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## Book Reviews

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## BOOKS REVIEWED

**The Choice of Law Process.** By David F. Cavers. Ann Arbor: Michigan Press. 1965. Pp. xiv, 336. \$8.50.

This is a brilliant and ambitious book. It seeks no less than to lead us out of what is now the chaos and confusion of choice of law into a state of reasonable certainty and predictability. To some extent, the existing chaos and confusion is the author's doing. In a seminal article written in 1933,<sup>1</sup> he attacked the very foundations on which choice of law rules have been constructed. His attack, and the more recent attacks of others, have found their mark. The foundations of choice of law have crumbled into dust or, at the least, have been badly shaken. There is no present consensus, however, as to how these foundations had best be replaced. Choice of law is today an area where there is lack of agreement even with respect to basic principles and values.

The book opens on an historical note. The author briefly describes the attempts, starting with those of the Italian statisticians in the thirteenth century, to develop choice of law rules and concludes that the past six centuries have brought us little but "frustration." In line with what appears to be a basic choice of law tradition, the writers have devoted much of their energies to attacking each other's proposals. The result has been a welter of words and much confusion as to what are the exact differences between the various schools of thought. The author brilliantly points up these differences by posing five hypothetical cases decided by a bench of five judges, each of whom is an advocate of a different choice of law methodology. The different methodologies represented are those of the original Restatement of Conflict of Laws, of the Restatement of Conflict of Laws Second, of Professor Max Rheinstein, of Professor Brainerd Currie, and finally of the author himself. The first four methodologies are subjected to brief criticism by the author who points out that in so doing he has displayed the "mark of the true conflict-of-laws scholar: a keen sensitivity to the deficiencies in the theories of his fellows."<sup>2</sup> Thereafter he launches into an exposition of his own suggested approach to choice of law.

In the author's opinion, the principal defect of present-day choice of law rules is that they are more concerned with choice of jurisdiction than with choice of law. Typical of such rules is that one should look to the law of the state where a contract was made to determine the rights of the parties thereunder and to the law of the place of injury to determine liabilities in tort. In his 1933 article,<sup>3</sup> the author was the first to suggest that these rules, taken literally, could not work well in practice because they required the courts to engage in a "blindfold test" by selecting the state of the governing law without first having examined the content of the relevant laws of all potentially interested states. After all, a state's interest in having one of its laws applied must inevitably depend upon the content of that law. So a state's interest in the bodily security of its residents would not be furthered by the application of a law of that state which absolves the defendant from liability. Indeed, says the author, jurisdiction selecting rules may at times result in the application of a law which frustrates the interests of all concerned states and furthers the interests of none.

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1. Cavers, A Critique of the Choice-of-Law Problem, 47 Harv. L. Rev. 173 (1933).
  2. Cavers, *The Choice of Law Process* 75 (1965).
  3. Cavers, *supra* note 1.

In the author's opinion, the first thing a court should do in a choice of law case is to determine whether it is bound by a local statutory directive. Usually, this will not be the case, since statutes are directed only infrequently to choice of law. In the absence of such a directive, the court should examine the content of the relevant laws of all potentially interested states. Sometimes, it will be found that the purpose of only one of these laws would be furthered by its application to the case or that the interests of other states in having their own law applied are negligible by comparison. In such instances this law should be applied without further ado. There will be relatively frequent situations, however, where two or more states each have a substantial interest in the application of their relevant laws. Situations of this sort present the most difficult problems in choice of law, and it is to them that the major portion of the book is addressed.

