BOOK REVIEWS

GOVERNMENT AND COLLECTIVE BARGAINING. By Fred Witney.* Chicago: J. B. Lippincott Co., 1951. Pp. viii, 741. $6.00.

In an earlier recent study[1] Professor Witney focused his attention on a very special aspect of government and collective bargaining, namely the wartime work of the NLRB. In the present, much more exhaustive work he deals comprehensively with the subject, tracing the development of the influence of government on collective bargaining in the United States from early beginnings to the present. Yet, while comprehensive in its chosen field, as to collective bargaining the book confines itself to one particular aspect: governmental influences. Therein it differs greatly from various other recent texts on collective bargaining[2] which, in covering many other matters such as union history, principles of union organization, bargaining procedures and techniques, grievance and strike procedure, dispute settlements, etc., usually devote only a chapter or two to the influence of government.

Thus, as to subject matter, Mr. Witney's book is comparable to Gregory's *Labor and the Law;* but it differs greatly as to treatment, giving far less consideration to the analysis, comparison, and original evaluation of legal opinion, and far more to the recounting of socio-economic developments and circumstances—always appraised in the light of Mr. Witney's unfiinching union sympathies. In fact, the book is not meant for the specialized student of labor law, but, according to the author's own statement in the preface, as a text for students of Liberal Arts and Commerce.

The general arrangement is based on the almost dramatic dialectics under which the development of the union movement in the United States appears to its friends. After a brief introduction concerning the nature and significance of collective bargaining, the first major part deals with the phase of "Legal Suppression of Collective Bargaining," reaching from the early nineteenth century to the end of the 1920's: the conspiracy doctrine; the rise and flowering of the labor injunction; prosecutions under the Sherman Act, interwoven with the hopes and disappointments of the Clayton Act. All this is told at the hand of the

---

* Assistant Professor of Economics, Indiana University.

1. WITNEY, WARTIME EXPERIENCE OF THE NATIONAL LABOR RELATIONS BOARD, 1941-45 (1949).

2. *See, e.g.,* CHAMBERLAIN, COLLECTIVE BARGAINING (1951); DAVEY, CONTEMPORARY COLLECTIVE BARGAINING (1951); RANDLE, COLLECTIVE BARGAINING (1951).

long-famous test cases demonstrating the liberal opinions of Holmes and Brandeis as yet outweighed by those of their more conservative colleagues.

The next part, "Government Encouragement of Collective Bargaining," treats the New Deal era. A full treatment is given to the Norris-La Guardia Act (which "strangely enough . . . was not signed by Roosevelt");[3] a rather slight account of the Railway Labor Act of 1934; with full emphasis finally on the Wagner Act, its origins, its content and significance, its operation under the evolving policies of the NLRB, and its general impact on the American labor movement.

With the next two parts, "Restrictions on Collective Bargaining" and "Collective Bargaining: Area of Industrial Conflict," the author makes a somewhat unexpected change in the arrangement. Rather than continuing the historical account with the full story of the Taft-Hartley Act, he turns to a topical treatment of various problems of collective bargaining such as—to name only a few—control of the bargaining unit, union security, enforcement of collective bargaining, the right to strike, national emergency strikes, etc. Relative to each of these the role of government is treated in its historical development, with maximum emphasis on the change from the Wagner Act to the largely, but not summarily, deplorable Taft-Hartley Act. The latter is criticized in general for its anti-union intent and effect and its tendency to inject a legalistic and punitive spirit into labor relations; in particular for its unfair restrictions on union security (notably its indiscriminating prohibition of the closed shop), for the return to the labor injunction, and, most specially, for its interference with the substantive terms of collective agreements.

A further brief part on "Wartime Controls of Collective Bargaining" deals essentially with the work of the War Labor Board, its restrictions of wage increases under the Little Steel formula, and its compromise union-security scheme through "maintenance of membership." There are also glimpses towards the controls under the present emergency.

