



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 18 | Number 4

Article 5

6-1-1940

Book Reviews

North Carolina Law Review

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

North Carolina Law Review, *Book Reviews*, 18 N.C. L. REV. 384 (1940).

Available at: <http://scholarship.law.unc.edu/nclr/vol18/iss4/5>

This Book Review is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

BOOK REVIEWS

The Federal Income Tax. By Roy G. Blakey and Gladys C. Blakey.
New York: Longmans, Green & Co. 1940. Pp. xvii, 640. \$7.50.

This is not the book for those who seek ways of avoiding income tax liability, or for those who seek a simple summary of the income tax law, or yet for those who seek primarily a chart of judicial meanderings through the increasingly complicated phraseology of the revenue acts. The book is primarily, indeed almost solely, a carefully compiled history of the development of federal income taxation from its Civil War beginnings through the short-lived statute of 1894, the corporate excise phase of 1909, the sixteenth amendment and every successive revenue act thereafter through 1939.

The character of the book is perhaps best shown by the fact that, of 577 pages of actual text, 477 deal with the chronological development of the tax as a whole, 31 are devoted to the struggle between varying concepts of taxable income, 18 summarize the history of rates and exemptions, 32 are concerned with the history of the administrative organization and its major problems, and only 19 are left for what must necessarily be somewhat inconclusive conclusions. Obviously the book was not written for the sake of conclusions; and it may be doubtful whether a book of conclusions could fill so definite a need as does the book actually written. The qualifications of the authors for the job, which would have been generally admitted in advance, have been now amply demonstrated.

In that major portion of the book which this reviewer has chosen to characterize as dealing with "the chronological development of the tax as a whole", the authors' technique is to take each successive revenue act, introduce it against the immediate fiscal and political background, follow its progress through the Ways and Means Committee, the House, the Senate Finance Committee, the Senate, and the Conference Committee, and conclude with a brief summary of the more important changes effected by the law finally enacted. There are, of course, some weaknesses inherent in the concentration on this method of approach, the primary one being that, while each major change is interpreted with its contemporaries, it is not always easy for the reader to hang it on the family tree in proper relation to its ancestry and posterity. There is some mitigation of this to be found in the three chapters dealing with the definition of taxable income, rates and exemptions, and administration. While recognizing that undue emphasis on the development of particular phases of the law, dissociated from other surrounding and

related phases, would be at least equally open to criticism, it is tempting to say that the addition of more material of this character would have been beneficial. No doubt the length of the volume without such additions is the explanation for their absence.

Despite the length of the book, there are, of course, many minor changes of interest to the legal or accounting specialist in the income tax field which receive scant attention or none at all. Yet the reader receives the impression of having been exposed to an immense amount of detail, including much tabular and statistical material, which the memory will retain neither today nor tomorrow, but which will deserve a place on the most convenient shelf.

It is to be hoped that this painstaking study will, now and in the future, receive the attention which it deserves, not only from students of and specialists in taxation, but from executives, administrators and legislators who constantly pass upon and often initiate proposals for changes in the tax laws. If in no other way, the volume could be helpful to them in pointing out that many new proposals are, in reality, perennial ones, and that some have been tried and found wanting.

HENRY BRANDIS, JR.

University of North Carolina Law School,
Chapel Hill, N. C.

Criminal Appeals in America. By Lester B. Orfield. Boston: Little, Brown & Co. 1939. Pp. 13, 321. \$5.00.

"Where can one turn," says Professor Orfield in his book, *Criminal Appeals in America*, "to find any detailed discussion of the nature and functions of appeals, as to the scope of review by the appellate court, as to the procedure, the organization, and history of appellate courts, as to federal appeals, as to appeals in petty cases, and as to the causes and devices for eliminating technicalities?"

The answer to this inquiry is that one may turn to Professor Orfield's book. As a background for his study of the American problem he outlines the history of criminal appeal in England, and then develops his theme under the following successive headings: Appeal by the State, The Scope of Appeal, Review of the Sentence, Delay on Appeal, The Appeal Papers, The Oral Agreement, Bail and Stay of Execution, Appeal in Forma Pauperis, Technicality and Prejudicial Error, History and Organization of State Appellate Courts, Petty Criminal Appeals, Federal Criminal Appeals, Appeal Under the American Law Institute Code of Criminal Procedure.

