REVIEWS


This casebook is indeed "a very substantial revision" of Scott and Simpson's Cases on Judicial Remedies. The earlier work demonstrated the editors' reliability for careful and meticulous workmanship. The present voluminous product fulfils expectations for it is scholastically and technically impeccable. The publisher's description of the work as covering all "aspects of Civil Procedure from commencement of action to appellate review, with generous use of text to provide background information" is more accurate than the usual ritualistic blurb of the law book trade. It is a mine of trustworthy information on procedural matters, valuable to the practicing lawyer and judge as well as the student and teacher. It deserves the high place it will undoubtedly attain as a source book in the field of procedure.

But teachers expect more from competent and experienced scholars than an erudite source book. They are interested in the editors' insights and points of view, not as substitutes for their own independent thinking, but for their own enlightenment. Scott and Simpson's philosophy of procedure is not stated systematically nor always made articulate. It appears to be as follows: (1) First of all, the Federal Rules should be emphasized but not overemphasized since "in order to understand the federal practice, and certainly to understand the practice in the state courts, it is necessary that a student should have as a foundation some knowledge of common-law and equity procedure, and procedure under the Codes and Practice Acts." The editors'

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1. Due to the death of Professor Simpson before the work of revision was begun, Professor Scott has assumed full responsibility for the present work.


According to the current Harvard catalog, this book is used in the first-year procedure course, which meets for three hours a week throughout the entire academic year. Professor Chafee gives an elective three-hour course in Equitable Remedies which the catalog describes "as an advanced and intensive study of certain important problems of Civil Procedure." Chafee's Cases on Equitable Remedies and mimeographed materials are used.

Any comprehensive survey is inevitably remiss in detail. However, a 4-page treatment of multiple parties and claims (pp. 441–445) seems inexcusably abbreviated.

3. P. v.
emphasis consists mainly in the insertion of the relevant Federal Rules and appropriate sections of Title 28, United States Code. Of the some 250 principal and extracted cases, not more than 12 deal with or even touch upon the Federal Rules. (2) Common-law practice, equity practice, and practice under the unified procedure, should be integrated “instead of taking up these matters separately.” Integration for the editors, however, consists in arranging these subjects in separate consecutive chapters in the early part of the book. (3) As for the forms of action, “it would seem that all that is necessary is that a student should be familiar with the broad outline of the forms of action, in order that he may be in a position to appreciate what the courts were deciding in many of the cases which arose before the middle of the nineteenth century; that he may understand how the substantive law of Contracts and Torts and Property has been molded by the forms of action; and that he may understand what was meant when the legislatures provided that there should be but one form of action.”

Professor Scott does not seem very happy about this for he makes the nostalgic observation that if “the forms of action were still with us, it would be necessary to devote a full course to the subject. Indeed, the first book written by a professor at the Harvard Law School was a book devoted to Real Actions.” If a knowledge of the forms of action is necessary to understand the substantive law of Contracts, Torts and Property, it is this reviewer’s opinion that the burden should be assumed by the instructors in those fields rather than by the procedure course. This is not to say that neither history nor completeness of survey is needed. History is essential for adequate knowledge of procedure. It is profitable to examine the formulary system briefly for the light that will be shed on the course of procedural reform, the current philosophy of civil procedure, the existing procedural system and contemporary procedural rules, and, perhaps most important of all, strongly entrenched professional attitudes and patterns of thought. Trouble develops when the history of how we got where we are is made more important than where we are. (4) “The law of procedure is of great importance to the beginning law student for three reasons. In the first place, a knowledge of how to get into court and what to do when one gets there is absolutely essential to a practicing lawyer. Second, the procedure followed in the granting of judicial remedies in the past has had a very great effect upon the development of the substantive law. . . . It is impossible fully to understand much of the common law without an understanding of its history, and it is impossible to understand much of that history except in terms of procedural law. Thirdly, the system of precedents which contains most of the law of the English-speaking world involves the basic postulate that the decision of a court is authority only for the point actually decided . . . and it is impossible to determine what that point was without knowing how the case
came before the court and what point or points were actually presented for
decision." 7 We are then told that the course proposed by this book "is
concerned with fundamental procedural conception and methods, and their
history. . . ." 8

Ideationally there is nothing singular or unconventional in this casebook. There is a real danger, however, that a course in procedure taught according
to the limited objectives of the editors will encourage unimaginative tech-
nicalism and particularism and that the broad sweep of procedural law will
be obscured.

