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## Book Reviews

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## BOOK REVIEWS

THE BACKGROUND OF ADMINISTRATIVE LAW. By Milton M. Carrow.<sup>1</sup> Newark, New Jersey: Associated Lawyers Publishing Co. 1948. 214 pages. \$5.— This brief volume purports to “present a synthesis of the fundamental principles” underlying the vast field of administrative law. After touching upon its growth, definitions and terminology, the author analyzes critically the “conceptual stumbling blocks” which have impeded its progress. Such a work should prove of great value to the student, for the new Administrative Procedure Act of 1946 (included in the Appendices) assumes a familiarity with the old “concepts” and indeed recognizes some of them at least implicitly in the “hard won compromises” hammered out by the draftsmen of the Act. The author does an excellent job within the narrow limits of his book. It may indeed serve as a point of departure for those who do and for those who do not completely assent to his conclusions. A valuable table of cases is presented, and the case discussion in the text is most illuminating, however much the legal profession must still wait for the present Supreme Court to make up its mind as to the future of American administrative law. An extensive bibliography of books and law review articles is included and should prove helpful, although it is apparently limited for the most part to works supporting Mr. Carrow’s point of view. The student will therefore find it necessary to go elsewhere for material indicating that the growth of Administrative Law in the United States has not been greeted with universal applause.

Whether from Mr. Carrow’s “functionalist” *analysis* of traditional constitutional and judicial “concepts” there emerges a clear and satisfying “synthesis” must be left to the reader to determine for himself. This reviewer felt that the author might well have added a chapter by way of “restatement” (if, perchance, the “functionalist” does not disdain such a thing) following his analysis. The brief “conclusions” with which each chapter ends seem somewhat inadequate for purposes of “synthesis.”

Readers who regard the modern American bureaucrat as a twentieth century fulfillment of Plato’s dream of the philosopher-king will not need Mr. Carrow’s book. Those who suspect administrative law as a subtle usurpation threatening the traditional “Rule of Law” will probably not be persuaded otherwise by the author’s rather summary demolition of their cherished “concepts.” The moderates who seek a middle way between the enthusiast and the skeptic may question whether the author has substantially contributed to the solution of the problem.

The traditionalist comes today too late with his argument that when the need for “administrative controls” over the many phases of a complex economic and social system became apparent, we should first have explored with greater care the possibility of working out such a system of controls through the medium of the existing judicial system. True it is that the courts both of common law and of equity in their long history, once discharged many “administrative” duties before they became narrowed to hearing contentious disputes over “rights” in the shape of “cases and controversies.” The traditionalist must, however, forget the “might-have-beens” and even the “should-have-beens”. He must now accept the fact that the “controls” are here and that we have long since chosen to create our own “corps administratif” to exercise them. Nevertheless, it seems to this reviewer an oversimplification to assume that current opposition to the growth of Administrative Law is merely a rear-guard action on the part of the retreating forces of laissez-fairism, chafing at the restraints placed on “private property rights”. The current dichotomy between “human rights” and “property rights”, however fashionable

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and useful on the political platform should not blind one to the fact that property rights are still protected by the Constitution of the United States. So long as this is true, the champions of our inherited "Rule of Law"—admittedly developed in a day when insistence upon property rights was not considered a social stigma, may still make the point that, granting the "necessity" of administrative controls, it does not follow that all that has been done in the name of such controls by way of "administrative processes" is equally to be blessed or accepted as "necessary" and "inevitable". The "middle of the roader" may accept administrative controls as necessary. He may, however, still object that we are not yet ready, if ever we shall be, to cast out as now devoid of reality, our inherited "concepts" built up around the dominating Anglo-American concept of the "Rule of Law" and established long ago at so great a cost.

