

REVIEWS

CASES AND OTHER MATERIALS ON LEGISLATION. By Horace E. Read and John W. MacDonald. Brooklyn: The Foundation Press, Inc., 1948. Pp. 1337. \$8.50.

PREPARATION of a casebook on legislation, or the conduct of a course in that field, demands more than ordinary attention to the question of what the objectives of the course should be. Unless the instructor knows what he is after and keeps a firm grip on the material, a course in legislation is likely to wander almost anywhere and hence arrive nowhere. The course is a newcomer in the law school curriculum and there appears to be no particular agreement upon what it should attempt to do or how it should be taught.¹

Certain of the problems in developing a course in legislation are only too clear. Legislation, in the sense of statutes passed by legislative assemblies, constitutes a major portion of the entire body of law. Obviously the statutory material relating to a particular field must be studied as an integral part of that field; it would be senseless to relegate legislative material to a general course on "legislation". What, then, is the purpose of the legislation course? Is it possible to cull out "general principles" applicable to legislation as a whole which are worth the study of law students? Or should the course be devoted only to matters of legislative procedure and drafting?

Furthermore, any study of legislation can readily lose touch with reality and degenerate into useless sterility. In the field of legislative law-making, the play of political, economic and social forces is particularly strong. Mere legalistic scrutiny of the final product or the formal record conveys a singularly empty notion of the legislative process. The same is applicable, perhaps to a less degree, to judicial interpretation of statutes. For this reason full comprehension of the subject matter requires intensive study of the particular problem to which the legislation is a response, as well as a clear insight into the broad "non-legal" elements in the picture. How can a sense of reality be given to a general course in "legislation"?

Again, legislative drafting—surely a vital segment of a course in legislation—is an art which can scarcely be transmitted to a student through cases or other reading materials. What kind of assistance can a casebook give on this aspect of legislation?

Messrs. Read and MacDonald struggle manfully with these and other difficulties. Some light on the extent of their success in finding a solution may be gleaned from a brief summary of their materials.

The book commences with a long introductory chapter on the "growth of law through the judicial and legislative processes." The opening section

1. Suggestive discussions may be found in Hurst, *The Content of Courses in Legislation*, 8 U. OF CHI. L. REV. 280 (1941), and Cohen, *On the Teaching of Legislation*, 47 COL. L. REV. 1301 (1947).

contains historical material pointing up the increasing importance of legislation in modern society. This is valuable background, though possibly treated too summarily. The three succeeding sections—dealing with the nature and limitations of judicial law-making, early “law-reforming” statutes, and “legislation in aid of the courts”—seem to me of dubious utility. On the other hand the final section on the origins and development of legislative policy, including the factors and agencies which influence legislative judgment, is suggestive and valuable. These are matters which go to the heart of the legislative process and are, in fact, entitled to more attention than the authors bestow.

The second chapter treats of legislative organization and procedure. This job is on the whole well done. But I would suggest two criticisms: first, that the material on parliamentary procedure is insufficient and does not give an adequate picture of the actual functioning of a legislative body—the methods by which its leaders exercise control, tactics of obstruction, the effect of debate, and similar matters; second, that the material on the investigatory function of legislative bodies is badly slighted.

The authors then include a chapter on “types of statutes,” discussing various aspects of direct, declaratory, creative and special legislation; amendments, repeals and codification; uniform laws and interstate compacts. Some of this material is significant, but much of it concerns minor matters of statutory interpretation (a subject treated at great length later) and in general the chapter strikes me as unfruitful and at many points trivial.

A chapter on measures for enforcing legislation, including “effectuation through administrative agencies,” raises squarely the problem of keeping the course within reasonable bounds. I doubt the wisdom of including such material. In any event the issues cannot be handled effectively in the space available. Thus there is little or no data on such vital matters as the statutory injunction, the civil damage suit, requirements of record keeping, organization, and many other features of the enforcement problem.

Chapter 5 is devoted to “Forms of Law-Making: The Parts of a Statute” and contains material on the use of bills and resolutions, title, preamble, enacting clause, definitions, and similar matters. Much of this material is necessary. But it is questionable whether so much space should be given to the manifold and detailed problems arising out of differing state constitutions and statutes; the problems of federal legislation in this area are insignificant. And again much of the material perforce relates to problems of statutory interpretation having doubtful general relevance.

The next chapter, entitled “Legislative Language, Its Arrangement, and the Mechanics of Drafting,” includes some material on statutory interpretation (particularly canons of construction) and a section on the rule against vagueness and delegation of legislative power. More valuable is a collection of writings on the problem of legislative drafting. This material reflects the practical experience of the authors in working with the Minnesota and New York legislatures and is one of the best sections of the book.

The remainder of the book—two chapters totalling over 350 pages—deals mainly with statutory interpretation. The collection of cases and materials is good. But the space devoted to the problem, taking into consideration the material in preceding chapters, appears excessive. And certain sections, such as those dealing with the weight given to administrative interpretation and with violation of statutes as negligence per se, seem altogether unnecessary. Moreover, the treatment of statutory interpretation poses a more basic problem. The authors have chosen to group their materials in the conventional pattern, the various sections dealing with the "plain meaning rule," the "mischief rule," the "golden rule," the effect of previous interpretation, reenactment, use of legislative history, presumptions, and similar classifications. One is left with the feeling that the study of these devices gives only faint and barren clues to an understanding of the interpretative process. It is suggested that a series of cases dealing with judicial treatment of a few selected statutes—such as the Mann Act, the Federal Trade Commission Act, the Fair Labor Standards Act—would be equally successful in presenting the various legal devices used or ignored by the courts and at the same time would permit the inclusion of political and economic material that would place the problems in a less abstract and more realistic atmosphere.