The widespread indifference of the legal profession to the technicalities,
the anachronisms, and the delays in existing procedural law is a strange
phenomenon. Although forward steps have been taken here and there we
must, in the main, look to the federal courts for an example of what can be
done for judicial administration by simple modern rules of civil procedure.
In most of the states there has been neither sustained impetus for judicial
and procedural reform nor the leadership necessary to overcome the inertia
or active opposition to change. Where reform has come about, as in New
Jersey, Delaware, Maryland, Utah, and other states, it has been primarily a
response to the stimulus of the Federal Rules. Various reasons have been
assigned for the obstructionist attitude of judges and lawyers toward the
problems of judicial administration but the law schools and particularly the
teachers of procedure must bear a large share of the blame. The aversion
originates in the law schools. The courses in procedure are likely to be the
dullest and most unpopular in the curriculum. This is in large part due to
the tendency to emphasize history apart from the modern law of procedure-
and to use procedure as an introduction to the substantive law courses.
When the subject of modern pleading is at length reached, emphasis is too
frequently placed on local rules. The distaste for procedure acquired in the
law schools seems to cause a fixation against any interest in improving the
work of the courts. Upon admission to the bar, the lawyer is reluctant to
approve a new system of procedure—even if it is a much better one—that
will jeopardize his slight learning in the field.

In reviewing a book such as this, one that capably achieves the goals which
the editors set, about all a reviewer can do is give vent to his own pre-
conceptions as to what a course in procedure should try to do. It should
not only focus attention upon the eminently practical goal of achieving a
simple, expeditious, and effective process for the determination of contested
rights having due regard for the civil liberties of the parties. It should also
strive to impart an understanding of the character of legal controversy as
both adversary and intellectual; of procedural law as a body of operational
rules regulating the issue-forming, issue-trying and issue-deciding processes
involved in legal controversy; of procedure as a means to an end, not an end

in itself—thus being subordinate to substantive law; and of the allocation of the functions of judge and jury. It should make it clear that in pleading there is a continuous dilemma of how to make procedural rules definite enough to work—the objectives of certainty and of singleness of issue—and yet flexible enough to do justice. This dilemma requires that pleading be a balanced compromise, but the maintenance of this balance necessitates continuous re-examination and constant revision. Too much emphasis has been placed upon the immediately practical and almost no attempt has been made to formulate a general jurisprudential theory of procedure. We need to develop a generation of lawyers who have a broad statesmanlike conception of procedure as only a means to an end, not those whose reaction to pleading questions is inevitably narrow and particularistic. We do have the means at hand for attaining this goal. It can be achieved by building upon both the impetus to and the content of reform given by the Federal Rules and the state rules which have used them as an archetype.

Notwithstanding the statement of the editors that the Federal Rules are to be emphasized, the general tone and orientation of the book impresses this reviewer as one of reluctance to give in to modern procedure. Unless there is accord with the thoroughgoing reform achieved by the Federal Rules, it is unlikely that a course integrated around them and stressing modern law administration, using history only to explain, will result. No course in pleading and procedure is worthy of its name unless it does teach that national system—which the Federal Rules offer—and in a grand way as having a philosophy and a methodology of its own.

Of course, any good source-book in law can be used to accomplish purposes other than those of its compilers. These somewhat querulous remarks do not change the fact that the book under review has most of the material any instructor needs. He can, if he wishes, recast it so as to fashion a course in modern procedure.

RICHARD C. DONNELLY†


"What good is happiness?" queries a venerable yuk-yuk in the card-file of every comedian, "You can’t buy money with it!" The slight discomfort in our laughter suggests that this, like many other switcheroos, flickeringly illuminates a little regarded truth of our psychology—in this case the fact that a half-realized primacy is one of the aspects, in our culture, of "the almost mysterious nature by which money differs from other things." 1 Lawyers need no convincing of the centralness of money; aside

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from an occasional electrocution, and a good number of terms in jail (more often than not over a matter of money), the terminal point of all our wit and craft, all our canons and lore, banquets and bar exams, decorums and dignities, is the decision that A must pay B a sum of money, (or, not following our "counsel," that he will have to do so) either right now or after he fails, if he fails, to obey an order of the court. More than that, we all are aware that money plays the part of life's-blood in most of the occurrences and transactions that lead up to this peak of judgment. "Money in the Law" is therefore for us a title that states a tremendous theme, implicated in all our harmonies.

