REVIEWS

PUBLIC CONTROL OF LABOR RELATIONS. By D. O. Bowman. New York: The Macmillan Co., 1942. Pp. xi, 500. $5.00.

MR. Bowman's study of the administrative role of the National Labor Relations Board is in the scholarly tradition of Gerard Henderson's *Federal Trade Commission* and I. L. Sharfman's *Interstate Commerce Commission.* It summarizes the historical and legislative background of the Board; analyzes problems raised by the statutory provisions proscribing unfair labor practices and authorizing certification of representatives; describes with minute detail the procedure, organization and personnel of the Board; and evaluates the seven year performance of perhaps the most controversial agency created under the New Deal.

Many persons have written about the Board on the basis of a few dramatic episodes. Some have, with pedestrian diligence, taken us on a tour of all the cases decided under the Act by the Board and by the courts. But Mr. Bowman has pictured the Board as it appears not only in the law books, but in annual reports, briefs, press releases, hearings before Congressional appropriation committees, hearings before special investigating committees, Congressional debates, monographs of the Attorney General's Committee on Administrative Procedure, and comments by labor and employer organizations. One merit of the method is that it makes available for readers distant from Washington material which is hidden because it is unindexed and ephemeral because it is unbound. But there is a greater merit. The story of the Board emerges in a rounded aspect. The critics and defenders of the Board make their own speeches. And, like Thucydides, Mr. Bowman for the most part stands aside, the impartial, detached recorder of their controversies.

His history begins with the federal government's legislation in the railway field. He passes on rapidly through the days of NRA, Senator Wagner's National Labor Board, and the first National Labor Relations Board constituted under Public Resolution No. 44, 73d Congress,[1] until he comes to the bill which ultimately became the National Labor Relations Act. He shrewdly observes that "the proponents of the bill visualized the proposed Board as an independent agency enforcing preventive legislation . . . the outlawing of the company-dominated union, and the protection of the *right of the individual* to organize. There was no evidenced desire to promote union organization nor even, indeed, to promote collective bargaining nearly as much as there was the desire to provide protection, to remove barriers, so that the individual could do as he wished in matters of unionism."[2] This limited view was, according to my recollection, the one held in 1934 by

1. 48 STAT. 1183, c. 677 (June 19, 1934).
2. P. 53. Italics in the original.

the President,[3] by Senator Walsh[4] as Chairman of the Senate Education and Labor Committee, and by the representatives of the National Labor Board and the Department of Labor.

However, it is only fair to add that a broader vision of the Act, including a primary design to promote collective bargaining, was always expressed by Mr. Leon Keyserling, the influential secretary to Senator Wagner. Over the protests of his co-draftsman (who yielded under the mistaken[5] belief that it was of no consequence), Mr. Keyserling insisted on inserting as the first section of the Act a declaration of policy drawn by him which goes far to favor an interpretation of the law which gives collective bargaining and unionism not merely a clear field but a preferred position. This tendency was augmented when, upon the suggestion of Messrs. Biddle and Garrison,[6] there was added to the list of unfair labor practices the fifth unfair employer practice, "to refuse to bargain collectively with the representatives of his employees."[7] And additional changes, made by Mr. Calvert Magruder and Mr. Philip Levy in their 1935 revision of the bill, support the view that ultimately the bill's purposes were not only to establish freedom of choice, but to promote collectivism in labor relations. Thus, the statement in 1937 before the Supreme Court of the United States,[8] that the Act merely promoted freedom of association and freedom of representation, although sincerely made, now appears disingenuous.

The conflict between the liberal and the collectivist views of the Act has arisen sharply in many issues before the Board. Mr. Bowman takes as an example the notable series of cases where two or more unions compete for the same workers' votes, and at the first election neither union gets a majority.[9] Under the liberal view, the purpose of the Act is to allow a worker absolute freedom until such time as a majority of his fellows have united upon the selection of a representative. This view would lead the Board to decide that the election just described was a conclusive determination that the requisite majority did not exist and freedom of choice remained unfettered. But the Board rejected this approach. Its view was that the

3. My recollection is buttressed by the draft bill, now in my possession, dictated by the President on June 12, 1934 in the presence of Senator Wagner, Senator Walsh, Senator Robinson, Speaker Joseph W. Byrns, Secretary Perkins, Mr. Richberg, and myself.

4. The burden of the hearings in 1934 was borne by Senator Walsh. His views of what the 1934 version of the bill was designed to accomplish were set forth in SEN. REP. No. 1184, 73d Cong., 2d Sess. (1934) 2-3. Other members of the Senate Committee on Education and Labor were irregular in attendance. Senators Murray and LaFollette were occasionally present. So far as I recollect, Senator Black, as he then was, never was long in attendance at a public hearing and came only to one of the private committee sessions.

5. See, for example, Phelps Dodge Corp. v. NLRB, 313 U. S. 177, 203-204 (1941); NLRB v. Fansteel Corp., 306 U. S. 240, 255, 257 (1939).

6. P. 57. *Hearings before Senate Committee on Education and Labor on S. 1958*, 74th Cong., 1st Sess. (1935) 79, 136-137.

7. 49 STAT. 452 (1935), 29 U. S. C. § 158(5) (1940).

8. See argument for the NLRB in Associated Press v. NLRB, 301 U. S. 103, at 301 U. S. 738-739 (1937); SEN. Doc. No. 52, 75th Cong., 1st Sess. (1937) 82-83.

9. Pp. 142-155.

most important purpose of the Act was to promote collective bargaining, not freedom of choice. Therefore, when on the first election one union did not receive a majority, but two or more unions did receive in combination a majority of the votes cast, the Board has decided that the election was inconclusive and has directed run-off elections until one union did receive a majority.[10] Thus, concrete issues of procedure are determined by abstract views of policy underlying the Act.