Mr. Carrow apparently thinks that the old assumption of an "antagonism" between "Law" and "Government" is today "unreal". We live under democratic rule and all law has its source in the will and expressed consent of the people. We no longer need a Coke to thunder to a Stuart tyrant that the "Law" is above the "King", for the people is now "King", and "government" their servant. Thus they have an adequate check upon the administrator through ordinary democratic political processes. The Constitution of the United States is far from embodying such optimistic naivete. That Constitution still contemplates an appeal to "Law" as against even the people themselves—against even the people themselves acting through the modern application of "pure democracy"—the popular referendum.<sup>2</sup> Moreover, with so many tragic examples of mass action and its results in the history of Europe since 1933, we may in the twentieth century still agree with Edmund Burke that the restraints on men are to be accounted among their liberties. Of course, Mr. Carrow, as a good "functionalist" dismisses rather shortly the "natural law" concept and once more hurls Holmesian thunderbolts against any notion of the Law as a "brooding omnipresence in the sky". To this reviewer it seemed that it was wholly unnecessary to take this position in searching for a "synthesis" of administrative law today. Mr. Carrow proves too much. His zeal, if to be taken as typical of the champions of administrative law, goes far to explain why the traditionalist has become suspicious and the moderate hesitant in the face of demands for the greater extension of the areas of American administrative law.

Again, in his discussion of the judicial distinctions between "rights" and "benefits" or "privileges" as employed in determining the proper fields of judicial review of administrative action, the author goes on to declare that government for us has become "service" government, rather than government concerned with the protection and preservation of "rights." Aside from the analysis of "rights" which leaves much to be desired, the adumbration of the "service state" and the de-emphasizing of the state as the protector of "rights" raise doubts and queries which are left unanswered. Says Mr. Carrow:

Rights are protected by the Constitution as interpreted by the courts, but they can nevertheless be created, modified or withdrawn by constitutional amendment, as in the case of the prohibition amendments. What lies behind all of these under a democratic government is the will of the people exercised at the polls . . . Moreover, our concept of the state has changed from a police version to that of a "service" government which has embarked upon an affirmative course of creating new economic and social rights.

Are we to gather from this that a "synthesis" of the principles of administrative law includes the postulates of Duguit, for example, for whom the "Law" has

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2 *Pierce v. Society, etc.*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

ceased to be a body of rights and has become merely another "social fact"?<sup>5</sup> Perhaps today no "functionalist" expounder of administrative law and its claims to further extension in the United States would subscribe to all of Duguit's premises or conclusions, but Mr. Carrow's occasional excursions into jurisprudence raise questions as to just what basic philosophy of law is to be taken as characteristic of the champions of administrative law. The author's opinion is that the new Administrative Procedure Act of 1946 exhibits the "functionalist" approach to administrative law. This reviewer cannot agree. The act still pays more than substantial respect to the old "concepts".

Mr. Carrow discusses the doctrine of "Separation of Powers" in its bearing upon the growth of administrative law. It is contended that the legislative, executive and judicial branches of the government are not "watertight compartments", to use Holmes' phrase, but "political vitality" is conceded to the doctrine. This latter point is not developed. It is difficult to see in what sense the phrase "political vitality" is used. No definition is vouchsafed. Does it mean that the courts are debarred from applying this "politically vital" doctrine as a check, when and if the Congress, the president or the courts should attempt to divest themselves completely of duties devolved upon them by the Constitution? If so, wherein lies the "political vitality" of the doctrine?

It is clearly pointed out that there is a distinction between "Separation of Powers" and "separation of functions" with regard to judicial review of administrative action. But the inner philosophy of the older cases applying the classic doctrine of "Separation of Powers" is closely akin to the doctrine or concept of "separation of functions". There is the same distrust of amalgamating all power in the same person or body of persons. This same distrust is behind much current opposition to any person or body possessing at once the power to make rules of law, to bring prosecutions for their violation and to adjudicate upon them. The future alone must determine whether the partial recognition of the older American tradition given in Section 7 of the new Administrative Procedure Act in the shape of what is referred to as "internal" separation of functions will work out with full satisfaction.