This book is the second and thoroughly revised edition of Professor Nussbaum's *Money in the Law* of more than a decade ago. It would be a little silly to strike the book-reviewer's posture of judgment in regard to what is already an acknowledged classic. My more modest aim will be simply to acquaint those to whom as yet the pleasure of first acquaintance is reserved, with the scope and, so far as possible, the texture of this indispensable work.

The general organization of the book shows one conspicuous change from the 1939 edition—a change foreshadowed in the expanded title. Where, in 1939, the international aspects of the subject might still plausibly be distributed and even unemphasized, the insights of 1950, formed by experience, have dictated that they form a separate "Book." This reorganization and change in emphasis is sufficient in itself to make the present book of prime interest even to those who know the former work.

But the most satisfying general feature of the book is the fact that, even where it purports to deal with the "national" aspects of the subject, the treatment is fully comparative, drawing insights and illustrations from the United States, Britain, and the civil law countries. The advantages of this method are more than the mere breadth of coverage; we are enabled to place the particular national experience in perspective and thus to see it more thoroughly for what it is in itself. A single illustration is the perception that the Legal Tender cases were not merely an isolated episode in American constitutional history, but constituted the securing by our national government of a power over currency "not inferior to the power of any other government. . . ." 3

The book opens with a treatment of the problem of the "nature" of money. To the taste of the present reviewer, it would have been preferable if this discussion were unequivocally pitched, as it is in part, in terms not of what money "is," for "money" is merely a noise or squiggle used in many ways, but rather of a description of these usages without judgment as to their "correctness," and a frank selection of one or more of them for one or more of the purposes of the book. But this point of linguistics is without weight against the depth and width of source and allusion brought to bear upon the problem.

3. P. 589.
It is interesting in this regard to note that in the preface Professor Nussbaum discusses the contrast of the two-valued legal terminology with the spectrum of "moneyness" perceived by economics:

"The issue of method has been brought into focus by an economist reviewer of my 1939 publication (7 University of Chicago Law Review 195 (1940)). He points out that there are different types of property, having different degrees of 'moneyness, varying along a nearly continuous scale,' and he considers it unfortunate that I have 'tried to establish a difference of kind rather than of degree, between money and non-money.' The reviewer illustrates his thesis by asserting that there is no basic difference between bank notes and bankers' records on bank accounts. The latter assertion, examined below in the section on bank deposits (p. 108), is certainly unfounded, but this fact does not affect the significance of the reviewer's general thesis. There is, one must admit, an almost continuous scale of things having different degrees of 'moneyness.' Still, a court confronted with litigation on the meaning of the term 'money' in a contract, will, statute, etc., has to say definitely whether the thing under inquiry is or is not 'money.' The court and, generally speaking the jurist, is compelled to weigh, in the light of legal theory, the elements of 'moneyness' involved in the particular thing, and to give an affirmative or negative answer according to whether the essential elements of what is generally called 'money' are or are not present in the situation at hand. The example is typical. Again and again the legal analyst is compelled to establish logical contrasts whereas the economist or sociologist may well proceed for the purpose of his analysis on the assumption of a continuous scale of elements gradually shading off into each other. Each method has its relative validity." 4

Surely it might be added that this contrast is all to the disadvantage of the law, and constitutes in fact an illustration of one of the leading branches of pathology in legal discourse and consequent decision. Bound by our own defective linguistic habits, we resolve "issues" where the sciences, and especially the social sciences, see spectra, continua, an infinity of shades and relational patterns. An awareness of this radical disconformity between legal language and scientific (or common-sense) reality will not liberate our courts from the necessity pointed out by Prof. Nussbaum in the quoted paragraph, but it would at least make explicit and respectable the freedom left even by categorical legal logic—namely, the freedom to change categories where differing purposes are to be implemented.

The remainder of the first chapter discusses the relations of "money," to commodity, to the state, and to bank credit, with a treatment of the different sorts of money, and of the money "system." The legal involvements of each of these problem-clusters are fully illustrated and analyzed.

Thus, the section on "Legal Tender" is at once a thoroughgoing historical and descriptive disquisition on that subject and at the same time an open sesame to the decisional and law-treatise lore. This double value marks, in fact, the whole book.