Each one of these topics he subjects to a minute and critical analysis, supported by a wealth of citation to the existing literature in the field,

arranged in such a fashion as to constitute one of the great assets of the book. For, one who wants to go beyond the pages of this book will find within it the leads to a great variety of material scattered almost to the point of practical inaccessibility for the average reader through constitutional provisions, legislative enactments, judicial decisions, articles in law reviews and other publications, and historical works. And, in addition to his analysis and supporting literature, he brings an insight and practical common sense indicating that he saw the facets of his problem in action before he looked for its reflections in research.

Chapter IV, *The Scope of Appeal*, illustrates the technique the author followed throughout the book. He traces the broadening scope of appeal from (1) the writ of error which limited the appellate court to review of errors apparent on the record—this included “only the process, the pleading, and the judgment, together with various entries made by the clerk”, (2) to the Bill of Exceptions and the extension of appellate review to include “the testimony and exhibits, the rulings on the admissibility of evidence, and the institutions of the court”, (3) to the “Code ‘Appeals’”, (4) to the review of facts. He places the American picture against its English background, outlines their parallel developments, compares them to the recommendations of the American Law Institute Code of Criminal Procedure, and analyzes the arguments advanced for and against the various extensions of the scope of appeal.

Professor Orfield has done an excellent piece of work. He would be the first to admit that it is not the final word in its field. It is, or should be, only the beginning of spade work in the various state and federal courts. It furnishes a standard for scholars in the several states to follow in tracing the evolution of this problem in thoroughgoing fashion in their respective states. If this book can stimulate this research, it will lay a new foundation on which Professor Orfield may carry farther in the future the work he has done so well at this time.

ALBERT COATES.

University of North Carolina Law School,
Chapel Hill, N. C.

Government and Economic Life. By L. S. Lyon, M. W. Watkins and Victor Abramson. Washington: The Brookings Institution. 1939. Pp. xvi, 490. \$3.00.

The consequences of a change in American policy toward private enterprises are bound to have a far reaching effect upon our economic life. An unmistakable change in attitude has been developing during the last few decades which has caused a sharp division between adherents to our traditional belief in the soundness of private enterprise as one

of the basic principles of our democracy and those who maintain that the factors which made private enterprise so successful in the past have largely disappeared.

There can be no doubt that there is a growing reliance upon government as a dominating factor in our life and a corresponding waning of confidence in private enterprise as the ideal agency for the production and sale of goods and for the distribution of income to bring about economic security. In a two-volume work, the second volume of which has not yet appeared, the authors have undertaken an analysis of this problem. The first volume deals with the use of government as an aid to private enterprise and as a means of regulating and restricting its bad features. The second volume is reserved for a discussion of those agencies of government engaged in the direct production of goods and services.

It is pointed out that the widespread acceptance of private enterprise as the best possible system for America has depended upon a number of assumptions. Such a system assumes a right to private ownership of natural resources, the right to purchase equipment for business operations and the right to sell such property at will, freedom to use time and effort as one pleases, and the right to enter a business, compete for customers or retire from same at will. It is also assumed that one can easily shift from one business to another with a high degree of freedom. Numerous factors are shown to have weakened our confidence in private enterprise. Critics contend that private enterprise no longer conforms to the basic assumptions mentioned and that it does not provide a satisfactory distribution of income. There are no longer unlimited supplies of land, coal, oil, and timber for private exploitation. The expansion of manufacturing and the complexities of specialization cut down the opportunities to go into a business and render very hazardous the successful disposition of the products of a new independent enterprise. The development of powerful organizations of employers and employees have very much lessened the opportunity for an independent livelihood and have many times multiplied the chances of unemployment.

In any picture of modern private enterprise are synthetic forces to aid or implement its operations. Devices, such as the private corporation and partnership, provision which the law makes for bankruptcy and reorganization of business, protection which government gives to patents, so important to modern business, monetary organizations and provision of agencies for the settlement of labor disputes compose the main aids to business. By the use of these devices sanctioned by the law, "it is not inaccurate to say that government was used for the creation and for the operation of the private enterprise system." The

limitations and restrictions placed by government upon private business are designed to prevent the destruction of competition and to curb unfair competitive action. As a smoothly operating system of private enterprise depends upon an adequate, competent and vigorous labor supply, government has also placed limitations upon wages, hours, and conditions of work.