As to judicial review of administrative action, the author discusses the distinction of the older cases between "fact" and "law" and subjects this "concept" to "functionalist" criticism. Recent decisions of the Supreme Court are cited to show a tendency to gloss over the old distinction and to place emphasis on the factor of "*expertise*"—a comparatively recent Gallicism which apparently means the special knowledge or expertness of the administrative body in dealing with the problem which the court is called upon to review. This development would seem to suggest the attitude championed by Justice Holmes in dealing with legislation attacked under the "due process" clause. Mr. Carrow, however, quotes Professor Harold Laski, in warning against undue emphasis of the factor of "*expertise*". Apparently the administrator is not immune to narrow-minded professionalism any more than the rest of mankind. If the trend indicated continues we may witness new areas being "pricked out" by the decisions as the Court struggles with the problem of marking off the boundaries where administrative "*expertise*" forecloses judicial review, just as we witnessed the struggle to establish the "*expertise*" (although it was certainly not called *that*) of the legislature when placed side by side with the due process clause in the days of Holmes. Since judicial review is preserved by Section 10 of the act, and since there is no express "reception" of "*expertise*"—which looks like a conceptual contribution of the "functionalist", the student will watch with interest the fate of the new section in the courts.

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<sup>5</sup> Allen, *Law in the Making*, 3rd. Ed. 482 *et seq.* (Oxford, 1939).

In his concluding chapter, the author gives us the "modern" Rule of Law as opposed to the older and traditional Rule of Law. Underlying the "modern" rule is the view that

in a democratic state, law is not a self-sufficient or transcendental body of principles which requires only the application of the judicial mind to reveal its truths, but a dynamic set of rules to which all are subject, which can be changed, made and unmade by the men in the government who have their ultimate sources of authority in the people acting through their established political organization.

Mr. Carrow quotes Woodrow Wilson in support of the view that "government of laws and not of men" never existed. We might ask, however, whether Wilson's assertion means that we are to abandon the old Americanism—the old *ideal* of such a government. Whether or not we can ever say confidently that we have finally achieved this ideal, is not the maxim capable of useful application in our own time? Do the champions of administrative law offer us a better ideal in a jurisprudence which seems to scorn the "objective" and enshrine the "subjective"? After all, "*expertise*" may not be enough.

Mr. Carrow believes, apparently, in "legislative" and "popular" controls over administrative action rather than in "judicial" controls. The champions of administrative law have yet failed to show how the long (but often dreadfully slow) arm of "popular" control which is, for example, somewhat effective biennially over congressmen, can speedily and effectively and withal efficiently, reach the administrative agency. "Law making powers of administrative agencies", says the author, "are not a usurpation of the judicial power which the courts must restrain". It may be said, however, that the courts are not "restraining usurpations" of judicial power, but restraining administrative action alleged to impair or destroy "rights", even in Mr. Carrow's sense of the term.

As Professor Hart has remarked,<sup>4</sup> it is unfortunate that the discussion of the value and need of curbs on administrative authority "is too often conducted by partisans who forget the ideal of the golden mean". It would seem to this reviewer that such a work as Mr. Carrow's suggests the need of a further treatment of the subject from a broad philosophic standpoint. The conflict between the partisans of Administrative Law and the partisans of the old "Rule of Law" goes deeper than technical questions with regard to the applicability of concepts such as "Separation of Powers", "Judicial Review" and the rest. What is needed is a definition or re-definition not only of "Law", but of the "State" and of its functions, in order that we all may know where the "new approach" of "functionalism" in the study of Administrative Law may lead us. The much-derided "conceptualism" may yet be entitled to at least one final brief—to one last day in court, even as *amicus curiae*. Something may remain to be said by the advocates of the "traditional approach". At any rate, the new Administrative Procedure Act, for the "background" of which Mr. Carrow's book was designed, even if its compromises do not make it a thing of "shreds and patches", is but another step in the continuing struggle between those who do and those who do not regard the "functionalist" approach as the herald of a New Dispensation.

Edward F. Barrett\*

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<sup>4</sup> Article on Administrative Law, Encyclopedia Britannica, vol. I, p. 168C, 168F.

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CANONICAL PROCEDURE IN MATRIMONIAL CASES (Volume I, FORMAL JUDICIAL PROCEDURE). By William J. Doheny,<sup>1</sup> C.S.C., J.U.D. Second Edition, Revised and Enlarged. Milwaukee: The Bruce Publishing Company, 1948. 1277 Pages. \$15.00.—In order to understand the subject matter of this volume, it is necessary to know something of the law of the Church and its evolution. The law of the Catholic Church is called the Canon Law in contradistinction to the Civil Law. The word "canon" is from the Greek word meaning "rule" or "standard." The Canon Law began when Christ gave the plenitude of power to Simon, the fisherman of Galilee, saying:

Thou art Peter and upon this rock I will build my Church and the gates of hell shall not prevail against it; and I will give to thee the keys of the Kingdom of Heaven. And whatsoever thou shalt bind upon earth, it shall be bound also in heaven; and whatsoever thou shalt loose on earth, it shall be loosed also in heaven.