Turning to the NLRB problems that have most excited public opinion, the alleged interference with freedom of speech and the alleged noxious combination of the functions of prosecutor, judge and jury, Mr. Bowman is both informative and dispassionate. His discussion of freedom of speech might perhaps have benefited from putting the NLRB cases in juxtaposition with the recent Supreme Court cases considering the application of the Fourteenth Amendment to picketing ordinances.[11] Yet this has been well done so recently[12] that the omission is not serious. And it is much more important to have had Mr. Bowman tell us step by step the procedure followed by the Board to assure fairness of treatment to all parties. In the light of his exhaustive analysis, there will be few who will quarrel with his conclusion that "most of the attacks launched against its procedure were in truth launched against the public policy itself."[13]

10. Mr. Bowman's discussion (pp. 152–155) of run-off elections and of Matter of R. K. LeBlond Machine Tool Co., 19 N. L. R. B. 1049 (1940), is not quite current. In February, 1941, after Chairman Millis took his seat, the question of run-off elections was reopened and the result reaffirmed. It may not be inappropriate for me to refer to an admittedly partisan brief filed at that time in behalf of United States Smelting, Refining & Mining Co., 29 N. L. R. B. 426 (1941), which stresses some points not emphasized by Mr. Bowman. As that brief indicates, the Board's decisions in favor of run-off elections proceed on what the logicians would call the fallacy *"a dicto secundum quid ad dictum simpliciter."* See 1 VINOGRADOFF, HISTORICAL JURISPRUDENCE (1920) 5. When bachelor John proposes marriage to Anne and is told he cannot have her, it does not follow that he will be content to select either Betty or Constance. He may not have an undifferentiated desire for matrimony. Likewise, if a worker votes to be represented by an unaffiliated union, it does not follow that if he cannot have that union he will be content to select between the A. F. or L. and the C.I.O. He may not [as the record of the NLRB shows (p. 152, n. 25)] have an undifferentiated desire for collective bargaining.

11. Thornhill v. Alabama, 310 U. S. 88 (1940); Carlson v. California, 310 U. S. 106 (1940); Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287 (1941); A. F. of L. v. Swing, 312 U. S. 321 (1941); Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe, 315 U. S. 722 (1942); Bakery and Pastry Drivers and Helpers Local 802 of Internat. Brotherhood of Teamsters v. Wohl, 315 U. S. 769 (1942).

12. Riesman, *Civil Liberties In a Period of Transition,* in 3 PUBLIC POLICY 33, 79–81 (Harvard University Graduate School of Public Administration, 1942).

13. P. 482. Indeed the formal procedural safeguards that surround NLRB cases are reminiscent of those that surround the almost unworkable Bituminous Coal Conservation Act of 1937. In the argument on the constitutionality of that Act [Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 391 (1940)], Mr. Attorney-General Jackson, as he then was, referring to the elaborate safeguards, provoked from Mr. Chief Justice Hughes the comment that it was an instance of the "undue process of law."

In treating intangible aspects of the Board's work Mr. Bowman has been unusually perceptive. Quite rightly he pays tribute to Mr. Charles Fahy for the excellence of the legal staff and the legal work of the Board. He notes that limited appropriations made the Board choose between veteran hacks who never had earned or learned much and law school neophytes who had never experienced much either in factories or courts. He believes that the Board wisely preferred the second alternative, even if that occasionally resulted in the Board's agents displaying the intolerance, the love of authority, and the desire for letter-perfect compliance, sometimes characteristic of immature officeholders.

It is a pity that a book which is so good is not better. Mr. Bowman has shown by his citations that he appreciates the value of material to be found in legal briefs and committee hearings; yet his book ignores the wealth of material to be found in law reviews, economic journals and political science reviews. He has diligently scrutinized reports and documents previously unindexed; yet he himself has been satisfied to put his book on the market with an index woefully inadequate, without the complete legal citation of cases, and without anything like the fullness which a bar spoiled by CCH, Prentice-Hall, and the West Publishing Company has come to think is standard. He has a healthy sophisticated skepticism as to the claims that Board members have sometimes made when talking of the practical achievements of the Act; yet he is unduly impressed by the deceptive record of the Board's success in the Supreme Court of the United States — (how could the Board lose often in any law-abiding court when Congress has said that the Board is subject to reversal only for egregious errors and not for bias, poor judgment, or belief in incredible testimony?) He has stressed the places where the NLRB has already begun to function as a labor court and predicted that the role of the federal government in labor relations will expand; yet he entirely ignores the last year and a half's experience of the National Defense Mediation Board and the War Labor Board.

Despite the ambitious title of his book, it would be unfair to treat Mr. Bowman as if he had tried to do for labor law what O. W. Holmes did in the Lowell Lectures for *The Common Law,* or what Chief Judge Cardozo did in the Storrs Lectures for *The Nature of The Judicial Process.* He did not set himself to express the philosophy of labor law but to paint its detail in one agency. The walls of administrative law libraries have room for their Vermeers as well as space for the Leonardos yet to come, and Mr. Bowman has portrayed the interior of the NLRB with the chiaroscuro, the microscopic care, and the complete faithfulness of the Dutch painter.

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A NEW CONSTITUTION NOW. By Henry Hazlitt. New York: Whittelsey House, 1942. Pp. xiii, 297. $2.50.

ANY initial shock touched off by the startling title of this book is at once dissipated by the knowledge that the author is an editor of the *New York Times*. A "new constitution" might be something dreadful — an abolition of the federal system, a regimentation of men and materials, a managerial revolution, a plan for a socialist commonwealth, a subordination of corporate enterprise to the general good, a charter for a collectivism of the left or the right. But it turns out all right; the proposal is one which even the most die-hard conservative might entertain without public apology. It is that we confess the error of our ways, renounce our form of government, and enthrone in its stead the British cabinet system.

If the suggestion is not novel, it is made respectable by the auspices under which it is now put forward. Mill, Bagehot, and James Bryce have all, with distinction and charm, said to us, "Why don't you do it the way that we do it?" And a number of Americans, with a touch of nostalgia for things over there, have testified to what an improvement the change would bring. Henry Hazlitt adds little to the classic arguments which he quotes at length. The whole political establishment should be under one single high command. The administration should endure so long as it holds the support of the country and no longer. A system under which the two Houses fall out with the Executive or move in different ways is a national hazard. If they can't pull together, we the people should be able to turn them all out and start afresh. If to the case for cabinet government the author adds nothing, he brings to it a superb gift for tinkering.

As a political engineer of sorts Mr. Hazlitt has set out to invent a system of many devices that can be operated. If two Houses are prone to disagree, the way to avoid the clash is to get rid of one of them. The Senate, as the less representative, is obviously the one which must go. Still a check upon hasty legislative action is a good thing. So why cannot the Single House create in its likeness a satellite to provide a sober second thought by holding up a bill for a short period, say sixty days. But, come to think of it, the smaller states are guaranteed "equal representation" in the upper chamber, and there are enough of them to protect themselves in the enjoyment of this ancient privilege. Hence there is nothing for it but to keep the Senate — and then abate its power until it is just the kind of brake which is needed. Then a Head of the Government is to be selected, who is to choose a Cabinet, whose members come generally, but with possible exceptions, from the legislative body. A Council, to mediate between the Ministry and Congress, is to be formed by adding to the Cabinet members of the opposition in the ratio of their numbers to total membership. In addition to the Prime Minister, there is also to be a President, elected by the Congress for a long term. He is to perform on state occasions, keep himself handy for ceremonial use, and as a last resort dissolve a stubborn legislature. The Cabinet, under the Prime Minister, is to run the political show; it is to originate all financial and most other measures; bills introduced by the several members are to go to it for review. A proposal can

reach the floor for public debate only after it has been considered by the Council in executive session. And, lest it be messed up by amendments passed by men with no unanimity of mind, the power of the House to make over the measure is severely limited. All is neat and tidy, under a single command, proof against individual whim and non-sense. The House can take it and like it — or else revolt and overthrow the administration.

