government or by hedging in the agencies of government with checks and balances; and the other, the belief that a government is liberal because it claims a vague mandate from "the people." The substance of constitutional government is the definition of powers by law. Within the limits thus set, the authority of a government ought to be supreme, for in no other way can it be either efficient or responsible. But where this authority derives from a constitution, there must be a line beyond which the acts of government become *ultra vires,* and the courts must possess a power to declare them so. Hence "judicial review, instead of being an American invention, is really as old as constitutionalism itself, and without it constitutionalism could never have been maintained" (p. 278). Where, as in England, judicial review does not exist as a legal institution, "there are

many fundamental rights of the subject that parliament in modern times has never dreamt of infringing and could only infringe at the cost of revolution" (pp. 279 *et seq.*).

It would, I think, be difficult to exaggerate the moral worth or the political wisdom implicit in this conception of constitutional government. From antiquity there has existed in the moral consciousness of the European peoples the conviction that power exerted through the forms of law is morally on a different plane from power that resides in brute force or in a ruler's personal will. Obedience to the one is felt to be compatible with the respect that a free man owes himself; subservience to the other is felt to be slavish. From the standpoint of a wise statecraft, also, it is clear that great discretionary power, especially when coupled with a government that is generally weak, is a standing threat to constitutionalism. The part played by the Emergency Decrees in the downfall of the Weimar Republic leaps to mind. In so far as Professor McIlwain's case rests upon ethical premises or grounds of political wisdom, it is a strong one.

Nevertheless, the argument on which Professor McIlwain overtly rests his case seems to me partly confused and partly irrelevant. This argument includes propositions about the nature of sovereignty which I take to be definitions, and also historical statements about constitutional theory and practice in the seventeenth century or earlier. In the first group is the proposition that authority is a different concept from power; the legal validity of an act is in a different universe of discourse from the force required to give it effect. It might equally well be added that both are different from the moral validity of an act or the political expedience of doing it. Now sovereignty is purely a legal concept; it "has no proper application beyond the domain of law" (p. 29). Professor McIlwain infers from this that the sovereign powers of government are conferred by law and must therefore exist within a framework of legal rules that make the government, and which consequently the government can neither make nor change (pp. 55, 73, 263). This part of the argument seems to be a formal deduction from a definition. To it Professor McIlwain adds his historical argument, showing that Bodin and many English writers before the first Civil War held some such view of constitutional government. The Crown and the Parliament are regarded as having a jurisdiction defined by the common law, but each is supreme in its rightful field. Hence there is no logical discrepancy between a power that is at once limited and supreme. The charges of "confusion" directed at Bodin are cast back by Professor McIlwain upon the heads of his critics, on Hobbes, on Whig and Tory, on the Austinians, and on most writers upon sovereignty.

So far as I have understood this argument, it seems to me to combine three positions which, for the sake of clearness, ought to be distinguished. In the first place, a definite delegation of legal authority, such as the theory of sovereignty contemplated, is not identical with the vaguer constitutional harmony upon which the earlier theorists had relied, and the presumption that they are identical really is a confusion. So long as the customary harmony within which King and Parliament had worked was intact, a constitutional theory such as Philip Hunton's was plausible; once the harmony

had broken down, it was merely futile, and some sort of change had to be made. It may well be true that a theory of sovereignty such as Hobbes's or Austin's was superficial, if it was supposed to cover all the social aspects of constitutional government. In so far as Professor McIlwain's argument implies this, he seems to me to be saying that law exists only in human societies that include ethical and political, as well as legal, relationships. Consequently, the delegation of authority, however fully it may be developed, will still leave many political relationships dependent upon the good will and intelligent cooperation of those who carry on a government. The legal supremacy of Parliament over the self-governing colonies is, as Professor McIlwain says, a transparent fiction (p. 32). But this, I should have supposed, is substantially what the political pluralists said. Why, then, the pluralist argument leads logically to anarchy (p. 58) while Professor McIlwain's argument does not, is something that I have not been able to follow. In any case there is something a little queer about the notion that "England's greatest contribution to politics in modern times" is a legal fiction.

