# REVIEWS

BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL. By Alfred Lief. New York: Stackpole Sons, 1936. Pp. 508. $3.00.

"IN THESE Holding Company Act cases great issues are involved, great in their complexity, great in their significance . . . An application for a stay in suits so weighty and unusual will not always fit within the mould appropriate to an application for such relief in a suit upon a bill of goods."[1] This recent admonition with reference to procedure in cases involving issues of constitutionality is the coordinate of that classic caution of Chief Justice Marshall with reference to substantive decision: "We must never forget that it is *a constitution* we are expounding."[2] But these are more than admonitions. They are characterizations of the special function of the Supreme Court and they explain the requirement of special competence in the Justices. Of course, Supreme Court Justices, like judges anywhere, are expected to possess strength of mind, rectitude, legal learning and talent, capacity for impartial decision and at least a modicum of knowledge about human affairs and human emotions. But for the decision of "great issues," "great in their complexity and great in their significance" and for the expounding of *"a constitution"* we want more. We want men of imagination who can pierce legal doctrine and uncover the idea and force beneath; men of intellectual power who can recognize and transcend personal predilection in matters of government policy; men of wisdom and statesmanship who can see the "great issues" before them in their larger setting of government and not merely as private disputes between litigants; men of courage and vision, not enslaved by the present and unafraid of the future. And, though it may appear paradoxical, we want men with a sense of humility as to their function and a sense of responsibility as to their great power; men who recognize that their power to kill is not matched by an equal power to create, that the awesome power to stop experimentation in government imposes the heavy duty to exercise that power sparingly and with utmost discretion. Such are the demands of a place on the Supreme Court bench. They are also the reasons for interest in the lives of Supreme Court Justices and of men qualified to meet these demands.

Though the lives of only a few Justices who sat on the Supreme Court bench since its erection are recorded in biographies, Mr. Lief's biography of Mr. Justice Brandeis, published on the eve of his eightieth birthday, is only the latest addition to an already voluminous literature about the Justice. The book relates the events of the Justice's life in chronological order and in a simple, readable style. With apparent authenticity, it presents the ideas which motivated his conduct and the reasons for his choices; and it ends with a brief review of his work on the Supreme Court. It is a diarial record, not

1. Landis v. North American Co., 57 Sup. Ct. 163, 166 (1936).
2. McCulloch v. Maryland, 4 Wheat. 316, 407 (U. S. 1819).

an interpretation. It is written with objectivity and dignity, though the author's admiration is not concealed. Much of the material is available elsewhere, in the books of Professor Mason and Mr. De Haas, in the collections of the Justice's writings and in the numerous articles about the Justice. But Mr. Lief has rounded out the story and has filled in many of the gaps. The chronicle of a thrilling life, it is a thrill for the reader.

Yet Mr. Lief's book demonstrates what a grand five volume work can be and some day will be written about Mr. Justice Brandeis. He has been an integral part of, and has played a noteworthy rôle in, a long and important period of American life. At eighty years of age, with more than forty of them spent in prominent and important participation in public affairs and with the last twenty spent in the "cloistered" life of a Supreme Court Justice, Mr. Brandeis is today probably a greater national figure, a greater influence in current thought than he ever was. His influence in the law is not exceeded by that of any judge. But his influence transcends the law. His thought is a power throughout the field of governmental policy, economic, social, administrative, political. Numerous attempts have been made, in the manner of scholars, to pigeonhole him, to put him in some "school," to affix to him some familiar label. But his individual distinctiveness has defied the attempts and his name has itself become the distinctive label of identification. His pragmatic specificity has given much concern to those prone to generalization and theorizing. Where others wish to plan for the universe, he prefers to concentrate on specific problems that the mind of little man can encompass. Where others are intrigued by the dialectic of large scale organization, he turns to experience for his guide. Where others display impatient haste, he is a Job with abiding faith in democracy, in the power of education, in the initiative and inventiveness of man when he does not attempt to be God. And though, after so full a life, he has strong convictions and definitely formulated views on public policy, he has been able to control them in the performance of the function of high judge in a democracy.