The author believes that the attempt should be made to develop choice of law principles to handle these difficult situations. He is opposed to having each case handled on an *ad hoc* basis with no further directive given the court than it should strive to reach what it conceives to be the just result.<sup>4</sup> He also does not believe that in these difficult situations adequate guidance for choice of law purposes can be obtained from an investigation of the purposes of the relevant laws of the forum and of the other potentially interested states.<sup>5</sup> This is primarily because statutes and common-law rules frequently have multiple purposes which are likely to point in different directions when the question is whether a given law should be applied to out-of-state facts. Also he does not favor an attempt, at the present state of development, to construct a series of narrow choice of law rules, each directed to a particular situation. This would "often prove hard to do" and "the odds against attaining a consensus" in favor of such a multitude of rules would be "very high indeed."<sup>6</sup> Instead the author advocates the development of a relatively small number of "principles of preference," or "guides for decision," that should be followed except when important considerations peculiar to the particular case point in a different direction. Such principles would be formulated with the view of doing justice to the parties and of achieving "a mutually acceptable scheme of accommodation for laws of the same general type."<sup>7</sup> By reason of their breadth, cases contributing to the development of such principles could be expected to recur with some frequency in contrast to the long intervals that would be likely to elapse between decisions directed to issues that have been narrowly defined. Also the breadth of the principles would make it easier for the courts to avoid parochialism and to apply some law other than their own.<sup>8</sup> Development of such principles is a goal for which courts should strive by endeavoring to subsume each decision under a principle, either already established or one tentatively suggested, or, if the time is not deemed ripe for such an endeavor, by articulating as clearly as possible the grounds of their decision. Other courts would then have the opportunity of testing the suggested principle in different situations to see if it led to desirable results. Or, if no principle had been suggested, these other courts could seek to build upon the grounds of decision stated in the first case and in due course a principle might emerge.

To have the choice of law area governed by a number of general principles of preference is not the author's ultimate goal. He thinks it probable that, in the course

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4. Cavers, *op. cit. supra* note 2, at 77-87.

5. *Id.* at 72-75, 88-113.

6. *Id.* at 68. (Citation omitted.)

7. *Id.* at 132.

8. *Id.* at 134.

of time and after a number of distinctions have been drawn in the light of further experience, each general principle would be converted into a set of specific rules.<sup>9</sup> He therefore views his principles of preference as an intermediate stage in the progression of the courts from the chaos of today to what it is hoped will be a well-ordered tomorrow.

The author then proceeds to state and to discuss seven suggested principles of preference, of which five are taken from the tort field and two from the field of contract. These principles, which are said to be the product of classroom discussions, are consistent with the result reached by most of the decided cases but do not take their inspiration from the reasoning of the opinions. It is made clear that these principles should be viewed only as "guides for decision, leaving ample room for independent judgment to any courts that resorted to them."<sup>10</sup> Also they should not be read as giving rise to a negative inference. The fact that a situation does not fall within the precise conditions of a principle does not mean that it should necessarily be governed by a different choice of law rule.<sup>11</sup>

Space does not permit discussion of all of the author's seven principles. Instead attention will be confined to the first and third whose principal characteristics are common to the rest. The first is that the law of the state of injury should be applied to determine rights and liabilities in tort if this law sets a higher standard of conduct or of financial protection than do the laws of the state where the defendant acted or has his home unless the parties have such a relationship to each other that their rights and liabilities should be determined by the law governing their relationship.<sup>12</sup> The third principle, which will be quoted verbatim, is

Where the state in which a defendant acted has established special controls, including the sanction of civil liability, over conduct of the kind in which the defendant was engaged when he caused a foreseeable injury to the plaintiff in another state, the plaintiff, though having no relationship to defendant, should be accorded the benefit of the special standards of conduct and of financial protection in the state of the defendant's conduct, even though the state of injury had imposed no such controls or sanctions.<sup>13</sup>

It will be noted that these principles cannot be applied until the content of the relevant rules of all potentially interested states has been ascertained. Likewise, as will be made clear in a moment, application of these principles will sometimes depend upon what the court believes to be the primary purpose sought to be achieved by a particular law.

The principles in operation can be well illustrated by the author's discussion of a hypothetical case closely similar on its facts to *Schmidt v. Driscoll Hotel, Inc.*<sup>14</sup> In the actual case, a Minnesota court held a Minnesota saloon keeper liable under a Minnesota statute for injuries suffered in Wisconsin by a Minnesota passenger of a Minnesota driver who had drunk too much at the defendant's saloon. The hypothetical case presented by the author is the same except that the person injured in Wisconsin is a Wisconsin pedestrian who was run down by the inebriated Minnesota driver. Wisconsin has no statute making saloon keepers liable for injuries

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9. *Id.* at 137.