Throughout the nineteen centuries of the existence of the Catholic Church, the Popes and the General Councils have made laws to meet varying situations and to combat rising errors. Gradually a jurisprudence and polity developed, until, with the decline of the Roman Empire and before the rise of the modern states, the law of the Church was the law of the land throughout Christendom. Up to 1918, the law of the Church was scattered through several collections of Papal decrees and decisions and the pronouncements of various General Councils. In 1904, Pope Pius X appointed a Commission of Cardinals and jurists to codify the law of the Church, and after more than twelve years of untiring labor and relentless research, this Commission presented to Pope Benedict XV the finished product—the Code of Canon Law. The Code of Canon Law went into effect as the universal law of the Latin Church on the Feast of Pentecost, May 19, 1918.

The Code of Canon Law is divided into five books. The first book gives the general norms of law; the second treats of persons and juridical personalities; the third of things; the fourth of processes; and the fifth of crimes and penalties. The fourth book of the Code is the one with which we are here concerned. This section lays down the general rules of procedure for all ecclesiastical trials. It ordains that in every diocese the Bishop should set up a tribunal to be a court of first instance for all matters requiring the exercise of judicial jurisdiction. Among the matters requiring a judicial process is the annulment of a marriage. The Code declares that the ordinary case, in which a declaration of the nullity of a marriage is sought, must be put to trial before a tribunal of three priest-judges and a priest who is known as the Defender of the Marriage Bond. The trial is to be conducted in accordance with the general rules of procedure laid down in the fourth book of the Code for contentious trials. This is known as the formal judicial process.

Some difficulties arose in the application to matrimonial trials of the general rules of procedure as set forth in the Code for contentious trials. Accordingly on August 15, 1936, the Sacred Congregation of the Sacraments, a department of the Papal Administration charged with the supervision of everything connected with the Seven Sacraments, issued an Instruction on the conduct of ecclesiastical trials in which the validity of marriage is at stake. In this Instruction, the procedural laws of the Code are applied specifically to matrimonial trials for the guidance of the diocesan tribunals throughout the world.

Shortly after the appearance of this Instruction, the Reverend William J. Doheny, C.S.C., J.U.D., prepared a commentary in English on the Instruction of the Sacred Congregation of the Sacraments. The commentary first appeared

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in 1938, and now a second "revised and enlarged" edition has been published, which is almost twice the size of the original. This commentary is divided into two parts. Part I, covering the first 574 pages of the book, gives a detailed analysis of the Instruction of the Sacred Congregation of the Sacraments, and is entitled: "Norms Governing Procedure in Diocesan Tribunals." In fifteen chapters, the author takes one through every detail of an ecclesiastical trial for the declaration of the nullity of a marriage from the rules for determining the competency of the tribunal to the regulations regarding the payment of expenses or the granting of a free trial. There are few commentaries on matrimonial trials in any language as complete and detailed as this volume, but in English this commentary stands practically alone, and has come to be accepted as the guide book for all American ecclesiastical tribunals. This fact alone makes the book of tremendous practical value to those engaged in the judicial work of the Church, and makes it an outstanding contribution to canonical literature; but its value is greatly enhanced by the remaining 521 pages constituting the second part of the volume. This second part is entitled: "Application of Procedural Law in Practical Cases." In this section, the author takes each of the bases on which the validity of a marriage may be attacked, and, after carefully delineating the nature and extent of each impediment, he applies the procedural law to the trial of a case on this basis. Perhaps the most valuable part of this work is the section at the end of his treatment of each impediment in which the author has cited practical cases adjudged by the Sacred Roman Rota on each particular basis. The Sacred Roman Rota is the supreme trial court in the judicial system of the Church, and each year the Rota publishes a volume of its decisions, which are accepted as precedents by the lower tribunals. Doctor Doheny has gathered typical cases from the published decisions of the Rota on each of the impediments, and has summarized them, or made reference to them, under each heading. His volume, therefore, acquires the added value of being, not merely a guide book on procedure, but also an extremely valuable case book for the practical canonist, and a handy catalogue of Rota decisions for the members of the ecclesiastical judiciary. Three appendices containing other documents bearing on matrimonial trials, a fifteen-page bibliography, a general index and four cross indices complete the volume. It is indeed a "must" for the library of anyone engaged in the work of the Church courts, and for anyone interested in this aspect of Canon Law.