Outside the Court, many recent developments are congenial to, or derive from, the Brandeis thought: the securities, banking and holding company legislation, the declining prestige of financial or industrial giants, the tax burdens imposed on bigness, the increased expectation of government's responsibility in economic affairs affecting social policy and the rejuvenated interest in the preservation of the economic independence of the individual (though not always by methods which he would endorse), the active interest in stabilization of employment, the strenuous efforts of law schools and law teachers to study and teach law as a living science concerned with economics, politics and social policy, and requiring specific knowledge about those subjects. But on the Court, he still is of the dissenting minority and it is his dissenting opinions which have gained the greatest renown.

But he has had a very notable influence on the institution and on decisions of the Court. The so-called Brandeis brief, the numbered paragraphs in opinions and the expansion of legal argument and analysis to include the economic and social facts out of which legislation is born are now almost conventional in the Court's business. His opinions for the Court in cases

involving railroad regulation are texts in that field. And there are unmistakable signs of his influence on what is called, in this connection somewhat misleadingly, procedure and jurisdiction. No Justice has been more vigilant than Brandeis—and few as vigilant—to guard against deviation from the rules of federal jurisdiction, regular procedure and propriety in the performance of the judicial function. For to him these rules, in the adjudication of constitutional and federal issues, are not purposeless legal technicalities or vain marks of craftsmanship. They confine the Court to what he deems to be its proper function in our democracy. They aid in the maintenance of federalism. They safeguard against excesses of judicial power and encroachment on the powers of its coordinate branches of government. And they protect the Court from self-injury.

In the present period of critical appraisal of the Supreme Court and its function, there is some dissatisfaction even with the philosophy of judicial self-restraint to avoid constitutional determinations and with its particular manifestations in Supreme Court decisions. Some urge that the Court should pass on the validity of legislation promptly after enactment and comprehensively; that it should not avoid or delay the first opportunity to express its judgments. Perhaps the critics do not really comprehend the function of the jurisdictional and procedural limitations, but regard them merely as legalisms. Perhaps they do not understand that serious conflicts on issues of power may have been quieted or avoided by concurrence on a jurisdictional or procedural point. Perhaps they are dissatisfied because they have not spent fifty years in fighting against odds for the public interest. They are impatient. They may prefer to have the Court decide issues of power adversely, badly in their opinion, than to leave the issues undecided, that is, to leave them for decision by the Court at a later time or for possible future adjustment without Court decision. And perhaps they do not concur in the view, based on experience, that procedural regularity is one of the greatest safeguards of liberty. They point to the seeming eccentricity of the decisions, some sustaining jurisdictional or procedural objections and others overlooking or denying them although they seem equally available. In any event, it is urged, the Supreme Court can only reverse or admonish; but can it thus control the four score district courts with their greater number of district judges each of whom has the power to make initial determinations, issue injunctions and effectively hamstring a legislative or administrative program? It is not the Supreme Court alone; it is the whole process, the inferior courts and their judges, that is involved.

Here are issues that challenge wisdom and experience. They concern the fundamentals of the place of the judiciary in our system. They are not to be disposed of by a simple generalization of the desire of the moment. One outside the Court does not know what compromises are hidden in a unanimous decision, or what pragmatic or opportunistic (if you will) considerations influenced the choice of one rather than another ground for the decision. Nor can one not intimately familiar with the effects of particular decisions, with the history of programs in which judicial decision was postponed or advanced and with the attitudes of the Justices during the pertinent

periods appraise the value of the course of action chosen. Mr. Justice Brandeis's years on the Supreme Court require not the scant hundred pages written by Mr. Lief (though they are good), but at least two volumes. And at least one volume would be required for an adequate treatment of the jurisdictional and procedural limitations on the federal judiciary with which the Justice has been identified.

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THE LEAGUE OF NATIONS AND THE RULE OF LAW, 1918–1935. By Sir Alfred Zimmern.[1] London: Macmillan, 1936. Pp. xi, 527. $4.00.