10. *Id.* at 136.

11. *Ibid.*

12. *Id.* at 139.

13. *Id.* at 159.

14. 249 Minn. 376, 82 N.W.2d 365 (1957).

caused by drunk drivers to whom they have sold liquor, and the question is whether the Minnesota court should grant the plaintiff relief under the Minnesota statute. The author answers this question in the affirmative on the ground that this hypothetical case falls within his third principle of preference. In his view, the primary purpose of the Minnesota dramshop act was to regulate the conduct of saloonkeepers. It was foreseeable that the drivers served liquor in Minnesota would cause injury in Wisconsin, and the "admonitory and deterrent values" of the Minnesota statute would be impaired if liability were not imposed upon the saloon keeper.<sup>15</sup>

Enough has been said, it is believed, to make clear the main thrust of the book. A few comments may now be appropriate. This reviewer is in hearty accord with most of the conclusions reached by the author. He hails the author's desire to avoid *ad hoc* decisions and to achieve whatever certainty and predictability is possible in choice of law. He agrees that difficult choice of law questions are unlikely to be resolved by the process of construing and interpreting the relevant laws of each potentially interested state. He further agrees that in their quest for certainty and predictability the courts should start with flexible general principles rather than with precise rules. With perhaps a few exceptions, experience to date has not been sufficient to make possible the construction of precise and satisfactory rules of choice of law. On the other hand, it can never be too early to strive to subsume particular cases under broad principles which point to what would usually be the correct result but from which the courts would be free to depart whenever the occasion warrants. These principles would provide initial guidance as well as a framework on which later courts could build. Then, in due course and on the basis of further experience, these general principles might eventually be subdivided into a number of narrower and precise rules. In other words, this reviewer shares the author's belief that the creation of principles of preference should be the first step along the way to the creation of satisfactory rules of choice of law.

Such differences as this reviewer has with the author's thesis relate primarily to matters of detail. Not surprisingly, this reviewer is inclined to prefer the principles of preference stated in the Restatement of Conflict of Laws Second. These principles, generally speaking, provide for the application of the law of a designated state with the proviso that if some other state has the most significant relationship with the parties and the occurrence its law shall be applied. So, for example, in the case of injuries to persons or to tangible property, the Restatement Second calls for the application of the law of the state of the injury unless some other state is that of most significant relationship.<sup>16</sup> It will be noted that this principle is in part jurisdiction selecting; since it calls for the usual application of the law of the state of injury. It does, however, provide a safety valve and leave room for experimentation and growth by making an exception of the case where the state of injury is not the state of most significant relationship. Also, usual applications of the law of the state of injury can be justified on the ground that, at least as a general rule, a person should receive the protection of the law of the state where he happens to be at any given moment of time. The principal difference between the Restatement principles and those of the author is that the applicability of the latter is entirely dependent upon the content of the relevant laws of the potentially interested states.

In this reviewer's opinion, the principles stated in the Restatement Second have, at least, three advantages. First, they are more in keeping with existing case law. To date, the great majority of courts have used jurisdiction selecting choice of law

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15. Cavers, *op. cit. supra* note 2, at 160.

16. Restatement (Second), Conflict of Laws §§ 379, 379a (Tent. Draft No. 9, 1964).

rules. The Restatement Second builds as much as it can upon what has gone before. Second, the Restatement principles should prove easier for a harried trial court to apply than would those of the author. As stated above, the applicability of the author's principles is dependent upon the content of the relevant laws of all potentially interested states. In other words, a court must learn the content of these laws before it can obtain any guidance from the author's principles. Such a task may be relatively easy, and at any rate is inevitable even under the Restatement Second approach, when all questions of foreign law are well briefed and argued by counsel. But in situations where these conditions are not met, the burden that the author's principles would impose upon the court might be considerable. To be sure, the courts could insist upon having neglected questions of foreign law briefed and demand further briefs if initially these questions were inadequately answered. But such measures would entail delay and sometimes would prove unrewarding. In a considerable number of instances, it is believed, a court would find itself in the unenviable position of having to research foreign law itself. By way of contrast, under the Restatement Second approach, the court is directed in the first instance to the law of a particular state, and it may apply this law unless and until the parties have demonstrated to it by proof of the law of other states and by other arguments that application of some other law would be more appropriate.

