

REVIEWS

THE PRESIDENT: OFFICE AND POWERS: HISTORY AND ANALYSIS OF PRACTICE AND OPINION. By Edward S. Corwin. New York: New York University Press, 1940. Pp. xii, 476. \$5.00.

THE AMERICAN PRESIDENCY, AN INTERPRETATION. By Harold J. Laski. New York: Harper & Brothers, 1940. Pp. viii, 278. \$2.50.

PRESIDENTIAL LEADERSHIP. By Pendleton Herring. New York: Farrar and Rinehart, 1940. Pp. xiv, 173. \$1.00.

THREE or four years ago, for some reason, the books were about the Supreme Court. This year, for some reason, it is the President's turn. These three books approach their subject from the complementary angles of public law, comparative institutional analysis, and the politics of consent. Rarely does a single year bring such penetrating studies of one of our major institutions.

Professor Corwin more than maintains his reputation in the profession as the most useful teacher of constitutional law to his colleagues. Though mainly concerned with the law, his book is enriched with the lore of practice and opinion, much of it painstakingly gathered from such sources as the *Congressional Record* and the *New York Times*, and set out at length in notes that fill nearly a third of the volume. The work is an unmatched annotation of Article II of the Constitution. More than that, it is an analytical study of the growth of Presidential powers. Corwin starts with the striking antithesis in theory and practice between the "weak" and "strong" conceptions of the office, for both of which the framers left ample room in "the most loosely drawn chapter of the Constitution." Mechanical questions of qualification and tenure then lead him to legislative suggestions to anticipate contingencies of succession unprovided for in the Twentieth Amendment, and to observations on the third term issue that subsequent events have vindicated. The rest of the book takes up the practical extensions of Presidential power, and the legal and theoretical justifications offered for them. In a chapter each, he considers the President as administrative chief, as chief executive, as commander-in-chief, as the organ of foreign relations, and as popular leader and legislator. Of these the first is definitely disappointing, being preoccupied with the removal power and premised on the half-truth that "whom the President may remove he may dominate." Nowhere does the public law of the subject leave more of its inner essence unaccounted for. On the other hand, the succeeding chapters are first-rate contributions. Jefferson's demonstration that a skillful party leader may acknowledge legislative supremacy and yet determine the course of its exercise; Jackson's denial of that supremacy and invocation of his oath of office to reduce his legal obligations to moral ones; Lincoln's assumption that as commander-in-chief during a war he was clothed with powers denied to Congress; Theodore Roosevelt's "stewardship" theory; Wilson's and Franklin Roosevelt's success

in securing broadly discretionary delegations; and even Johnson's escape from impeachment, are brought together in an impressive account to show how the President's autonomous constitutional and political powers are assimilated to the support or control, as he chooses, of his duty to "take care that the laws be faithfully executed." Especially interesting now are the emergency powers exercised during the Civil War, since which time "life has become definitely more dangerous, especially for popular governments." In sum, the President's power today is a function of the twin variables, personality and crisis, operating in a field marked by the "social acceptance of the idea that government should be active and reformist," the enlarged international role of the United States, and the breakdown of the principles of dual federalism and the separation and non-delegability of powers as defining the scope of Congressional activities. To stabilize Presidential power, "the most valuable political asset of the American people," Corwin suggests a new type of Cabinet, constructed from "such leading members of Congress as" the President "may choose," or from "those heads of departments whose activities are of general and constant political significance . . . and the aforementioned leaders of the houses." This would institutionalize what is currently a frequent *ad hoc* contrivance. It is as constructive a suggestion as has been made, if it can be sold to the right customers.

