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Postconviction Remedies, and Federal Jurisdiction: Tensions in the Allocation of Judicial Power

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BOOK REVIEWS

POSTCONVICTION REMEDIES. By Larry W. Yackle. The Lawyers Co-operative Publishing Co., Bancroft-Whitney Co. 1981. pp.xxi, 776. $47.50

*Reviewed by Robert Popper**

Postconviction Remedies[1] deals with a subject of great importance to the practitioner of criminal law. It is concerned with the procedures available to persons who seek relief from their convictions after trial and after direct review in the appellate courts. Though not usually a part of the law school curriculum and therefore not part of the attorney's formal training, the intricacies of postconviction remedies must be mastered by the lawyer who wishes to render skillfull service to the convicted client. The trial and appeal are important battles, but others remain to be fought which can decide crucial issues seriously affecting the final disposition of the case.

The activity in the area of postconviction remedies is reflected in the number of prisoners' petitions reaching the federal courts. Petitions filed by state and federal prisoners accounted for 13.8% of all civil litigation in the United States district courts for the twelve months ending June 30, 1980.[2] The records indicate a steady and significant increase in this litigation. Between 1960 and 1980, petitions from prisoners rose from 2,177 to 23,287, a difference of 969.7%.[3] These figures do not reveal the whole story, since they do not include the vast number of petitions from state prisoners that were filed in state courts throughout the country.

Despite the obvious need for guidance so that lawyers, judges and prisoners may find their way through a complex maze of highly technical procedural requirements, there has been a paucity of comprehensive materials on the subject.[4] Professor Yackle's thoughtful exploration of the area

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1. L. YACKLE, POSTCONVICTION REMEDIES (1981). The author is a professor of law at the University of Alabama School of Law.

2. [1980] U.S. DISTR. CTS. ANN. REP. 60.

3. *Id.* at 62, table 20. This compares with an increase in all civil filings over the same period of only 184.7%.

4. One of the more influential works, now outdated but still important, is Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970). *See also* H.

is welcome.

In his preface, the author refers to his volume as "a practical little book." He is too modest and not entirely accurate. It has 776 pages; 600 of which are text; the rest is devoted to statutes, rules, a table of cases[5] and an index—not "little" by any standard. It is practical but not in the how-to-do-it, continuing legal education sense. Although it is not technique oriented,[6] it is pragmatic because the knowledge it imparts is essential for making the necessary strategic decisions that govern postconviction remedies.

The approach of Professor Yackle is a scholarly one, which is appropriate to his task. Postconviction remedies, while sounding crisp and settled, are quite the opposite. It is an area that has undergone dramatic shifts in recent years and is still in flux. The author recognizes this and spends a good bit of effort pointing out and discussing the aspects of uncertainty that exist. Attorneys engaged in postconviction counseling and litigation will benefit from such discussion, which highlights the need for creative lawyering and pinpoints those areas where there is room for advocacy to influence the formation of the law.

The book is divided into nine chapters. The first chapter pertains to *state* postconviction remedies for persons convicted in state courts. The other chapters are concerned with *federal* postconviction remedies for persons convicted in state or federal courts. Chapter One is perhaps the least useful part of the book. It would not have been feasible to delve into the subtleties of the remedies available in each of the states, Washington, D.C. and Puerto Rico; therefore, except for California and New York, the remedies in the various jurisdictions are discussed only generally with emphasis on the historical development of habeas corpus and coram nobis. Persons interested in the law of California and New York will find this chapter particularly helpful. It will have very limited appeal to those in other jurisdictions.

The main thrust of the book, and its chief value, is found in Chapters Two through Nine. These deal primarily with the federal writ of habeas corpus and with the related device available to federal prisoners for col-

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HOFFMAN, PRISONERS' RIGHTS, TREATMENT OF PRISONERS AND POSTCONVICTION REMEDIES (1976); R. POPPER, POSTCONVICTION REMEDIES IN A NUTSHELL (1978).