Likewise, the Restatement principles are less likely than those of the author to require the court to engage in what may be the tremendously difficult and uncertain task of determining which of two or more purposes of a statute or common law rule is the primary purpose. This point can be made clear by returning to the hypothetical case which presents the question whether a Wisconsin pedestrian injured in Wisconsin by an inebriated Minnesota driver can recover under the Minnesota statute against the Minnesota saloonkeeper who sold liquor to the driver. It will be recalled that the author answers this question in the affirmative on the ground that the primary purpose of the Minnesota statute was to deter Minnesota saloonkeepers from selling liquor to drunk drivers, and that the "admonitory and deterrent values" of the statute would be impaired if liability was not imposed.<sup>17</sup> But was this really the case? Was the primary purpose of the Minnesota legislature in enacting the statute to punish saloonkeepers or to provide compensation for persons injured by drunk drivers? Almost certainly, the latter objective provided the original stimulus for the enactment of the statute. It is unlikely that a desire to punish those who sold liquor to drunks was the initial factor which set the legislature into motion. Clearly the statute, in common with most other rules imposing liability in tort, has two purposes: to compensate the injured and to deter conduct that is deemed anti-social. If one of these purposes should be predominant in a given case, it would probably not be so in a sufficient degree to provide an adequate basis for the application of a different rule of choice of law.

Suppose now that a Wisconsin saloonkeeper were to sell liquor to a drunk Wisconsin driver who thereupon injures a Minnesota pedestrian in Minnesota. Wisconsin has no statute imposing liability upon the saloonkeeper in these circumstances, and the question would therefore be whether the Minnesota pedestrian could obtain relief against the saloonkeeper under the Minnesota statute. None of the author's principles of preference expressly covers this case, but his conclusion that the Minnesota statute was designed primarily to deter rather than to compensate would lead one to suppose that he would hold that the statute should not be held applicable to the Wisconsin saloonkeeper. Here again we see the difficulty of trying, at least in the

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17. *Cavers*, op. cit. supra note 2, at 160.

tort field, to ascribe a primary purpose to a statute or common law rule. It seems not unlikely that the Minnesota legislature, if its members had been polled as to what range of application they wished to give the statute, would have said that they wished to have it applied so as to provide relief to all persons injured in Minnesota.

Under the Restatement Second approach, these two hypothetical cases would be decided differently. The Minnesota statute would be held inapplicable in the suit of the Wisconsin pedestrian injured in Wisconsin against the Minnesota saloonkeeper. On the other hand, the statute would be held applicable to provide relief against the Wisconsin saloonkeeper to the Minnesota pedestrian injured in Minnesota. These results would follow because the applicable principle of preference of the Restatement calls for application of the law of the state of injury unless some other state is the state of most significant relationship. This would not seem to be so in either of these two hypothetical cases. In both cases, the relevant contacts are more or less evenly divided between Minnesota and Wisconsin, and the content of the relevant laws of the two states does not, at least in the opinion of this reviewer, clearly point to a particular choice of law result. Surely, no injustice would be done the Wisconsin pedestrian in the first hypothetical by denying him relief for his Wisconsin injuries against the Minnesota saloonkeeper. The Wisconsin pedestrian would have had no right to relief under similar circumstances against a Wisconsin saloonkeeper, and there seems to be no reason in justice why his case should be improved by the fact that a Minnesota saloonkeeper was involved. On the other hand, the Minnesota pedestrian would have good reason to feel aggrieved if he were denied recovery for his Minnesota injuries against the Wisconsin saloonkeeper. Recovery would have been granted under similar circumstances to persons injured by drunks served by Minnesota saloonkeepers, and the pedestrian might justifiably feel himself the victim of injustice if recovery was denied him on the ground that the offending drunk was served in Wisconsin. These two hypothetical cases could well be handled, it is believed, by application of the law of the state of injury on the ground, if for no other, that a person should ordinarily receive the protection accorded him by the tort law of the state where he happens to be at the time.

