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Book Reviews

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BOOK REVIEWS

CASES AND MATERIALS ON DEBTOR AND CREDITOR. By Vern Countryman. Boston: Little, Brown & Co., 1964. Pp. lxiii, 841. $12.50.

The teaching of courses in creditors' remedies, as well as the practice of law in that field, has always been severely handicapped by the lack of useful literature. As Countryman understates it in his preface, "the field does not abound with reference works of outstanding reliability and perceptivity."[1] Bankruptcy books are to be found, of course, but the few treatises on state creditor process and problems have been outmoded for decades. Most were of little value when new. Why is there so little of value in this not unimportant field when publishers are able to produce duplications in others? No doubt there are several reasons. Most important, probably, is that the law is so widely varied from state to state, and so antiquated, intricate and burdened with pointless technical niceties that only a scholar of great energy and great talent could master the field.

To understand the importance of Countryman's book it is necessary to understand the nature of the beast which he has sought to handle. Countryman recognizes that creditors' remedies are an aspect of procedural law rather than of substantive law; *i.e.*, the procedure for enforcing judgments against debtors.

The antiquation and the intricacy mentioned above are not indigenous only to this area of enforcement law; they were common to all areas of civil procedure not very long ago. Until the adoption of the Federal Rules of Civil Procedure in 1938, the most "modern" procedural systems in the country were more than three quarters of a century old, and many even more ancient. Because procedure was so closely regulated by statute, there was little of the cross fertilization by case law innovation that permits one state to profit by another's experience. The breakthrough of the federal rules had several important consequences. Most often mentioned was the creation of a valuable model for the states. A greater contribution was the reexamination of fundamental propositions and the assembling of experience from all sources within, and even without, the nation. Procedural objectives as well as devices to achieve those objectives were re-evaluated. The result is that procedures for obtaining a judgment have been greatly reformed in the past quarter century, and even those states which elected not to adopt the federal model

1. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR vii (1964) [hereinafter cited as COUNTRYMAN].

wholesale have profited by its existence and by the studies upon which it is founded.

The same cannot be said of procedures for the enforcement of judgments. Although the Judicial Code contains some fragmentary provisions on execution,[2] it is on the whole subject to the command of Rule 69 that "The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held. . . ." Rule 65 makes the provisional remedies, including attachment and garnishment, "available under the circumstances and in the manner provided by the law of the state in which the district court is held. . . ." Failure of the federal venture to engage in reform of enforcement procedures is hardly to be criticized; the subject is so entangled with state property law that genuine revision would have threatened involvement with the "substantive"[3] rights of litigants as well as with the then less clearly seen prohibitions of the *Erie* doctrine.

The state reformers have less excuse for their failure to act, but at least there are understandable reasons. They had neither the stimulus nor the enlightenment of a federal model; often they were inhibited because they too were proceeding under a rule making power rather than by legislative revision. But the few which essayed a more comprehensive revision of judicial procedure did little more. New York looked at New York law[4] and suggested a few improvements and simplifications; Michigan did about the same.[5] In its overhaul of judicial procedure Kansas did some streamlining of attachment and garnishment,[6] and its revision of the pleading and practice sections and the adoption of the Uniform Rules of Evidence make its laws as current as any in the nation. Yet the same chapter of the session law which works this reform re-enacts another article preserving exemptions for "all spinning wheels and looms" as well as for "one yoke of oxen."[7] The ideas of the field, as well as the words

2. 28 U.S.C. §§ 2001-07 (1958). Even within these sections there are references to state law. *E.g.*, 28 U.S.C. § 2005 (1958) (appraisal of goods before execution if required by state law); 28 U.S.C. § 2007 (1958) (imprisonment for debt on same terms as allowed under state law).

3. 28 U.S.C. § 2072 (1958), provides that rules adopted under the authority of that section "shall not abridge, enlarge or modify any substantive right."

4. See generally N.Y. CIV. PRAC. LAW AND RULES. For the basic studies, see Weinstein, *Proposed Revision of New York Civil Practice*, 60 COLUM. L. REV. 50 (1960); Distler & Schubin, *Enforcement Priorities and Liens*, 60 COLUM. L. REV. 458 (1960). I do not mean that New York's effort failed, or that its studies are not valuable. They did, however, concentrate more on curing mechanical defects than in fundamental re-examination.

5. Revised Judicature Act of 1961, 21 MICH. STAT. ANN. 27A:101-9911 (1963).

6. 1963 Kan. Laws ch. 303, art. 7.

7. 1963 Kan. Laws ch. 303, § 60-2304 (4), (5).

in which they are expressed, are historic relics. Students in many states must examine *fieri facias* not to learn what went before, which is a worthwhile pursuit, but to learn what the law now is, which is a disgrace.

Perhaps the lack of literature is the reason for the stagnation in enforcement law while other areas of procedure have been revised and revitalized. As noted, there are no current treatises. Most of the periodical literature is highly parochial—it is easy to find treatments of garnishment in Oklahoma or homestead exemptions in Ohio, but remarkably little that examines basic predicates instead of explaining how to live with an existing statute.