There are few canonists as highly qualified as Doctor Doheny to write a volume such as this, for he is undoubtedly one of the outstanding modern jurists. He was born in Merrill, Wisconsin, in 1898, and ordained a priest of the Congregation of Holy Cross in June, 1924. After five years of graduate study at the Catholic University in Washington, he was awarded the degree of Doctor in Roman and Canon Law in June, 1927. He has been successively Rector of the House of Studies of the Congregation of Holy Cross at Rome; Rector of Holy Cross Seminary at Washington; Assistant Superior General of the Congregation of Holy Cross; and, until recently, Professor in the College of Law at the University of Notre Dame. While in residence in Rome, he matriculated at the newly erected School for Advocates conducted by the Judges of the Sacred Roman Rota, and, at the conclusion of the course, became the first American to be admitted to practice as an Advocate before the Sacred Roman Rota. But the greatest honor that has come to him thus far is his appointment by the Holy Father on November 18, 1948, as a Judge on the Sacred Roman Rota. This most recent achievement is a fitting climax to a career in ecclesiastical jurisprudence, which is without equal in the history of the American Church.

From the viewpoint of the American civil lawyer, a study of Monsignor Doheny's book will provide a comprehensive outline of the procedural law of the ecclesiastical courts in marriage annulment cases, as well as a handy catalogue

of the decisions of the Sacred Roman Rota, from which a practical knowledge of the substantive law on marriage may be gleaned. Some familiarity with both of these aspects of the law of the Church is expected of an educated jurist, especially of the Catholic lawyer, but unfortunately too frequently in these days of pragmatic standards even the Catholic lawyer is in total ignorance of the Canon Law which has so greatly influenced all modern jurisprudence. It is to be hoped that this condition will soon be remedied, and a good beginning may be made by a leisurely perusal of "Canonical Procedure in Matrimonial Cases."

James P. Kelly, J.C.D.\*

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THE FEDERAL INCOME TAX. A Guide to the Law. By Joyce Stanley<sup>1</sup> and Richard Kilcullen<sup>2</sup> Preface by Randolph E. Paul. New York: The Tax Club Press, 1948. 344 pages. \$6.00.—The avowed purpose of this new guide to the federal income tax law is a disarmingly modest one. The aim of the authors, both of whom are young and able members of the New York bar specializing in the tax field, is to provide an introduction to the complexities of federal income taxation in a form intelligible to the non-tax specialist who yet needs to acquire at least a working knowledge of the Code. The income tax law being primarily a matter of statute, the authors have felt that the best approach for the beginner is to study the Code in conjunction with the Treasury Regulations and the more significant of the decided cases.

Working from these major premises the authors have paraphrased in simple language those sections of the Internal Revenue Code dealing with income taxation, including Subchapter A dealing with personal holding companies, and Supplement P dealing with foreign personal holding companies as well as the procedural provisions relating to assessment and collection contained in Supplements L, M, and O. Major attention is, of course, directed to § 22 defining gross income, § 23 setting forth the allowable deductions from gross income, § 112 dealing with the recognition of gain or loss on sales or exchanges of property, §§ 113 and 114 defining basis, § 115 on corporate distributions, § 117 on capital gains and losses, § 126 dealing with income in respect of decedents, §§ 161-172 covering the taxation of trusts and estates in the process of administration and that intellectual wilderness which attempts to deal with the taxation of partnerships, §§ 181-190.

Worthy of especial note is the brief but effective treatment afforded § 102, under which is levied, on specified conditions, a special corporate surtax of 27½ per cent on the first \$100,000 and 38½ per cent on additional amounts of undistributed § 102 net income. The hand of Richard Kilcullen, author of a monograph on this subject, is in full evidence here.