In the second place, so long as the customary arrangements of a constitution are intact and the binding force of custom is not too seriously questioned, it is perhaps sufficient to describe a constitution as "a set of rules not made by the sovereign authority subsisting under that constitution." This means, however, that juristic analysis simply refuses to go behind the more important parts of customary law and the relationships between the organs of government that it supports. But does this cover the practice of modern states? He can hardly mean, for example, that there are clauses of the American constitution that the amending process cannot touch. A change in the constitution which would make the American government altogether unconstitutional in Professor McIlwain's sense might take place by acts that were legally unexceptionable. Consequently his conception of a *Rechtsstaat* is no guarantee whatever of the kind of political and ethical system that he admires. When he says that Englishmen have enjoyed fundamental rights that Parliament never dreamt of infringing, he is stepping quite outside his own principle that sovereignty is exclusively a juristic conception. Parliament had an undoubted legal authority to infringe the rights in question. If it was restrained by the fact that the cost would have been revolution, that is no juristic fact. Hobbes's absolutism does not imply that the sovereign has to be politically stupid.

Finally, Professor McIlwain passes very lightly over one outstanding characteristic of the constitutional theory of Bodin and his contemporaries: the fact that they all assumed the unquestionable validity of natural law. Their theories depended upon the conviction that there are unchangeable rules of justice and right which are binding alike upon sovereigns and subjects and which custom generally embodies and makes manifest. Professor McIlwain's argument would be philosophically more comprehensible if it included an avowed intention to revive, or perpetuate, this conviction. Substantially he does believe in natural law, and his position is untenable without it. But natural law was not, and cannot be, exclusively a juristic theory. It always existed on the boundary between jurisprudence and metaphysics. After the criticism to which it has been subjected by Hume and other modern

philosophers, it can hardly be put forward now as an unescapable pronouncement of the healthy human understanding, though Bodin and his contemporaries might have so regarded it. If Professor McIlwain believes, like Aristotle, that "Law is reason without passion" (p.74), he ought to recognize that this sentence summed up a whole system of logic and metaphysics which Aristotle thought that he could prove. It was certainly not a mere postulate of formal jurisprudence, like the proposition that force and authority belong to different universes of discourse. Nor is it the kind of proposition that can be proved by any amount of historical citation. There is of course no reason why any author should embark upon a metaphysical proof of natural law if he does not wish to do so, but if it is one of the premises of his argument he ought at least to avow it as a postulate. Professor McIlwain's argument is not really a deliverance of historical fact, as he seems to regard it; it is a deduction from a major premise that he never clearly states and never explicitly accepts.

GEORGE H. SABINE†

CASES ON BUSINESS ASSOCIATIONS — CORPORATIONS. Volume One. By E. Merrick Dodd, Jr. and Ralph J. Baker. Chicago: The Foundation Press, Inc., 1940. Pp. 1306. $6.50.

OVER ten years ago, William O. Douglas sounded the call for "a functional approach to the law of business associations."[1] Many have since labored in this vineyard, where virgin soil and skillful grafting techniques have produced a luxuriant growth. We have had courses and casebooks on Business Units, Business Organizations, Business Associations, Business Agencies. But the respectability of this labor was not established until 1934 when Business Organizations made its appearance in the Harvard curriculum.[2] The preliminary edition of Dodd and Baker's collection was published in that year under the title *Cases on Business Organizations*. After six years of further experiment and revision, the definitive edition has appeared as *Cases on Business Associations — Corporations*. Some readers may be curious as to the shift of title; the experience of this reviewer suggests that it may be traceable to the regrettable undergraduate tendency to refer to the course by the initial letters of its title.

The book has apparently been planned not only for the sequence of courses at Harvard but also for a single course on Business Corporations. Faced with the inevitable pressure for time, the editors have chosen to furnish materials for an intensive study of such "fundamental" topics as the formation of corporations, the distribution and exercise of corporate powers, *ultra*

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1. Douglas, *A Functional Approach to the Law of Business Associations* (1929) 23 ILL. L. REV. 693.

2. Respectability aside, courses in Business Organizations were given in the Yale Law School as early as 1928. [Ed.].

vires, directors' duties and their enforcement, and the creation, maintenance, increase and decrease of corporate capital. Matters such as preferred shares and the amendment of corporate charters have been relegated to a second volume. Similar treatment is meted out to the problem of promoters' profits, although the subject is briefly discussed in a "Note on Distinction between Liability of Holders of Watered Shares and of Promoters." Neither the *Old Dominion* cases nor any others on this problem have been included, although space is given to valuable SEC decisions under the Securities Act of 1933.

