These dire predictions, we believe, are quite unfounded. Government regulation of economic enterprise, it is true, is likely to increase in modern industrial society, notwithstanding our unshaken faith in the ideal of maximum voluntaryism, just as more regulation is needed for city automobile traffic than for driving buggies on country lanes. And of such regulations labor relations will receive the greater share the less capable—subjectively and objectively—the bargaining parties are to do the right and wise thing by the community as well as by themselves.[24] The forms which such government intervention assumes will vary with the nature of the problems to be solved, with the institutional set-up, and with the traditions of the communities. The criterion for their appraisal, however, should be merely their fairness, practicability, and effectiveness, not the exact place in the economy where they are applied.

Moreover, there seems nothing inevitable about the "course" which a government such as ours may enter upon. Far from being bound to stay on any set course, a democratic government is—in the language of *Cybernetics*[25]—a highly sensitive "feedback" system, perpetually readjusting its course by way of reacting to the effects of its previous actions. Where particular regulations of the terms of agreements are found impractical and unsound they can easily be altered or withdrawn and replaced by other methods. Hence, no great point of principle seems indeed involved in this issue of "government regulation of the terms of agreements."

JOHN V. SPIELMANS†

SUPREME COURT PRACTICE. By Robert L. Stern* and Eugene Gressman.** Washington: The Bureau of National Affairs, Inc., 1950. Pp. xii, 553. $7.50.

ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES. By Richard F. Wolfson*** and Philip B. Kurland.**** Albany and New York: Matthew Bender & Co., 1951. Pp. xxxii, 1147. $27.50.

24. On the development of this idea see Slichter, *The Changing American Economy*, The Commercial and Financial Chronicle, June 2, 1949.

25. WIENER, CYBERNETICS (6th ed., 1949).

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In few fields is the practitioner so well served as he now is, with the publication of these two books, in the field of the jurisdiction and practice of the United States Supreme Court.

Mr. Stern and Mr. Gressman have written an extraordinarily concise handbook —a *tour de force of* condensation, actually containing only 353 pages of text[1] in large print on small pages.[2] Mr. Wolfson and Mr. Kurland have performed the valuable service of bringing Robertson and Kirkham's standard treatise up to date. This admirable work is now restored to usefulness, with the structure and much of the content of the original retained, but with appropriate additions and deletions to reflect the substantial changes of the intervening decade and a half.

Both are practitioner's books. Mr. Stern and Mr. Gressman picture the practitioner as wanting concrete answers to practical problems, and they get right down to earth in giving them to him. Almost literally, they take him by the hand as he enters the Supreme Court building, and tell him which way to turn to reach the Clerk's office and which way to the Marshal's office, how to get seats in the courtroom for his family and friends, and how and when to snatch a bite to eat before his case is called. These are simply spots of color in an equally concrete treatment of countless more important matters. Judge Fahy of the Court of Appeals of the District of Columbia, reviewing this book, found it "beyond criticism."[3] This offers a tempting challenge to later reviewers but one which in fairness should be resisted.

The shortcomings of a summary, of course, are most obvious in the treatment of technical requirements of jurisdiction. But good lawyers understand that summaries are only summaries and will be grateful for the excellence of this one. Remarkably, this handbook achieves a broader coverage than the Wolfson-Kurland treatise; it deals, as the latter does not, with the original jurisdiction of the Supreme Court and, even more usefully, with the extraordinary writs. Indeed, the less technical sections of the book do not even have a summary's shortcomings. The full discussion (45 pages) of criteria in the grant of certiorari stands perfectly well on its own. So, in particular, does the

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1. The remainder of the book consists of a section of very helpful forms along with the pertinent rules and statutes.

2. The field seems to invite such *tours de force.* Compare BUNN, A BRIEF SURVEY OF THE JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES (5th ed. 1949), dealing with the entire federal judicial system in 276 pages of text in even larger type on even smaller pages.

3. Book Review, 64 HARV. L. REV. 1400 (1951).

section on preparing a petition for certiorari (22 pages), and the two chapters on briefs (27 pages) and oral argument (23 pages). Many law schools might well consider discarding their present handbooks for students taking part in moot appellate arguments and simply assigning these last two chapters.