Finally, under "Conclusions," the author introduces somewhat hastily the new topic of wage theories and collective bargaining. He expresses the hope that, at least for normal conditions, government interference with union wage policies will not be needed; that the unions themselves will eventually develop a "national wage policy" which, with a program once agreed upon, would make it "a simple matter to educate top union leadership to the vital economic necessity of a non-inflationary

3. P. 110.

union wage policy;"[4] with the final conclusion—in line with the present-day optimism—that "[controlled] inflation and full employment rather than unemployment, collectivism, or government control over the economic life could be the least of the evils."[5]

Appended are the full texts of the several federal statutes around which the development centers and—very handy for the busy professor—groups of five to six questions to each of the twenty-five chapters.

The above brief description should suggest the great amount of material assembled and organized into this comprehensive, informative account of a most complex development. The book should prove to be very useful, not only as a text for college labor courses, but also for trade unionists wishing to gain a broader understanding of their problems, and to those managers and executives who are willing to listen to "the other side" of the union story.

We wish to add a few critical and general remarks. Considering the liberally broad—at times almost overbroad—scope of the material included, it seems regrettable to this reviewer that the author did not make more use of the thorough and revealing congressional debate on the proposed amendments of the Taft-Hartley Act in the spring of 1949. Of this he mentions hardly more than a few features of the ill-starred Thomas bill. The debate on the Taft amendment of that bill (passed by the Senate) with its many and not inconsiderable concessions to the demands of labor seem a sure indicator of the minimum improvements in the law to be expected. (Senator Taft enumerated 22 such improvements among which, to mention only two, were the abolition of the union-shop elections and of the one-sidedness of the non-Communist affidavit.)

This same debate would also have disclosed the many and varied ideas and amendments proposed (*e.g.* by Senator Morse, and Senators Douglas-Aiken) and difficulties found in the way of improving the provisions for national emergency strikes. Instead, Mr. Witney offers only his own "drastic" solution: government seizure, with workers "expected" to continue work under previous conditions, and, "to balance scales" as to pressure on the two parties, "confiscation of all profits earned by the industry during the period of seizure."[6] This solution appears to be defective in at least two respects. First, to make the unions act their assigned part the hated injunction might, after all, have to be used in case of non-compliance, with no assurance of being effective

4. P. 609.
5. P. 613.
6. P. 513.

(as demonstrated by John L. Lewis' injunction-complying back-to-work order disobeyed by the "rank and file"). Secondly, the pressure exerted on management by the confiscation of all profits would, in most instances, be much stronger than that on the workers who would merely have to continue for a while under previous conditions. This scheme would essentially place the coercive powers of government on the side of the unions, regardless of the merit of their demands.[7]

Next, there is a question regarding the author's treatment of the issue of legislative as contrasted with judicial modes of government interference in labor relations. Mr. Witney expresses himself in principle strongly in favor of legislation,[8] and against judicial lawmaking, especially in the form of injunctions:

> In legislative bodies, the issue of policy is decided by a representative body. But in injunction cases, the judge alone, motivated by his beliefs, attitudes, and prejudices, decides the issues.[9]

In this connection he takes to task a recent decision of the Massachusetts Supreme Court[10] upholding an injunction against a strike for union security, because "[n]o law enacted by the legislature of that state has outlawed such strikes."[11] But in thus leaving nothing between statutes enacted by legislative bodies and the individual prejudices of individual judges, does the author not disregard the whole role of common law, on which non-arbitrary decisions may be based in the absence of statute law? In fact, the Massachusetts Court upheld the injunction on the basis of a whole line of precedents under Massachusetts' common law.