A score of devices are invented to fill in outline and make the scheme go. The Chief Executive, as we have known him, is cleft in twain. The dominant part of him survives the surgery to become Prime Minister; the recessive part emerges as the President, new style, who seems to be an edition of the Crown faded into formalism. With such a creature to strut a general uselessness, there is of course no further need for a Vice-President. The veto power goes to the scrap heap; where Cabinet and Congress must be in accord there is no place for it. The people can choose men, but measures are intricate and beyond the brain of the voter. So there is no place for the referendum. The initiative, too, is to be dispensed with; though on second thought it might be retained to decree checks on the legislature. An ingenious device enables an M.C. to be recalled and returned to office at a single election. It is hard to see how any member outside the Cabinet —submerged as he must be by a well-oiled machine — could ever do anything which provoked resort to the device. The amendment clause of the Constitution is itself to be amended to make easier the process of amendment. Such are fair samples of the ingenious inventions deemed necessary to make the apparatus go. It has been a long time since so amazing an array of political gadgetry has been put on exhibit.

Thus the discussion moves on a routine level far removed from function. One would expect a consideration of the tasks of a modern government, a contrivance of devices to do distinctive jobs, an aggregation of instruments into an institution adapted to the American political climate. Yet in the whole book there is no concern with the spirit of the American Constitution, the conditions under which the political system must operate, the usages and intangibles which bind it to the society it must serve. The frozen affair Mr. Hazlitt would foist upon us is not even the living organism which operates in Great Britain. In office and usage it departs radically from the model after which it was copied. The House of Lords came into its decadent political role by way of a series of dramatic incidents. To blueprint the Senate into its likeness is to disregard the historical process through which so unique an institution came to be. The course of events beat upon the Crown to reduce it from a vital to a ceremonial office. To create a functionless President as its counterpart is to achieve the vestigial by the magic of apparatus. The King once claimed to rule by divine right; his will found expression in the acts of his vicars. As Parliament curbed the royal prerogative, it undertook to supply His Majesty with his ministers. The primate among these little by little horned in to reduce the Crown to a ceremonial office. Our President is quite another sort of potentate; as the people's choice he represents the general interest far more accurately than a Congress elected district by district. What England did was to replace an irresponsible monarch

with a more representative official. What Mr. Hazlitt proposes is to replace a responsible Executive with a leader further removed from the popular will.

In Great Britain parliamentary government is not a political mechanism. It is an instrument through which the Constitution operates and the English people carry on. A small and compact nation, an orderly social structure, a high regard for the proprieties, a general agreement upon articles of faith, a zone of action narrow enough to invite reasonable differences, a determination to do with decency whatever has to be done — such are the conditions of its origin and success. The very presence of His Majesty's Opposition testifies to an orderly establishment, respect for tradition, a closed club for the elect, a government highly responsive within its severe orbit. But the conditions which have made for success there do not prevail here; and the author provides no recipe for beating our far-flung, heterogeneous, turbulent population into a body politic amenable to his prescription. He admits the failure of the cabinet system outside the British Empire, but attributes the unfortunate result to the lack of a model equipped with his fancy gadgets. How his synthetic design can operate beneath the cruel American exposure he does not tell.

Nor does he realize how evasive is the institution he recommends. The cabinet system of which Mill and Bagehot wrote is not that of Stanley Baldwin and Neville Chamberlain. The Victorian was the great age of parliamentary supremacy. As the decades have passed the legislature has lost power, the ministry has moved into ascendancy, a rigid discipline has been imposed upon the M. P. The party can find a place — and even Honors — for one who serves it faithfully; it can send the rebellious member to fight for a seat in a hostile constituency; it can even deny him the right to stand as its candidate. It is true that the Cabinet may turn out the Parliament or be turned out by it. And, under an older regime, where an unpaid legislative service was a single one among the many duties of a caste, there was quite a disposition for differences in views to break into the open. But today, the party whip has its restraining bite; and, for the very reason that each has power to turn the other out, there are strong reasons for ministry and legislature to stick together. And, if each holds at the pleasure of the other, it does not follow that tenure is by popular will. An administration which in a crisis can prolong its own life by its own act can hardly be considered the epitome of representative, or of responsible, government.

How the country comes in is a far more complex matter. Where the party majority is large, it is only at the expiration of the maximum term of five years that the people come in at all. A party sure of its hold can choose its own date for an election and capitalize a passing mood or a favorable occasion. Thus the current Parliament, now in its eighth year, was returned on the occasion of George V's jubilee. As for the system insuring an administration which reflects the crisis, the government which now sits was chosen on a pledge of disarmament. More than one of the champions of ministerial control has admitted — Mr. Churchill has on occasion indulged such talk — that it is a narrow difference within a larger understanding which makes the thing go. Certainly, when great events impend, the appeal to the country is given a recess. Thus, in time of war, the ministry in power commutes

itself into a "coalition government" and, with a few of the opposition as insiders, carries on. And when domestic issues grow grave, the system is likely to throw out a queer sport. Memory still recalls a Socialist Prime Minister as leader of a reactionary administration; and the incident has enriched the language with the phrase to-pull-a-ramsay-macdonald. The spirit of the cabinet system is not in its mechanism; to make it work, you need to bring along the society to whose needs and values it has been shaped.

And I wonder if Mr. Hazlitt is quite fair to our own system. There are amongst us uncouth persons — the reviewer confesses to the weakness — who will say a word now and then for American institutions. Some of us are even more willing to reform what we have than to make a fresh start. Certainly the fitness of alien political ways to American needs cannot be established by acts of faith. Yet the author speculates as to why our M. C.'s are inferior to a mythical parliament made up of men like "Burke, Cobden, Macauley and Mill." The question is meaningless, for men are moulded by the arrangements under which they work and the ways in which they do things. Different governments attract different sorts of persons and draw out different qualities. The groups whom he compares are just not comparable. I would not exchange my American pick of five for an equal number whom he might choose from the current parliament. And as for men of the inferior sort, something is to be said for the crack-pot as against the slightly animated lump of acquiescence. The spectacle of a resort to guerilla tactics by a small group of Senators is shocking — but the poll tax bill did reach the floor. Under the rigid control of Cabinet and Council it could have been quietly smothered without letting the people in on the secret.