On the other hand, the Restatement approach would lead to the same result as that reached by the court on the actual facts of *Schmidt v. Driscoll Hotel, Inc.* In that case, it will be recalled, all of the parties were from Minnesota and the offending drink was sold in Minnesota. Under the circumstances, the fact that the injury occurred in Wisconsin would not be sufficient to remove the case from the range of application of Minnesota law. It was only by happenstance that the injury occurred in Wisconsin rather than in Minnesota. With respect to all the parties, Minnesota was the state of the normally applicable law and Minnesota clearly had a greater interest than did Wisconsin in the determination of the particular issue. In Restatement terminology, therefore, Minnesota was the state of most significant relationship.

These minor differences should not be permitted to obscure this reviewer's admiration for the book and his hearty agreement with its basic approach. The book may well prove to be one of the most influential ever written in the choice of law area. The legal profession is much in the author's debt.

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**Judicial Control of Administrative Action.** By Louis L. Jaffe. Boston: Little, Brown & Co. 1965. Pp. xvi, 792. \$20.00.

Three decades ago, when James M. Landis delivered his Yale lectures on the administrative process,<sup>1</sup> the very premises of administrative law were under attack. Only a year earlier, a distinguished advisory panel had warned the President that administrative agencies constituted a "headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers."<sup>2</sup> Today, the climate of scholarly opinion is quite different. Administrative law no longer needs champions to make it respectable; administrative agencies no longer have to be justified. But the need persists for articulation and refinement of the principles of administrative law. Many of the problems which Landis illuminated in 1938 continue to warrant careful study. The administrative process, if accepted, is far from fully understood. Thus, there is clearly a place on the shelf for a new book about administrative law by so distinguished a scholar as Louis Jaffe.

The present volume is much more than a compilation of Jaffe's numerous law review articles on judicial review of administrative action. Many new chapters have been added, and the old chapters (such as those dealing with the scope of judicial review) have been substantially revised and updated. Even more important, new introductory material gives the book a coherence and philosophy which a mere collection of Jaffe's articles, however useful, would lack. Thus even the veteran student of administrative law cannot feel that he has "been here before."

If it is more than a compilation, this book is somewhat less than a treatise. It does not purport to duplicate the work of Professor Davis, though of course many subjects are discussed extensively by both authors. Because it is not a treatise, the Jaffe book cannot reasonably be expected to exhaust even the subject of judicial review, much less to study the processes by which agencies develop the decisions the courts review. The book confines its scope to the complex relations between agencies and courts.

The book has no single topic sentence. As indicative as any passage, however, is this statement toward the end: "An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the 'common law,' and the ultimate guarantees associated with the Constitution."<sup>3</sup> The concern of the book, then, is the context within which administrative action is reviewed and evaluated by the courts—the legal structure that provides both the criteria and the procedural framework for this evaluation. This context subdivides roughly into five parts: First, the allocation of law-making among legislatures, courts, and agencies; second, the right to and channels of judicial review; third, the

1. Landis, *The Administrative Process* (1938). The lectures were recently republished in paperback form by the Yale University Press, with a foreword by Professor Jaffe. That foreword had originally appeared in Jaffe, James Landis and the *Administrative Process*, 78 *Harv. L. Rev.* 319 (1964). Jaffe's reflections upon Landis' views of the administrative process a quarter century earlier provide a valuable backdrop to the present volume.

2. President's Committee on Administrative Management, *Administrative Management in the Government of the United States* 39-40 (1937).

3. Jaffe, *Judicial Control of Administrative Action* 590 (1965) [hereinafter cited as Jaffe].



obstacles to judicial review; fourth, the scope of review; and fifth, the judicial power to stay administrative proceedings.