Another of our scruples concerns the way in which the author enlists numerical data to support his views. As one of several instances we cite his repeated contention that union-membership figures *prove*

7. The Douglas-Aiken amendment, to which Mr. Witney's proposal bears a certain resemblance, also provided for Government seizure under proper safeguards. But instead of "confiscation of profits" it contemplated "just compensation for the owners," with the Government merely deducting its own operation costs. It also provided for the "duty of labor organizations" to keep their members at work during the period of seizure, but with provision for the United States President to ask for an injunction in case of non-compliance. The difference between such an injunction and that provided under Taft-Hartley, Senator Douglas emphatically pointed out in the debate, was that it would require workers to continue work for the Government, not for private employers. 95 CONG. REC. 7798 (1949).

8. Occasionally however, when disapproving of a particular piece of legislation, Mr. Witney labels it as mere "government edict." P. 278. Also he criticizes legislative interference with practices established by the NLRB, *i.e.*, Board-made law "even upheld by the Supreme Court." P. 317. By contrast, Dr. William Leiserson, as a member of the NLRB, dissented repeatedly from decisions amounting to Board-made law as "unauthorized by Congress." See *e.g.*, Rutland Court Owners, Inc., 44 N.L.R.B. 587 (1942).

9. P. 50.

10. Colonial Press, Inc. v. Ellis, 321 Mass. 495, 74 N.E.2d 1 (1947).

11. P. 49.

the detrimental effect of the Taft-Hartley Act on the union movement which indeed, due to this law, has "ground to a halt."[12] This "proof" lies essentially in a single figure supposedly showing an abnormally small increase in membership during the first year after Taft-Hartley, in comparison to the much greater increases in the "peacetime years of the Wagner Act."

On the one hand, this increase—only very approximately known—is hardly significantly smaller than those in immediately preceding years.[13] On the other, the asserted causal nexus with the Taft-Hartley Act is largely open to question. While the almost explosive growth in union membership in 1937 was doubtless due primarily to the protection given to the right to organize by the Wagner Act, it was co-conditioned by the previous retardation of union organization in the mass production industries; so that, with automobile, steel, oil, rubber, electrical appliances, etc., suddenly organizing, membership figures naturally soared. A persistently diminishing rate of increase was discernible by about 1943 (especially when taken relative to the increasing labor force); apparently indicative of the greater resistance to unionization in the remaining non-union areas, due partly to the nature of the industries, notably trade and agriculture, partly to the social backwardness and local mores of the working population, plus unfavorable state laws, especially in the South. That the Taft-Hartley Act has in various ways added to the difficulties of organizing these areas, is more than likely. But the "proof" is certainly not in the figures cited.

We mention this point not so much for the sake of the particular facts in question, but for that of a principle. There is so much biased citing of statistical figures in the world around us—through press and radio, in politics, and in the pleadings of all special interests. Hence, it would seem especially desirable that students be taught to cautiously, critically, and objectively interpret statistical figures. This objective will be difficult to attain so long as their teachers persist in indiscriminately using statistical material to substantiate their own views.

Finally, there is a broader question of principle regarding government and collective bargaining, apropos not merely of the present

12. P. 474.

13. According to the United States Department of Labor (Bur. of Labor Statistics Bull., No. 937) annual variations in union membership since the Wagner Act have ranged from an all-time high of about 3 million in 1937 to an actual decrease by about 100,000 in 1940; rising fluctuatingly to an average of about 1 million per year during the war, and down again to an average of about 300,000 per year between 1945-47; wherefore the roughly 260,00 increase for 1948 can hardly be regarded as out of the ordinary, especially since Mr. Witney himself points out that current membership figures are not known with any degree of accuracy. (The 1951 World Almanac gives the last years' membership as somewhere between 14 and 16.8 millions).

author's views, but of those of a whole school of thought. This question concerns the explicit or implicit claim that the proper and legitimate role for government is to "guarantee free collective bargaining," but that it is highly improper and, indeed, detrimental for government to "intervene in the substantive terms of collective agreements." To have entered upon this course is, according to many, among the very worst features of the Taft-Hartley Act.[14] The present book abounds in assertions to this effect.[15] This thesis we wish to challenge.