STUDENTS of the League will appreciate the book of a man who speaks as a close observer and out of personal experience, both when he deals with the old methods of diplomacy, with the working of foreign offices and international conferences, and when he describes the League as it takes shape in committee work, technical councils and Geneva Assemblies. League admirers and League skeptics will be able to draw support for their opinions from this stimulating but inconclusive study.

Every chapter, whatever phase of the League it deals with, seems to raise the question whether the League possesses authority to end a state of affairs in which "force still reigns supreme." We are left without an answer. We are told in the introduction that the League is "but a new technique in interstate affairs," a new method "merely supplementing the old methods." But how then can it hope to change "power politics into responsibility politics?" How is it to fulfill what Sir Alfred Zimmern regards as its "first and major function," namely, "to eliminate once and for all the fear of war," if it is only good machinery for serving familiar ends? The author is fully aware of these problems. He emphasizes again and again that "rudiments of a world community at least," to use the words of Lord Parker of Waddington, must be presumed to have emerged and to have created "a real sense of social solidarity between the leading peoples of the world" if the League is to be capable of guaranteeing and enforcing peace. But has the experience of seventeen years shown the rise and working of such a new spirit?

We are led through four phases of League history, covering the period from 1919 to 1935. Never has a more realistic account been written. First phase, 1919–1920: "The assumptions upon which the Covenant was drafted were undermined and indeed very largely destroyed." Second phase, 1920–1924: Outside opinion saw the failure of the League to become "a society for mutual assistance against aggression." At no moment was there "a common basis of principle on which agreement could be founded." Third

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phase, 1924–1929: Sir Alfred Zimmern calls it "the most normal period," showing a spirit of cooperation between the European great powers. This, however, led to the Locarno treaties negotiated outside of the League. "The Assembly met in a mood of chastened resignation." Fourth and last phase, 1929–1935: Europe slips back into the anarchy not of the nineteenth, but worse than that, of the eighteenth century. The author, in concluding his historical survey, declares that the "new international system" has broken down. The last chapters of the book seem, however, to contradict this opinion. The author, when writing them, apparently was greatly impressed by Great Britain's "naturally assumed" leadership in Geneva's collective action against Italy. Since sanctions had not yet collapsed when the book was published, he could hope against hope that the League might yet emerge as a "union of force and law." Perhaps he was pinning his faith to the cooperation of two great "law-abiding powers," France and Great Britain, "the most powerful and prominent representatives of the collective opinion and conscience of mankind," rather than to League action.

Sir Alfred Zimmern compares enforcement of peace by the League, that is, collective action by the League members against an aggressor, with a one-time effective institution of British municipal law, the so-called "hue and cry." This was a method by which, in the absence of an organized police, each member of the community, at the call of the public authority, was obliged to join in the pursuit and apprehension of a felon. If "hue and cry" were all the League stands for, the League today would stand condemned. Collective action, now known under the name of League sanctions, has failed. Sir Alfred Zimmern shows, however, that the League has a whole series of other no less important functions, none of which presupposes any such revolutionary change of spirit, as would effective application of the principle of hue and cry in international affairs. And he renders a great service to the cause of the League in bringing these other functions to our attention. Three out of the four "systems" embodied in the Covenant (the author speaks of five systems) represent a gradual development, a logical continuation of institutions established in the nineteenth and twentieth centuries. Thus the League is first a "system of world services" on the model of the Postal Union. Much light is thrown on the working and importance of this technical side of the League's activities. Then secondly, there is "the Hague Conference system," that elaborate multilateral treaty embodied in Articles XII to XV of the Covenant, widening the efforts of prewar days to organize the peaceful settlement both of legal and political disputes. It is highly misleading to find Article XVI included in this category when it should be evident that the "sanctions article" is the very core of what Sir Alfred Zimmern calls the "system of hue and cry." A third group of articles embodies "the Concert system," the importance of which the author tends to minimize, as is apparently the inclination of all adherents of the hue and cry. That bias accounts for his failure to include in this category Article XI, a consultative pact calling upon the members of the Concert to try to seek agreement and if possible, to evolve concerted action whenever there is a threat of war.