In the choice of evils in delimiting the scope of a first course in corporation law, I should prefer to make way for these omitted topics by a drastic cut of the 350 pages devoted to the chapters on "By Whom and How Corporations Act" and "The Scope of Corporate Activities." Brief attention may effectively be given to the tenure and powers of corporate officers, *ultra vires,* and contracts made by promoters in connection with analogous problems of the law of agency. Similarly, the study of *de facto* corporations may profitably be combined with that of partnership liability. Some experience with Steffen's *Cases on Agency,* in which these topics are included, suggests that this arrangement has important advantages in teaching.

It is only at a few points such as these that my preference is for more of a "business associations" arrangement. Many of the early disciples of Douglas have turned away from the thoroughgoing reshuffling of the law of agency, partnership, and corporations which was illustrated by his series on Business Units.

Dodd and Baker have developed a particularly fortunate arrangement of topics in several chapters. Thus, cases on directors' duties of care and loyalty are immediately followed by an excellent section on shareholder's suits and the inspection of corporate books. Even more unusual and attractive from a teaching standpoint is the chapter on corporate capital, including sections on subscriptions, watered stock, no-par shares, dividends, purchase of treasury shares, reduction of capital, and preemptive rights.

This chapter on corporate capital is preceded by a 40 page note on capital and surplus from the accounting point of view. The editors suggest that the students expose themselves to this note before and after the study of the cases in the chapter. The note is a skillful introduction to corporate accounting. My only question is whether it would not have been better to shield the student a little from the multiplicity of accounting opinion. At several points, views for which little can be said have been given as respectful attention as those for which there is substantial authority.

Perhaps the outstanding feature of the book is the large number of explanatory notes which have been included in the text. Almost 600 pages are devoted to these notes, which reflect the breadth of the authors' researches and the caution with which they formulate general statements. Nor does this total of pages include the countless footnotes interpolated in the cases. The first of the text notes is a 37 page summary of "The Evolution of the Business Corporation." This is by far the best brief historical treatment which has appeared. I wish it could be published in a form in which it would be easily available to all students of the subject.

The entire book bears witness to the years of work and the infinite care which have gone into its preparation. It is a book which will be useful to practitioners and which students should resist the temptation to sell. I prophesy that it will have many "adoptions"; and that in most schools it will become one of the principal working tools of instructors in corporation law.

WILBER G. KATZ†

THE COURSE OF AMERICAN DEMOCRATIC THOUGHT. AN INTELLECTUAL HISTORY SINCE 1815. By Ralph Henry Gabriel. New York: The Ronald Press Company. 1940. Pp. xi, 452. $4.00.

PROFESSOR Gabriel's book faithfully carries out the promise of its full title. It is indeed an intellectual history of the United States since 1815, though not a complete intellectual history, since it touches upon art, letters, learning, and the natural sciences only as they seem to form a part of "democratic thought." On the other hand, it is by no means merely a history of what is commonly called "political ideas" or "political philosophy"; nor is it exactly a history of the social sciences in the United States. It is, as Professor Gabriel makes clear at the outset, an account of what various kinds of men, from Emerson and Whitman to Thurman Arnold and Walter Lippmann, have held to be the meaning and promise of American life. It is a history of the *values* these men cherished — primarily, therefore, a history of ethical and political ideas—but so widely taken as to draw on almost every field with which the American mind has concerned itself: religion, politics, economics, law, literature, natural science.

For this ambitious task Professor Gabriel is well prepared. He has a useful familiarity with the various incomplete disciplines we call the social sciences, a familiarity which enables him to use with almost disconcerting freedom such technical terms as "in-group" and "marginal product." He is a trained historian, impelled by his profession to record without special pleading, without irony, without wise-cracking, what he finds to be facts. He is a contemporary, well aware that in human affairs the deed does not always follow logically from the word, and that therefore in intellectual history the influence of an idea cannot be deduced simply from an examination of its logical implications. Finally, he has gone directly to an extraordinarily wide variety of sources, read and digested the work of all sorts of men — philosophers, novelists, poets, prophets, scientists, professors, preachers, business men, judges, settlement workers. If only for this width of range, Professor Gabriel's book is uniquely valuable in the field of American intellectual history.