5. The researcher might find one aspect of the table of cases annoying. Instead of referring the reader to the page in the text where the case is cited, the table gives a reference only to the section where the case appears. Since sections can include many pages, the reader is left to search through the many footnotes in the section in order to find the author's comments about the case.

6. *See also* M. HERMANN & M. HAFT, PRISONERS' RIGHTS SOURCEBOOK 255-328 (1973).

laterally attacking their federal convictions.[7] One portion which lawyers familiar with criminal practice might find enlightening deals with the use of civil rights actions brought by state prisoners in order to obtain traditional postconviction relief.[8] Professor Yackle's discussion relates to matters that are on the frontier of postconviction developments. Unfortunately, it does not appear that the usual postconviction measures, such as habeas corpus, will be replaced by a more modern, flexible action under 42 U.S.C. § 1983. Use of section 1983 can cause difficulties. For example, the United States Supreme Court recently held that the doctrine of collateral estoppel applies to section 1983 suits where the alleged grounds for vacating the state court judgment were litigated at trial.[9] This does not explicitly answer whether section 1983 can be used to vacate a conviction on grounds other than those actually litigated in the state trial. But the author recognizes that the signals already emitted by the Court appear to give a negative answer to that question, making it risky to rely on section 1983 as a substitute for a habeas attack on a judgment of conviction.[10]

Apart from the discussion of section 1983, Chapters Two through Nine cover the main aspects, as well as the subtleties, of proceedings statutorily provided for in 28 U.S.C. §§ 2241-2255. The topics explored include the niceties of custody as a jurisdictional requirement, the exhaustion doctrine, the law relating to procedural defaults, other procedural rules and pitfalls, problems caused by successive applications, and issues cognizable in collateral attack proceedings.

The two most recent significant developments in postconviction law concern the availability of federal habeas corpus to raise fourth amendment claims[11] and to raise points marred by the defendant's procedural defaults before, during or after the trial.[12] Professor Yackle's treatment of these issues is excellent. He points out the ambiguities which are fruitful grounds for further litigation. I would have been happier, however, if his discussion of procedural default and decisions, such as *Wainwright v. Sykes*,[13] had included a more careful analysis of what constitutes sufficient "cause" to relieve the habeas petitioner of the procedural default bar. He mentions ineffective assistance of counsel and related claims as

7. 28 U.S.C. § 2255 (1976).
8. L. YACKLE, *supra* note 1, at 106-47.
9. Allen v. McCurry, 101 S. Ct. 411 (1980).
10. L. YACKLE, *supra* note 1, at 147-48.
11. Stone v. Powell, 428 U.S. 465 (1976).
12. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977).
13. 433 U.S. 72 (1977) (failure to timely object in accordance with state rule amounted to independent and adequate state ground for decision).

examples of cause,[14] but he fails to probe further into this slippery unknown in order to define with more precision the all-important "cause" concept. For example, the innocent defendant who is the victim of a miscarriage of justice would seem to fit into the cause exception[15] thereby gaining access to federal habeas corpus. Also, where the default occurs in relation to a procedural requirement that serves no legitimate state interest, the *Sykes* bar would be eliminated since the independent and adequate state ground rule would itself be avoided.[16] Other examples include: the grisly choice á la *Fay v. Noia*[17] which constitutes cause excusing the procedural default, a retroactive change in the law which negates the defendant's prior failure to make procedural objections,[18] the mental incompetency of the defendant which prevents him from raising timely objection,[19] and plain error.[20] A checklist and discussion of these and other grounds for asserting "cause" would be an important and useful supplement to the present edition.[21]

There is another point of great practical importance which merits more emphasis than given in the book. The prisoner seeking to vacate a state conviction by invoking federal habeas corpus usually will have to rely on federal constitutional grounds.[22] Accordingly, lawyers who wish to take advantage of federal habeas must use their ingenuity to fashion errors of state law into a federal constitutional mold. A prime example of this oc-

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14. L. YACKLE, *supra* note 1, at 346-50.