Because of the dominance of money as a means of implementing private enterprise, the chapter on Monetary Mechanism is given more detailed consideration than some of the other aids. A chapter which should be of special interest to critics of government, who sometimes contend that it is bent on destroying business, is the one on Standards, Research, and Dissemination.

It is difficult to overemphasize the direct benefits made by government. Witness the establishment of standards of quality and physical composition, the limitation of the number of varieties of products, the researches into the problems of public health, agriculture and climatic conditions. The dissemination of new knowledge highly important to private enterprise is not equalled anywhere else in the world.

The chapters, Competition and the Plane of Competition, clearly portray in brief but adequate fashion the efforts of government to strike down monopolies and unlawful restraints of trade. Doubtless, the omission of the many exemptions from the operation of the antitrust laws was in the interest of preserving space. It is felt that the authors might have emphasized more clearly the change of attitude of the United States Supreme Court toward the Federal Trade Commission as significantly shown by the opinion of Justice Black in *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112. Here the Court did much to restore the fact-finding power of the Commission, which had been so ruthlessly invaded in the case of *Federal Trade Commission v. Curtis Publishing Company*, 260 U. S. 568.

The final chapters of the book deal with labor. More space is given to consideration of various phases of the labor problem than to any other single element of the work. The history of the labor movement is briefly given and its modern phases are dwelt upon. Significant statutes and court decisions are treated.

In the last chapter the authors set forth certain new developments and undertake an interpretation of our present policy. The efforts of government, they say, "have reflected consistently a design to make private enterprise a better device for the organization of economic life." While competition is still regarded as the best means of regulating the productive and distributive processes in the public interest, we have now laid hold of controls for more effective aids to and regulation of

private business. Government has moved through monetary regulations of discount rates and open market operations to federal programs of taxation, spending, and lending. Resort has been had to direct management of certain functions, under statutory authority—the monetary system, bituminous coal, agriculture, electric power through T.V.A. More specific regulations are secured under the Robinson-Patman Act and other statutory provisions.

With these changes in methods of control have come fundamental changes in the objectives of our policy. Our fundamental social purpose is to provide economic security. Preservation of the small independent business unit is a definite part of our policy—witness the many discriminatory schemes of chain store taxation.

There is a definite change in values of certain features of our democratic institutions. The greatest single factor in the maintenance of private enterprise has been our complete allegiance to personal liberty. There is “a diminished confidence in private enterprise as a social instrumentality for the organization of economic life.” “There is also . . . a diminished valuation of economic freedom as an end in itself.” We now want economic security fully as much if not more than we want economic freedom. In this connection a part of the dissent of Mr. Justice Stone in the case of *Morehead v. Tipaldo*, 298 U. S. 587, comes to mind in which is said: “There is a grim irony in speaking of the freedom of contract to those who because of their economic necessities give their services for less than is needed to keep body and soul together.”

It remains to be said that the work is written in a free, easy and readable style. In an appendix there is much data on the Corporate Enterprise, Federal Trade Commission orders and labor organizations in European countries. For those who want a clear, brief, historical and factual treatment of American public policy toward business enterprise and a careful and tempered appraisal and interpretation of the changes that are taking place, this volume will fill a definite need.

R. J. M. HOBBS.

University of North Carolina,
Chapel Hill, N. C.

James Kent: A Study in Conservatism 1763-1847. By John Theodore Horton. D. Appleton-Century Co., Inc. 1939. Pp. xi, 354.

On a July day in 1778, Yale College installed a new president, Ezra Stiles. In his inaugural address, delivered only a few miles from the camp of the forces of King George, he commended to his hearers the study of the English law, and prophesied that, nurtured on such studies, an American Bracton, Coke, or Selden would arise to expound our laws

in a great and learned commentary. Among his hearers was a fifteen-year-old freshman, James Kent, who must have listened to these words with more than ordinary intentness. They sounded a key-note of his career. During the next summer vacation—the same summer that saw his father's house burned to ashes by the British—he read and was captivated by Blackstone's Commentaries. The writer unfolds the story of Kent's career with special stress upon the part that he played in the reception in America of English law, and on his use of that body of imported English legal doctrine to buttress the power of the landed and mercantile interests against the leveling efforts of the popular party.