Laski's subtitle accurately describes his book, which is an eloquent full-length plea that in the Presidency lies America's hope of political salvation; that the office must be made more powerful and its incumbent a great leader, not just now and then but systematically, continuously. His main theme has much to commend it; but it suffers from being drawn too sharply in black and white. He postulates the present need for a "positive" state, and the necessity, in a positive state, of strong and clear leadership; and he argues convincingly the impossibility of finding that leadership in Congress. He advocates direct national election for the President—a proposition unlikely to appeal to Republicans when they realize it would project the weight of southern majorities beyond the borders of the southern states—, an item veto in finance, and the abolition of "senatorial courtesy." He rejects, rightly, proposals for a power of dissolution and for Cabinet participation in Congressional debate; he urges stronger Cabinets and hails the party realignment he thinks increasing preoccupation with national issues will bring. Most of all, he insists that the President "must be given the power commensurate to the function he has to perform"; "the central problem of representative government in a democracy is . . . to make the source of responsibility for action unmistakable." There is much insight in the elaboration of these points, but we need not look beyond Huey Long or Hague to know that the last is an over-simplification.¹

1. Apart from the accustomed brilliance of his argument, the essay will not add greatly to Laski's stature. He marshals an impressive acquaintance with the diaries and memoirs of our leading nineteenth-century figures. On this score the publishers of W. E. Binkley's *Powers of the President* have complained of his "uncredited appropriation" from that volume, chiefly a group of upwards of two dozen quotations and citations in a 10-page sequence. While Laski readily acknowledges his indebtedness to various of the great and

It is the peculiar virtue of Herring's work that he emphasizes what Laski neglects—the importance of devices for securing a consensus as to what ought to be done. It solves little to vest transcending powers in an individual unless he has reliable means of reaching satisfactory decisions, and these commonly involve adjustments of conflicting interests. If they can be reached, the problem of power becomes less acute; if not, the focus of pressures is simply transferred from one end of Pennsylvania Avenue to the other. "The president may serve as a leader-symbol to some people; to others he is simply one way to get things done," and "if he loses his influence over Congress and his popularity throughout the country, his constitutional powers avail him little." The President does not, by gaining a power to overrule objections, become immune from pressures to satisfy demands; on the contrary, the pressures increase. There is urgent need for institutional assurances that he will be surely and fully informed before deciding whether to overrule or to accede in any particular case. So Herring, like Corwin, urges all practicable steps to maximize collaborative action on legislation and policy. In other respects the book fails to do justice to Herring's talents and experience. It appears to have been too hastily written, its argument marches unclearly, and there is altogether too little documentation of numerous generalized assertions.

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CASES AND MATERIALS ON FEDERAL TAXATION. By Erwin N. Griswold. Chicago: The Foundation Press, Inc., 1940. Pp. xxi, 744.

THE appearance of this first casebook to be devoted exclusively to *federal* taxation may be greeted by those unfamiliar with this field as representing simply the addition of another head to the curricular Hydra.¹ Those, however, who know the situation better will realize that this is not another subversive attempt by a "public law" fifth columnist to undermine further the foundations of the traditional curriculum by adding a new course in taxa-

near-great, he does not mention Binkley; and his reply by no means exonerates him of exploiting the labors of a humbler toiler too cavalierly for a professing socialist. In a species of confession and avoidance he disparages the parallels in judgments as "commonplaces," and urges that, granted his thesis, the quotations are the "obvious" ones from "inescapable" works whose citation is "inevitable." *NEW REPUBLIC*, Nov. 18, 1940, p. 696. But he is not advertised as a purveyor of commonplaces, nor do obvious quotations need inevitably to be used, as he uses them, in exactly the same order. Not that he should be accused of partiality in borrowing. In the same chapter he twice repeats illustrations he has himself used only a few pages earlier. Compare pp. 120 and 139; 117 and 144.

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1. In 1845, the Yale Law School offered an "impressive list" of 20 different courses. HICKS, *YALE LAW SCHOOL: FROM THE FOUNDERS TO DUTTON, 1845-1869* (Yale Law Lib. Pub., No. 3, 1936) 53. In 1876, the total had jumped to 33 (including a course in Hermeneutics—but none on Taxation). HICKS, *YALE LAW SCHOOL: 1869-1894* (Yale Law Lib. Pub., No. 4, 1937) 26-27. There are listed in the 1940-41 Announcement, 96 different courses!

tion. Federal taxation has for years been a part of that curriculum; it has simply been offered along with another course—on state property taxation—with which it has no more in common than has Federal Procedure with the general practice and procedure courses. But, while there is offered here a separate set of materials on federal taxation, there is not presently available a single published volume dealing exclusively with state tax systems, the other half of the traditional taxation course. This means that in any school where the study of such systems is considered important, the adoption of this new casebook will depend upon the individual instructor's compiling a separate set of materials, devoted probably to the tax laws of his particular state. In so far as the property tax courses heretofore presented are felt by many to have suffered severely from the attempt to teach what is a peculiarly local subject from a collection of jurisdictionally assorted cases, it may well be that one of Professor Griswold's most valuable contributions will be to the field which he has chosen to exclude from his book.