Because the project would be so immense and the incentive so small, no one person can undertake to become the master of this field and to produce the kind of fundamental studies that would be required for reform. The federal rule making apparatus seems unlikely to move in that direction, and indeed should not. Two of the largest and wealthiest states have recently gone through major reforms of procedure that left the enforcement of judgments virtually untouched. Thus, there seems little promise that conventional research sources will focus on this area. And most of them lack one capacity that is indispensable—an understanding of actual practice as well as of statutes and case law. This requires funded field research to supplement the intuitions of competent scholars, and that necessity restricts the competent sources to the institutional researchers. Among these the best candidate seems the American Bar Foundation. This kind of inquiry and this kind of purpose should be the prime concern of that institution, for here is a central problem in the administration of American justice which no one can doubt has been long neglected but about which nobody else can be induced to care enough to commit the resources necessary for the job. This project would be far better suited to both the capabilities and the responsibilities of a foundation representing the profession than studies of the European Common Market, even if there is risk that complete disclosure may reveal that the legal profession has here done more harm than good to the society it is sworn to serve.

Countryman's book is remarkable as a casebook because it does do something about this inadequacy of the literature. The gap is far too great for any one book or any one man to remedy, of course, but this book does as much as could be done within the limits of its size and its purpose. There was a time when books designed for classroom use in law schools were edited. In recent years there have been a few striking examples of coursebooks that are authored instead. A rough check of Countryman's book indicates that less than half of the

printed matter is reproduced cases. A small part of the rest is reprinted textual matter, most of it prior writing of Countryman himself. The remainder is note material. Not the notes which consist of excerpts from cases, or the "see also . . ." and "for another view" so common when casebooks began to become "Cases and Materials on . . ." These are genuine compositions, most of them carefully thought out, with references to authorities considering the points. The notes are the distinctive thing which prompted the comments at the outset of this review—this casebook is a significant contribution to the literature of the law of creditors' remedies. It identifies most of the problems which arise under state creditor process systems, points out the various solutions which are reached, and gives enough cases for leads and virtually exhaustive coverage of the periodical literature. I claim a working familiarity with the best of the older writing and awareness of, if not familiarity with, most of the more recent. The citations are there, even when the problem is on the fringe of the field. I have written (or co-authored) three articles which fall within this area. Two are cited and the problems they discuss explored, although one is only peripherally related. The third article is absent. Unfortunately, so is the problem, although it is of some practical significance and has provoked a fair number of cases at the appellate level. This is the question of severance of joint tenancies in real property by process directed against one of the joint tenants. Conceptualism and purpose there sharply collide.[8]

This omission—really an oversight, I suspect—might be thought serious in some settings. In the context of the Countryman book, so panoramic in its range, the topic is scarcely missed. Doubtless there are other omissions. Probably they are no more serious. I have taught all of the existing books in the field, including a progenitor of this one.[9] I have always had to supplement and to raise problems on which the book provided no coverage. Teaching this book in the equivalent of a two semester hour course, I found virtually no need to raise a problem for which I was unable to supply a reference within the casebook.

The book, then, is a splendid reference work. It is a valuable addition to a library, whether of a practitioner or a professor. I venture that even those who elect not to use this book for classes will make substantial use of it in preparing for classes.

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8. See Swenson & Degnan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466, 493-503 (1954). Nor do I find anything on the related but distinguishable problem of garnishment of joint bank accounts. There is a short note on the simpler problem of tenancy by the entireties. COUNTRYMAN 41-42.

9. MOORE & COUNTRYMAN, DEBTORS' AND CREDITORS' RIGHTS: CASES AND MATERIALS (1951). Despite the ancestry, the books are very different.

All of these points relate to use of the book for other than its primary reason for existence. How does it teach? I used it under optimum circumstances for making such a judgment; in a new state, after not having taught the course for several years. I was thus about as dependent on a casebook as one gets. I was well satisfied. One measure of its quality is that for the first time I have the feeling that thirty class hours is adequate (if only barely so) for the course in creditors' remedies. The notes proved to be an efficient way of covering terrain and preparing students for class discussion of the significant issues involved; not infrequently they turned out to be sufficient in themselves to dispose of a subject with minimal mention. In short, I liked the book and would use it in preference to any existing alternative.

This general satisfaction does not preclude a few reservations, however. The most significant one relates to the distinctive feature of the book, the compendious notes. Countryman expresses in the preface the hope that they will "present problems more efficiently and at least as provacatively as would a more extensive use of cases."[10] As already indicated, I thought the book taught efficiently, but I doubt that the notes are as provocative as they could be. (I do concede that for third year students they are as effective as cases for that purpose.) The notes are predominantly informative in tone and content. They are more effective in answering questions than they are in defining issues. They are not the "problem" type notes which have been used, with varying success, in casebooks produced in recent years.

Other reservations are less serious. Most can be coped with by readjusting the order of materials. I did have trouble assembling enough material and in enough depth, to get across any coherent ideas about jurisdiction in bankruptcy cases. The material is scattered, and the main note on summary jurisdiction[11] is densely packed and very difficult. But the other reservations I have are of that order and of even lesser dimension.[12]

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10. COUNTRYMAN vii.

11. COUNTRYMAN 390-92. Treatment of the plenary jurisdiction is found in COUNTRYMAN 633-34 n.3, 648-50 n.5. There are other more minor mentions of these problems, which are difficult to teach even with the best of materials all in one place.