Kent was well suited to the role, by background and temperament. Born of solid professional forbears, with plenty of Tories among his kin, he was modest rather than daring, able and studious rather than creative. Like so many other lawyers destined to a high place, he began his practice in a small town. There, with one of the Livingstons as partner, he collected debts and tried replevin and ejectment cases, went to the legislature, and by working at law for two hours a day, leaving the rest of the hours for gardening, sociability and the classics, he was passing rich on \$500 a year.

At thirty, disappointed in his effort to secure the nomination for a seat in Congress, he loaded his household upon a sloop bound down the Hudson and made the trip to New York, then a city of thirty thousand. With £100 in his pocket, he sat down to wait for clients. In the legislature he had played a resolute and conspicuous part on the Federalist side in the struggle between Jay and Clinton for the governorship. This was not forgotten by those in the seats of the mighty, and his genuine, and for that day, rare learning in the English decisions and Continental texts, won early acclaim from the judges and his fellows at the bar. Accordingly, within a few months after his arrival, he was named to the newly established professorship of law in Columbia College at a stipend of £200 a year. This early venture in university legal education, however, was soon blighted. The first year the lectures, as a novelty, were well attended, but the novelty palled, and by the fourth year the class had dwindled to two hardy souls, and Kent resigned. Meantime he was prospering at the bar and in real estate speculation, and was staunchly pamphleteering for the Federalist party. His defense of the much-denounced Jay treaty against the charge of surrender of our rights to the British was well documented by references to Grotius, Vattel and Pufendorf, and he even sought forage in the enemy's country by shrewd citations of the pronouncements of Jefferson and the French convention. Soon he was named to the profitable posts of Master in Chancery and City Recorder. He had never really enjoyed the buffets

and anxieties of the practice, and a judgeship was his ambition. This was gratified by appointment as Justice of the Supreme Court.

For sixteen years he rode the circuit, and amid the wild and beautiful scenery of the Western shires, before the Indians had all retreated from the woodsman's ax, he had a part in bringing to the frontier the system of ordered law that the rudest men of the backwoods demanded. Though he was often shocked at first by the freedom of manners of the "raftsmen squatters, insolvent emigrants and demagogues" that he found there, he saw the frontier becoming settled and civilized before his eyes. Though he yielded none of his conservative convictions, his understanding of all sorts and conditions of men must have widened, for he carried on successfully the exacting duties of a justice-in-eyre in a country which was as turbulent as the shires into which Henry I sent his commission of assize.

In the other phase of his work, the hearing of cases *en banc*, his force was even more strongly felt. He came to a court composed mainly of incompetent or merely average judges, and he soon established an ascendancy as remarkable as Marshall's, despite the fact that the majority of the court belonged to the opposing political party. The practice of giving oral opinions which were unreported had left the law dubious and uncertain and there was little knowledge on the part of any of the judges, including Kent, of the considerable body of local American legal tradition. The time was ripe, then, for what Kent was eager for, the transplanting of the English common law.

In 1814 he became chancellor and in the realm of equity he had an even wider influence in popularizing in this country the English system. Nearly always his leaning was toward the rights of property, as when he sustained the Fulton-Livingston steamboat monopoly, later overthrown by Marshall in *Gibbons v. Ogden*, and when he held that the grant to a bridge company of the privilege of charging tolls included an implied right of immunity from competition by new bridges nearby (p. 218). His one notable decision in vindication of individual liberty was *People v. Crosswell* (p. 176), in which for once he rejected English doctrine, and held that in a criminal prosecution for libel, the truth could be proven in defense. But even here, since the libel was an attack by a Federalist editor upon President Jefferson, we may suspect that party feeling was at least as potent as the judge's mild passion for liberty of the citizen. Kent's own expressions were far from temperate. In writing to Justice Story, he referred to Andrew Jackson as "a detestable, ignorant, reckless, vain and malignant tyrant", and of Taney, newly appointed Chief Justice, he wrote: "I can never think well of a man who consented to do what his predecessor thought it dishonest to do,