On the other hand, however, the preparation of such separate sets of materials involves a very considerable expenditure of effort, and some may doubt whether Professor Griswold has built a sufficiently better casebook that the path to his publisher's door will be beaten by customers who must, to buy, agree also to produce. I think he has—and for reasons so numerous as to preclude more than their suggestion here. Perhaps the most significant among them is his accomplishment in presenting his subject in such a manner that even the most conceptualistically-minded student will see principles and doctrines as servants rather than as masters. They are presented here, not as they appear in too many "leading cases"—as immutable and isolated concepts—but simply as standards to be used in the very important process of administering a social institution; the emphasis is placed throughout on their continual redefinition in the light of new problems which arise. The great percentage of the editor's principal cases are recent decisions,² those which show the direction in which the process is presently moving; the land-mark cases, in which the course was tentatively charted, are incorporated simply by reference. He even commits the Hamlet without Hamlet heresy of omitting *Eisner v. Macomber*, relying simply on its treatment in *Koshland v. Helvering* and other recent decisions. Similarly, *Brushaber v. Union Pacific R. R.*, *United States v. Wells*, *Heiner v. Donnan*, *Schlesinger v. Wisconsin*, and *Lynch v. Hornby* are presented simply in footnote obituaries. On the theory that "constitutional questions are today incidental rather than dominant," many of the cases which deal exclusively with the constitutional issue have been eliminated. Less than two-thirds of the principal cases are Supreme Court decisions, and there are included seven Board of Tax Appeals decisions, seven Bureau rulings, and a long extract from a Committee Hearing. Although the question involved in one chapter³ has been recently "settled" by a Supreme Court decision,⁴ there is presented the entire line of pre-

2. The editor includes in his preface the following tabulation: "The book contains 170 principal cases. Of these, 99 were decided in 1935 and thereafter, and 154 were decided since 1926." Preface, p. vi.

3. That devoted to the inclusion in the gross estate of jointly held property. Pp. 192-211.

4. *United States v. Jacobs*, 306 U. S. 363 (1939).

ceding decisions, the editor's express purpose being to illustrate the process by which the Treasury Department, through careful case maneuvering, gradually conditions the Court to the eventual acceptance of a doctrinal dosage which might, at first, have been too much for its constitution. By weaving his cases together with extensive and uniformly excellent editorial notes, which fill in the lacunae between the cases and at least suggest the social and economic factors affecting the legal problems presented, Professor Griswold presents a picture not of a set of laws but of a vital social and economic institution.

There is another advantage which accrues from the editor's refusal to accept leading cases as always the best implements of the case method. It is surprising how many leading cases seem to involve the very drabest fact situations conceivable. By resorting to a wider basis of case selection, Professor Griswold has been able to take full advantage of the value, for teaching and learning purposes, of cases which involve the application of important but intrinsically uninteresting principles to entertaining, even amusing, fact situations. It is more than mere coincidence that his cast of characters includes Bobby Jones, Mrs. Roosevelt, Douglas Fairbanks, the Astors and the du Ponts, and the New York City deputy clerk who capitalized to the extent of \$16,000 a year on the natural reluctance of bridegrooms to make their first marital act a niggardly one. The student is far more likely to remember something of the problem of deducting from gross income the loss on a sale of residential property because it is presented here not from the Supreme Court opinion in *Heiner v. Tindle*, but from the later lower court decision involving a houseboat instead of a house.⁵ This sugar-coating of important problems may be inconsistent with some of the scholarly traditions, but most teachers who have not been teachers too long will be inclined to feel that a bitter taste in the mouth is not essential to successful pedagogy.