Mr. Wolfson and Mr. Kurland have a different and, it seems to me, less valid conception of what a practitioner wants. They undertake to deal thoroughly with the case law. But they assume that what is called for, in such a treatment, is primarily the accurate statement of rules and of the facts and holdings of illustrative cases. "We have forborne," they say in the preface, "to express our own opinions regarding the wisdom of the Court's jurisdiction as now constituted;"[4] and the text makes clear that this means forbearing to express opinions concerning the soundness of the Court's decisions on its jurisdiction and practice.

What a practitioner really wants, no doubt, is not for a professor to say. But I am sure that this is not what students want—at least not good students. An accurate collection and statement of relevant decisions is helpful, of course, as a foundation for research. But if a book stops here it does no more than improve on the arrangement and scholarship of the United States Code Annotated. It helps only in getting the easy answers. To work out hard answers, what you want is a book which deals with the reasons for rules—with the materials of thought and argument. You want a persistent search for the rationale of statutory provisions, court rules and judicial decisions alike, and persistent effort to lay bare competing considerations. You want an author who is doing this under his own horsepower and not merely by quotation or paraphrase of judicial opinions. Such an author will not shrink from disclosing his own judgments. Witness Wigmore. I cannot help believing that practitioners, like students, prefer Wigmorean armories of rational thought concerning difficult problems to mere collections, however well-organized, of holdings and rules.

Fortunately, Mr. Wolfson and Mr. Kurland have not entirely succeeded in living up to the sterile positivism of their preface. Their book contains a lot of analysis and criticism, and this is responsible for a lot of

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4. In this, the authors claim to be following the example of their predecessors and the advice of the survivor of them. But Robertson and Kirkham said in their preface that, while their "major effort" had been "to state the rules as they exist and are applied," they had "not refrained from criticism of established rules or of particular decisions, where deemed to be justified." Nor did they so refrain from criticism of critics of particular decisions. Many of their vigorous opinions have been edited out of this edition, and the book loses force and color correspondingly.

its value. But one can never wholly escape the shackles he puts on his own purpose. The disappointments and limitations of this book seem to me to trace directly to what its authors did not try to do.

Here is an example of what is likely to happen if one decides not to think and speak for himself. With his attention fixed on the effort simply to state what the cases seem to hold, anyone might well say, as this book does, that:

> Where the meaning of a state statute depends upon federal law, incorporated by it, a construction of that state statute, interpreting federal law, presents a federal question for the Supreme Court and is not a state ground of decision.[5]

Standard Oil Co. v. Johnson[6] and the other cases which the authors cite seem to support the statement. But one who is thinking critically about the decisions and the problems with which they deal will see that so unqualified a statement cannot possibly be true. Surely, a state cannot, by simply adopting the Federal Rules of Civil Procedure, make questions of construction of those rules arising in state court proceedings a matter for review in the Supreme Court of the United States. Wrestling with the question of where to draw the line, such an author would at least decide that the *Standard Oil* case should be viewed with caution, and he might even dare to suggest that it is unsound. This is only a single instance, but it is not, I think, untypical nor is it trivial. Problems of state reference to federal law (like the converse problems of federal reference to state law) present fascinating intellectual difficulties and are of growing practical importance. This book barely gets to first base in helping a lawyer confronted with such a problem.

To give another illustration, the authors are concerned with the "contradictions" in the decisions respecting the effect of a state court's certificate that a federal question was raised and decided,[7] and particularly with *Honeyman v. Hanan.*[8] Searching for a rule, they pose the question whether such a certificate is or is not "sufficient to show the existence of a federal question," and they find the answer unclear. A search for the reason for rules, it is submitted, would point the way out of the difficulty. If the problem is simply one of finding out whether, as a matter of fact, a particular and definite federal question was or was not raised and decided, there seems to be no reason why the Supreme

5. Section 99, p. 180.
6. 316 U.S. 481 (1942).
7. Section 81, pp. 138-41. While preparing the book, the authors enlarged on their difficulties with this problem in Wolfson and Kurland, *Certificates by States Courts of the Existence of a Federal Question,* 63 HARV. L. REV. 111 (1949).
8. 300 U.S. 14 (1937).