In the second chapter, on "Debts," the author is principally concerned with the manifold of problems arising out of currency fluctuation and collapse. Noting that a constant lowering of the value of money seems somehow to be observable throughout history, and that this trend has at times been enormously accelerated, so that one may properly speak of "inflation," he explores the legal treatment that has been accorded the various means creditors have adopted to protect themselves against these diastrophic and catastrophic movements—from the metallic clauses of venerable antiquity to the cost-of-living index clauses of recent decades. The classic inflation, of course, is that of Germany after World War I; the author has brought to bear upon that crazy phenomenon a wealth of wisdom and learning. Of conspicuous interest is the section on "Revaluation," where the author describes the almost incredible usurpation of authority by which the Reichsgericht set forth, without statutory warrant, upon a course of rescue, in proportion varying with the court's sense of equity, of the debts that had been swept away in the inflationary undertow.

Of creditor's hedges against the turn of the wheel of Fortune, the gold clause is of course the one of most recent interest; the reader will find in the several sections devoted to this topic a full and acute treatment from the lawyer's standpoint and a wealth of bibliographic leads.

The second "Book," *Money in the International Law*, opens with a treatment of the thing that, in a sense, gives rise to all international monetary problems: "Foreign Money," and its treatment in law. Particularly fascinating is the historical treatment. Out of the fact that "money" may be "foreign" arises the problem-set dealt with in the second chapter of the second book, *Debts in International Relations*, with the complication (this time raised to a higher power by the sovereign independence of the states comprising the functioning courts) of the gold clause. Finally, in the third chapter, the national defensive reaction—exchange control—and the international movements toward solution or palliation are explored. The Bretton Woods institutions are discussed historically and functionally, and at last the notion of world money is traced through history. This notion has, as Prof. Nussbaum remarks, proved "sterile"; but it must be rejoined that the fertility of other notions has so far issued in the monstrous, the imbecile, or the unviable, and it may well be that the problem of world exchange, an indispensable component of world trade and investment, cannot be solved except on a world-wide basis, by "world-money" or something very like it.

An "Annex" contains a valuable and interesting discussion of the "Legal History of American Currency."

Justice cannot be done to this book without mentioning that its scholar-
ship and heavy apparatus do not keep it from being absorbing reading throughout, nor from attaining at times an almost romantic fascination. It contains at least one story—the Portuguese Bank-note case—which wants only the engrafting of a love-interest to be immediately available for the scenario needs of Hollywood. Edmund Gwenn could ask no fitter climax to a career as screen-counterfeiter that started with "Laburnum Grove" and led to "Mister 880."

It ought to be noted that the subtitle of the work—"A Comparative Study in the Borderline of Law and Economics"—would arouse false expectations if it led us to look for the according of approximately equal weight to these two disciplines. Of citations to economic literature there are many, but the analysis in large and in detail is legal. The happy consequence is that the book is uniquely adapted to the needs of the lawyer who wishes to study the subject of money; he may, and doubtless ought, read it concurrently with or followed by dippings into the abundant economic lore to which the footnotes provide access. An analytical bibliography might have helped out here.

Cognate, perhaps, with the predominantly "legal" character of the book is a stylistic trait which the present reviewer, as a matter of taste, cannot but regard as a defect—the passing of judgment, sometimes rather summarily, upon the "rightness" or "wrongness" of decisions or decisional trends. We are told, for example, that the petition in *Emperor of Austria v. Day and Kossuth* "should have been dismissed because of lack of jurisdiction." Well, maybe it should have been. But the scientific job is to describe what is done, and try to understand why it was done, in terms of concept or of extra-legal cultural involvements, and to this reviewer the reversal of old cases (the example cited was decided the year Fort Sumter was fired on) simply gets in the way of that task of description and understanding. There is, of course, no one from whom we had rather have such judgments than from the author of this book.

All in all, the best comment upon this internationalized revision of an acknowledged classic might be simply that, if one may commit what seems a natural solecism, it is more indispensable than its predecessor.