Professor Gabriel defines the basic tenets of American faith, the essentials of American democratic thought established at the beginning of the "Middle Period" of our national life, as: (1) the existence of a fundamental law of

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God or Nature, which underlies all the contradictions and variations of our experience of this world, and which by proper means we can discover and live up to; (2) the freedom of the individual in his attempt to find and live up to that law; (3) the philosophy of progress — *i.e.*, the belief that gradually these free individuals will approximate more and more closely in their lives the good as laid down in that fundamental law; (4) the destiny of the United States as a society leading the way for the rest of the world in the progressive attainment of democratic ends. Then, with a wealth of detailed reference to all kinds of specific Americans who have left record of their ideas, he traces the actual working out of this faith — its strengthening and reaffirmation in the Civil War, its adaptation to the new forces of Darwinian naturalism, the industrial revolution, the international anarchy which culminated in the Four Years' War, down to the contemporary challenge it faces in the rival systems of totalitarian social doctrines. Throughout, he sticks closely to concrete facts, tries always to relate ideas to actual living conditions, and avoids successfully the worst pitfall of the intellectual historian, the analysis of ideas *in vacuo*.

With so many and conflicting ideas and aspirations to handle, Professor Gabriel naturally has difficulty in tying them all together into a solid bundle. A few edges stick out now and then, but on the whole he manages to make his "American democratic thought" stretch out to cover them all. The book has a real and unforced unity. Chapter VIII, "The Pre-Sumter Symbolism of Democratic Faith," and Chapter XXX, "The New American Symbolism," seem of rather different scope from the rest of the work. In these chapters, Professor Gabriel deals, not with the ideas of specific thinkers, but with the symbols and rituals by which Americans have established a kind of secular communion in their ethico-political faith — with the flag, with the canonization of Washington and Lincoln, with the worship of the Declaration of Independence and the Constitution. This is pioneering work, for although social historians have dug up much of the material Professor Gabriel uses, no one has put it together as he has, to explain the actual workings in a democratic society of age-old habits of worship. There is so much meat in these chapters that one hopes Professor Gabriel will return to them, and expand them into a separate book on the place of such symbolism in the development of our society. His main point, that after the Civil War symbolic emphasis was shifted from Washington and the Declaration of Independence to Lincoln and the Constitution, is worth further elaboration.

Professor Gabriel is too good a historian — and, incidentally, he discusses clearly and briefly in his chapter on Turner and Henry Adams the part of "scientific" history in American thought — to make his book a plea for any single interpretation of democracy, or even for democracy itself. Yet he does take sides, does make evident his own preference for what he calls the democratic faith over any form of totalitarian belief. And like most Americans in these days, he feels that his faith is seriously menaced by events. At the end of his book, he contrasts "humanism," belief in the freedom of man to make himself and his environment over to accord with his idea of the good, and "naturalism," belief in a determinism that makes liberty an illusion, man's destiny the product of inhuman forces beyond his control. Democracy, he holds, cannot survive in a society in which large numbers of men hold

naturalistic beliefs. Naturalism throws over belief in a fundamental law, knows no absolutes, and cannot therefore consistently urge men to behave in one way rather than in another. Naturalism Professor Gabriel specifically ties up with Science (p. 375). The scientist can only describe how men behave. He cannot tell them how they ought to behave.

Yet the scientist commonly does so, as two of Professor Gabriel's type-devotees of "scientific naturalism," W. G. Sumner and Thurman Arnold, most certainly have done. The trouble is that Professor Gabriel's dualism of "humanism" and "naturalism" is an over-simplification. In modern times, the impact of natural science on the social sciences has taken a form commonly, though perhaps unfortunately, called "anti-intellectualism." Both Sumner and Arnold, as well as Sorel, Pareto, and many others — including the Professor Gabriel who writes so well about the building up of the Lincoln myth — belong to the movement of anti-intellectualism. But the anti-intellectual is not necessarily an anti-democrat, not necessarily a man who denies the value of the democratic faith. In this world, doubt and faith are as inseparable as love and hate. You can doubt the divine inspiration of the American Constitution, you can even poke fun at the "Nine Old Men," and still hold that the distinction between a constitutional provision and an ordinary statute is real, useful and worth maintaining. You need not be pinned down by that uncomfortable pair of conjunctions, "either . . . or." This Professor Gabriel knows well enough, as he shows in his thoughtful concluding paragraph, in which he says that "the democratic faith is a philosophy of the mean." It is surely a mean that can adapt to its own uses the findings of "scientific naturalism."