Nor can the devices under which the rival institutions operate easily be measured against each other. Office, agency, process are parts of going schemes of arrangements set in unlike cultures. In terms of place, prestige, performance, President and Prime Minister belong to different worlds. Our Executive has a distinctive function; usually he does not come from the legislature; he is chosen by, and responsible to, the whole people; he brings from without the freshness and vitality which keeps government from becoming formal and stale. If Fillmore, Grant and Harrison were dull, so were the times that produced them. As the tempo of national life quickens, we manage to discover men like T. R. and Woodrow Wilson. It is impossible to find a least common denominator for cool Calvin and volatile F.D.R. But the electorate which picked the one would never at the time have put up with the other. And I am not persuaded that the occasional failure of the two Houses to pull together threatens the very existence of the republic. On no important measure does either branch of Congress vote along strict party lines. We have our own usages for bringing groups which differ into a working accord; witness the distinctive capacity of the type now represented by Jimmy Byrnes. Nor does such a breach in a united front turn up more often than the English system produces its disturbing anomaly.

It seems to me that Mr. Hazlitt practices magic in his appeal to the country. The continuity of the agencies of government is not likely to be

seriously disturbed by changes in administration. Shift parties, and the British Foreign Office and our own Department of State will continue to plod along the same old protocol way. The author makes much of the Minister, who comes in with his party, as the maker, and the Under Secretary, a permanent official, as the executor of policy. Any first year law student could tell him better. It matters not who phrases the principles; it is in the series of instances that the general course is set. Mend and amend our government, if you will. But think twice before you tear up an indigenous growth to replace it by a synthetic product, however beautifully it operates in the abstract.

One suspects now and then that Mr. Hazlitt knows a constitution only by hearsay. He seems to think of it as a theologian would — a document to be applied and expounded. He has no conception of a group of flexible and durable usages which need to be accommodated "to the infinite variety of the changing circumstances of life." As a rigid measuring stick, it has for him no capacity for growth. If need occurs, he would bring the instrument up-to-date by formal action. But a gloss on the text is sacrilege; and the progressive leeway by which the instrument is fudged along into a new statement is to him an usurpation of power. Along the frontier between individual rights and the province of government, we have of late acquired a new constitution. The process has been none the less revolutionary because it has been informal. The result has been to give independence to the legislature and to free public administration from the severe oversight of the courts. The author does not approve — even though the event has come about in exactly the way that the cabinet system was shaped to the work it has to do. If he will quit thinking of the English and the American constitutions as different sorts of things, he will come nearer to the realistic approach which his task demands. Until he acquaints himself somewhat with the facts of political life, he will continue to confuse the British Constitution with the instruments through which it operates.

These remarks are not intended to question the need for political reform. We have done rather better at recording with precision the public will than we have at informing the suffrages which are cast at the polls. The Fathers were mightily concerned with the place of education and "intelligence" in the republic. We have gone a very little way in making organs of opinion — the press, the movies, the radio — instruments of the democratic process. We tinker with that apparatus of government — executive, cabinet, legislature — which is a legacy from another age. We do not attack with the weapons of political theory the newer domains in which public authority has been established. Necessity has of late brought into being a host of agencies which are still amorphous, uncertain of their places, not sure of their tasks. They emerge, almost as of course, as a government, which still affects to be individualistic, attempts to maintain its authority over a business system which has gone collectivistic. Our large corporate entities have long ago ceased to be private affairs. And, as the government attempts to mobilize the national economy, it enlists these worshipful companies in the public service. Their executives become public, without ceasing to be corporate, officials — to an utter confusion in the use of the personal pronoun "we."

The powers of government are currently exercised through a host of these new agencies. Some are avowedly public, others are still nominally private; and in one form or another they are here to stay. There are boards which depend from a cabinet minister, boards which report directly to Congress, boards organized as public corporations, boards set up as their subsidiaries, boards which in name and control are still legally private concerns. And through the whole amorphous, gigantic structure of government, function is as diverse as form. The ICC is still a creature of T. R.'s administration; the RFC carries on as in the days of Herbert Hoover; the SEC is a "New Deal" agency; the WPB is the very incarnation of the businessman's attempt to run the war. The corporate estate has been endowed with public authority; a corresponding responsibility has not yet been imposed upon it. An agency vital in its beginning is susceptible to the disease of bureaucracy; it may be taken captive by the very interest it was set up to control. These are samples of impending problems which cannot be avoided — and as yet they have hardly been fumbled with. And how can the great questions of state — feeding the people, maintaining the common health, insuring the strength of the nation — get raised and receive definitive answers? Here is the great current demand for political invention and discovery — and the author addresses himself to issues which are academic. The superb example of the evils Mr. Hazlitt parades is the second Cleveland administration — and it is too late to do anything practical about that now. If we are to have a new constitution, it should be for our own age.

WALTON HAMILTON†

THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES. By Joseph P. Chamberlain, Noel T. Dowling, and Paul R. Hays. New York: The Commonwealth Fund, 1942. Pp. xii, 234. $3.00.

THIS volume consists of five essays entitled "Methods," "Policy," "Sanctions," "The Courts," and "Conclusions," synthesized to only a slight extent by the final chapter.

The chapter on "Methods" classifies cases, discusses informal settlement, and explains in rather elementary fashion some aspects of formal procedure. The authors emphasize that "By far the greater number of matters which come before the agencies are settled informally and never reach the stage of formal procedure."[1] "It is in informal conferences and personal visits of investigation that the education of both government officers and private persons can best be carried on."[2] Such observations are all to the good. But one illustration impels me to protest: "In dealing with complaints against railroads by private parties, the Interstate Commerce Commission has usually been

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1. P. 9.
2. P. 13.

able to secure a settlement without formal proceedings."[3] True, more cases are filed on the informal docket than on the formal docket. But numbers do not tell the story. Informal complaints are handled by seven clerks and reviewers whose civil service classifications are somewhat lower than those of the four score examiners of the Bureau of Formal Cases. Correspondence methods — not conferences — are used except in those rare instances when parties on their own initiative come in together. Mediation methods for complaints against railroads are entirely foreign to the Commission's philosophy. The writers seem to commend for informal methods that part of that agency which is outstanding for its deficiency in failing to develop adequate informal methods.

"These informal procedures of settling and adjusting differences are generally not appropriate in those situations in which the agency is performing a legislative function, as in rate making, or in which administrative approval must necessarily precede action by private persons, as in granting a license."[4] But why? Surely this dogmatic conclusion is not supported by experience with informal procedures. The bulk of rate cases in the ICC, for instance, readily lend themselves to informal treatment. And a proposal to dispense with informal procedures for granting licenses is revolutionary and runs counter to enlightened thought in the field.