Sir Alfred Zimmern discovers two more systems where there would seem to be but one. The guarantee of territorial integrity and political independence (Article X) is declared to represent the "system of the Monroe Doctrine." Could anything be farther removed from that traditional American policy than any such entangling and universal commitment to the status quo? Article X and Article XVI belong together and make up the "system of hue and cry." This is the one system for which the author is unable to find any precedent in prewar international relations. He calls it a "product of war-time thinking." This is not, I suppose, because he has forgotten the Holy Alliance or the later so-called defensive military alliances. In the minds of the British and the Americans when they drafted the Covenant, the very purpose of the new collective system of guarantees and sanctions was to supersede the old deprecated method of alliances. This was not true with respect to the French, who have never ceased to regard the League as a kind of greater coalition or a new Holy Alliance for the maintenance of the status quo. Sir Alfred Zimmern is satisfied, however, that the League is in fact completely removed from anything resembling an alliance. "To be everybody's ally is to be nobody's ally . . . A collective system," he says, "and special alliances belong to different worlds." It seems not to occur to him that the hue and cry of the League, collective security as it is also called, might serve as a cloak for alliances, or that it may work only when it happens to fit in with an underlying system of alliances. Must not Articles X and XVI either constitute a kind of superalliance against specified "potential aggressors" or else remain a dead letter?

If Sir Alfred Zimmern is right in assuming that the hue and cry presuppose a community spirit, and if according to his description of postwar politics, such a spirit is lacking, should it not be concluded that the League must, for the time being at least, give up the idea of organizing collective action against aggressors, if it is to be saved from further failures and ultimately from complete collapse? Should not the friends of the League wish that the Geneva institution might concentrate on its three other functions and, forsaking unattainable ambitions, at last try to become a new Concert of Powers, a center of peaceful settlement of disputes and an agency for international technical cooperation? That such a "weak" League will not in itself suffice to save Europe from a new war must of course be conceded, but it is more likely to contribute to the pacification of Europe than a League that persists in preparing punitive actions which it will never be able to carry out and the vain threat of which causes irritation and creates dangerous illusions.

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THE ENGLISH LEGAL TRADITION. By Henri Lévy-Ullmann.[1] Foreword by Sir W. S. Holdsworth. London: Macmillan, 1935. Pp. lvi, 383. $4.50.

WRITING FROM the viewpoint of the comparative jurist, Professor Lévy-Ullmann has given us a history of the English legal tradition which is clear, concise, carefully documented, quite humorless, and entirely lacking in a sense of the social realities behind lawyers' pleadings. *The English Legal Tradition* represents, one might almost say, a grammarian's idea of legal history. The author is scrupulously attentive to variations in the spelling of Littleton's name,[2] the different methods of citing the older English statutes[3] and the etymology of various legal terms. Almost nothing is said about the content of the English legal tradition, that is to say, the actual legal relations between individuals and classes within that tradition, or about the economic and cultural factors that make up the background of the legal tradition. When Professor Lévy-Ullmann does venture to offer historical explanations of legal facts, he is not particularly illuminating. He faces the fact, for instance, that there was a great deal of statute-making during the first half of the sixteenth century. How shall a historian explain this? Is it necessary to know what the legislation dealt with and whether it was related in any way to the growth of industry and commerce? Not at all. A sufficient explanation may be found, it seems, in the character of the sovereign, Henry VIII. The same "turbulent energy" that called forth many marriages called forth many laws. But then there were likewise a great many statutes enacted in the reign of the Virgin Queen. Nothing daunted, our author ascribes this, likewise, to the character of the sovereign. And so we are given a sentence that is a wonderful *reductio ad absurdum* of the personal interpretation of legal history: "The thirty-eight years of the reign of Henry VIII (1509–1547) and the forty-five of Elizabeth's (1558–1603) produced a forest of legislation obviously the outcome of the turbulent energy of the king, or, again of the cold though lofty puritan zeal of his daughter."[4]

The limitations of this kind of history-writing are too obvious to require elaboration. Within these limitations, however, Professor Lévy-Ullmann has done solid and serviceable work. He has undoubtedly given us the best one-volume critical bibliography for the study of English legal history. To students in that field the book may serve as a useful substitute for the ponderous volumes of Holdsworth on which it is so largely based.