CRANE BRINTON†

THE LAW OF PUBLIC HOUSING. By William Ebenstein. Madison: The University Press, 1940. Pp. ix, 150.

THE evolution of a new body of legal doctrine has made possible the progress of public housing in America. It has cleared the way for the work of the planners and builders and has enabled city, state, and federal governments to join hands for the common end of rehousing the slum dweller. There were many formidable obstacles that had to be overcome before anything tangible could be accomplished. But in spite of the need for reformulating and redefining many traditional legal concepts, in spite of the confused if not unfavorable state of the established precedents, the development of this new structure has been remarkably rapid and favorable. Dominating the whole issue in the dark days of 1934 was a question that now sounds as distant and forgotten as "The Merry Widow": is public housing a public use for which public monies could be spent and private property acquired?

The decision in *New York City Housing Authority v. Muller*[1] answered the question in the affirmative and paved the way for a local and decentralized public housing program. One decision followed another in quick

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1. 270 N. Y. 333, 1 N. E. (2d) 153 (1936).

succession, and the high courts in twenty-five states have now in thirty decisions swept away barriers that once seemed almost insurmountable. Five hundred local authorities now function in thirty-seven states. Nearly a billion dollars has been authorized for initial operations. While it is now settled that public housing is a public purpose, housing law is still in its infancy. Yet it is a lusty infant that seems to have survived creditably all the early legal ailments, though from present appearances it has still to overcome quickly developing political and administrative complications.

William Ebenstein has courageously undertaken to open up the field of public housing law with a work which might serve as a prelude to more comprehensive exploration. The book contains thumbnail discussions on the elements of the housing problem, on the role of the Federal Government in public housing and related fields, and on foreign experiences and problems. More comprehensive treatment is given to the federal cases dealing with the right of the Federal Government to engage in public housing activities and to the early development of public housing law in the states.

Mr. Ebenstein's book omits, however, all consideration of the numerous pressing legal problems that have arisen since the public use decisions which are relevant to any discussion of public housing law. The volume might be indispensable if it included discussions of such subjects as a housing authority's power to act as a federal agent for management and construction; its liability for negligence; its relationships to the state and city in such matters as civil service; its right to acquire reserve lands for future use; the meaning of the term "lowest income group"; the validity of numerous eminent domain procedures aimed at cutting down land acquisition costs; questions involving the issuance of its bonds and the liability of a city for authority obligations. These and many other related issues which press for discussion and enlightenment do not appear in Mr. Ebenstein's work. They are the immediate issues with which housing counsel are now wrestling. Since federal legislation requires the equivalent elimination of substandard properties, the city's right to vacate or eliminate substandard dwellings might have been discussed fully. Yet the author dismisses this important question with the statement that "The condemnation of such defective, dangerous and unsanitary structures has repeatedly been held constitutional." No consideration whatever is given to the case of *Health Department v. Dassori*,[2] in which a New York court held that the city had no right to tear down an unfit dwelling.

The discussion of the background of public housing law and of the most recent court decisions is commendable, although here, too, one is left with the impression that too much emphasis is laid upon the *Muller* case and too little upon the later decisions which broadened its scope. Thus, although nineteen more recent decisions are cited, almost nothing is mentioned of their holdings on such important questions as tax exemption, contribution of funds by a city to a housing authority, conveyance of property to the authority and the obligation of the city for the authority's debts.

There is much in the book that is helpful to the student interested in the legal background for recent decisions on housing in its public purpose aspects.

2. 21 App. Div. 48, 47 N. Y. Supp. 641 (1897).

But there still exists a vital need for a comprehensive study on "The Law of Public Housing."

CHARLES ABRAMS†

FEDERAL PROCEDURE. By Stanley F. Brewster. Chicago: Callaghan and Company, 1940. Pp. xxxvii, 769. $5.50.

THIS is no book for those who want an insight into the problems of conflicting state and federal jurisdictions. The practitioner who impatiently has to know whether he should answer, move to dismiss, or merely move for a more definite statement of claim, will find in it no thorough resolution of his indecision. Nor does the book contain the requisite high-lighting to be of much help to the dark-to-dawn crammer or to the harried skimmer who is "reading for the bar." Rather, the book is, and purports to be, simply a quantity of informational cement to hold classroom construction together.