that is, remove the United States Bank deposits to gratify the malignant persecutions of a savage despot and in palpable violation of contract" (pp. 292, 293). This bitter partisanship, surprising in a man so mild-mannered, reached almost treasonable extremes in Kent's die-hard opposition to legislative measures of defense against the British in the War of 1812. His membership in the Council of Revision, a body consisting of the Governor and the judges, which had the power of rejecting acts passed by the Assembly, threw him in the political whirlpool, and his violent partisanship was his Achilles heel as a judge. Despite the universal tributes to his great learning, the legislature near the end of his career, expressed their resentment by reducing his salary in successive cuts from \$4500 to \$2000, and efforts to change the age-limit of sixty for his benefit were fruitless.

After retirement, he became again a professor, and a lawyer for lawyers, but his great achievement, of course, was the Commentaries, the first great American legal text. It embraced "a discourse on the law of nations, a treatise on the constitutional jurisprudence of the American Union, and investigation of the sources, both English and Roman, of the municipal law of the several states . . . the rights of persons and the rights of property, personal and real". A Bible of the Federalists, it was more popular in the North than the South, but its influence was widespread. So great was the demand, that the author prepared five successive revisions. When as a member of the Board of Visitors of West Point, he examined the graduating class upon his volume on constitutional law, the text used at the Academy, he singled out Robert E. Lee as one of the most proficient of the cadets (p. 303).

The emphasis in the present work is upon Kent's place in the political and social scene rather than upon his influence in the development of legal doctrine. But in its interest to lawyers, whose taste easily transcends the technical, it is none the worse for that. The writer has given us a judiciously selective, gracefully written, and well-balanced life-story of the father of American equity.

CHARLES T. McCORMICK.

Northwestern University,
Chicago, Illinois.

The Course of American Democratic Thought. By Ralph Henry Gabriel.¹ New York: The Ronald Press Company. 1940. Pp. xi, 452.

The sub-title of this book, *An Intellectual History since 1815*, suggests that it is broader in subject matter and more limited in time-span

¹ Larned Professor of American History in Yale University.

than its title indicates. Actually the scope is even more extended for it is concerned with faith and emotion and not merely with intellect in any coldly narrow sense. Mr. Gabriel examines in his first one hundred pages "the doctrines of the American faith . . . against the social and intellectual background of the Middle Period." He finds the doctrines of this faith to be those of a fundamental law, the free individual and the future of America or nationalism. These formed "a pattern that for a century was to provide the foundation of American thought" (p. vi). In the subsequent parts of the volume this faith is traced through "the fires of sectional controversy" (Part II), the modification and development after Appomatox incident to the "effort to bring it into harmony with the new naturalism of Darwinian evolution and to make it useful in a society undergoing an industrial revolution" (Part III), reinterpretation and criticism by scholars in the fields of economics, sociology, history, and philosophy (Part IV), the progressive era (Part V), and finally into the period of disillusionment and insecurity that followed Versailles (Part VI). Here it is found that the three elementary doctrines of the American democratic faith are "potentially antagonistic". Therefore the pattern which they form is "a system of checks and balances in the realm of ideas", "a philosophy of the mean", proclaiming "that within broad limits of an ordered nature, man is master of his destiny" (p. 418).

The writer of intellectual history has the problem of choosing whether to follow general movements or to analyse the thought of particular figures. Mr. Gabriel has attempted to compromise by setting the stage of the movements and then introducing typical or leading thinkers with occasional attention to dissenters or critics for the emphasis of contrasts. It is in the sketches of certain individuals that he has done his best work, although in too many cases these sketches are constricted to thumbnail proportions. This reviewer finds those of Herman Melville, Isaac Hecker, Walt Whitman, Stephen J. Field, Lewis Henry Morgan, William Graham Sumner, and Josiah Royce most suggestive and most nearly adequate. These men do not usually appear in surveys of American political thought and Mr. Gabriel's presentations of their ideas provide insights into some of its significant phases. This list may also be taken to illustrate the range of his search for bearers or critics of the American democratic faith for it includes a whaler turned novelist, a convert to Roman Catholicism who became the founder of a monastic order (the Paulists), a poet, a son of New England who after pioneering in California served vigorously as a Justice of the Supreme Court of the United States, a lawyer who took up anthropology as an avocation, a congregational clergyman who abandoned the ministry to teach