The first question is, why should government have to intervene at all to "guarantee" free collective bargaining? Why was it not enough to have the Norris-La Guardia Act protect union activities against interference by injunctions, and thus leave unions and management truly "free" to settle their mutual issues? Why did government have to enter under the Wagner Act with all its far-flung machinery to set up bargaining units, hold representation elections, certify majority unions, and stop employers from committing "unfair labor practices?"

The pertinence of the question appears when it is noted that most other industrial countries with well developed trade unionism do not have any government interference of this particular kind. The reason why this was necessary on the American scene was because of the American employers' widespread and extreme hostility, fighting unionism and collective bargaining with a degree of success unparalleled in other countries. Thus, a peculiar problem called for this solution through an unusual form of government intervention in labor relations.

Secondly, when the government admittedly needed to get and keep collective bargaining rolling, why should it be so categorically undesirable for government also to regulate certain terms of collective agreements where this is found necessary to prevent socially undesirable, or to insure socially desirable, policies?

Let us take, as an example, the case of union security. To prevent certain well-known abuses under such contracts government can intervene either by regulating the unions themselves (*e.g.* specify fees and dues, proscribe exclusive admission policies, and regulate the adminis-

14. In Taft-Hartley there are four such instances of interference with the substantive terms of collecting agreements, all but the first, in our opinion, quite defensible on grounds of intrinsic merits and fairness: 1) restrictions on union-security contracts, 2) prohibition of feather-bedding, 3) regulation for the joint administration of industrial pension and other welfare funds, and 4) provisions for the final determination of jurisdictional disputes through the NLRB, failing their settlement through the unions' own machinery. All these four instances are fully and critically discussed in Professor Taylor's GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS, c. 6 (1948). Mr. Witney's specific criticism of this type of government interference is chiefly turned against the union-security provisions. Pp. 311 *et seq.*

15. See Pp. 278, 280, 281, 410, and 619.

tration of union discipline); or it can leave the unions alone and restrict union-security contracts, thereby "interfering with the terms of collective agreements." The former, apparently "legitimate" method is strongly opposed by the unions as "interference with their private affairs;" nor is it used by the Taft-Hartley Act. But it has been used in varying degrees of stringency and fairness by a number of states, in particular under Fair Employment Practice laws prohibiting exclusion from union membership on account of race, creed, national origin, etc. This method is also advocated by many legislators and authors, including Mr. Witney.[16] The latter, supposedly "illegitimate" method was used first under the New Deal Railway Labor Act of 1934 prohibiting all union-security contracts;[17] next by the Wagner Act's restricting them to the duly designated majority bargaining agent;[18] next by a number of state laws regulating such contracts more narrowly than the Wagner Act (some of them, in our opinion, very fairly by balancing security to the unions with protection for individual workers);[19] then by a number of obviously anti-union state laws altogether forbidding union security, (anti-union because operating in exactly those areas where the extant weakness of the unions makes union security most necessary); and finally by the Taft-Hartley Act's prohibition of the closed shop and narrow limitations on the union shop.

Either form of intervention, we find, may be used fairly or unfairly, wisely or unwisely. Why is the one, on principle, more objectionable than the other?

Or consider as another most important example the economic terms, notably wages and hours, of collective bargaining agreements. In the United States the Federal Government has "interfered" with such terms only indirectly, in two ways, both eventually accepted as necessary in spite of being limitations on "free" collective bargaining. First, the fixing of legal minimum terms under the Fair Labor Standards Act and similar laws in an attempt to strengthen labor's bargaining powers

16. Pp. 335 *et seq.*

17. This prohibition, for which there were fairly good reasons at the time, was enacted over the protests of the Railroad Brotherhoods. See BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 51 (1950). Recently, yielding to the persistent demand of the unions, this prohibition was repealed and replaced by a union-shop formula similar to that of the Taft-Hartley Act. Pub. L. No. 914, 81st Cong., 2d Sess. (Jan. 10, 1951).