12. I think that Countryman is sometimes wrong in his conclusions, but any man who ventures to say as much as he does in as little space is bound to be wrong a few times. And it doesn't really matter; my students enjoyed sometimes coming to conclusions of their own which they thought better than his.

There are remarkably few misprints for a first printing. I found only one that was misleading: *Green v. Powell*, cited as 46 S.W.2d 915 (Tex. Civ. App. 1932), on page 40, is a Missouri rather than a Texas Civil Appeals case. This was momentarily disconcerting, for Texas law is contrary on the point. But there are very few users to whom the error would matter at all.

I cannot resist saying that the type set of the book seems almost deliberately designed

In summary, this is different from the books that have been produced before. It would be a worthwhile accomplishment even if no course in creditors' remedies were offered in American law schools. For course use, it is less a casebook than it is a do-it-yourself kit from which a first class teaching tool can be assembled. The result is well worth the effort.

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THE SUPREME COURT ON TRIAL. By Charles S. Hyneman. New York: Atherton Press, 1963. Pp. IX, 308. $6.50.

Professor Hyneman's book represents still another entry in the current debate over the proper role of judicial review in a democratic society.[1] Although he approaches this subject via an analysis of several recent attacks upon the United States Supreme Court, Professor Hyneman essentially deals with the same topics—the legitimacy of judicial review, the proper standards applicable to constitutional adjudication, and the alleged departure of the school segregation cases[2] from those standards—that have served as the subject of several books and at least a score of articles published within the past five years.[3] Indeed the writing in this area has grown so voluminous that it is difficult for anyone except a full-time student of constitutional law to read it all. Accordingly, any evaluation of a new book in this area must take into account the "competition." Judged in this light, *The Supreme Court on Trial*, while a fairly interesting and possibly useful volume, hardly ranks as "essential reading" for the lawyer who is interested in the subject of judicial review. Professor Hyneman obviously has produced

to be of as little aid to the eye as possible. I doubt that Professor Countryman had any choice about this.

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1. A more complete description of this debate may be found in Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587 (1963). In many respects, the current debate is merely the latest chapter in a long standing controversy over the proper function of the Court. See, *e.g.*, the literature cited in Sutherland, Book Review, 74 HARV. L. REV. 197 n.3 (1860). See also BOUDIN, GOVERNMENT BY JUDICIARY (1932).

2. Brown v. Board of Education, 347 U.S. 484 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

3. See, *e.g.*, BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); BLACK, THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960); MASON, THE SUPREME COURT: PALLADIUM OF FREEDOM (1962); MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT (1961); ROSTOW, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW (1962); WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW (1961). Various law review articles are collected by Shapiro, *supra* note 1, at 587 n.1. See also Wright, *The Supreme Court cannot be Neutral*, 40 TEXAS L. REV. 599 n.2 (1962).

a better work than several other authors dealing with the same topic,[4] but, in my opinion, his contribution still falls far short of the excellence of the best literature in this field.[5]

One favorable aspect of Professor Hyneman's book is that the several sections into which it is divided, unlike the segments of some generally superior books,[6] are tied together by something more than the fact that they deal in some general way with the Supreme Court. The forty chapters in *The Supreme Court on Trial* are divided into five major sub-books, each of which builds progressively toward the final conclusions offered in part five, titled "Judicial Power and Democratic Government."

In the first sub-book Professor Hyneman carefully examines recent criticisms leveled against the Supreme Court, concentrating primarily on the criticism which stemmed from the school segregation cases. He describes in detail the various forms this criticism has taken and notes that such criticism has ample precedent in similar attacks which have been made in every significant period of the Court's history. This leads him to conclude that the nation has not lived comfortably under dramatic demonstrations of judicial power[7] and that, in part, this has been due to a "widespread suspicion" that the power of judicial review was never intended by the founding fathers but was usurped by the courts.[8]

Whether there is any reasonable justification for suspicion is the concern of the second sub-book. After examining the language of the Constitution, the writings of the founding fathers, the reasoning of *Marbury v. Madison*,[9] and the arguments of commentators, Professor Hyneman finds that, "men who fear extensive judicial power may reasonably cling to a conviction that a doctrine of judicial review was not originally incorporated in the Constitution but was grafted onto it by subsequent practice."[10]

In part III the author considers another basic line of attack against the Court, the frequently raised charge that it has "cross[ed] the boundaries of judicial power and invad[ed] a realm intended exclusively for the political branches of government."[11] He finds that the basis for such charges lies in the significant policy-making power which is almost inevitably a part of constitutional interpretation. As

4. See *e.g.*, BLOCH, STATES' RIGHTS: THE LAW OF THE LAND (1958); Nichols, *An Appeal To Save Our Written Form of Government*, 13 DE PAUL L. REV. 15 (1963).
5. See, *e.g.*, BICKEL, *op. cit. supra* note 3; BLACK, *op. cit. supra* note 3.
6. See, *e.g.*, ROSTOW, *op. cit. supra* note 3; WECHSLER, *op. cit. supra* note 3.
7. HYNEMAN, THE SUPREME COURT ON TRIAL 31 (1963).
8. *Id.* at 84, 123.
9. 5 U.S. (1 Cranch) 137 (1803).
10. HYNEMAN, *op. cit. supra* note 7, at 114.
11. *Id.* at 129.

an illustration of the Court's past exercise of this power, Professor Hyneman describes in detail the shift in the judicial interpretation of the due process and interstate commerce clauses during the nineteen thirties.