"The concept of fair hearing includes the right to compel the attendance of witnesses."[5] No authority is cited, and Professor Gellhorn's careful analysis shows that the authorities are conflicting.[6] If the authors have new light on the subject, they do not reveal it.

"The memoranda of the technical assistants must therefore be given a more formal character and produced at the hearing, where they may be subjected to the criticism of other parties."[7] If this means that the lawyer-commissioner cannot secure help from engineers and accountants on his staff when he is trying to understand the case he is deciding, I think distinctly inferior decisions would result. I wonder whether the practical problem does not demand more than merely announcing a reaction for or against permitting agency heads to rely on assistants' memoranda which are not made known to parties; perhaps some means must be provided for safeguarding parties' rights to rebut and cross-examine with respect to all facts which concern the parties, at the same time permitting administrators wide latitude to make full use of technical staffs in understanding materials in the record, in using information of which official notice may appropriately be taken, and in developing policies.

The chapter on "Policy," at the risk of expounding the obvious, says much that probably needs to be said: that Congress expresses policies but that formulation of policies by agencies is an essential activity; that "a policy means more than the standards which are to be applied in dealing with particular cases";[8] that "the heads of an agency may be appointed with the

3. P. 11, n. 7.
4. Pp. 13-14.
5. P. 24.
6. GELLHORN, ADMINISTRATIVE LAW — CASES AND COMMENTS (1940) 595-96.
7. P. 49.
8. P. 56.

object of carrying out a particular policy";[9] that an agency may develop policy "through its decisions, its regulations, and, in some agencies, the opinions of its counsel"[10] (and, the authors might have added, through many informal activities, through press releases, through initiation of proceedings, through general investigations, and in other ways); and that agencies are and should be subject to control through Congress, the courts, and the President.[11] On the latter point the authors seem to part company with Sharfman, who deplores what he denominates "manipulation of the appointing power"[12] to control ICC policy, and even regrets the Hoch-Smith resolution of Congress as tending "to weaken the system of administrative control, and to hamper, if not seriously to impair, the independent performance of the Commission's tasks."[13] Because I believe that, subject to due process restrictions, "expertness" should not prevail over a democratic process which happens to be articulate on a particular issue, I prefer the conclusions of the present authors to those of Sharfman. But the authors require the reader to dig for their views and to shift for himself to find reasons pro and con.

The long chapter on "Sanctions" is especially valuable for its exposition. Exhortation, education, and propaganda are preliminarily treated, as well as intermediate and final sanctions, inspection and investigation, and threats of prosecution in court. The crux lies in "sanctions on specific individual conduct," some of which are: deportation; the various monetary fines which at least ten agencies have power to impose; penalties in the guise of taxes; benefits for approved conduct — tax exemptions, ship subsidies, AAA, Sugar Act, government loans; withholding of benefits such as social security, aids to Indians, veterans' pensions; denial of government contracts under such measures as the Walsh-Healey Act; cancellation of federal deposit insurance; power to report violations for prosecution in court; publicity; revocation, suspension and modification of licenses; affirmative orders; prevention, seizure, destruction, and confiscation; mail fraud orders; cease and desist orders; and reparations.

In addition, there are "generalized sanctions," which include award of benefits such as social security, grant of licenses, determination of tax liabilities, land claims adjudicated by the General Land Office.

> "Sanctions of this group are not primarily designed to penalize, reward, or shape the conduct of the individuals involved in particular determinations. They are methods of working out larger policies of government, such as regulation of industrial enterprise, social security, and redistribution of wealth."[14]

Here the authors depart from common usage, for such determinations, I believe, have not generally been thought of as "sanctions." This novel use of the term seems less likely to prevail than the earlier suggestion that

9. P. 57.

10. P. 58.

11. P. 69 *et seq.* But at p. 73 the authors flatly state: "Over the policies enforced by administrative agencies the courts have little control."

12. 2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931) 453.

13. *Id.* at 472.

14. P. 94.

sanctions are "methods of shaping unofficial conduct in order to effectuate official policy."[15]

The chapter on "Sanctions" advances one major thesis—that judicial procedure should be used in many cases where its applicability now is "frequently overlooked because of the habit of mind that links judicial procedure with sanctions traditionally imposed by courts."[16] Thus the authors assert that AAA and sugar benefit payments require "adequate administrative procedure," observe that "formal administrative procedure is completely lacking" in the administration of government loans, and declare: "Only the formal distinction between sanctions of the benefit type and such sanctions as denial or withdrawal of a license can explain — and such distinctions cannot justify — the difference in required procedure."[17] This cryptic conclusion is unsupported by analysis of advantages and disadvantages of formal procedures. Here is typical reasoning:

> "Where the claim is by the government in connection with the revenue, the judicial nature of the determination adverse to the taxpayer is similarly recognized. The absence of requirements for formal procedure when the determination is to grant the application is based upon the possibility of safeguarding the public interest by procedure within the administrative agencies. Where the statute clearly specifies the standards so that there is a minimum of administrative discretion, the propriety of leaving the determination to internal administrative procedures is reasonably clear. However, where a determination in favor of a claimant involves the exercise of relatively unguided discretion and especially where the determination concerns matters of great importance such as, for example, large tax refunds, a noncontroversial judicial procedure provides more effective safeguards for the public interest. Frauds on the relief agencies may be left to police methods and punitive sanctions, but Teapot Domes could be profitably avoided by formal requirements as to methods of determination."[18]

I question the soundness of the authors' thesis concerning judicial procedure for several reasons. I believe the degree of administrative discretion is not the proper criterion for determining the propriety of judicial procedure. Government loans and benefit payments seem to me to call for over-the-counter methods. And I believe that when government officers and the only private party involved are in agreement a judicial procedure is nonsensical. Furthermore, I think one must deal with concrete realities and not with such abstract and undefined phrases as "noncontroversial judicial procedure." A noncontroversial judicial procedure when all concerned are in harmony must mean that a file will be orally read to a court reporter in a room filled with empty chairs. What else can it mean?

15. P. 79.

16. P. 163.

17. Pp. 105–106.

18. P. 158. At some other places more rigorous stylistic editing would have been in order. *E.g.*, p. 162: "Where the purpose of licensing is restriction of competition, there is a further interest in the desirability of granting the privilege at all, particularly where there are prior licensees."