18. This Wagner Act restriction is often classed as being not "interference with the terms of collective bargaining," but merely as "setting the rules of the game" by government. We fail to see the merit of this distinction.

19. Notably those of New Hampshire and Massachusetts. N.H. REV. LAWS c. 195 (1947) (later repealed because too much in conflict with Tart-Hartley); MASS. GEN. LAWS c. 657 (1947).

where it was too weak on its own account. Secondly, the placing of ceiling limitations on wage increases to prevent inflation, used in wartime and the present emergency. Otherwise our traditional devotion to "voluntaryism" has operated against direct interference. Even in deadlocked disputes giving rise to "emergency" strikes, federal law, both under the Railway Labor and Taft-Hartley Acts, has strictly refrained from prescribing the terms of settlement to be imposed.[20]

Other undeniably democratic countries, on the other hand, have felt no compunction about government intervening directly in fixing various terms of agreements; *e.g.* through more or less continual regulation of wages and hours; the laying down of legal minima for paid vacations; legally extending the scope of representative agreements to the whole industry; or, in deadlocked disputes, making temporarily binding awards either through permanent wage boards, or state conciliators, or through special legislation.[21]

It thus appears that there are many different ways in which democratic governments can and do attempt to solve problems of labor relations through legislative means, with controls applied at whatever point deemed suitable. Why then this insistence among us that, whatever the controls are to be, they should not be applied to the "substantive terms of collective agreements?"

The chief, if not the only, reason which these advocates of "free" collective bargaining seem to offer is that every instance of this particular kind of government interference is a breach in the ramparts of our "free economy," threatening to lead to "all-out" regulation,[22] to totalitarianism, if not dictatorship. In the words of the present author:

> If the present law [Taft-Hartley] is a precursor of still greater government control, the terms of employment will not be determined by employers and employees in the collective bargaining process, but by government edict. (sic!) Such a state of affairs . . . is wholly incompatible with a free economy, for government control of the terms of employment could easily be the prelude to general control of all economic activity.[23]

---

20. State laws have occasionally resorted to direct interference. Examples are the Kansas Industrial Court of the 1920's, and the more recent laws for settling disputes in public utilities in the last resort by binding governmental awards, under simultaneous prohibition of strikes. These laws have, partly at least, been held invalid either under the Constitution or under the Taft-Hartley Act.

21. A great variety of such regulations is discussed in *Extent of Collective Bargaining in Seven European Countries*, 64 MON. LAB. REV. 1019 (1947); See also MARQUAND, ORGANIZED LABOR IN FOUR CONTINENTS (1939).

22. TAYLOR, *op. cit. supra* note 14, at 371.

23. P. 278.

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).

† Professor of Economics, Marquette University.

* Office of the Solicitor General, United States Department of Justice.

** Member of the District of Columbia and Michigan Bars.

*** Member of the New York Bar.

**** Assistant Professor of Law, Northwestern University.

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

---

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

---

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.

† Professor of Law, Harvard Law School.

* Professor of Financial Research, Harvard University.

** Society of Fellows, Harvard University.

*** Professor of Law, Northwestern University School of Law.

on such a scale as to warrant a major overhaul of the tax structure on this account.

This examination of the effects of taxation on corporate mergers should prove extremely valuable to lawyers and businessmen who take cognizance of the impact of taxation on business. The authors have included in their study details of illustrative cases of corporate mergers and through these examples have depicted tax motivations for such transactions with interest and clarity. These motivations have been explored from the standpoint of both seller and buyer. The case method employed renders the study readable and enlightening.

Liquidity considerations in the payment of estate taxes and valuation of closely held companies for estate tax purposes received comprehensive treatment. The former normally arise where an individual has his entire wealth centered in one closely held corporation and will be of real concern only where the size of the estate is substantial. This problem has been eliminated almost entirely through the addition of Section 115(g) (3) to the Internal Revenue Code. Nevertheless, the detailed analysis of the many aspects of the problem of liquidity will be of great assistance to the practitioner engaged in will writing or estate planning. Although valuation uncertainties present real difficulties in the handling of estates, the study reveals that there is very little direct relation between such uncertainties for estate tax purposes and a sale or other disposition of the stock of a closely held company.