The usual graceful preface to which the tax bar has grown accustomed to see issue from the *atelier* of Randolph Paul, replete with the jurisdictional reference to *Alice in Wonderland*, and to which at least the master's name is affixed, contains the thought that this volume should prove of value not only to the student of tax law, to the practical man of business, to the economist and the accountant but to the tax expert as well.<sup>3</sup> The more modest pretensions of the authors seem closer to the mark.

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A work of this sort is subject to almost as much criticism on the matter of selection and omission as an anthology. Someone's favorites—usually the reviewer's—are always omitted. Many of mine were. For example, in the introductory chapter orienting the reader among the vast mounds of literature in which the tax law is to be found, no mention is made of even the existence of private unpublished Bureau rulings although an oblique reference is made to them and to their use in Chapter 5.<sup>4</sup> Nor is reference made<sup>5</sup> to that anomaly, the “unpublished” memorandum opinions of the Tax Court, which are of equal precedent value with the official published decisions but are much harder to find.

On the sheerly technical level, the language employed by the authors occasionally lends itself to misconstruction. Fire, theft, storm and other casualty losses are not limited by the capital gains provisions of the Code.<sup>6</sup> The recovery exclusion doctrine does not operate to put the taxpayer in “the same position tax-wise that he would have been in if he had never taken a deduction” except to the extent the tax rates applicable to his income vary in the different years.<sup>7</sup> It is also a little surprising to find the flat statement that capital losses are only deductible from capital gains modified only by a footnote pointing out “a minor exception” in the case of an individual who may deduct capital losses from ordinary income to the extent of \$1,000.<sup>8</sup> The capital loss carry-over provisions of the Code apparently fail to rise to the level of even “a minor exception,” although they multiply by five the amount of capital loss an individual may deduct from ordinary income.

It is also difficult to reconcile with the decided cases the authors' statement<sup>9</sup> that doubt exists on the tax-free liquidation of a corporate subsidiary under § 112 (b) (6) where assets of the subsidiary are sufficient to discharge its debts whether assets received by the surviving corporate parent in cancellation of the subsidiary's stock fall within the tax-exempt sweep of § 112 (b) (6). Nor did the Supreme Court's decision in the *Adams* and *Bazley* cases<sup>10</sup> turn as the authors suggest<sup>11</sup> on the presence or absence of an independent corporate business purpose.

And, of course, the inevitable march of the cases has already outmoded the text at isolated spots. *International Investment Corp.*<sup>12</sup> has effectively solved the riddle noted by the authors<sup>13</sup> as to whether cash constitutes “property” for the purposes of § 112 (b) (6) as it admittedly does under § 112 (b) (5). The Tax Court's opinion in *Leonard Farkas*<sup>14</sup> has been reversed<sup>15</sup> since the publication of this book.

More searching questions, however, are posed by the basic premises upon which this book is written. Is it an effective teaching tool, is it a useful *vade mecum* for the tax neophyte? Perhaps only time can tell but “simplifications” of the complex usually are too broad in sweep for the specialist, too lacking in

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<sup>3</sup> p. vi.

<sup>4</sup> p. 156.

<sup>5</sup> See p. 9.

<sup>6</sup> See p. 82.

<sup>7</sup> *Ibid.*

<sup>8</sup> p. 71.

<sup>9</sup> p. 166.

<sup>10</sup> *Adams v. Commissioner, Bazley v. Commissioner*, 331 U.S. 737, 67 S.Ct. 1489, 91 L.Ed. 1782 (1947).

<sup>11</sup> p. 156. The authors have perhaps confused the Supreme Court's opinion with the reasoning of the Third Circuit below.

<sup>12</sup> 11 TC \_\_\_\_\_, No. 82 (1948).

<sup>13</sup> p. 166.

concrete detail to be intelligible to the beginner. *THE FEDERAL INCOME TAX* appears to offer no exception to this rule.

At six dollars per copy this book is frankly overpriced. Printed on the cheapest of slash pine wood pulp those parts of the pages not already blackened by carelessly blotched and smeared printer's ink will have turned quite saffron by this time next year.