Before considering limits upon the allocation of legal business, the book begins with an introductory chapter that contains several insights about the direction and deficiencies of the contemporary administrative process. Professor Jaffe offers five observations that warrant repetition here because they bear on his approach to judicial review: (1) "the regulated and client groups exert an effective pressure on the administrative agency in proportion to the importance of their economic function and to their organizational cohesion;" (2) "the administrator develops a presumption in favor of regulation;" (3) "regulation addresses itself to the problems of the past and gives too little weight to the dynamism of the industrial system;" (4) "the exercise of government power will not be tolerated unless subject to procedural safeguards;" and (5) "the multi-powered administrative agency finds it difficult to allocate its energies among its policy-making, enforcement, and adjudicatory tasks."<sup>4</sup> These are broad criticisms of the administrative process, as much of its rationale as of the way in which it currently functions. Professor Jaffe acknowledges that no ready formulae will prevent "industry-orientation," or check the trend toward senescence, or decide whether to separate policy-making from adjudicative functions in those agencies which exercise both. The need, rather, is for the reader to understand realistically the author's view of these shortcomings and limitations—the "Effective Limits of the Administrative Process" about which he wrote a decade earlier<sup>5</sup>—before tackling the substance of the book.

The first part of the book discusses the allocation of power between courts and agencies, and the delegation of power to agencies by legislative bodies. The obvious questions are considered—what remains, for example, of the now largely discredited *Schechter* doctrine of delegation;<sup>6</sup> what constitutional limits restrain the exercise by agencies of essentially "judicial" functions and powers, and what corresponding restraints limit the exercise by courts of essentially "administrative" power. This section also includes an excellent chapter on the thorny question of primary jurisdiction. Here Professor Jaffe draws together some observations previously developed in two important articles,<sup>7</sup> and adds a few new dimensions. If there is any criticism of the primary jurisdiction chapter, it is that the author tries too hard to reconcile recent Supreme Court decisions on the primary jurisdiction-antitrust matter.<sup>8</sup> However hard one forces them, the cases simply will not mesh.<sup>9</sup> One important post-publication decision fails to resolve the conflict.<sup>10</sup> Perhaps it would have been better simply to have left the cases in their dissonant state—at least until the time came for a more extensive discussion than this book's broad coverage permits.

Professor Jaffe approaches the availability of judicial review, the subject of his

4. Jaffe 11-20.

5. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 *Harv. L. Rev.* 1105 (1954).

6. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

7. Jaffe, *Primary Jurisdiction*, 77 *Harv. L. Rev.* 1037 (1964); Jaffe, *Primary Jurisdiction Reconsidered. The Anti-trust Laws*, 102 *U. Pa. L. Rev.* 577 (1954).

8. *E.g.*, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963); *California v. FPC*, 369 U.S. 482 (1962).

9. See *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 332-33 (1963) (Brennan, J., dissenting). Professor Jaffe himself noted the difficulty of reconciling these cases in Jaffe, *Primary Jurisdiction*, 77 *Harv. L. Rev.* 1037, 1068-69 (1964).

10. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966).

second major section, with a presumption in its favor: "in our system of remedies, an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity."<sup>11</sup> The argument in support of the presumption is compelling. The weight of precedent is less persuasive, however. One of the major Supreme Court decisions on which the presumption rests, *Leedom v. Kyne*<sup>12</sup> was never on very solid ground<sup>13</sup> and has been virtually confined to its facts by subsequent decisions.<sup>14</sup> Professor Jaffe apparently regards the precedent as still viable, though observing in a footnote that the later cases have marked its "narrow limits." It is rather surprising that in developing the presumption of judicial review, no reference is made to an important and rapidly expanding area of its application—the review of denial, withdrawal, and conditioning of government welfare and other benefits. The recent writings of Professor Charles Reich,<sup>15</sup> for example, provide most impressive support for Professor Jaffe's proposition, even if the cases have not gone as far. But even in Supreme Court jurisprudence, the unconstitutional condition cases<sup>16</sup>—of which Professor Jaffe apparently makes no use—have begun to bolster the presumption of reviewability from another quarter.