The income tax impetus on corporate mergers stems from the income tax, capital gains tax, and surtax on corporations improperly accumulating surplus.[1] Through the use of an illustrative case the problem of securing the most money *after taxes* to the individual stockholders of a business is analyzed. By means of a detailed case history of the Toni Company's growth and subsequent sale to the Gillette Safety Razor Company, Professor Butters and his colleagues demonstrate that the transfer by Toni's original proprietors eliminated the risks involved in their continuing ownership of the company and actually netted more money after taxes than was probable through their retention of the enterprise. This analysis illustrates the need for an extensive examination of the many ramifications of such a transaction before it is consummated. The combination of high individual surtax rates, lower capital gains tax rates, relatively low corporate tax rates,[2] and Section 102 surtaxes will

1. Imposed by Section 102, Internal Revenue Code.

2. Of course, since the completion of this study the Excess Profits Tax Act of 1950 and the Revenue Act of 1951 have materially changed this picture. Thus the need is emphasized for business decisions to be predicated on business reasons rather than on possible future tax savings not consistent with those business reasons.

constantly prod the owners of profitable closely-held companies to explore the intricacies of federal tax law for ways of netting more cash after taxes.

The work includes a detailed examination of alternatives to sale or merger, including an analysis of gifts of interests in the corporation prior to the death of the owner, public sales of securities, gifts and sales to philanthropic institutions, survivor purchase and stock retirement plans, and others. The estate planner or practitioner counseling the owner of a closely-held corporation may further his clients interests by a careful perusal of the discussion of tax and non-tax problems in this portion of the study.

Of historical interest is the chapter on the comparisons between the major merger movements. The authors conclude that, as distinguished from the earlier merger movements (1879-1908 and 1922-29) which had the elimination of competition as their primary impetus and result, the merger movement of 1940-47 had relatively little effect on industrial concentration.

As distinguished from the relative unimportance of tax motivation in the current merger movement, taxes are a prime influence on the *form* of the transaction. The authors aptly state that:

> there are, in fact, few areas in which tax considerations more completely dominate business actions and in which the tax penalties for ill-advised decisions are more pronounced. Potential sellers of a successful enterprise, in particular, would be foolhardy to commence negotiations for the sale of their business without first ascertaining the tax consequences of each move and then scrupulously observing the ceremonials prescribed by counsel in carrying out the sale.

Of course, the study does not treat the complex and technical details of the tax law as it applies to mergers. However, the broad outlines of the law are discussed from the standpoint of the buyer as well as the seller. The tax problems with respect to each are outlined. The various forms in which the merger may be cast are set out and their tax consequences considered.

It is particularly gratifying that the authors have maintained a realistic approach to all the tax problems mentioned in the study. For the tax lawyer, the work has its greatest value in summarizing the many practical, non-tax questions surrounding mergers. In addition, for the general practitioner, the tax problems are surveyed in a manner which makes the book a serviceable reference volume. The study particularly indicates that substance will prevail over form and that business exigencies

should be determinative, with the one possible exception of selecting the form of the transaction where more than one form is available. The form which will produce the desired tax result should be selected, but such a choice may be made only after detailed analysis and actual computation of the alternative tax consequences.

This survey provides the practicing lawyer with a useful tool in the everyday analysis of problems inherent in corporate mergers. In addition to clarifying the fact that "strangling taxes" have not been of major importance in the recent merger movement, the authors have provided the profession with a useful volume which highlights the tax problems encountered in the field and points the way towards the solution of practical and legal problems through the application of scientific research.

KENNETH FOSTER†

† Member of the Indianapolis Bar.