I approve the authors' disapproval of "the 'cock fight' aspect of judicial procedure,"[19] but the authors should not stop with a neat phrase and a broadside statement of the wish. How does one go about achieving the ideal? Eliminate oaths? Curtail cross-examination? Replace oral testimony with written evidence? Relax rules of evidence? Do something about pleadings, motions, briefs, oral arguments? Somehow alter practitioners' psychology or strategy?

The chapter on "The Courts" deals primarily with methods of review, without mentioning: Professor McAllister's excellent article on "Statutory Roads to Review of Federal Administrative Orders,"[20] primary jurisdiction,[21] exclusive jurisdiction,[22] non-reviewability,[23] exhaustion of administrative remedies,[24] declaratory judgments, negative orders,[25] or the *Bassett* case[26] which casts doubt upon *Crowell v. Benson*.[27] The authors assume that *of course* the cornerstone of judicial review is still *Crowell v. Benson*, which, even apart from the *Bassett* case, seems to me questionable. The reliance is upon judicial language, with hardly a glimmer of the frequency with which judicial motivation and action depart from judicial language, especially on questions of scope of review.[28] Nevertheless, the compilation of authorities is a useful one. A section on "Constitutional Background for Statutory Development" reviews the *Morgan* and other cases.

The chapter entitled "Conclusions" contains an able and realistic account of reasons for and against the combination of prosecuting and judging functions. Earlier discussions are summarized. The treatment of sanctions is more than a recapitulation:

> "The use of that cluster of controls which is designated supervision and which includes inspection, investigation, consultation, education, advice, cooperation, and the like is becoming increasingly the method of government regulation as against the policing and judicial procedure."[29]

The book is a significant addition to the literature of administrative law, even though the small volumes by Landis and Gellhorn surpass it in originality and in stimulating qualities, and even though in some respects some of its predecessors in the Commonwealth Fund series — Freund, Henderson, Van Vleck, Sharfman, and Dodd — may have delved more deeply.

KENNETH CULP DAVIS†

19. P. 158.
20. (1940) 28 CALIF. L. REV. 129.
21. *E.g.*, Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426 (1907).
22. *E.g.*, Myers v. Bethlehem Shipbuilding Co., 303 U. S. 41 (1938).
23. *E.g.*, Perkins v. Lukens Steel Co., 310 U. S. 113 (1940).
24. See, *e.g.*, Berger, *Exhaustion of Administrative Remedies* (1939) 48 YALE L. J. 981.
25. Rochester Tel. Corp. v. United States, 307 U. S. 125 (1939).
26. South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251 (1940).
27. 285 U. S. 22 (1932).
28. *E.g.*, United States v. Carolina Freight Carriers Corp., 315 U. S. 475 (1942); NLRB v. Columbian Enameling & Stamping Co., 306 U. S. 292 (1939).
29. P. 224.

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PROTECTION OF COASTAL FISHERIES UNDER INTERNATIONAL LAW. By Stefan A. Riesenfeld. Washington: Carnegie Endowment for International Peace, 1942. Pp. 296. $2.00.

THIS book was written for the specific purpose of furnishing a foundation upon which to build a solution of a problem of the utmost urgency. The stake is the perpetuation of important parts of a natural resource, ocean fisheries — estimated to produce annually ten pounds of nutritious food for each man, woman, and child in the world. The future of this invaluable resource is imperiled by the application of the so-called "three mile rule," that a nation can protect fisheries only to the distance of three miles offshore, although its coastal fisheries may in fact extend as far as a hundred miles. The question submitted was whether international law precluded any relief.

In past ages ocean fisheries were generally believed to be inexhaustible. But in recent years, with modern development of vessel power, fishing appliances, and refrigeration, fishing vessels have operated across the widest oceans; and, as a result, valuable fisheries have been definitely threatened with commercial exhaustion by the intrusion of foreigners indifferent to their preservation. Thus, in 1936, the Japanese asserted the right to pursue unrestricted any method of fishing anywhere, no matter how destructive of the future supply, as long as they stayed three miles offshore. Consequently, the great salmon fishery of the Pacific Northwest was in danger of destruction. Many believed that, in addition to fishing, the Japanese were surreptitiously surveying our waters.

Protests against the Japanese brought to their defense two American groups: those who openly sympathized with Japan, and those who considered the "three mile rule" sacrosanct and the Japanese therefore within their rights. With the belief that investigation would disclose that the sanctity of this rule was a myth, and that, with proper understanding of the past, future progress would be facilitated, the Institute of Pacific Relations was induced to promote a research program. Two legal publications resulted: an argumentative brochure by Dr. Joseph Walter Bingham, entitled *Report on the International Law of Pacific Coastal Fisheries,* published by the Stanford University Press in 1938; and the work of Dr. Riesenfeld just off the press. In spite of the dates of publication, Dr. Bingham's argument was in fact largely based upon the research conducted by Dr. Riesenfeld.

The present work is in three parts. Part I, "International Legal Theory," reviews the legal controversies from Roman times to the present over freedom of the seas. Much attention is devoted to Hugo Grotius, often credited as being the founder of modern international law. This part presents a thorough and most interesting chronological analysis of the position of each significant international law writer who had dealt with the subject, ever since the Dutch initiated the conception that a nation owned a strip of water as far out as a cannon could shoot — an idea which some nations conventionalized into the three mile rule.

Part II, "State Practice," attempts to summarize the actual position asserted by law and diplomatic practice of each of the four geographical groups into which the author divides Europe, and of each American nation.

Part III, "International Arbitrations," considers the international adjudications which have been claimed to involve the three mile rule.

A conclusion summarizes and interprets the three parts. Little doubt is left that there is not and never has been any harmony of opinion among text writers, nor any uniformity of practice among nations, concerning the rights in or extent of territorial waters. Nor have adjudications been at all conclusive of the universality of the three mile rule.

"What, then, is the solution?" Dr. Riesenfeld answers his own question as follows:

> "In the opinion of the writer, the answer to this question can be found only in the application of international law as a means of adjustment of the various national interests in the spirit of a community of nations. On the one hand, there exists no mechanical three-mile rule which, regardless of the interests involved, is applicable under all circumstances and for all purposes. On the other hand, there cannot be complete anarchy. Therefore, if it can be assumed justly that coastal fishing grounds, owing to their primordial importance for coastal states and owing to the very imminent danger of their complete destruction resulting from the employment of piratical techniques by distant nations, can be adequately preserved only by control and exclusive exploitation by the coastal state, international law must and does recognize the right to such control and exploitation by the coastal state, unless the vested, long standing rights of other nations are thereby infringed. This seems to be the only way in which important food supplies for mankind can be preserved, and, unless international law is to be regarded as a senseless and dead body of rules, a reasonable claim to coastal fisheries by the coastal state for conservation purposes is no breach, but fully in accord with international law."[1]

In a rapidly changing world, international law must conform to changed conditions. So vital a natural resource as fisheries must be conserved even at the expense of venerable concepts. Dr. Riesenfeld demonstrates that the way is open.