Professor Lévy-Ullmann's acquaintance with his documentary materials is impressive. On the other hand, he is quite uncritical in his acceptance of traditional valuations of men and doctrines. Surely no legal historian today has the right to attribute to Blackstone a "clear mind"[5] without even attempting to answer the demonstrations of Bentham and others that Blackstone had a very muddy mind. Similarly, the author's judgment that "the fundamental difference which separates English law and Continental law" lies in the law of contracts and particularly the doctrine of consideration[6]

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2. P. 139.
3. P. 243–8.
4. P. 252.
5. P. 229.
6. P. 72.

leads one to wonder whether our author has simply repeated an old academic maxim or whether he has actually studied such points of difference between the two systems as the conduct of criminal trials or the legal status of administrative officers, and concluded (on the basis of some undisclosed system of values) that the actual differences between the two systems of modern law in the enforceability of agreements are the more important.

A number of the author's comments on the growth of legal institutions contain valuable insights. "The Writs of *Habeas Corpus*, of *Certiorari*, of *Prohibition*, of *Mandamus*, made it possible for Common law, thanks to the King's Bench Court, to prevent illegal acts by the bodies and individuals charged with the functions of central and local government. This Court having thus in reality become an administrative tribunal made unnecessary in England the establishment of a special administrative jurisdiction. . . ."[7] The form of the Common Law, our author observes, "in all its audacity and ingenuity, with its subtleties and its formalism, its prejudices, its repetitions, its deliberate obscurities, and its mysticism," is directly traceable to the arguments of generations of law students around the dinner tables of the Inns of Court.[8] Noteworthy is the care with which Professor Lévy-Ullmann demonstrates that publicity has not always been a characteristic of statutes or judicial opinions but is, in fact, a fairly modern development in the English legal tradition.[9] Perhaps the only trace of legal realism in this volume appears in the author's account of precedent in equity: "In judicial matters there always is a tendency, avowed or not, on the part of every judge to quiet his doubts by placing his decision under the aegis of similar judgments rendered by his predecessors, judgments by which he then claims to have been guided. It must also be remembered that every judge is likely, in the interest of the reputation of his court, to show respect for its decisions."[10] Particularly pithy is the observation, "To ecclesiastical Chancellors Equity owes its formation. To legal Chancellors it owes its transformation."[11]

Unlike some students of legal history, Professor Lévy-Ullmann admits that there are legal problems which history does not solve. A question that particularly concerns him is whether equity may be correctly viewed "as the sovereign remedy for the world's sickness, a healing of the nations flashing upon us in splendid vision,"[12] or whether one must accept the assurance of Mr. Justice Buckley that the Chancery Division "is not a Court of Conscience,"[13] and derive from this the melancholy observation: *Les oiseaux s'envolent et les fleurs tombent.*[14] And so the volume ends with at least one unanswered question: "But which of these two pictures is the true one? Tradition gives us no clue. Perhaps contemporary theory may furnish one to us."

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7. P. 39.
8. P. 85.
9. Pp. 104, 267.
10. P. 358.
11. P. 294.
12. P. 369.
13. P. 368.
14. P. 369.

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CASES AND MATERIALS ON THE LAW OF CREDIT TRANSACTIONS, Second edition. By Wesley A. Sturges.[1] St. Paul: West Publishing Company, 1936. Pp. xiii, 1082. $6.50.