Turning from policy-making in the past to policy-making in the present, Professor Hyneman presents in part IV the heart of his book—an analysis of the school segregation cases. Building upon the points made in previous sections, the author concludes that the school segregation decision has carried judicial review, and consequently judicial policy-making, to a "new peak of judicial power."[12] He stresses that, unlike the significant cases of the past, such as the laissez-faire decisions of the thirties, the ruling in the segregation cases does not merely confirm the status quo by preventing new reforms, but operates affirmatively to force a highly significant social change upon society. Professor Hyneman apparently feels that the Court in this decision has travelled farther into the "domain" of the legislature than ever before; thus, opening up the possibility of a "new regime" in constitutional law. The author views this potential new regime as the offspring of the philosophy of "judicial activism." Accordingly he closes section IV with a lengthy description of this "contemporary school of thought" and its "plea" for "aggressive judicial review."[13]

In the concluding sub-book, part V, Professor Hyneman considers the desirability of judicial activism as compared to a judicial process which leaves significant policy making to the political process. Professor Hyneman notes that the latter alternative has the advantage of being more democratic and more efficient. Legislatures not only are more responsive to the people, but, because of their ability to move on a step by step basis, to back up when they have gone too far, and to limit new rulings to a prospective application, they are also a more effective body for the institution of social reform. Professor Hyneman notes that some would prefer bold judicial action precisely because the Court is not completely responsive to the popular will and therefore better suited to limit majority excesses. Although he does not flatly reject this position, Professor Hyneman's negative reaction is clearly indicated by his description of its proponents as painting a "picture of the Supreme Court as a wise father, admonishing his children to a higher morality by reading appropriate verses from the Scripture."[14] Professor Hyneman has difficulty with the argument which justifies bold judicial action on the ground that the inaction of the political branches has left the judiciary as the only body able

12. *Id.* at 198-99.
13. *Id.* at 217.
14. *Id.* at 245.

to make secure the democratic process. The author is somewhat skeptical of a court's ability to determine when legislative inaction truly signifies a failure of the political process. Moreover, while he questions any group's ability to fix the outer limits of the democratic process as they apply to our institutions,[15] he feels that the legislative judgment in this area is at least equal to that of the judiciary.

Although Professor Hyneman professes to do no more than state the arguments on both sides, the concluding sections of *The Supreme Court on Trial* make it obvious that he finds the arguments in favor of judicial self-restraint stronger than those in favor of judicial activism. This book review is hardly the proper vehicle for a profitable discussion of the merits of this conclusion, or, for that matter, even for a discussion of the author's basic assumption that the common classifications of "judicial self-restraint" and "judicial activism" accurately reflect a true dichotomy in basic judicial philosophy rather than just a difference in the degree to which particular judges hold sacred certain constitutional rights.[16] What can be considered in the limited space available is this: accepting the author's assumptions and his predilections, has he made the most convincing presentation of his point of view that can be made, or, of more importance to the potential reader, has he made the most convincing presentation that has been made to date. On both counts, I feel the answer is clearly "no." Though *The Supreme Court on Trial* has several strong features, it contains too many major defects to be recommended as a primary source-book for the lawyer who is interested in exploring the basic issues raised by the current debate over the proper role of judicial review.

One such defect is the author's lack of discrimination in his choice of arguments. Frequently, he detracts from strong arguments by giving equal (and sometimes even greater) emphasis to weaker arguments, several of which are so attenuated that it is doubtful whether they should have been mentioned at all. This quality is strikingly illustrated in the arguments advanced to support the author's conclusion that the critics of the Court have a reasonable basis for suspecting that the establishment of judicial review in *Marbury v. Madison* constituted a usurpation of power not granted to the judiciary. In analyzing the *Marbury* case Professor Hyneman concentrates primarily on the question, also stressed by Chief Justice Marshall,

15. *Id.* at 268.

16. See, *e.g.*, Kadish, *A Note on Judicial Activism*, 6 UTAH L. REV. 467 (1959); McWhinney, *The Great Debate: Activism and Self-Restraint and Current Dilemmas in Judicial Policy Making*, 33 N.Y.U.L. REV. 775 (1958); Rodell, *Judicial Activists, Judicial Self-deniers, Judicial Review and The First Amendment—or, How to hide the melody of what you mean behind the words of what you say*, 47 GEO. L.J. 374 (1959).

whether the Constitution was meant to be "paramount" law (*i.e.*, prevailing over contrary legislative acts). The author concludes that opponents of judicial review may "reasonably" take comfort from the fact that Marshall, in reaching an affirmative answer, "offered an appeal to generalized experience" as his initial support and turned only secondarily to the language of the Constitution itself.[17] Surely the concept of what constitutes "reasonable" support for a position is strained to the limit when the order of a judge's argumentation in an opinion is given such significance. It is hard to understand why, instead of emphasizing this point, indeed, instead of stressing so heavily the question of whether the Constitution was intended to be paramount law, Professor Hyneman did not concentrate on the point generally recognized to be the weakest link in the argument for judicial review[18]—Marshall's premise that, accepting the Constitution as paramount law, the Court's interpretation of that law should be binding upon co-equal branches of the government.[19]