political economy at Yale and finally branched out into anthropology, and a professional philosopher. The general treatment of the development of economic science in the United States, and especially that of the conflict between the defenders of the *laissez-faire* tradition of classical economics and the younger economists who, under the influence of the German followers of Frederick List, advocated positive state action in the economic field is an illuminating sketch of the background of ideas presently active on the American political scene. The sections devoted to tracing the course of religious thought parallel to the development of the democratic faith enter a field of American cultural history as yet scarcely explored.

On the whole, Mr. Gabriel has not been successful in the portrayal of trends nor in his estimates of their significance. This is due to the broad yet arbitrary character of his formula: fundamental law, individual liberty, and nationalism. Its breadth is illustrated by the assertion, anent the slavery controversy in which protagonists of each side were basing their arguments on conceptions of fundamental law, that "the doctrine of the moral order was here providing those agreements which, by functioning as the foundation of logical discussion, made it possible for the democratic process to continue" (p. 18). Even of the period of 1861 to 1865 it is stated that "the general outline of the thought-patterns of the Northern and Southern leaders were the same" (p. 114). If that be true, it becomes important to examine the particular differences within the general pattern which could contribute to so great a cataclysm. The examination and evaluation of such differences, as distinguished from those which challenged one of the basic elements of the pattern, is excluded by the formula. When such differences do appear they are treated merely as variations on the themes of fundamental law, individual liberty, and nationalism. This imposes upon the development of American democratic thought a harmony which has at no time been characteristic of it. It may be contended, as Mr. Gabriel does, that American political battles have been fought within the ambit of an idealogical pattern that has made it possible to arrive at "middle-of-the-road solutions" for "those problems which arise among interest or pressure groups" (p. 418). It may also be true that this pattern has proved to be adaptable to changing scientific conceptions and changing economic and social conditions without fundamental alteration. Nevertheless, the resolution of the sharp differences in political, economic and social ideas that have appeared in the course of American history into a substantial agreement under a formula so general and flexible as that which Mr. Gabriel offers, is anticlimactic.

Preoccupation with his formula has, furthermore, influenced Mr.

Gabriel in his selection and exclusion of material. In many instances he fails to interrogate his witnesses on pertinent points. Rhetorical assertions of belief in fundamental law are not followed up with penetrating inquiries as to what the conception represents in the divergent philosophies of the persons concerned; opinions as to the relation of government to individual liberty are not critically examined; the whole question of views on equality is treated only incidentally. Moreover, important trends and the persons connected with them are omitted. In the Middle Period there was a vital beginning of the labor movement. Significant proposals for political, economic and social reform appeared. The "possibility of economic security" which the frontier offered "every man" (p. 22) was quite remote for many thousands in the eastern cities, which were increasing in population faster than the country as a whole. The consequent unrest was reflected in movements which were potentially if not immediately effective in the development of American democracy. Though mention is made of it, the post-Civil War labor movement is not adequately presented; Marxian socialism appears only as a foil even in the two pages (pp. 377-378) which are devoted directly to its relation to "the American democratic faith"; Populism receives nowhere so much as a paragraph of consecutive treatment. Many omissions and slights may be forgiven an author on account of the limitations inevitably imposed by available wordage; but mere physical limitations cannot justify a historian of American democracy in dismissing Horace Greeley with the assertion that "Arthur Brisbane and Horace Greeley" were the "New-World prophets" of "the collectivist philosophy of Charles Fourier" (p. 45), or of William Jennings Bryan with the sentence: "Bryan's crusade swept eastward like a prairie fire and was beaten out by Mark Hanna's rescue party" (p. 399). One must conclude that Mr. Gabriel considers the rhetorical agreement discoverable in a cross section of Fourth of July or Lincoln's Day addresses and the by no means insignificant pronouncements of intellectuals and pseudo-intellectuals more important indices of the course of American democratic thought than the diverse programs for social amelioration that have welled up from the substratum of mass insecurity and suffering.

CHARLES B. ROBSON.

The University of North Carolina,
Chapel Hill, N. C.