NEW EDITIONS of some casebooks accomplish little more than to render the preceding editions obsolete by the substitution of a few recent cases for older ones, which often were more valuable. They do enable law publishers to torpedo a second hand market surfeited with copies of earlier editions. This book is not, however, that kind of new edition. On the contrary, it is a thorough and scholarly revision, which not only brings an essentially pre-depression casebook up to date—the first edition appeared in 1930—but which also makes it a more effective teaching implement.

The present edition follows the general outline used in the earlier book. Within that broad framework, however, there have been considerable changes in, and rearrangement of, material. Even the index has been rewritten. A new section and a new sub-section have been added;[2] 149 cases appearing in the text of the first edition have been omitted,[3] and 78 new cases included. Certain topics have been developed by almost entirely new materials.[4] Even more extensive use has been made of excerpts from legal treatises, law review articles, notes and comments. The practice has been discontinued of setting out part of an opinion followed by the query "Judgment for whom?" although a great many more questions have been inserted. Numerous forms have been reprinted as text materials and annotations have been made more exhaustive. Recent amendments to the Bankruptcy Act have been included in the appendix.

Much of the material new to the present edition concerns tremendously significant phenomena of the past six years such as mortgage moratoria, the Frazier-Lemke Act, the fixing by courts of minimum "upset" prices in mortgage foreclosures, the legislation intended to secure a fair price at foreclosure sales, and so on. In short, there is exhaustive reference to all recent legal developments bearing upon credit devices.

Rearrangement of cases has made for a more closely knit and better articulated book. The inclusion of forms in current use by certain governmental lending agencies and private financing institutions also represents a real improvement. No longer is there an excuse for students leaving the

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2. The new section appears in chapter six and is entitled "Appointment of Receiver." It consists of three very recent cases concerning the appointment of a receiver pending the foreclosure of a mortgage—a problem inadequately dealt with in the first edition. The new sub-section is entitled "By special execution" and is added to the section entitled "Methods of foreclosure." This new sub-section consists of two cases appearing in the earlier edition in the section dealing with foreclosure by equitable action.

3. Included in this number are the well known cases of *Freeman v. Auld, Gibbs v. Blanchard, Grantham v. Hawley, Holyrod v. Marshall, Mallory v. Gillett, Laudisi v. American Exchange Bank, Newcomb v. Hale* and *Sexton v. Kessler and Company.*

4. For example, mortgages on after-acquired property and many of the problems incident to the insolvency and bankruptcy of the debtor.

course with only a sketchy, piece-meal and unreal conception of actual credit instruments. Contrariwise, it is now possible to develop various aspects of the subject in terms of the forms set out in the text by examining the legal effect of the language used in these forms as well as the reasons underlying the inclusion of certain clauses. In this manner students may acquire a more realistic understanding of the problems they will face in practice than can be obtained by simply analyzing, comparing, contrasting and synthesizing cases. They may even acquire some skill in legal draftmanship.

By substantially increasing the number of supplementary text questions the present edition is made even more effective than the older book in challenging student interest, independent thought and study.[5] Some of these questions set out interesting and curiosity-provoking hypothetical cases dealing with situations not directly covered in the text materials. Appended to each problem case are citations to authorities to be consulted in working out a solution. Other questions are directed toward ascertaining the considerations, social, economic, doctrinal, etc., which influence courts in deciding cases in this field. Still others, in substance, ask why courts talk as they do. All have one characteristic in common: They are incisive and searching inquiries which arrest attention, stimulate the imagination and compel the reader, if he would solve them, *to think*—and not merely in terms of legal formulae.

From what has been said it is obvious that I am enthusiastic about this book. My criticisms of it are few in number and concern relatively unimportant matters.[6] I do believe, however, that the book would be even more valuable if it dealt more adequately with the surety's rights of subrogation, indemnification and contribution—particularly the latter. Also, I wish that Professor Sturges had inserted brief historical introductions, similar to those found in Professor Hanna's book on Security, to the material concerning third persons as security and to the material concerning property as security. Finally, I question the advisability of including sections on bankruptcy. It seems to me that most of the situations dealt with in these sections can best be discussed in a course in which the Bankruptcy Act is studied as a whole, such as the courses in Bankruptcy, Debtors' Estates or Creditors' Rights.