True knowledge of and intellectual penetration into a subject as vast and difficult as Federal income taxation cannot be acquired by the reading of even twelve easy chapters of summary and condensation. If you are determined to learn tax law, buy a copy of the Code and Regulations 111, to be read and re-read. Better yet, work with real problems in that field. If you insist on simplification, try the Practising Law Institute's monographs. If you are teaching an elementary tax course and are bored with your present text and your present students, *THE FEDERAL INCOME TAX* offers a smooth precis. In addition, the publishers, who supply free copies to reviewers, will be grateful.

*Robert T. Molloy\**

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*RELIGIOUS LIBERTY AND THE POLICE POWER OF THE STATE.* By Francis J. Powers,<sup>1</sup> C.S.V. Washington, D. C.: The Catholic University of America Press, 1948.—Unlike most doctoral dissertations, *RELIGIOUS LIBERTY AND THE POLICE POWER OF THE STATE* is an interesting and valuable book. Its author, Father Francis Powers, who at one time practiced law in Massachusetts and was later admitted to practice before the United States Supreme Court, possesses to a remarkable degree the insight of a legal philosopher and the practical wisdom of a political scientist. Both of these qualities reveal themselves in his present treatment of the delicate problem of the right to freedom of conscience in the United States.

In the first chapter, Father Powers gives the jurisprudential background of the problem of freedom of conscience, outlining and criticizing the controlling concepts of sociological jurisprudence (Montesquieu, von Ihering, Pound) and the basic premises of legal realism (Holmes, Dewey). The chapter ends with a sketch of the scholastic concept of the natural law. The second chapter, "Principles of Criticism," is a more particularized treatment of the problem of freedom of religion and conscience in which the relationship between man and society is discussed especially under the aspect of the state's duty to protect the religious liberties of its citizens. The complex but vitally important issue of Church and State relationships is given no specific treatment since the author has deliberately limited himself to an ethical consideration of the constitutional principles and practices now prevalent in this country. Yet he shows by numerous quotations that the traditional American concept of Church and State postulates whole-hearted cooperation—not a wall (or spite fence) between them.

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<sup>14</sup> 8 TC 1351 (1947) cited by the authors at p. 35.

<sup>15</sup> *Farkas v. Commissioner*, 170 F. (2d) 201 (C.C.A. 5th 1948).

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<sup>1</sup> Formerly a member of the Massachusetts bar.

Reviewing in the third and fourth chapters important high court decisions relating to religious freedom in this country, Father Powers thoughtfully and critically discusses the policies that helped to form these decisions, especially Mr. Justice Frankfurter's "preservation of the political process" argument and the late Chief Justice Stone's "more exacting judicial scrutiny" doctrine. As the author points out, the political process argument, when applied to disputes in the area of religious freedom, can too easily become a doctrine of majority absolutism since in this connection it virtually surrenders the constitutional protection of minorities to the popular will. His comments on the absurd implications that arose when this judicial formula was applied to cases involving the activities of the Jehovah's Witnesses might be profitably read and considered by the present members of the supreme judiciary.

Of course, the problem of finding a formula that will satisfactorily solve all (or even most) of the problems involved in protecting the religious rights guaranteed by the Constitution is not an easy problem. It is becoming increasingly clear, however, that respect for others' rights does not involve abandoning one's own. There are limits to "liberalism"—as Evelyn Waugh's latitudinarian African bishop found when he was finally forced to draw the line at human sacrifice among his religious subjects. In fact, growing numbers of thoughtful men have lost their faith in the promised blessings from an unlimited "free flow of ideas," pointing out that although truth may always win out, the final victory may have to be paid on the battlefields of Europe and Asia with the lives of millions of men. Is it not possible for truth to have its victory sooner? And cannot the errors which attack the dignity and true freedom of men be crushed, at least at home, before they begin their corrosive influence? Is it impossible to draw the line between liberty and license?

At any rate, the author rightly insists that one of the first concerns of our supreme judiciary at the present time is to find legal means by which the religious freedom of twentieth century Americans may be protected from irresponsible fanatics, without at the same time establishing precedents that might be used in future times against the very liberties that the supreme judiciary should now protect. Whether this means be, as Father Powers suggests, the employment of the protection of minorities argument or of the more searching judicial scrutiny doctrine or of some other formula that has yet to be shaped, is still an open question. But some means should be devised. In this connection, incidentally, the author could have notably improved this chapter had he attempted to suggest new formulae or made a longer and more searching analysis, based on philosophical criteria and political experience, of formulae now being used.