15. 433 U.S. at 91. *See also* Schneckloth v. Bustamonte, 412 U.S. 218, 250-66 (1973) (Powell, J., concurring); Canary v. Bland, 583 F.2d 887, 894-95 (6th Cir. 1978) (Merritt, J., concurring).

16. 433 U.S. at 83 n.8; *id.* at 107-08 n.9 (Brennan, J., dissenting); Grace v. Butterworth, 635 F.2d 1, 5 (1st Cir. 1980); Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978), *aff'd*, 445 U.S. 263 (1980).

17. 372 U.S. 391, 439-40 (1963).

18. Carter v. Jago, 637 F.2d 449, 454 (6th Cir. 1980); Graham v. Maryland, 454 F. Supp. 643, 648-49 (D. Md. 1978). *Contra*, Cole v. Stevenson, 620 F.2d 1055 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 545 (1980).

19. Zapata v. Estelle, 588 F.2d 1017, 1021 (5th Cir. 1979); Suggs v. LaVallee, 570 F.2d 1092, 1116-18 (2d Cir.), *cert. denied*, 439 U.S. 915 (1978).

20. *Compare* 433 U.S. at 99 (White, J., concurring) *and* Berrier v. Egeler, 583 F.2d 515, 522 (6th Cir.), *cert. denied*, 439 U.S. 955 (1978) *with* Hockenbury v. Sowders, 633 F.2d 443 (6th Cir. 1980).

21. In a news release of March 11, 1981, announcing the publication of the book, the publisher states that *Postconviction Remedies* will be kept up to date through annual supplementation.

22. Professor Yackle correctly identifies detainers as a means by which the prisoner can gain federal habeas relief from a state conviction without relying on federal constitutional grounds. L. YACKLE, *supra* note 1, at 361 n.16. *See, e.g.*, Cody v. Morris, 623 F.2d 101 (9th Cir. 1980).

curred in *Jackson v. Virginia,*[23] which the author cites in a slightly different context.[24] The Court in *Jackson* "federalized" the right to have a conviction based upon legally sufficient evidence. Prior to *Jackson,* an error of insufficient evidence generally was considered to raise a question of state law.[25] Other recent examples of federal constitutional issues include the impropriety of allowing into evidence the accused's prior convictions,[26] denying a defense request for a continuance in order to obtain a crucial witness,[27] and failure to instruct on the defense of self-defense.[28] The point is an important one. The attorney must remain alert to the possibility of phrasing state trial error so as to assert federal constitutional grounds.

Professor Yackle did not discuss executive clemency, a significant nonjudicial remedy. It is a topic which, though important, is sufficiently offbeat to escape the attention of many lawyers and deserves some attention.

Postconviction Remedies is a book that will be valuable to the lawyer engaged in the prosecution or defense of criminal cases. It is well documented, easy to read, and, in its thoughtful way, practical. The practitioner who is familiar with the subject will benefit from new insights offered by the author. The newcomer to postconviction remedies will find the work rewarding in many ways. The law it discusses is exciting. The great writ of habeas corpus has proved to be indispensable in preserving our liberties. How it should operate—expansively or restrictively—is an issue which has provoked emotional debates over the judiciary's role in the administration of justice. The feelings that can arise in postconviction cases are reflected in a dissent to a decision which continued a trend expanding the habeas court's jurisdiction by applying a liberal definition of the custody requirement. Justice Rehnquist, joined by Chief Justice Burger and Justice Powell, wrote in ire: "The Court apparently feels, like Faust, that it has in its previous decisions already made its bargain with the devil, and it does not shy from this final step in the rewriting of the

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23. 443 U.S. 307 (1979).

24. L. YACKLE, *supra* note 1, at 416.

25. An exception to the general rule that insufficient evidence raises only a question of state law occurs when the evidence is so insufficient that the record is wholly devoid of evidence relating to a crucial element of the offense charged. Vachon v. New Hampshire, 414 U.S. 478 (1974); Thompson v. Louisville, 362 U.S. 199 (1960).