CHARLES L. BLACK, JR.†


Professor Hesseltine, a well-established specialist in puncturing legends of the Old South, has exploded another one. We had long realized that the first post-Civil War identification of Southern leadership ("on their remote

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5. P. 84 et seq.
6. See the author's disclaimer in Preface, p. vi.
7. P. 36.
† Associate Professor of Law, Columbia University Law School.
plantations, surrounded only by their colored menials . . .,” as Hesseltine quotes one of the earliest) was inadequate. Hesseltine shows that, quantitatively, the bulk of Southern leadership did not come either from plantations or from the regular army. Of 585 leaders of the CSA, 304 were practising lawyers.1

The 585 are the product of Hesseltine’s preparation, as a working tool for use in this volume, of a Who’s Who of the Confederacy. He listed the high civil leaders, members of the Confederate Congress, judges, governors, diplomats. He listed also more than 400 military men, from “Brigadier General Daniel W. Adams, a graduate of the University of Virginia who, in his early forties, laid aside his Louisiana law practice to take up the sword, to Brigadier General William H. Young, another Virginia graduate who had been a member of the bar in San Antonio.”

When the records had been checked on the post-War careers of these men in numerous obscure sources, North and South, 585 remained on whom there is enough data to report. This volume recounts the philosophies and activities of these men in Reconstruction and after.

It is not news to historians that there were prominent lawyers in the Confederacy. Judah P. Benjamin, whose name is well known, chose to make a new career abroad. John A. Campbell made as great a name for himself after the war as a practitioner as he had before the War as a Supreme Court Justice. A. H. Garland is famed for a case in which he participated very directly,2 and for a career as United States Senator and Attorney General; and he deserves more credit than he has had for a pleasant volume of reminiscences.3 Walter Clark, as a boy of 17, took turns studying law and serving as a major in the Confederate Army years before he became the “Fighting Judge” of North Carolina.

What is historians’ news is the report of what became of the less prominent lawyers after the war. Hesseltine distributes the subjects of his reports between two polar extremes, one represented by Jefferson Davis, the unreconstructed rebel, and the other represented by Robert E. Lee, builder of a new South. (The number of complete collaborationists, or scalawags, such as General Longstreet and some of the politicians, was small.) Davis devoted the energies of the remainder of his life, as he said, to encouraging Southerners to “preserve the traditions of our Fathers, and to keep in honorable remembrance the deeds of our Brothers.” He wrote his memoirs, restated the theory of states rights, and for practical purposes left the South at his death with no more than he had given it when he fled from Richmond.

Lee, on the other hand, took the stand that the War settled the issues between the North and the South, and that all remaining energy should go

1. Enough to Lose any Cause.
2. Ex parte Garland, 4 Wall. 333 (1866) (holding unconstitutional as ex post facto an act of January 24, 1865 which in effect disbarred from federal practice a very large proportion of all Southern lawyers).
3. GARLAND, EXPERIENCE IN THE U.S. SUPREME COURT (1898).
to building the region anew. As President of Washington College, he not only vastly increased its physical plant and its faculty, but greatly modernized its curriculum. To accompany the classics, he introduced courses in engineering, commerce, and agriculture. Confederate Judge John Brockenbrough added his private law school to the College, and became its Dean, putting John R. Tucker, Confederate Virginia’s Attorney General, and later President of the American Bar Association, on his faculty.

In the post-war South, 292 of the 585 leaders continued as lawyers. Hesseltine contends that largely they took the Lee approach. He mentions lawyers who could afford to spend their time being intransigent. “But almost without exception those who achieved prominence in the postwar South were corporation lawyers—serving as counsel, as directors, or as presidents of railroads, mining companies, or manufacturing establishments.” For example, John C. Breckenridge, former Vice President of the United States, Major General and Secretary of War, CSA, became lobbyist and promoter for several railroads in Kentucky including the Chesapeake & Ohio. Others followed similar paths—Confederate Speaker of the House Bocock, attorney for three Virginia railroads; Arkansas’ Brigadier General Cabell, general manager of the Texas Trunk Railroad; Tennessee’s Brigadier General Cambell, bank president, railroad director, and gas-light company director.

In the struggle for the Tennessee Democratic gubernatorial nomination in 1870, the rivals were Confederate Congressman A. S. Colyar, president of the Tennessee Iron & Coal Co., and John C. Brown, who had risen from private to major general. Brown became Governor and devoted himself to bringing Northern industrial capital to the state (we must “make a respectable Pittsburgh” of Nashville, he said). Thereafter he became counsel for the Texas and Pacific railroad, a Pennsylvania ally, and later general solicitor for the Jay Gould western lines. Hesseltine comments on the statue raised in his memory: “Clad in Confederate uniform, with his hand upon his sword and his gaze toward the South, the stylized figure fails to convey the significance of John Calvin Brown as a builder of the new South.”