It must suffice here simply to mention some of the many other features of this casebook which contribute to its general excellence. There is a new organization of the income tax materials, characterized by a progression from the simple to the complex problems, and apparently avoiding, so far as is conceivably possible, the difficulty arising from the interrelation of one problem with another which must be taken up later. There has been an obvious attempt made to give the student, before he gets to class, as clear an idea as is possible of the general direction in which the cases he reads are supposed to lead him. Practically every principal case is followed by a number of illuminating and suggestive problems which involve corollaries of the general issue involved. There is an invaluable little section on The Materials of Federal Taxation and a separate chapter devoted to the Gift Tax.

A review of a new casebook untried in the class room can represent, like an advisory opinion, nothing more than conjecture as to how the book, or the statute, will operate in actual practice; but it would be my conviction that Professor Griswold has here made a contribution which will more than justify the expenditure of any independent effort upon which its acceptance may be conditioned.

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5. *Rumsey v. Comm'r*, 82 F. (2d) 158 (C. C. A. 2d, 1936).

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THE PATTERN OF COMPETITION. By Walton H. Hamilton.¹ New York: Columbia University Press, 1940. Pp. ix, 106. \$1.25.

IN the back of the mind of every thoughtful American the question forms: can we preserve the way of life we have known, or are free enterprise and its attendant institutions but "a short bridge between two unlike citadels of authority?" To this question Walton Hamilton addresses his book, and his answer, tentative as it is, should be read and pondered by all. This, fortunately, is not difficult, for there are only 100 pages and they are as exciting as a good detective story. This is the sort of education to save us, if education can.

Once upon a time political economy was a tight little island of logic where conclusion flowed from premise with the assurance, and something of the art, of the professional prestidigitator about to perform his simplest trick. In those days, the Economist was both priest and logician who did things with curves, equations, and such interesting qualifications as "the long run" and "other things being equal." But while Senior Sr. was handing down the "mystery" to Senior Jr., strange things were happening in the world of affairs—things of which neither Senior had the slightest knowledge. John D. Rockefeller, for instance, rationalized the oil industry, and when he turned to put sense into education, oil went crazy again. "It is hardly possible," says Walton Hamilton, "to reduce industrial actuality to trim categories. A trinity of competition, in-between, and monopoly pitches most instances into the middle group, where the sorting has to be done all over again. A refinement into monopoly, duopoly, and oligopoly—which bears a faint aroma of the monarchy, oligarchy, democracy of high school civics—is stark mechanics which leaves the usages of the trades out of account."

Citing case after case—autos, cigarettes, dresses, cottonseed, gasoline, milk, movies, razor blades, wastepaper—out of his vast store of experience, Professor Hamilton shows that "Competition goes, yet it endures, for the only norm of its reality is a spectrum."

So what? So the Hoar (alias the Sherman) Act—which, "When the insistent need was to command the future . . . looked to the past. On the eve of the greatest of industrial revolutions, the National Government was fitted out with a weapon forged to meet the needs of petty trade."

Of course it did not work. "The picture of conspiracy as a meeting by twilight of a trio of sinister persons, with their pointed hats close together, belongs to a darker age. . . . The modern way is to make the mores do it for you." "In quality and tradition due process of law is patient, decorous, considerate, circumstantial. Its rubric has little place for rules of economy and dispatch; its scrupulous purpose is a meticulous justice between all the parties. The industrial process is dynamic, erratic, imperative, too hurried to pause for the ceremonial consideration of every claim at stake. The criminal action is a clumsy weapon whose nimblest controls are penalty and threat. The decrees of equity, painfully achieved, abide as frozen formulas; the trades to which they are addressed hasten upon their way. Criminal judgments become events in the history of industry. Many injunctions are decades

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old; the usages now in vogue are as fresh as the morning. The industry strides ahead, little embarrassed by fetters too out of date to bind. The use of litigation to give effect to economic policy is not the happiest of human inventions."