EDWARD W. ALLEN†

THE ECONOMICS OF TOTAL WAR. By Henry W. Spiegel. New York and London: Appleton-Century, 1942. Pp. xiv, 410. $3.00.

IN this work Professor Spiegel deals with a wide variety of topics, including the economic causes of war; its economic significance; the material and human resources of the participants; changed relationships between nations; and the maladjustments in our economy that war produces. Al-

1. P. 282.

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though the book is recommended to those who desire an over-all picture, it is the opinion of the reviewer, nevertheless, that many dissents will be forthcoming from the critical reader. In particular places exposition seems to masquerade as argument in the sense that an enlightening statement of what has been done is confused with its justification. Elsewhere proof seems to be attempted by a statement of the conditions that would have to prevail if a certain result were to follow and then to imply without direct assertion that these conditions do not prevail. To illustrate these points I shall single out one chapter, "How To Pay For The War."

In this chapter the author is quick to demonstrate that, in the present conflict, our country will be unable to borrow (in net amounts) from other nations and thus postpone the burden of the war for future generations of taxpayers. Whatever borrowing we do must be from ourselves. All that can be done by borrowing, therefore, is to determine the way in which the war's burden will be borne by different classes of our citizenry. With this point conceded, as of course it must be, the problem becomes that of choosing the most equitable method of distributing the burden. Herein the more or less consistent position of the author is that those who make the contributions in the present should be in a position to recover from the rest of society in the future. Sympathy therefore is generally expressed with the policy of making generous wage payments to workers so that out of their pay envelopes they may become creditors of the war effort. To avoid dangers of price inflation it will be proper to compel the payment of a part of their wages in currently non-spendable bonds. Among other considerations, so it is argued, such a policy will help to provide the purchasing power needed to sustain employment when the war is over.

In my opinion we may quickly rule out of the argument all that part which bears upon the possession by present bond-buyers of purchasing power in the post-war period. It will be easy enough then to provide purchasing power to the extent that is required. There is no certainty that the encashment and spending of war bonds in the future may not be carried to an extent that will make our economy uncontrollable. The basic question at issue seems to be whether heavy reliance upon bonds of any sort instead of upon taxes will contribute to distributive fairness. In the reviewer's opinion a policy of carrying taxation as far as can be will lead to more equitable results.

When the soldiers and sailors return from the conflict they will find themselves debtors of the war's burden. No matter whether a soldier is well or poorly paid, he will be unlikely to acquire any large amount of bonds. Those who run the risk of death in battle cannot be expected to save. In the future, therefore, they will be taxpayers primarily and not bondholders. A portion of the products of their future toil will be wrung from them to meet the interest on the bonds purchased by the stay-at-homes. Veterans in the future will be quick to recognize the injustice of this state of affairs. Their demands will carry tremendous influence in politics. It is my guess that if the debt we inherit after hostilities amounts to 150 billions of dollars the minimum demands for the average soldier's bonus will amount to ten thousand dollars. Multiply ten thousand by — perhaps — ten million, and you have an addition

to our debt of 100 billions. To the total debt of 250 billions add such further debt as may have to be incurred in order to sustain employment in the post-war period and you may easily find the debt unmanageable. Taxes may have to be employed of a type and amount that will compel neglect of any principle of equity.

The only possible answer to this criticism of the bond program that is found in the work under review is the contention that a debt we ourselves own is not a burden upon the people as a whole. Although everyone agrees that a distinction must be made between an external and an internal debt, I for one take the position that the consequences of a large internal debt cannot be lightly waved aside. There is every likelihood that it will require a type of taxation in the future that will be highly discouraging to enterprise and endanger our ability to operate the existing economic system.

The above criticisms apply to the policy of selling bonds to savers. Bonds sold to banks are open to severer objection. They tend to expand the circulating medium with the consequence of inducing inflationary movements in the price level. Any pronounced price rise impairs the efficiency of the war effort by destroying the only standards we have of fair prices and fair wages — those that prevailed before the war — and contributes to strikes, disgruntlement, and contract-bickering. It is highly important therefore that we gauge the extent to which bank credit expansion resulting from bond sales to banks will affect prices. In the author's analysis of this question complacency in the face of the inflationary danger is at least implicit. On pages 338–339, Mr. Spiegel states the conditions under which bank credit expansion will be inflationary. Few readers will fail to carry away the impression that these conditions are regarded as special and exceptional. I would ask the reader, however, to determine for himself if they do not correspond closely to reality. The conditions outlined, moreover, all have to do with the demand side of the market. Neglect of supply conditions is of course indefensible. High wages put up costs, and it is only by expensive subsidies that it will be found possible to produce goods for any sustained period at less than output costs. High money wages, however, are the result of making dollars plentiful by the device of issuing bonds to banks.

The reviewer must also take exception to the statement (on pages 336–337) that the Federal Reserve proposals of January, 1941, "were designed to create an artificial scarcity of bank credit and to raise interest rates." I think these proposals were intended only to give the authorities power to mop up a portion of our credit expansion potentiale and to make it clearer to our procurement agencies that dollars must be spent economically.

The principles of sound war finance are simple. They are, first, to raise funds in such a way as will help mobilize our economy for war; second, to pay out as little as possible for what is procured; third, to take out of circulation as much purchasing power as may be without destroying effectiveness. Total war is not a parlor game. In any sound policy some place will have to be found for bonds, but not the amount the reader might complacently assume after reading this volume. The combination of high wages and compulsory bond buying has certain advantages over other objectionable devices.

But it itself is by no means ideal. It has the terrific drawback of inspiring contentment in the face of a tremendous increase in our debt. There is no substitute for careful spending and for as severe taxation as can be laid down.

HAROLD L. REED†

CITY LAWYER, THE AUTOBIOGRAPHY OF A LAW PRACTICE. By Arthur Garfield Hays. New York: Simon and Schuster, 1942. Pp. xvii, 482. $3.00.

MR. Hays insists that "This is more the biography of a law practice than of its practitioner" and that, although he does not hesitate to write of his experiences, "assuredly I am not important enough to write of me." This reviewer feels that Mr. Hays *is* sufficiently important to this world in which we live to write about himself without hesitation. But whether it is about his practice or himself that Mr. Hays has written — and there is a great deal of both in this book — every page makes eager reading. The tempo changes and the scenes shift quickly, but the themes recur and from the pages emerges the picture of a successful "big city" lawyer who has not forgotten that the practice of law is more than the winning of cases and the collecting of large fees.