In the last issue of this JOURNAL,4 Mr. William Miller gave extensive insight into the origins of the big business bar at the turn of the 20th Century. Professor Hesseltine’s researches incidentally complement the work of Mr. Miller insofar as they report on an important segment of that same bar in one region for a period 25 years earlier. Almost a quarter of the Confederate leaders, though not all lawyers, were top managers for railroads, mines, mills, banks, and blast furnaces.

While the Confederate leaders were turning from Appomattox to commercial law, the leaders of the North capitalized on broader, though perhaps not more lucrative, opportunities. Professor Hesseltine’s extensive re-

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searches deal exclusively with Southern leaders. A superficial inspection of the post-War careers of Northern leaders shows great differences.\(^5\)

There is one striking similarity: Northern leadership, like Southern leadership, was lawyer concentrated. A list of 126 Northern Generals,\(^6\) plus 51 Northern Governors,\(^7\) plus 27 Presidents, Vice-Presidents, Cabinet members,\(^8\) and members of the Committee on the Conduct of the War,\(^9\) breaks down as follows:

<table>
<thead>
<tr>
<th>Lawyers in Northern Leadership</th>
<th>Lawyers</th>
<th>Non-Lawyers</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Generals</td>
<td>51</td>
<td>75</td>
<td>126</td>
</tr>
<tr>
<td>Governors</td>
<td>31</td>
<td>20</td>
<td>51</td>
</tr>
<tr>
<td>National Polit. Leaders</td>
<td>22</td>
<td>5</td>
<td>27</td>
</tr>
<tr>
<td></td>
<td>104</td>
<td>100</td>
<td>204</td>
</tr>
</tbody>
</table>

Law is the traditional auxiliary of a political career, but it can hardly be said to develop any attributes particularly useful in military leadership. Yet 40% of these generals were lawyers. The explanation lies in the fact that most Civil War generalships were political positions. Occasionally a general was, in a real sense, both a military man and a lawyer; an example is General Halleck, Lincoln’s chief military adviser and also one of the foremost lawyers of California. But many of the generals were appointed straight from politics; and early in the War many regiments of volunteers elected their own colonels, later promoted. The same personal qualities of personality and leadership which make lawyers political officeholders put surprising numbers of them into military offices in the 1860’s.

A worse system of selecting generals has probably never been devised. An historian of the profession must sadly note that the outstanding generals were, to a man, from non-legal ranks: Grant, Sherman, Sheridan, Meade, and George Thomas for examples. While the lawyers by no means had a monopoly of the worst generals, their ranks did include General B. F. Butler, notoriously untalented in the field.

The difference in the post-War careers of the Northern and Southern leaders lay in the difference between victory and defeat. Section 3 of the

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5. The following data was collected by Eve Thomas Sherouse.
6. For convenience, this list was compiled from Powell, Officers of the Army and Navy Who Served in the Civil War (1893). It is by no means comprehensive, but appears to be a fair sample, omitting some lawyer generals (e.g., Halleck and McClernand) as well as some non-lawyers.
7. The list is compiled from Hesseltine, Lincoln and the War Governors (1948).
8. The list in 2 Cyclopaedia of American Biography (1900) was used.
9. The list was taken from Pierson, The Committee on the Conduct of the Civil War, 23 Am. Hist. Rev. 550 (1918). Thaddeus Stevens and Charles Sumner were added for good measure.
14th Amendment for a time blocked Southern leaders from holding “any office . . . under the United States or under any State.” Southern lawyers were thus virtually forced into commercial law and business. In the North, the victory, the bloody shirt, and the appeal to the boys in blue put the leaders into politics. The results are these:

**Post-War Careers, 51 Northern Lawyer Generals**

<table>
<thead>
<tr>
<th>Category</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Politics</td>
<td>21</td>
</tr>
<tr>
<td>Practice and politics</td>
<td>13</td>
</tr>
<tr>
<td>Practice and business</td>
<td>8</td>
</tr>
<tr>
<td>Military</td>
<td>3</td>
</tr>
<tr>
<td>Deceased</td>
<td>6</td>
</tr>
</tbody>
</table>

In other words, 75% of the group which did not die too early to have a post-War career were in politics either full time or to a major extent. The list of politicians includes important national leaders, such as Rutherford B. Hayes, James A. Garfield, Benjamin Harrison, and Carl Schurz.\(^\text{10}\)

Those whose careers lay almost entirely in business and practice include the unfortunates who, being Democrats, tried to win political honors and failed. General Thomas Ewing was defeated as a candidate for Governor of Ohio, gave up on politics, and settled in New York as a practising lawyer. General Francis Preston Blair was the defeated candidate for Vice President in 1868. It also includes a few figures of substance in business, such as Francis Drake, president of three railroads; Lewis Parsons, president of the Ohio and Mississippi Railroad; and James A. Williamson, president of the Atlantic and Pacific Railroad.