What then, to do? Professor Hamilton suggests that the Act be implemented by larger funds for enforcement and the power of subpoena. Ready access to information would do much to "loosen the severities of legal process," and substitute "industrial analysis for the costly, clumsy, erratic process of inquiry by grand jury." Amendment is also needed, but this is not enough. As anti-trust regulation has developed, two functions have emerged: prosecution and administration. "Administration demands agencies skilled in industrial analysis and the technology of regulation." "Legal resort should be to an industrial court." The result: industrial codes reached through the administrative agency, and subject to review by a five or seven member bench. Appeal, limited to questions of law, would be only to the United States Supreme Court.

But with this change there is found a change also in objectives. Anti-trust is no remedy for "the ills of competition," but as it "moves away from litigation, its administrative process can serve other policies than the maintenance of competition." Thus we have made a full turn. A law to restore competition may be used to destroy it.

At the end, a caution: "The administrative agency invites the very invasion of economic power which the competitive market is supposed to be proof against. It is played upon by all the pressures which powerful groups can muster into service." If it were a choice between Government and open market regulation, Professor Hamilton, like most economists, would prefer laissez-faire. Commissions have not been a great success. "The NRA . . . staged a full-dress performance"—was it a rehearsal?—"of the hazards of the administrative process." We are properly skeptical. But the choice lies not between automatic (market) and administrative regulation. It lies between public and private control, and we must adventure.

No economist, not excepting Keynes, can write like Walton Hamilton; and I have used his own language in this review in an attempt to impart some of its flavor. Everyone should read this little book for the style, for the sharp lights it throws on industrial life in its infinite variety, for the criticism of anti-trust mechanics, and for the suggestions for retooling and invention in social controls. Perhaps, as he suggests, free enterprise is really but a short bridge between two unlike citadels of authority. If not, we must all learn that "The task of keeping industry the instrument of the commonwealth is as arduous as it is everlasting."

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ALIENS AND THE LAW. By William Marion Gibson. Chapel Hill: The University of North Carolina Press, 1940. Pp. 200. \$3.00.

CONTROL OF ALIENS IN THE BRITISH COMMONWEALTH OF NATIONS. By C. F. Fraser. London: The Hogarth Press, 1940. Pp. 304. 12s. 6d.

ONE of the crucial touchstones of a democracy is the way it treats its aliens. When symptoms of xenophobia begin to appear, it is time to worry about survival of the democratic way of life. The recent manifestations of intolerance toward aliens in our own country and in the democracies at war indicate that it is high time for us to worry, and study and act. These two books, in many respects complementary, will make an appraisal of the situation considerably easier.

Aliens and the Law deals with the legal rights of aliens in the United States. It specifically omits consideration of the exclusion and deportation of aliens, as these subjects have already been adequately covered by Van Vleck, Clark, and others. The disproportionate stress which Gibson places on the rights of aliens under international law tinges the entire book with a nostalgic aroma of unreality. Two of the seven chapters are devoted to the minimum standards of customary international law and the rights guaranteed by treaties with foreign countries. An appendix lists hundreds of national treatment provisions in American treaties, including the right to enter, travel, and sojourn; to engage in work; to acquire real and personal property; and to be protected against illegal search and seizure. It is a shame that the author's painstaking research and high ideals should have been nullified by the sweep of world events. Nowadays it does not add to clarity to say that a nation-state "does not have the unlimited power to treat aliens as it sees fit" or that "one of the rights which a state is obligated under international law to extend to aliens is protection against any arbitrary and unfair arrests." However, since the author concludes that aliens subject to American law have a greater latitude of enjoyment and protection than either customary or conventional international law demands, the inclusion of the international law background, though unreal today, may charitably be dismissed as a case of misplaced emphasis.

The rest of the book deals, more usefully, with rights accorded to aliens by American municipal law. It discusses the leading cases and statutes, treating the rights of aliens as to property (real property, copyrights, patents, trademarks, protection against illegal searches and seizures), taxation, pursuit of occupation, and access to the courts. A useful series of appendices collects the state laws on real property and workmen's compensation benefits in relation to aliens. Gibson concludes that the only substantial legal discrimination against resident aliens is in the "right to work." This discrimination, however, has more disturbing consequences than the author indicates. It is easy to formulate a legal rationale to justify discrimination against aliens in work on public projects, receipt of public benefaction, exploitation of certain natural resources, and practice of certain professions. But the practical impact of occupational discrimination on most of our four million aliens is far more direct and severe than discrimination in such fields as real property or taxation.