The opening chapter rushes the reader through a day at Mr. Hays' office — not a typical day, perhaps, but a fair picture of the juggling technique which a successful New York City attorney must acquire. In the remaining chapters of the first two parts of the book — "Biographical" and "Somewhat Biographical" — Mr. Hays proceeds at a more leisurely pace to fill in the background of his practice — the early years before the first World War, the war years at home and abroad, and the established lawyer representing great corporations and wealthy clients. The chapter on "Getting Started" will be of particular interest to law students and young lawyers struggling for a foothold in their chosen profession. Mr. Hays uses his own experiences to illustrate his belief that "Assuming that you know your business and are reasonably diligent, the gods of luck will make or break you," but the reader will not fail to see that Mr. Hays forced his luck by means of courageous and difficult decisions and by refusing to "let well enough alone." He could have remained in the comparative security of the well-established firm in which he began his legal career. Instead, he risked his bread and butter in forming, with two of his classmates, a new firm each member of which, as Mr. Hays puts it, "conversationally had a clientele." Having succeeded in this venture, Mr. Hays could have devoted his entire attention to the demands of his numerous corporate and other well-paying clients. But again he refused to "let well enough alone" and in the third part of his book, aptly called "Salt in a Law Practice," we find the activities which have flavored Mr. Hays' practice and enriched it far beyond that of most other successful New York lawyers of his time.

Mr. Hays' defense of the rights and liberties of the individual has extended from the so-called "Negro covenant" clause in real estate deeds to the Reichstag-fire trial. He has not missed many of the famous civil liberties cases of this century — the Sacco-Vanzetti case, the Scopes anti-evolution

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trial, Tom Mooney, the Scottsboro Negroes, and one of the earlier Jehovah's Witnesses cases are among those in which he has been an active participant. His reminiscences about these cases make fascinating reading, and his comments on civil liberties in general go far to explain his active defense of them under any and all conditions and circumstances.

In a brief concluding chapter Mr. Hays attempts to define or at least to describe "Our Kind" — an expression used by Clarence Darrow in introducing friends to Mr. Hays: "Dear Art, Here's one of our kind." Mr. Hays conceives his kind to be men of good will, tolerant of all save intolerance, and generous of their time and energy in the defense of freedom. This reviewer sincerely hopes that this book will find its way into every Army camp and Naval training station in this country. The men there are now being called upon to defend with their lives the very things for which Mr. Hays has been fighting in the courts. If these men can return to private life with an enhanced appreciation of these rights for which they fought, from their ranks will emerge many of Mr. Hays' kind to carry on an unremitting fight for the importance of the individual and his right to think what he wishes, to say what he thinks, and to live his life as he sees fit within the framework of a liberal society.

HENRY A. FENN†

BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE. Edited by George E. Woodbine. Volume IV. New Haven: Yale University Press, 1942. Pp. 378. $7.50.

IN the review of Volume III of this work in the April, 1941, YALE LAW JOURNAL,[1] there was an attempt "to look both backward and forward" — to summarize the achievement since the first volume was published in 1915 to the present, and also the plan which Professor Woodbine had in mind for its completion. It seems unnecessary to repeat what has been stated so recently. The appearance of volume IV in April of this year corresponds closely to the prediction then made.

As this volume completes the text, containing approximately the last third, the editor comments briefly upon the work and refers to some of his statements made twenty-seven and twenty years ago. He wishes particularly to stress that what appears to be the best text "from the standpoint of law or history or language" is not necessarily that which stands closest to Bracton. "Bracton would have to have been more than human not to have made the same kind of mistakes and the same kind of slips that writers today make, mistakes that all the more easily could have gone undetected because he did not have the benefit of printer and proofreaders to help him correct them."[2] Twiss appears to have adopted the principle that the "purer," the more accurate, text must be nearer to Bracton, although this theory ignores the fact that glossators and copyists of the late thirteenth and early fourteenth centuries lived in a maturing law and a ripening erudition. But Professor Woodbine's purpose throughout has been to bring us as close as possible

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1. White, Book Review (1941) 50 YALE L. J. 1134.
2. P. ix.

to Bracton — probably not closer at any point than a manuscript in the third generation from the autograph. He hews to this line, let the slips fall where they may. In so doing, he has found himself justified in holding to the three principal traditions into which he grouped the manuscripts as the result of that tremendous study, "the pedigree of the manuscripts," which occupied his first volume. He has found it impossible by emendation or selections from variants to reconstruct the original. And all later study has confirmed his initial conclusion "that the tradition represented by group I gives us what is, basically at least, an early text which is older than most of the *addiciones,* and older than many of the corrections and alterations made probably by Bracton himself."[3] Furthermore, it can now be stated definitely that the unidentified T. N., editor of the first printed edition (1569), told the truth when he claimed that he did not reproduce any one manuscript and that he collated some twelve which were available at that time. This is an interesting addition to much other evidence that there was sound historical scholarship in the mid-Tudor period. This text was followed in the edition of 1640 and also, with but slight change, by Twiss. It has been referred to by scholars as the "vulgate," and now we have some knowledge of its sources.

This last third of the text is wholly in the *English* part, based on the court rolls and Bracton's own long experience as judge. He writes as a master. He is free from Rome and from Azo, within whose precincts, it has had to be acknowledged, he at times wandered in a world but very imperfectly realized. There is less theory and philosophy, more sound stuff and readability. As Maitland remarked, the most learned parts of Bracton are the worst. Learned in a different sense are such later great divisions as *novel disseisin, entry, writ of right, essoins, warranty,* and finally *exceptions,* the last that he wrote. *Quid sit exceptio,* he says at the start of this last; and then with clarity and fulness he tells of the curious, incidental, but now thoroughly domesticated *exceptio,* which was already having, and was still more to have, a profound influence on procedure and even on the substance of law. Here Bracton was at his best, treating "a practical legal problem in a lawyerly way." Bracton was Janus-faced: Roman inspiration and his own instincts led him to organization and rationalization; but from a deep immersion in a practical, vital, growing law, he looked towards a law of precedent, judge-made and jury-made, to be endlessly elaborated and "toughened" in the Year Books and Inns of Court. To watch these two forces, which Bracton projected into the future, as alternating influences in all later English history illuminates much and proves the greatness of the work to which Professor Woodbine devotes his life.

"The next volume will be one of notes and commentary, much of the material for which is already collected. It will contain also the addenda and corrigenda for the preceding volumes, which matter has been reserved till this time in order that it might profit, in completeness, from the thorough use of the text which the notes and commentary will necessitate."[4]

ALBERT B. WHITE†

3. P. x–xi.

4. P. xi.

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