In the North, while the military lawyers were entering politics, the wartime political leaders were, to a much larger extent, abandoning politics to enter business and practice. The post-War career distribution of the 31 lawyer governors and the 22 lawyer national political leaders follows:

**Post-War Careers, Northern Political Leaders**

<table>
<thead>
<tr>
<th>Category</th>
<th>Governors</th>
<th>Others</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Politics</td>
<td>8</td>
<td>8</td>
<td>16</td>
</tr>
<tr>
<td>Practice and politics</td>
<td>4</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>Practice and business</td>
<td>14</td>
<td>4</td>
<td>18</td>
</tr>
<tr>
<td>Deceased</td>
<td>5</td>
<td>4</td>
<td>9</td>
</tr>
</tbody>
</table>

The political careers of these men were substantial in number and impor-

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\(^{10}\) Others were: Thomas J. Henderson, 18 years in Congress from Illinois; Joseph Kiefer, Ohio, Speaker of the House of Representatives in the 47th Congress; Joseph Hawley, Senator from Connecticut; William W. Belknap, Grant's Secretary of War and best remembered for the Indian Office frauds; John F. Hartranft, Auditor General and Governor of Pennsylvania; Theodore Runyan, Newark city attorney, alderman, mayor, and state chancellor. Any further list would merely duplicate the types of offices held; but it should be noted that they ranged from minor local to major national posts.
tance. Governors Kirkwood of Iowa, Morton of Indiana, Oglesby of Illinois and Ramsey of Minnesota earned long terms in the Senate, and some of the Congressmen stayed in office until they died. But the migration into railroading is more impressive. Seven of the 31 lawyer Governors became top railroad officials or railroad attorneys. Of the national political leaders, Senator Ben Wade of Ohio served as attorney for the Northern Pacific Railroad, and Secretary of Interior Usher became attorney for the Union Pacific.

To summarize, both North and South had substantial numbers of lawyers in command on the battle fields as well as in the more customary chambers of government. But the difference in the post-War careers of the bar of the two areas is marked; for the Southern war-leader lawyers furnished much of the leadership for the industrialization and modernization of their region, while their northern counterparts found political careers ready and waiting. Yet there is a major difference in two classes of Northern leaders; for the military lawyers went very largely into politics, while a very large number of the War-time political leaders, and particularly the governors, abandoned politics for railroading.

Any generalization broad enough to be interesting which could be drawn from this scattered data is almost certain to be wrong. In lieu of a generalization, perhaps pure speculation will do. The draining off of lawyers into executive positions, usually though not always through the intermediate step of corporate lawyer, served as a substitute for barred political careers in the South, and as a grand finale to political careers in the North. Is the modern rise of the lawyer in business a by-product both of the financial opportunities offered by business and of the severe proscription of rebels in the 14th Amendment? Did the victors, meaning to handicap the vanquished, in fact perform a service for them which made the Southern lawyer an economic winner by virtue of military defeat?

John P. Frank†


Professor Arthur Holcombe’s latest book suffers from the start by the thesis it sets out to prove, that “our more perfect union” is such because it hasn’t departed very far from Madison’s three principles of government. The first of the three, which are all culled from his Federalist Paper, Number 51, was the separation of powers, the second, the natural limits of majority
power in representative government, and the third, federalism. Any book that concerns itself with this kind of idea is bound to suffer from at least three difficulties. 1) Original contribution is almost impossible. Professor Holcombe's answer to this problem is more statistics, more wrinkles, and he does about as well as anyone could to light up an already well illuminated area. 2) Such a thesis smacks of the contented conservatism which has, with a few exceptions, so incapacitated academic political thought in the last forty years. 3) The degree to which the American political system is rooted to the past of 150 years ago does not so greatly overshadow the changes brought about in the meanwhile as the author must assume. The answer that Professor Holcombe would make seems to be that the developments have been ones of "expediency"; the tradition with us today is "principle."