26. Bryson v. Alabama, 634 F.2d 862, 865 (5th Cir. 1981).

27. Hicks v. Wainwright, 633 F.2d 1146 (5th Cir. 1981).

28. United States *ex rel.* Means v. Solem, 480 F. Supp. 128 (S.D.S.D. 1979), *aff'd,* 646 F.2d 322 (8th Cir. 1980).

statute."[29] Professor Yackle has managed to capture that excitement. His book deserves a place on the criminal law practitioner's bookshelf.

29. Hensley v. Municipal Court, 411 U.S. 345, 355 (1973).

FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER. By Martin H. Redish. The Michie Company, Charlottesville, Va. 1981. pp.xiii, 361, $25.00

*Reviewed by William B. deMeza, Jr.**

The apparent liberal-to-conservative shift in this nation's dominant political philosophy during the past several years may not be the most dramatic in our history. It will nonetheless have long-range consequences for the federal courts. First, the composite philosophy of the federal judiciary will undoubtedly change as the new presidential incumbents exercise their appointive prerogative to fill vacancies on the bench. This is hardly surprising. Americans have long resigned themselves to the fact that the shifting sands of political fortune are reflected in the pools of candidates for life-tenure federal appointment. The second consequence is, perhaps, of more significance, though no more surprising after ideological upheavals. Ambitious legislative efforts to change the nature of cases to be heard in the federal courts have been spawned by the rise of conservatism. Special-interest groups have prompted congressional proposals to restrict, sometimes radically, the jurisdiction of both the Supreme Court and lower federal courts.

There have been prior attempts to limit federal intervention by adjusting jurisdiction over matters "traditionally left to the states."[1] The sheer number, varied subjects, and potential effects of the current legislation may be unprecedented. The bills would abolish diversity jurisdiction,[2] modify the Supreme Court's mandatory jurisdiction,[3] and divest the Supreme Court or lower federal courts of jurisdiction to hear abortion[4] and school prayer cases.[5] These legislative measures have greater probability

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1. *See, e.g.*, S. 917, 90th Cong., 2d Sess. (1968) (sections of the Omnibus Crime and Safe Streets Act eliminating federal jurisdiction to review the voluntary nature of confessions offered in state court criminal proceedings); S. 2646, 85th Cong., 2d Sess. (1958) (the Jenner bill, eliminating Supreme Court jurisdiction to review a variety of federal, state, and local laws and proceedings related to subversive activities).

2. H.R. 2404, 97th Cong., 1st Sess. (1981). The immediate predecessor of this bill, H.R. 9622, 95th Cong., 2d Sess. (1978), passed the House but died in the Senate at adjournment for lack of action.

3. H.R. 2406, 97th Cong., 1st Sess. (1981).

4. S. 158, 97th Cong., 1st Sess. (1981).

5. S. 481, 97th Cong., 1st Sess. (1981). These "special interest" bills have met with strong

of passage than their predecessors, for the bills are not only sponsored by well-financed, vocal groups but also have received encouragement from the executive branch.

Further restructuring of federal-state and inter-branch relationships also may be anticipated in light of forthcoming appointments to the Supreme Court. Although it would be naive to expect that the new Justices will faithfully mirror the President's personal philosophy, they will probably reflect the conservative nature of his constituency. New appointees may assist a growing minority on the Court in further limiting the growth of the federal government's authority.