Another significant defect in *The Supreme Court on Trial* is that too frequently it contains the very flaw which the author complains of in the work of others, namely that it is "long on argument and short on evidence."[20] Of course, many of the conclusions in a book of this type are not capable of proof, but too frequently Professor Hyneman has either failed to offer any evidence, or has offered dramatically insufficient evidence to support conclusions which must be supported by something more than logic.[21] For example, it is Pro-

17. HYNEMAN, *op. cit. supra* note 7, at 97, 124. Professor Hyneman's analysis throughout this section goes only to the question of whether anyone could *reasonably doubt* the constitutional legitimacy of judicial review and not to the question of whether the case for judicial review might not still be more convincing than the case against it. *Id.* at 93, 113-14, 117-26. Compare BLACK, *op. cit. supra* note 3, at 1-27.

18. See, *e.g.*, BICKEL, *op. cit. supra* note 3, at 2-14; BLACK, *op. cit. supra* note 3, at 13-16, 26-27; HAND, THE BILL OF RIGHTS 7-10, 27-30 (1958).

19. Professor Hyneman does recognize this problem at one point, HYNEMAN, *op. cit. supra* note 7, at 120, although he does not discuss the possibility of allowing each branch of the federal government to judge the constitutionality of its own actions. Some commentators have found support for such a system of "concurrent review" in the writings of Thomas Jefferson. See Krislov, *Jefferson and Judicial Review: Refereeing Cohn, Commager and Mendleson*, 9 J. PUB. L. 374 (1960); Mendleson, *Jefferson on Judicial Review: A Reply to Professor Krislov*, 10 J. PUB. L. 113 (1961); Mendleson, *Jefferson on Judicial Review: Consistency Through Change*, 29 U. CHI. L. REV. 327 (1962). See also Hand, *op. cit. supra* note 18, at 3-4.

20. HYNEMAN, *op. cit. supra* note 7, at 244.

21. It should be acknowledged that in at least a few instances the absence of documentation is most understandable. For example, in discussing the Court's unanimity in the school segregation cases, the author cites a "widespread conviction among lawyers and other close observers of the Court that the Supreme Court judges were far less in agreement than [Chief Justice] Warren's [opinions] would indicate." *Id.* at 211. Professor Hyneman has been sharply criticized by one reviewer for his failure to cite "which lawyers and which other close observers" hold this conviction. The absence of such references, in that reviewer's opinion, reduces Professor Hyneman's statement

fessor Hyneman's view that "throughout our history" much of the criticism of the Court has stemmed from a "significant social doubt that power to overrule Acts of Congress was conferred on the courts by the Constitution."[22] Yet, to support this position he offers little more than the statements of fourteen supporters of the Roosevelt court-packing plan who declared that judicial review of congressional legislation constituted a usurpation of power. Certainly, such a limited number of statements, coming within a single period of time, can hardly substantiate a general conclusion as to the nature of the criticism against the Court from the days of *Marbury v. Madison* to the present. Another example of the author's apparent lack of interest in furnishing evidentiary support for his conclusions is found in his citation of only a single "illustrative" article to document a rather dubious statement that "the leading law reviews today" are "dominat[ed]" by the view that "the Supreme Court is chief custodian of the nation's conscience and it must be supreme in saying what that conscience requires."[23] In a few instances, moreover, Professor Hyneman has not provided the reader with even a single citation to support his conclusions.[24] Thus, he offers no support for his statement

to "mere . . . scuttlebut." Fellman, Book Review, 32 GEO. WASH. L. REV. 449 (1963). It should be noted, however, that this very bit of "scuttlebut" has been advanced on the basis of "information that has filtered out [of the Court]" by one of the closest and most careful observers of the Court. See Lewis, New Look at the Chief Justice, N.Y. Times, Jan. 19, 1964, § 6 (Magazine), p. 9. Moreover, while the sources of such "scuttlebut" are not identified by Professor Hyneman—possibly because it was felt unnecessary since all they had to offer for publication was their own speculations—the arguments which support their conjecture are clearly stated and it is primarily on these arguments, not the authority of others, that the author relies.

22. HYNEMAN, *op. cit. supra* note 7, at 92. See also *id.* at 123. *But see* Barron, *Decision Without Power—The Dilemma of the Supreme Court*, 40 NORTH DAKOTA L. REV. 57, 60 (1964) ("presently . . . [the Court's] power of judicial review is rarely questioned"); Kurland, Book Review, 28 U. CHI. L. REV. 188 (1960) ("the argument . . . that the court has improperly usurped the power of judicial review is no longer urged by any except those mired in the deep South.")

23. HYNEMAN, *op. cit. supra* note 7, at 196. The article cited, Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960), is hardly typical of the current literature as indicated by the articles referred to in note 3 *supra*. See also Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35, 36 n.6 (1963).