In the closing chapters of the book, Father Powers treats the origin and development of the "clear and present danger" test and its supplementary principle, the "avoidability of clash." These juridical formulae were originally constructed to restrain the state from interfering with the individual's constitutionally guaranteed rights of freedom of expression. This purpose they have fulfilled more or less successfully. But as the author points out,

In the dual process of restricting the police power and securing the individual's right of free expression, a wide and important group of social interests vital to the preservation of the common good is left without sufficient protection. (p. 143).

For too often these formulae have protected groups in their vicious propaganda attacks on the very interests which the high courts and the country should chiefly wish to protect.

In general, then, this is a work that every lawyer will find extremely useful—especially every Catholic lawyer, since the growing numbers and prestige of the Church in this country will inevitably incur the hostility of its enemies and find legal expression in the courts of the land. In this connection, one finds it difficult to share the final optimism of the author for the future of basic freedoms of the individual. The current of positivism in the vast majority of American law schools is too strong to be overcome without a struggle. Father Powers could make a valuable contribution to this struggle against legal positivism by writing other volumes possessing the same high quality of *RELIGIOUS LIBERTY AND THE POLICE POWER OF THE STATE*.

R. W. Mulligan, S.J.\*

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*TOTAL POWER*. By Edmund A. Walsh, S.J.,<sup>1</sup> New York, New York: Doubleday and Company, Inc., 1948. 375 pages. \$5.—The author of this book presents in the first of a series of three monographs some leaves from his Nuremberg diary together with an “inquiry into the concept of power as an externalized expression of intellect and an attempt to trace the evolution and devolution of power forms”. Along with this, he endeavors to make a study of the causes leading to revolution.

While he intends in the second monograph to present “a factual and considered estimate of the entire Nuremberg episode; its inception, its legal and moral basis, its findings, and its bearing on the development of international law”, Father Walsh finds it convenient to include in this first monograph “certain passages of relevant material from other previous manuscripts because of their bearing on contemporary events”, related to the Nuremberg trials.

The first part of this volume is entitled “Retribution” and describes the part that Professor General Karl Haushofer played in furnishing the philosophy of *Lebensraum* to the Nazis. The second part, book two, contains an analysis of the anatomy of power, the anatomy of revolution and humanism as it is related to world revolution. The third book discusses the challenge contained in the new geopolitics in Europe and Asia as offered by Communism and Stalin’s socialistic prelude to the classless society. The responsibilities of America in the Atomic Age are finally coupled with the challenge to civilization.

The story of the philosophers who provided the false premises for the nihilistic politicians of Germany is very well told in Father Walsh’s catalogue of subversive ideas that stemmed from Machiavelli’s *Prince* and the writings of Fichte, Hegel, Nietzsche and a host of other idolators of power. It is well that this crude power concept is shown for what it is, a repulsive calamitous theory which in practice bore the evil fruit of Nazism and Stalinism. If Father Walsh waxes eloquent in his detestation of philosophic untruth, no one should find fault, for the hypocritical attempt to dress dreams of conquest and totalitarian tyranny in the garb of practical philosophy deserves to be unmasked with dramatic finality.

The only part of incompleteness, it strikes this reviewer, an element wanting to make this book a finished footnote to the history of the first half of the twentieth century, is the postponement to the future of a considered “estimate of the entire Nuremberg episode; its inception, its legal and moral basis, and its bearing on the development of international law.” This volume sidesteps the question of the legal basis on which the victorious powers stood in hailing the war criminals and other

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Nazis to trial and death or imprisonment. Many legal scholars are at a loss to understand the principles which guided the Nuremberg court as a legal tribunal. Is this the way, the Nuremberg way, to establish international law, to ensure justice and convince world revolutionists that their philosophy is wrong?

We will await the second monograph in this series with great interest, believing that if anybody can contribute the elucidation of principles on which international courts can safely stand in dealing with world revolutionaries the wobbly international law of our day will be rejuvenated.

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