Probably no one has ever seriously contended that an unrelieved three year diet of cases, statutes, and rules of court would produce a lawyer-like avoirdupois. Something else is needed: a conception of the lawyer's role in society, a knowledge of the relation of law to other disciplines, an anti-authoritarian attitude or independence of thought — all these, and more, go to make the best practitioners, administrators, and judges. The classroom hour can encourage some, perhaps all, of these qualities. But, alone, it can hardly exert the school's best possible effort with each.

What is to be done in the class hour and what materials can best be isolated for extra-class consideration, then, become problems of selection, of emphasis. Sheer information, certainly, can be left to the student to acquire by eye. Similarly, the opening engagements with problems later to be carried into the classroom lists for deep thrusting can be broached in print. In addition, helpful data from related disciplines can be presented. All this is already available for pre-class digestion, of course, or for post-class clarification. But it is to be found in widely scattered places, perhaps even in more than one library (or, not in a library at all). That the student will search hard for it is to presuppose on his part a vigorous interest that he will almost never have until classroom activity stimulates him. By that time, the class is likely to be pulled on to some new listing ground.

To collect materials of this sort between two covers would be a real contribution to the teaching literature of any subject. Not to spoon feed, but to give perspective, to open vistas, to prepare the student to develop his power to go on into uncharted borderlands and interstices. Prefaced by preliminary work on the part of each student with such a book, the class hour could best be used to develop the tough communicables — the power to reason, to form judgments, to perceive relationships, to think in terms of justice, as well as to manipulate rules and doctrine. In short, a well-planned book of this sort would enable classes to start at a point where most have to end.

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Judged by these standards,[1] Brewster's informational presentation lacks discrimination. There are pages devoted to relaying bits such as that the United States Supreme Court meets "at the seat of the federal government, which is in the District of Columbia," that non-official stenographers may be employed in the preparation of transcripts of record, that there are "nine steps of *habeas corpus*" and "ten essentials of an order." Other inclusions are objectionable on curricular grounds. Evidence topics and criminal procedure would be better left for consideration elsewhere, not only because there are other courses which cover the subject-matter, but because any adequate treatment in a two or three hour federal jurisdiction course seems unlikely. Some of these alleged shortcomings flow, of course, from the author's expressed hope to be "comprehensive" in 655 pages of text. In spite of that hope, however, there are certain regrettable omissions. For example, no discussion can be found of the applicability in equity of *Erie Railroad v. Tompkins* or the effect of denial of certiorari by the Supreme Court. Yet the book does contain a good description of the federal court system.

As far as opening vistas is concerned, Brewster hacks away very little underbrush. His most frequent device is to construct a chapter or a section from a definition and subordinate paragraphs embroidering the terms of the definition. He is inclined thoroughly to insulate his construction from the borderline, the controversial, and the doubtful. He discusses Congressional power with relation to the courts without mentioning the Roosevelt-sponsored court reorganization bill, mandamus without indicating anything of the difficulty of polarizing conduct as "ministerial" or "discretionary," criminal extradition without questioning the present possibly too broad powers of the governor of the asylum state, the constitutional guarantee of a "public" trial without discussing whether it makes such spectacles as the Teapot Dome Oil cases unavoidable. An especially conspicuous example of this inclination is the author's discussion of criminal procedure. If he must treat it, why not organize chapters around pressing problems of federal criminal justice and administration? There does not appear to be the slightest mention of the movement for reform of federal criminal procedure. An impressionable reader would be bound to emerge from Brewster's work with a very static minded attitude toward the jurisdiction and procedure of the federal courts.

The social implications of federal jurisdiction demand data for forward-looking consideration. There is no presentation here of materials on cost of litigation in the federal courts, congestion, need for public defenders, personnel of juries, district attorneys, and judiciary, or the function of the new administrative office for the United States courts. Statistical and other material to base such discussions are available. There can be no need to sketch a predominantly trial court subject almost exclusively in summary outline of appellate court decisions, rules, and statutes.

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1. The author phrases it, "primarily to meet the need of the law student for a simplified and comprehensive text treatment." Preface, iii.

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