Taking the book as a whole, however, one must give full credit for a comprehensive and well-documented job. The book represents an enormous amount of hard work over a long period of time. The materials have been carefully and thoughtfully chosen. The notes are crammed with citations so that the volume is an excellent working tool in the study of legislation. And the non-case material is abundant and suggestive. The ultimate product is thoroughly worthwhile and represents a contribution to the field that certainly outshines all previous efforts.

The major shortcomings that I find have already in large part been indicated. Essentially I would offer two basic criticisms. One is that the authors have perhaps given insufficient attention to the scope of their effort and the objectives they seek to attain. The preface alleges that the work is designed for a course "in the methods of the legislative process and in judicial techniques of applying statutes in the solution of legal issues." But the attempted coverage is actually far wider and a substantial proportion of the 1337 pages skims lightly over more distant fields. In addition, too much of the material concerns details peculiar to a single state jurisdiction. At the same time certain matters, outlined below, are neglected or omitted entirely.

The other flaw, at least in my judgment, is that the total result conveys a somewhat abstract and sterile view of the legislative process. One fails to obtain from the book a clear appreciation of the function and actual operation of a modern legislative body. There is an absence of the flavor of practical politics and of the clash of social and economic forces. There is insufficient picture of the capacity of the legislature to grapple with live

modern problems,—such as a Federal program for full employment or a state program for housing. In real life the legislative process is awkward, unruly and badly integrated with other government functions; the problems it must solve are complex and pressing. Yet the legislative assembly is the core of our democratic institutions. A book on legislation should convey some of the spirit and urgency of this dilemma of modern democracy.

I believe that many of the difficulties just outlined could be avoided, and valuable advantages gained, by a somewhat different approach. In my judgment, the law school course in legislation should be built around a study of the legislature as an institution of government. It should be directed toward consideration of the function of the legislature in a highly industrialized society, the role it is equipped to play, its methods of operation, and the legal problems involved in the performance of its functions. This would have the advantage of narrowing the field to more manageable proportions and affording a clearer insight into the forces at work and the actual problems of legislative operation. Such an approach could be readily integrated with the study of executive institutions in the course on administrative process and of judicial institutions in the procedure and other traditional courses of the law school curriculum. It would permit a wider use of social science materials and facilitate a realistic treatment of the major issues that confront our Federal and state legislatures today.

A course of this kind should commence with a study of some of the problems involved in the election of members to legislative bodies—the basis of representation, apportionment and reapportionment, restrictions on voting, rights of new parties, control of corrupt practices, and the like. It should then move to a consideration of the composition of legislative bodies—the age, occupation, education, social status, geographic and group representation, experience, intelligence, and skills of the persons who get themselves elected to the legislature. Only in the light of such background is it possible to understand or appraise the working of our current legislative assemblies. From here one can begin to appraise the role which the legislature of today plays and can play in modern government and its relationship to other institutions of government.

The student should then proceed to consider the forces in our society which underlie and influence legislative action. This involves a study of pressure groups, public opinion, the impact of political parties, the part played by the chief executive and the administrative bureaucracy, and the other factors which condition the operation of the legislature.

The investigatory function of the modern legislature is certainly deserving of more attention than it has usually been accorded. The methods by which a legislature obtains information, its function as public investigator, its role in supervising the bureaucracy, possible limitation on the powers and procedures of legislative committees, are all matters of growing significance.

With respect to the law-making function of the legislature the student should be acquainted with the organization and procedure of legislative as-

semblies, including methods of maintaining leadership, the committee system, tactics of obstruction, the use of the veto, judicial review of legislative procedure, and similar matters. Next should come a consideration of certain major problems in framing a statute, covering such issues as the rule against vagueness, private and special legislation, the role of legislative findings, as well as technical requirements of title, single subject matter and the like.

Statutory interpretation, of course, requires some attention. But I believe this can be somewhat de-emphasized, and considered primarily from the viewpoint of its relation to statutory drafting. Training in drafting on the other hand should be a matter of major concern. As already indicated this requires mainly actual practice, and the contribution to be made by reading cases or other materials is a limited one. The course could well conclude with a consideration of the various proposals for reform and rejuvenation of legislative bodies.

All of the foregoing material should be presented in the context of the political, economic, social and psychological forces which shape our current legislation. The use of specific case studies—such as the operation of the Committee on Un-American Activities or the legislative struggle to pass the Employment Act of 1946—can readily be used to give life and color to the course.

This outline is necessarily couched in general and sketchy terms. But I believe it presents the framework of a course which would furnish to the future practicing lawyer, government servant, political scientist or average lawyer-citizen a valuable initiation into a critical area of modern government.

THOMAS I. EMERSON†

THE POLITICAL COMMUNITY. By Sebastian De Grazia. Chicago: The University of Chicago Press, 1948, Pp. xx, 258.

WE have taken things too easy. In liberalism as well as in socialism we have put all emphasis on the hoped-for improvement of *conditions* which, in a more or less far-away future, might lead to the restoration of those community values whose loss we darkly feel as a threatening thing; conservatism, on the other hand, merely bewails this loss without knowing what to do about it. But, even supposing that it is *not* utopian to assume that, in an age of specialization and of increasingly totalitarian organization of state and society, the lost early "community" will be restorable, there is the problem whether we can afford to wait until "conditions" have been changed. Can the sense for cultural and communal values be put on ice without turning into that "ice cream" evaluation of values of the famous GI, who referred to the soda fountain of the home-town drugstore as the embodiment

† Professor of Law, Yale Law School.