A caveat by way of conclusion: The instructor who wishes to ignore the frontiers of a subject, soft pedal its more controversial aspects and "hit only the high spots" will not find this book to his liking, nor will the student who is long on note taking but short on brain sweat. On the other hand,

5. It is of interest that Professor Sturges states in the preface that, "As a further stimulus to independent work by the members of the class, the author plans, during the school year 1936-1937, to edit the questions and answers put and answered in the classroom with respect to the text materials and to provide copies of them for members of the class at the beginning of the course in succeeding years. Revisions will be substituted from time to time."

6. Since this volume is concerned only with devices intended to secure obligations to pay money, it contains little or no material concerning fidelity, construction, fiduciary and court bonds. Consequently, it is not a satisfactory book to use in training men as attorneys for corporate surety companies.

either a student or an instructor who is interested in a critical and exhaustive investigation of the myriad legal problems arising in connection with "the simpler and frequently recurring transactions whereby parties borrow and lend money and buy and sell property on credit" will find this book a delight.[7]

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FEDERAL COMMISSIONERS. By E. Pendleton Herring.[1] Cambridge: Harvard University Press, 1936. Pp. xi, 151. $1.50.

THE whole problem of the relation of the federal "independent" commissions to the executive is badly in need of comprehensive study. Their growth in number, scope of activities, and power has been rapid, especially in the years since the war. They have been justified by the need for regulation, the desire for neutrality in adjudication, the distrust of politicians as administrators, the effort to eliminate the more blatant incidents of the spoils system, the lack of suitable executive departments to which the tasks might be entrusted, and the desire to limit presidential control of administration. Paralleling their growth, however, is a similar growth in the regulatory functions of the old line departments.[2] No clear policy of Congress is discernible, when a new job is undertaken, as to the sort of agency most appropriate to handle it, or as to the agency's relations to the president. Fortuitous circumstances, such as the personality of the incumbent cabinet officers, have often controlled the results. The National Labor Relations Board and the Social Security Board were for that reason made independent; while at the same time the Bituminous Coal Commission was put in the Interior Department and the Federal Reserve Board was reorganized to permit closer presidential supervision. Regulation of securities issues was first destined for the Federal Trade Commission, then switched to a new agency; the

7. Although the present edition is shorter by 146 pages and contains 71 fewer cases than the first edition, Professor Sturges states in the preface that he expects to continue to devote three hours a week throughout the year to presenting the course. It seems that at least that much time will be necessary, because, except for certain problems arising out of the effect of the National Prohibition Act upon conditional sales and chattel mortgages, the present edition covers all the situations discussed in the earlier edition as well as a few situations not referred to therein. The reduction in size has been accomplished by omitting the "judgment for whom" cases and by relying upon excerpts from law reviews and legal treatises to develop a number of problems which were developed by space-consuming case material in the preceding edition.

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2. The rise of government-owned corporations presents a separate but cognate problem. While most of them are service agencies, some, like the Deposit Insurance Corporation, have important regulatory duties as well. How much independence should they have, and from what? How is their management to be distinguished from that of commissions?

authority conferred by the holding company bill was divided between the Securities and Exchange Commission and the Power Commission on one basis in the original draft, and on another in the Act as ultimately passed. The Alcohol Administration began as a code authority under the N.R.A., was later revived under an administrator responsible to the Secretary of the Treasury, and is shortly to become an independent agency.