The attraction the author feels for his three-cornered thesis leads him to divide the discussion into three parts, each one concerned broadly with one of the three classic branches of government. But he spends most of his time with the effect of a century and a half of history on the representative process as conceived by the founders. His conclusion is that despite population growth—the revolution of the United States from a land of small farms to one of big factories and the flood of people from the land to the cities—nationally unified partisan power will remain a will-o’-the-wisp rather than a reality. People still think of themselves as mainly middle class and this means that they are factionally unattached. Barring social revolution, therefore, the balance of political power will continue to swing merrily from one major party to another. Moreover, even when the elected representatives of the people assemble on the floors of Congress, the legislative process itself bars strict party government and a nationally unified partisan majority. Congressmen are elected locally and have local interests to keep happy if they want to be reelected.

The President, remains, of course, the one centralizing possibility. But the evidence of party voting records indicates that even the most politically successful presidents have been unable to command anywhere near complete party discipline.

The treatment of the judiciary suffers most from the difficulty of saying anything new. The author does, however, come to two significant conclusions. One is that the Supreme Court’s use of the power to declare acts of Congress and of the states unconstitutional has justified the faith which the framers had in the doctrine of separation of powers. This is justified by the fact that the inherently conservative judiciary has been able to block social legislation only tentatively, and that the legislature can, with some time lag, correct whatever mistakes the Court makes. The other is that the Supreme Court’s handling of federal-state relations has shown the inherent wisdom of a federalism whose primary justification is decentralization and the culturing of local talent.

However, much of the emphasis is lost in a somewhat long-winded recita-
ation of constitutional history. This, by the way, is also misleading in many spots. For instance, the statement that "the framers of the Constitution readily agreed to vest the judicial power in the Supreme Court and in such inferior courts as Congress might establish" ¹ looks a little too pat when compared with the tale of bitter compromise that Warren spins.² Nor can I help questioning the theory that the Saratoga Springs case "finally established [that] the business operations of the state governments should not escape taxation by the federal government" ³ when I re-read the innumerable and far from clear opinions in the case. Nor is the history of the income tax constitutionality as simple as the author implies.⁴

But these are trivia; the most serious flaw in Professor Holcombe's nicely woven thesis is his neglect of the impact of executive department expansion on classic political theory. As far as the separation of power goes, here is the most serious threat to any argument that it remains valid in all its pristine glory; Madison himself would have to rewrite his Federalist 51 completely to explain such things as the ICC, SEC, Departments of Interior and Labor and the Atomic Energy Commission to a Montesquien-minded populace. Federalism, too, has felt the impact of this development and legislative majorities—for better or for worse—have lost the power to govern in many areas because of the twentieth century's contribution to political science—government by administrative body. In this regard at least, the constitutional delegates did not "builded better than they knew"; they didn't build at all. One would have liked to see Professor Holcombe come to grips with this despite the fact that it does not fit in very nicely with his three-cornered thesis.

The author did, however, exercise discretion to an advantage in his final chapter. There is only the slightest hint of an idea that apparently comes all too easily to many political theorists, that we institute a program of wholesale exportation of our political principles to the rest of the world.⁵ On the other hand, in Professor Holcombe's view, classic political theory as embodied in our more perfect union, is marred only by the flaw of foreign relations under unrestrained and almost unadvised presidential aegis. But an expanded influence for the more democratic branches of the Government would carry within it the seeds of an erratic policy; the only final solution to the dilemma, according to the author, is our old friend from Utopia, world government.

The outstanding beauty of the book is that it incorporates, without the

¹. P. 284.
³. P. 385.
⁴. P. 302.
⁵. I take this as a tacit admission that classic theory has had such a happy history in this country, not simply because we adopted it and practiced it in its purest form, but because it was just plain lucky to be born in a wealthy, broad continent. No Marxist he, Holcombe also does not, contrary to the claim of the publisher's note on the front flap, waste his time with a "documented critique of Marxist theory."
cacophony of any obvious axe-grinding, a solid and occasionally brilliant review of our political history. But the drawbacks that the book inevitably suffers from are serious; so serious, in fact, that I doubt if there are too many readers who will be able to follow the author through some four hundred pages without at least an occasional rebellion.

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