24. This disregard for documentation has carried over to the author's description of the conclusions reached by others. See, *e.g.*, HYNEMAN, *op. cit. supra* note 7, at 100, 102, 165, where the author describes the position taken by "lawyers of considerable reknown," "students of American History," and "some writers on constitutional law" but fails to give any references to the authors whose work he is describing. This shortcoming is overcome in large measure by the bibliographic notes in the appendix to the book. In fact, to the general reader, the bibliographic notes are probably of much greater value than would be the documentation of the author's general statements. There are several instances, however, in which the author's descriptions of the views attributed to others are subject to question, and, at least here, citations should have been furnished. *E.g.*, *id.* at 165, where it is stated that "some writers on constitutional law have stretched these facts [of the *Jones & Laughlin* case] into a con-

that "there are many . . . opinions [of the Supreme Court] in which fear of future enactments is offered as a main reason for holding the present enactment invalid."[25] This is hardly a matter so obvious to any student of constitutional law that no citations are needed. In fact, I am somewhat puzzled as to what cases Professor Hyneman had in mind when he made his statement.

Although Professor Hyneman's disregard of the need for evidentiary support of his conclusions is often disconcerting, probably the most serious defect in his book is a somewhat related tendency to oversimplify, usually by overgeneralizing. In his description of judicial activism, for example, Professor Hyneman attempts at times to convert the position of a single author into a basic premise of what he considers to be a whole school of jurisprudence. Thus, he states that it is a good guess that virtually all students of constitutional law who think of themselves as judicial activists share the view that "the failure by the State to bar discrimination [by private citizens, organizations, and business firms] is state action denying the equal protection of the laws."[26] It seems very unlikely, however, that more than a handful of those described as judicial activists would support this approach to the state action problem.[27] In fact, a leading member of what Professor Hyneman would call the "activist" wing of the Court has clearly rejected this viewpoint,[28] and the author cited as the source of this position only advanced it as one of several possible approaches to the state action issue.[29] Professor Hyneman's tendency to oversimplify is also illustrated by his description of various Court decisions in the 1930's. For example, in describing the Court's "turnabout" during that period, the author places his emphasis upon the impact of the Roosevelt court-packing plan and makes no mention of those factors which have led some commentators to conclude that the later decisions upholding New Deal Legislation would have been made even if the Roosevelt plan had never been announced.[30] Similarly, Professor Hyneman characterizes the *Jones & Laughlin* "sub-

clusion that the Supreme Court will never again hold a national statute invalid on the ground that it is not necessary and proper to an enumerated power or encroaches on a power reserved to the states."

25. *Id.* at 208.

26. *Id.* at 219 quoting in part from Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555, 569 (1951).

27. Certainly the general literature on the state action problem, both by so-called "activists" and "passivists," does not reveal much support for this view. See, *e.g.*, the various articles cited in Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUP. CT. REV. 101, 115 n.41, 116 n.42, 129 n.73, 134 n.80.

28. See the opinion of Justice Black in Bell v. Maryland, 375 U.S. 918 (1964).

29. See Hyman, *supra* note 7, at 569-70.

30. See McWhinney, *supra* note 16; Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955).

stantial relationship" test[31] for determining the scope of the commerce power as providing the Supreme Court justices with "a greater invitation to enthrone their own judgments . . . than they can find in earlier opinions."[32] He does not, however, acknowledge that substantial variation in viewpoint had also existed under the "standards" of those older cases.[33]

Despite the defects mentioned above, Professor Hyneman's book may still have a significant value, if not to the lawyer, at least to the person who has no previous background in the study of constitutional law.[34] Viewed solely as an attempt to explore the current debate over the role of the Court, to trace its history, and to present the arguments on both sides (with the author's own conclusions clearly indicated) in a fashion understandable to one "new to the study of constitutional law,"[35] *The Supreme Court on Trial* has many favorable aspects. While it contains little that is new, the book does cover all the major points brought out by others, and it does so in an interesting manner which is often an improvement over the original presentation. It also presents clearly and in detail all of the background material, particularly the historical material, which a reader must have in order to appreciate the basic issues being debated. Finally, although the book does contain some ambiguities, the author generally avoids the very general, very ambiguous discussions so frequently found in this field.[36] His discussion of judicial activism, for example, though lacking in other regards, does go beyond a broad, vacuous description and attempts to relate this philosophy to various substantive constitutional doctrines. Of course, even as a book aimed at the general reader, *The Supreme Court on Trial* still has several drawbacks. There is, for

31. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937): "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

32. HYNEMAN, *op. cit. supra* note 7, at 165.

33. See, *e.g.*, The opinion of the Court and the opinion of Chief Justice Hughes in Carter v. Carter Coal Co., 298 U.S. 238, 278, 317 (1936). It should be noted that there were dissents not only when the "older cases" invalidated congressional legislation but also when they upheld legislation as within the commerce power. See, *e.g.*, Chicago, Board of Trade v. Olsen, 262 U.S. 1, 43 (1923); Houston, East & West Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342, 360 (1914).

34. Professor Hyneman never makes clear the exact audience for which this book was written. Since it is based on the Shambough Lectures in Political Science delivered at Iowa State University, I assume it is aimed at readers who already have some familiarity with the constitutional law field. On the other hand, certain statements in the book might indicate that it is designed primarily for, people who, as the author puts it come "new to the study of constitutional law." HYNEMAN, *op. cit. supra* note 7, at 171.