Several recent decisions suggest that the Supreme Court is ripe for change. *Minnesota v. Clover Leaf Creamery Company*[6] may be indicative of the Court's mood. Although the decision involved a relatively routine application of the equal protection[7] and commerce[8] clauses of the Constitution, it sparked a heated colloquy between Justices Brennan and Stevens concerning the deference to be accorded legislative facts as found by a state's highest court. *Cuyler v. Adams*,[9] which held that the Interstate Agreement on Detainers must be interpreted as a matter of federal law, prompted a dissenter's charge of unwarranted, unprincipled, and unwanted extension of federal authority into purely interstate matters.[10] *Sumner v. Mata*,[11] another recent opinion, suggested increasing solicitousness of state criminal verdicts. *Sumner* required federal habeas courts to specify the basis for reversing state court findings of fact even when that issue was not raised in a timely manner in the court below.[12]

Critics have long called for major modifications in the jurisdiction of the federal courts and in the federal government's intrusion into state issues through its laws, agencies, or judiciary. For example, the Chief Justice has frequently advocated the elimination of federal diversity as well as the severe restriction of the Supreme Court's mandatory jurisdiction.[13]

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criticism from the legal "establishment." *See* Editorial, *Attack on Courts*, 67 A.B.A.J. 812 (1981). The American Bar Association apparently opposes the abolition of diversity and divestiture of the Supreme Court's jurisdiction to review the "special interest" topics, supports the limitation of the Court's mandatory jurisdiction, and has not taken a position on review of the special-interest topics by the lower federal courts. 67 A.B.A.J. 704 (1981).

6. 101 S. Ct. 715 (1981).

7. U.S. CONST. amend. XIV, § 1.

8. U.S. CONST. art. I, § 8, cl. 3.

9. 101 S. Ct. 703 (1981).

10. *Id.* at 713-15.

11. 101 S. Ct. 764 (1981).

12. *Id.* at 769-72.

13. *See, e.g.*, Burger, *The State of the Federal Judiciary 1979*, 65 A.B.A.J. 358, 362

Scholarly legal journals are filled with articles suggesting that federal jurisdiction be widened or narrowed or widened *and* narrowed, with discussions of the perplexing effects of those changes.[14]

Tensions[15] is a particularly timely publication in light of this ferment in federal-state and legislative-judicial relationships. The author identifies and discusses those areas of federal jurisdiction in which he believes the tensions are most acute. Each of the twelve chapters focuses on a separate area of potential conflict: between the federal and state courts; the federal courts and state political entities; the state courts and federal political entities; and the Article III courts and other branches of the federal government. Redish is not content with merely reiterating the current state of the law. Instead, he presents "applications of the unified approach to the issues of judicial federalism . . . [in] an attempt to reorganize the values and priorities underlying the allocation of judicial power."[16]

In these days of states' rights and highly-financed special-interest groups, the premise of the book may seem somewhat anachronistic.

> The premise . . . is that the integrity of the Article III federal courts as the primary adjudicators of federal law must be preserved. The federal courts stand as the fundamental protectors of both federal rights and federal governmental interests. An individual should therefore be presumed to be able to obtain judicial vindication of his federal rights in federal, rather than state court. This presumption should be overcome only when Congress has made clear its contrary intent, or the consequence of providing such an opportunity would be severe disruption of a compelling state interest.[17]

While Redish persuasively argues for his premise that the states, state courts, and the non-Article III federal judiciary are not to be trusted as the final guarantors of individual rights, *Tensions* may be most susceptible to criticism for this very premise.

The growth of federal "interventionism" in all its forms during the past 125 years has been prompted in part by the well-founded belief, that the states and their courts were often unwilling or unable to acknowledge and

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(1979).

14. *See, e.g.*, Champlin, *Extension of Federal Subject Matter Jurisdiction: The Need for a Functional Approach*, 26 WAYNE L. REV. 1437 (1980); Berger, *Congressional Contraction of Federal Jurisdiction*, 1980 WIS. L. REV. 801; Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980).

15. M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER (1980).

16. *Id.* at 1.