This portion of the book is also concerned with the remedies by which judicial review may be obtained. Much attention is given to the historical development of mandamus and certiorari, and these chapters make very good reading indeed. There is also an excellent chapter on sovereign immunity. Professor Jaffe concludes here that "there emerges from the judicial precedents no logic for determining that a suit against an officer either is or is not in substance a suit against 'the Sovereign' or 'the State.'"<sup>17</sup> When one realizes what history does *not* prove, he must face the central issue that Jaffe poses: "whether there shall be a remedy without the consent of the legislature, and if so, the form that suit shall take."<sup>18</sup> These decisions must be made on policy grounds, and not on the basis of logic or history.

The historical discussion throughout this part of the book is valuable and interesting reading. But the historical emphasis may have caused the slighting of several subjects that deserve greater attention: first, there is the Federal Administrative Procedure Act, which has major implications for federal judicial review. Although, as Professor Davis points out in his review of the book, section 10 of the APA<sup>19</sup> does not "stand

11. Jaffe 336. (Footnote omitted.)

12. 358 U.S. 184 (1958).

13. The confinement is based, at least, on *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943), a case which Professor Jaffe considers questionable authority. Jaffe 343-44.

14. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963).

15. Reich, *Individual Welfare and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245 (1965); Reich, *The New Property*, 73 Yale L.J. 733 (1964); Reich, *Midnight Welfare Searches and the Social Security Act*, 72 Yale L.J. 1347 (1963).

16. E.g., *Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958). For discussion of these cases, see, e.g., Linde, *Justice Douglas on Liberty in the Welfare State: Constitutional Rights in the Public Sector*, 40 Wash. L. Rev. 10 (1965); Willcox, *Invasions of the First Amendment Through Conditioned Public Spending*, 41 Cornell L.Q. 12 (1955); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

17. Jaffe 200.

18. Jaffe 231.

19. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964).

alone as a judicial remedy"<sup>20</sup> (nor does Jaffe argue that it does), that section at least sets up the machinery through which the particular remedies are typically invoked, and may qualify or condition their availability.<sup>21</sup> Second, more attention might have been given to other remedies such as injunction and declaratory judgment, which Professor Davis deems obviously preferable to mandamus and certiorari.<sup>22</sup> Third, the Federal Tort Claims Act is discussed rather summarily. This statute might have been left out altogether, but once introduced even casually, it raises questions too germane to the chapter on "Suits Against Government and Officers" to be relegated to its rather insignificant role. Finally, there is the vast and rapidly changing subject of habeas corpus. This topic, too, could have been omitted entirely; but having been introduced at all it cannot be hustled off stage without taking some account of the profound changes which recent Supreme Court decisions have wrought.<sup>23</sup>

The third part of the book considers obstacles to judicial review. There are chapters on ripeness and exhaustion, of course, but the major contribution of this section is the discussion of standing. Professor Jaffe has already contributed much to this subject, and his chapters in this book revise and amplify that contribution. He differentiates, as his articles have previously done,<sup>24</sup> between the public action and the private action, arguing for clearer recognition of the former. The discussion of the private action is thorough and very helpful. But the obstacle to full understanding of the public-action section is the absence of a clear definition. There is some guidance in the suggestion that the public-action plaintiff "must convince the court that a so-called 'public right' is involved and that it is generally in the public interest to issue an order against the officer or administrative agency,"<sup>25</sup> and other descriptive statements of this type. This statement does not really furnish a definition, however. The need remains for an explicit definition to help the reader appreciate the particular contribution which the Jaffe public-action theory makes to the judicial review of questions of public importance.

There is one other question about standing: If Professor Jaffe favors the expansion of the public action, and if he finds solid support in state law for the citizen-mandamus and taxpayer actions, why does he not join with Professor Davis<sup>26</sup> in urging the reinterpretation of *Frothingham v. Mellon*?<sup>27</sup> The answer seems to be that Jaffe and Davis come out about the same place on the question even if by different routes. They take issue, on rather similar grounds, with the older, more restrictive views of federal taxpayer standing. They would apparently allow the courts to entertain about the same sorts of suits to test essentially the same grievances. They answer along similar lines the charge that relaxation of standing principles would flood the courts

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20. Davis, "Judicial Control of Administrative Action": A Review, 66 Colum. L. Rev. 635, 642 (1966).