35. *Ibid.*

36. *But see* Fellman, *supra* note 21.

one, still the problem of overstatement and oversimplification. Nevertheless the overall picture presented by the book is sufficiently accurate to give the lay reader a general appreciation of the dilemma presented by judicial review in a democratic society, and what is lacking in subtlety of argument and accuracy may be compensated for by the author's clear and vigorous style of presentation.

JEROLD ISRAEL*

RELIGION AND AMERICAN CONSTITUTIONS (1963 ROSENTHAL LECTURES). By Wilbur G. Katz. Northwestern University Press, 1964. Pp. 114. $3.50.

In these three amazingly comprehensive lectures on contemporary church-state problems Professor Katz of the University of Wisconsin Law School[1] centers his discussion on this crucial issue: should the state be neutral towards religion or should there be a strict separation between church and state?

Professor Katz, former Dean of the University of Chicago Law School, and widely known for his many thoughtful and balanced articles on the "establishment" and "free exercise" clauses of the first amendment, argues in these carefully chiselled lectures on behalf of a state neutrality towards religion that would not, however, result in an absolute or strict separation of church and state. Professor Katz analyzes the twin forces opposed to state neutrality, first, on the part of those who assert that the state must assist religion and, secondly, on the part of those who seek to forbid all state action which, however incidentally, might render some assistance to religion.

One's first reaction to Professor Katz's definition of neutrality is to associate it with the well-known test advanced by Professor Philip Kurland of the University of Chicago Law School. Professor Kurland in his volume *Religion and the Law* argued that the two clauses of the first amendment "should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden."[2]

Professor Katz appears to accept the Kurland thesis, but not as a principle without exceptions; the Katz hypothesis is neutrality but with an understanding that the state should be an institution which

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1. Professor Katz is also the chairman of the National Commission on Church-State Relations of the Protestant Episcopal Church.

2. KURLAND, RELIGION AND THE LAW 18 (1962).

"does not give preference to secularism and is actively concerned for religious freedom."[3] One may legitimately raise the question whether the Katz hypothesis can really co-exist with the Kurland line of reasoning. Professor Katz urges persuasively that "neutrality" will effectuate the purposes of the first amendment more fully than "strict separation." But one is left with the intuition that both Professors Kurland and Katz are advancing words to make the thrust of the first amendment conform to their own prepossessions. Such attempts are, of course, by no means reprehensible and indeed are commendable. But the impression remains that the first amendment is neither self-explanatory nor self-executing but will almost inevitably become the instrument by which a particular view or vision of society will become a legally established reality.

Professor Katz puts his principle of neutrality to severe tests in his second and third lectures. He measures the concept of state neutrality towards religion against the complex problems of religion in public education and of tax-support for church-related schools.

Neutrality, according to its definition by Professor Katz, would appear to agree with the holding of the United States Supreme Court in *McCollum v. Board of Education*[4] banning released time religious education from the premises of the public school. But neutrality would apparently sanction released time off the school premises as permitted in *Zorach v. Clauson*,[5] *only if* the issue of institutional pressure and coercion, obfuscated in the *Zorach* litigation, were satisfactorily resolved.

Neutrality would also endorse the decisions, if not all of the reasoning, in *Engel v. Vitale*,[6] *Murray v. Curlett*,[7] and *School District v. Schempp*.[8] The neutrality thesis would insist, however, that although the state cannot teach religion *via* the public school, the state can, and indeed must, teach *about* religion. Professor Katz is more aware than most writers on church-state issues of the fact that the public school which is silent about religion in effect advances and even "establishes" secular humanism.

Professor Katz is also unusually realistic about the asserted "divisiveness" of any form of religion in the public schools. With his characteristic candor, Professor Katz concedes the possibility of exacerbating religious differences by having courses *about* religion in the public schools. In answer to this fear of "divisiveness," Professor

3. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 22 (1964).
4. 333 U.S. 203 (1948).
5. 343 U.S. 306 (1952).
6. 370 U.S. 421 (1962).
7. 374 U.S. 203 (1963).
8. 374 U.S. 203 (1963).

Katz offers two challenges which are in fact the crucially important questions not answered by those commentators who would forbid released time, "shared-time" and even teaching *about* religion on the grounds that the mere presence of these programs will have a divisive —and presumably deleterious—effect on students enrolled in a public school.

Professor Katz asks pointedly:

> Are we to interpret the First Amendment on the assumption that serious hostility is the norm in interfaith relations and that legislatures and school boards should therefore be enjoined to take note of religion ouly by staying away from it?[9]

The neutrality position advocated by Professor Katz is, in his own words, "based on the assumption that American religious pluralism is not so charged with hostility that religious issues must be avoided by enforcing a rigid principle of separation."[10]

Professor Katz, however, is willing to have some "divisiveness" in the public school if this is the necessary price that a society must pay "for the maintenance of religious convictions."[11]

With regard to religion in the public school, it appears that the Katz neutrality formula supports all the major decisions of the Supreme Court on this matter—from *McCollum* to *Schempp*—with the exception of the 1952 *Zorach* opinion wherein the Court developed a rationale of "accommodation" between the public school and the spiritual needs of its young pupils. Professor Katz seems to feel that *Zorach* does not really leave the state in a position of neutrality as between religion and irreligion—as was argued, of course, by the three dissenters in *Zorach,* Justices Jackson, Frankfurter and Black.