Legislative aspects of the work of the commissions—the scope of their powers and the standards to be applied—have attracted many writers and lawmakers. So too, the legal problems of judicial review. Special studies have also been made of particular commissions and of the emerging intricacies of administrative law and procedure. But the problems of administrative management that the commissions present have gone largely unnoticed. Where policy enters the president cannot be indifferent, for he is held generally responsible for all that the administration does. Yet he cannot supervise directly the activities of half a hundred subordinate bodies. The nub of the problem is the combination of discretion over policies, important law-enforcement duties, and the power to judge cases, in many autonomous agencies. True, discretion in matters of policy is inevitable in the administrative regulation of business. It finds expression in the statutory delegations of power to fix "reasonable" rates, to prevent "unfair" competition, to allocate radio licenses "in the public interest." But it does not necessarily follow that the entire job should be given to an independent body. Similarly it is desirable that administration should be "independent" of partisan or selfish considerations. But that independence should not be confused with the cold neutrality of adjudication; nor should it prevent an administrative response to general changes in public regulatory policy. The establishment of the independent commissions has resulted in the divorce and diffusion of authority and responsibility, the creation of vested bureaucratic interests, and the frequent paralysis of governmental action.

Independent commissions as we know them are thus indefensible in theory. Policy should rest where political responsibility lies; adjudication should be divorced from it. The arrangement is defended in practice on the ground that the two cannot be separated—a curious argument in a nation wedded for a hundred and fifty years to the separation of powers. The argument is not founded in fact. The functions can be segregated, as the establishment of the Board of Tax Appeals in the Treasury demonstrates. It is further argued, even by so discerning an administrator as Commissioner Eastman, that independent commissions are agents of Congress and, as such, properly independent of the executive. Whatever the merits of this contention as an abstract proposition, it is an unreal description of administrative practice. A Trade Commission and a Tariff Commission go their ways for years with slight regard for the intentions of Congress. The statutory instructions to most of the commissions are couched in generalities that have no meaning except as meaning is given in the process of administration. The commissions themselves determine their policies, with greater or less deference to presidential wishes, and spend much of their energies either in securing Congressional ratification for them or in staving off unwanted Congressional interference. The powers of several commis-

sions are broad enough, moreover, to cover matters that the President cannot overlook.

The President now influences the policies of the commissions chiefly through his power of appointing their members. Because it is his only effective means of control, he has often used it drastically. Hence the importance of knowing something about those who have manned the commissions. Questions of law, of administration, of economics, of partisan or pressure group politics, and of public policy, may all be involved in the decisions on personnel. *Federal Commissioners* breaks new ground.

In this book, however, Professor Herring is content merely to set forth the official *vitae* of federal commissioners: their age, residence, and previous qualifications when appointed; what president put them in; what questions the Senate asked before confirming them; the length of their tenure; and why they left office. The material is clearly presented and intelligently discussed. But although it is the indispensable raw material for a realistic study of the commissions as instruments of government, it does not, by itself, furnish much more enlightenment than would statistics of the weight, height, and color of hair of commissioners. For the more significant questions about them—are they men whom the President expects to be able to control; men to whom he is willing to entrust great decisions; men nominated by interested groups with which the commissions have to deal—Professor Herring provides no generalizations, although the excellent volume he published last year, *Public Administration and the Public Interest,* shows that he is aware of their significance. He applies his data in seeking to define the proper qualifications for commissioners; but he arrives at only two specific conclusions: "(1) the average brevity of service, and (2) the lack of intimate knowledge of administrative duties on the part of most appointees." These do not answer the question propounded, and the book ends inconclusively on the need for "good men" in government.

The difficulty lies in the isolation of too limited factors in a complicated problem. We need to know the official lives, not only of commissioners, but of commissions. The commissions have not been alike in their powers and tasks, nor in the contexts in which they have worked. It is significant that the Civil Service Commission was omitted from the study, because of the lack of data about some of its members. During some periods that commission was too insignificant for such elementary facts to be recorded. It mattered as little, although the data are available, who served on the Interstate Commerce Commission during the "doldrums" period from 1895 to 1906. "Until the purpose of a commission is defined," says Professor Herring, "its relation to the rest of the administration broadly indicated, and its functions agreed upon, the proper qualifications for those serving as commissioners cannot be fixed." For light on the problem as a whole we must read this book in conjunction with his previous volume, and await the further studies that the author has qualified himself to make. In the meantime political debate is sharpening public interest in a solution.

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