17. *Id.* at 1-2.

enforce large parts of our Constitution. That those federal intrusions were necessary and appropriate responses to those times and those circumstances can hardly be disputed. The author recognizes that legislative and attitudinal changes in the last three decades may have removed the preconditions for continuing to designate the federal courts as the *sole* final guardians of individual rights. While noting that many states have extended their protection of individual rights in theory and practice beyond those enumerated by or implied under the federal Constitution,[18] Professor Redish does not properly reconcile this fact with his deeply-felt mistrust of the states and their judiciary. Professor Redish obviously lacks the jurisprudential optimism recently expressed by Justice Rehnquist:

> State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted that all are not doing their mortal best to discharge their oath of office.[19]

Although one may criticize the author's hypothesis, it is difficult to criticize the substance of what he has accomplished: a coherent, cogent, one-volume presentation of a subject whose complexity has earned it the understandable aversion of many a law student. *Tensions* is a welcome addition to the literature. It is difficult to characterize the work as casebook, treatise or commentary—normally the formats of the standard federal jurisdiction references. Such formats are either all-encompassing and academic,[20] strongly oriented to the federal practitioner,[21] or thoughtful jurisprudential commentaries.[22] Each has its own particular appeal and application. *Tensions* seems to combine their features in a readable fashion most useful to the academician or frequent federal or appellate

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18. *See, e.g.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); Cooper v. California, 386 U.S. 58, 62 (1967).

19. 101 S. Ct. at 770. Federal habeas corpus review of state convictions has become a fertile source of federal-state friction, especially after Fay v. Noia, 372 U.S. 391, 416 (1963), which held that habeas was "almost in the nature of *removal* from the state to the federal courts of prisoners' constitutional contentions."

20. *See, e.g.*, P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973); ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969).

21. *See, e.g.*, C. WRIGHT, LAW OF FEDERAL COURTS (3d ed. 1976).

22. *See, e.g.*, H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973). It is interesting to note the recent reissue of several older works in the field, which prove informative for their historical perspective on the current debates. *See* R. POUND, ORGANIZATION OF COURTS (1979) (originally published in 1940); G. HOLT, THE CONCURRENT JURISDICTION OF THE FEDERAL AND STATE COURTS (1980) (originally published in 1888).

practitioner.[23]

Tensions' greatest strength may lie in its ability to stimulate the reader's thinking. Redish's fresh approach to seemingly settled areas of the law, accompanied by an unwavering commitment to his major premise, makes for an interesting book. Unfortunately, the book went to press before a number of intriguing opinions were handed down by the Supreme Court; consequently no consideration is given to the Court's strict interpretation of the federal habeas statute,[24] extensive inclusion of uniform acts within the federal law,[25] and exposure of state judiciary to civil penalties.[26]

The book is logically organized, thoroughly substantiated and precisely written. Redish accurately summarizes opinions and is careful to delineate his objective analyses of precedent from his thought-provoking opinions. Perhaps the volume's only "mechanical" deficiency is in the index, which is too incomplete to allow rapid reference to a specific, less significant topic.

Tensions may not be suitable for classroom use as a primary sourcebook, for it analyzes and disposes of even major precedent in several short paragraphs. Since it is of manageable length and reads well, *Tensions* may be suitable for a one-semester federal jurisdiction course. However, students should also be assigned a more detailed, supplemental exploration of specific key cases.

Federal Jurisdiction: Tensions in the Allocation of Judicial Power by Martin Redish will undoubtedly become a widely used reference in many libraries. Many readers may disagree with Professor Redish's belief that the Article III courts are the only trustworthy institutional guardians of our Constitution, and may be put off by his frank mistrust of the states, state courts, and non-Article III federal judiciary. *Tensions* transcends philosophical differences, however, for it is a well-organized study of a complex topic which provides concise summaries of the law as it exists, followed by the author's thoughtful reflections on the law as it should be or may become. This excellent study should be read by every federal judge, clerk, and practitioner.

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23. *Tensions* has a facial similarity to a treatise on constitutional law by Professor Tribe. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1979). Both works dissect the subject according to a scheme developed by the author and attempt a comprehensive yet unified analysis. Both authors speak distinctly and with authority.

24. 101 S. Ct. 764 (1981).

25. 101 S. Ct. 703 (1981).

26. Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719 (1980).