Nevertheless, Professor Katz would permit released time off the school premises if one could assume that released time "programs where students are unconditionally dismissed would be no less successful."[12]

Professor Katz does not develop a reply to the contention of some proponents of religion in public education who reason that the "free exercise" of religion is infringed if a majority of the students are forbidden to participate in religious exercises during school hours. The sensitivity of Professor Katz to claimed infringements of religious freedom does not cause him to see merit in the argument advanced by such writers as Bishop James Pike and Dean Erwin Griswold to

9. KATZ, *op. cit. supra* at 55-56.
10. *Id.* at 56.
11. *Id.* at 56, quoting from Address by Rev. James A. Pike, General Theological Seminary, May 22, 1951.
12. *Id.* at 50.

the effect that a protest against religious exercises by a minority should not be permitted to interfere with the rights of the majority to exercise their religious faith. Underlying this difference of viewpoints is the basic issue of the extent to which the public school is or should be exclusively the instrumentality of the state. If the public school is deemed to be the creation and agent of the state as are the post office and the army, then parents and children should not be permitted to have any opportunity to manifest their religion during their hours as "functionaries" or "co-agents" of the state. On the other hand, if the public school is thought to have some responsibility to be a part of the community it serves, then a rigid no-religion policy is not entirely appropriate. It may be that until this fundamental question is resolved, those advocating the policy of no aid to religion will continue to contend with those favoring mere neutrality without either of them reaching the really basic question from which all of the legal and constitutional questions derive.

The Katz thesis when applied to church-related private schools translates into a policy of permitting limited aid to these institutions. In this matter Professor Katz has opinions similar to Professors Mark De Wolfe Howe and Arthur E. Sutherland, Jr., of the Harvard Law School who, along with Professor Katz, were requested in 1961 by a Senate committee to give their views on the controversy then raging over the constitutionality of federal aid to church-related schools. These two professors stated that they could find no barrier in the federal constitution to the inclusion of sectarian schools in general grants for nonreligious purposes. This is the position endorsed by Professor Katz, and, in his judgment, it is entirely consistent with his neutrality approach to church-state relations. Professor Katz, however, does *not* subscribe to the idea that it would be unconstitutional for Congress to give aid to public schools alone.

Although Professor Howe in 1961 expressed his opinion that grants to church-affiliated schools would be constitutional, he also volunteered his opinion that as a matter of policy, "it would be a mistake to make provision at the present time for aid to private elementary and secondary schools." Professor Katz appears not to share this viewpoint on the policy question; he firmly advocates aid to Catholic schools so that, in his words, "the present situation of injustice"[13] will be eliminated.

Professor Katz seeks to answer—in a way concededly too brief—the objection that tax support for the nonreligious aspects of a Catholic school almost inevitably gives aid to the Catholic Church. Two un-

13. KATZ, *op. cit. supra* at 85.

developed arguments against this allegation are noted by Professor Katz:

(1) A denial of support to private schools is in effect the adoption of a policy which assumes that church-related schools should be discouraged. Before such a policy is adopted, it should be realized that "there are some disadvantages . . . in policies which tend to promote conformity and uniformity through a monolithic system . . . . [Moreover] it is not yet clear that public education can avoid promoting secularism."[14]

(2) A denial of aid to Catholic schools on the grounds that such a subsidy would in effect strengthen an institution not devoted to religious freedom cannot be justified. Statements on religious freedom by the American hierarchy, scholarly defenses of religious liberty by Catholic scholars and the forthcoming, hopefully vigorous, pronouncement on this issue by the Vatican Council all serve to persuade Professor Katz that the Catholic stand on religious freedom does not supply a "sufficient reason for the withholding of equality in programs of aid to education."[15]

Professor Katz would be the first one to concede that he has not confronted all of the difficulties inherent in the application of the concept of neutrality to the multi-faceted problem of the wisdom of granting public aid for private schools. The fundamental difficulty which readers of these three lectures will have is the apparent contradiction between the endorsement of "neutrality" and the qualification that the state must protect and even foster religious freedom. Mr. Justice Stewart defined neutrality as requiring "a refusal on the part of the state to weight the scales of private choice."[16] This definition would appear to be consistent with Professor Katz's view, but it is not certain that it really advances one's understanding of neutrality or simply enunciates another broad principle subject to the many widely differing interpretations which are advanced regarding the purposes of the first amendment. Similarly, Mr. Justice Clark's endorsement in *Schempp* of a "*wholesome* neutrality" contributes little if anything to an understanding of what would be an "un-wholesome" neutrality.

But if this slender but significant volume from the gifted pen of Professor Katz raises more doubts and misgivings than its author can resolve, we can confidently await further writings on church-state matters from Professor Katz.

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14. *Id.* at 78.
15. *Id.* at 85.
16. *Id.* at 103, quoting from Abington School Dist. V. Schempp, 374 U.S. 203, 295 (1963).

The essence of the concept of neutrality explored by Professor Katz in these essays can perhaps be summarized in his own words where he states that he supports:

> a principle of neutrality—not neutrality for its own sake, but neutrality in order that religion may have freedom—and not only external freedom from restraint, but also the interior freedom which is literally essential to the religious act . . . .[17]

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17. *Id.* at 85-86.

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