Court should not accept the state court's word for it, even though the record is otherwise wholly silent. The Supreme Court seems willing to do this; certainly *Honeyman v. Hanan* is not to the contrary. But the Court may need to know more. It may be uncertain exactly what the question is which was raised and decided, and which the Court is now called upon to review. This was the situation in the *Honeyman* case. The Court accordingly could not rest upon the certificate, and remanded the case to the state court for clarification. On the return from the remand, this procedure was vindicated, when it was disclosed that the question actually raised and decided was insubstantial, and that another more serious question which had at first seemed to be involved was not actually in the case.[9]

One of the most useful parts of the Wolfson-Kurland book is the elaborate examination of the "principles and precedents governing the exercise" of discretion to grant certiorari.[10] There is no more conspicuous feature of the Court's jurisdiction, either in principle or practice, than this enormous power it has to decide what cases to decide. The Wolfson-Kurland discussion, coupled with Stern and Gressman's, helps to throw more light where more light is badly needed. Yet here again it seems to me that a more critical inquiry, conducted in a mood of greater readiness to assume intellectual responsibility for firm conclusions, would have yielded better returns. The authors, for example, fudge the question whether, in the absence either of a square conflict of decision or of an issue of wide public importance, the Court will or should grant certiorari simply to correct a plain error of decision. Robertson and Kirkham had argued forthrightly that the Court both would and should do this in certain cases, and had suggested as criteria the plainness of the error and its unambiguous appearance on the face of the opinion below.[11] The suggestion was worth pursuit and vigorous debate instead of weak dilution.[12] The pursuit would have provided material for coming to grips with, instead of straddling, the further and related problem of cases in which the ascertainment of error involves the appraisal of controverted evidence and findings of fact. In federal employers' liability cases and cases involving the application of constitutional guarantees of fair trial, this problem has been a battleground in recent years. This book tells the practitioner that

9. Honeyman v. Hanan, 302 U.S. 375 (1937). Curiously, neither in the treatise nor in their article, *supra note* 7, do the authors make any reference to this illuminating denouement.

10. Part 4, §§ 308-375, pp. 579-753.

11. Section 304 (1st ed. 1936).

12. Section 334.

there have been battles,[13] but by failing to get into the fight on its own account, it fails to give him any new or better weapons against the inevitable recurrence of the fray.

To repeat, this is a good book but a little intellectual nerve would have made it better.

HENRY M. HART, JR.†

EFFECTS OF TAXATION ON CORPORATE MERGERS. By J. Keith Butters,* John Lintner,** and William L. Cary.*** Boston: Division of Research, Graduate School of Business Administration, Harvard University. 1951. Pp. xviii, 364. $4.25.

The contribution of Messrs. Butters, Lintner, and Cary, although perhaps not based on unassailable scientific methods, persuavisely challenges several heretofore widely held conceptions regarding corporate mergers. The object of this study was to provide "a careful and dispassionate appraisal of the effects of Federal taxation on merger activities and on the continued existence as competitive entities of our independently owned small and medium-size companies."

The authors conducted extensive field interviews with one or more participants in over 100 sales and purchases of business enterprises which occurred during the period 1940 through 1947. Directly considered were the 1,990 mergers uncovered through the field surveys and through analysis of general statistics reported in the various financial journals. This painstaking research and analysis indicates that although tax burdens have been a highly significant motivation in the sale of a considerable number of closely held companies, the role of taxes has been much more limited than frequently supposed. Indeed, it was determined that federal taxation was important in but 9.7% of all corporate mergers involving 27.5% of the total corporate assets included in the survey. The disproportionate amount of assets involved is attributed to the fact that tax motivations were more significant in connection with the merger of the larger closely held companies. Furthermore, the merger movement did not appear to weaken the over-all competitive structure of the economy to any serious degree. The ultimate conclusion, therefore, was that during the 1940's tax pressures on owners of closely held companies did not cause independently owned companies to be sold out

13. Sections 304 and 373-74.

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