The Control of Aliens in the British Commonwealth of Nations concentrates on the phases omitted by Gibson. The author modestly and accurately acknowledges in the preface that the book's main purpose is to present the existing state of facts to those wishing a starting point for more specialized investigation.

Each chapter is devoted to four major questions: how an alien is stopped or turned back at the port of entry; how and for what reasons an alien may be removed or expelled from the country; the alien's status with regard to public rights and duties; and how an alien may acquire the status of a national or citizen in the country to which he has migrated. The reader is given a more comprehensive picture of the totality of aliens' rights than in *Aliens and the Law*. While liberal use is made of statutes, regulations and court decisions, there is a more solid background of practice and policy than in Gibson's book. For instance, Fraser discusses realistically the relative effect of excluding and expelling aliens, emphasizing geographical and political considerations. The author is, moreover, more critical than Gibson. His admiration for the British tradition of fair play does not prevent him from severely criticising, among other things, the absence of definite standards for exclusion and expulsion of aliens even in peacetime in the United Kingdom, and the absolute discretion of the Home Secretary and Labour Ministry.

In the light of the present war, perhaps the most interesting portion of Fraser's book is its last chapter, which deals with the treatment of aliens in the United Kingdom since the outbreak of the war. Written after the first few months of war, before the fall of France, it is necessarily incomplete in many respects. The full story of the tragic plight of refugee aliens in the belligerent democracies is yet to be written. But Fraser has at least taken the first step, and has reflected a keen appreciation of the problem.

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THE DEVELOPMENT OF CONGRESSIONAL INVESTIGATIVE POWER. By M. Nelson McGeary. New York: Columbia University Press, 1940. Pp. 172.

IN a neat little volume the author has simplified the purposes of Congressional investigations down to four: to further legislation, to supervise the executive, to inform and energize public opinion, and to judge and control legislative membership. In this form he brings up to date Eberling's *Congressional Investigations* of 1928 and Dimock's *Congressional Investigating Committees* of 1929. His own contribution, commendably compact and well documented, moves forward under the further headings of "procedures," "results," "court decisions," and "future methods."

The discussion of procedures, though it is diverting enough in its illustrations and sound enough in its cautions, is relatively the least important of his chapters. Court decisions are described as having become increasingly favorable to the investigatory power of Congress during the last decade.

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They have slightly broadened the purposes judicially accepted, though the purpose of informing public opinion still lacks specific judicial approval.

The principal interest of the book lies in its discussion of results and future methods. During the last decade, the study shows, 146 inquiries by committees were authorized by Congress: 84 by the Senate, 50 by the House, and 12 jointly. Eighty-nine of these were assigned to standing committees and 57 to select committees. A few of this large number have not proved potent enough even to produce reports, more of them have produced tangible legislation, and the majority of them fall in between, with influence above the negligible but below the colossal.

One reason a large proportion of Congressional investigations have not been more influential—and this is the author's major suggestion on future methods—is that the inquisitorial and the research aspects of the investigative process have not maintained a larger social distance. The inquisitorial, when it is publicly useful as well as when merely productive of personal publicity, belongs peculiarly to Congress. The gathering of facts to sustain it, however, is a task that strongly suggests delegation. The author surveys new fact-gathering devices in the states such as "legislative councils," and ventures for the Federal Government the suggestion that investigations would normally reach further if this divorce in function were recognized and if Congress delegated the research work of most investigations to administrative agencies or to public or semi-public commissions. The volume concludes with pointed observations upon the results achieved along these lines by such agencies as the National Monetary Commission, the Advisory Council on Social Security, the Committee on Social Trends, the National Commission on Law Observance and Enforcement, The Committee on Economic Security, the Great Plains Committee, the Committee on Farm Tenancy, the Temporary Economic Committee, and the National Resources Planning Board.

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