21. For a thorough and trenchant discussion of some problems of the limitations or qualifications imposed by section 10, see Berger, Administrative Arbitrariness and Judicial Review, 65 Colum. L. Rev. 55 (1965).

22. See Davis, *supra* note 20, at 641.

23. E.g., *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963).

24. See Jaffe, *Standing To Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255 (1961); Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265 (1961).

25. Jaffe 530-31.

26. See Davis, *supra* note 20, at 664.

27. 262 U.S. 447 (1923).

with suits injurious to the smooth operation of government. Thus, Professor Jaffe's failure to deal as explicitly with the *Frothingham* question as does Professor Davis is not a matter of substance. Here, as on other questions, the common ground shared by these two distinguished scholars may well be wider than they openly acknowledge.<sup>28</sup>

Little need be said about the several excellent chapters on the scope of review. Much of the material contained here has previously appeared in articles in the *Harvard Law Review*.<sup>29</sup> But the very juxtaposition of these chapters has produced some valuable additions. There is, for example, a brilliant introductory section probing the differences between findings of fact and conclusions of law. The distinction has never been easy, and is made more difficult by a recognition of the elusive quality of language itself. The chapter begins with a bold definition: "A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect."<sup>30</sup> But the variations and subtle shadings in the meanings of words at once compel caution in the application of such a proposition, however confidently the courts may be inclined to label matters as "fact" and "law."

The touchstone of review of conclusions of law is Professor Jaffe's "clear purpose criterion." Why, he asks, are agencies permitted to fashion law in some areas, to "legislate" interstitially, while in other areas they may not do so? "The answer," he argues, "should run primarily and presumptively in terms of clear statutory purpose, or as Professor Fuller would say, 'the intention of the statute.'"<sup>31</sup> The application of the clear purpose criterion takes one back through the major cases on the review of conclusions of law with a fresh insight; *NLRB v. Hearst Publications, Inc.*,<sup>32</sup> *Packard Motor Car Co. v. NLRB*,<sup>33</sup> and *SEC v. Chenery Corp.*<sup>34</sup> can be better understood in this setting. If the criterion is not always self-executing, it is at least a test and an invitation to develop more particular standards consistent with its general approach to reviewing conclusions of law.

The one regrettable sacrifice in the treatment of scope of review concerns the review of rules and regulations. The issue is hardly novel; Dean Landis observed in 1938 that "the incidence of judicial review over administrative law-making by way of rules can be contrasted with the scope of judicial review in cases where the law-making of the administrative flows from adjudication."<sup>35</sup> With all the current discussion of the choices to be made between rule-making and adjudication,<sup>36</sup> and the threshold difficulty a reviewing court may encounter in deciding which path the

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28. Professor Davis stresses at the outset of his lengthy review of the book that "Professor Jaffe and I . . . largely share the same basic philosophy about judicial review . . ." The differences, he suggests, lie chiefly in the interpretation of precedent, and perhaps in assessment of the directions in which the courts are moving. Davis, *supra* note 20, at 636. There are, however many points during the course of the Jaffe book and the Davis review at which differences are suggested.

29. See note 24 *supra*.

30. Jaffe 548. (Emphasis omitted.)

31. Jaffe 572. (Emphasis omitted.)

32. 322 U.S. 111 (1944).

33. 330 U.S. 485 (1947).

34. 318 U.S. 80 (1943), *aff'd on remand*, 332 U.S. 194 (1947).

35. Landis, *The Administrative Process* 149 (1938).

36. See, e.g., Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 *Harv. L. Rev.* 921 (1965).

agency has in fact taken,<sup>37</sup> the issue seems deserving of more than the page which it receives. But the criticism is minor, and in all other respects the treatment of scope of review is profound and thorough.

A great deal more could be said about these and other parts of the book, if time and space allowed more extensive discussion. But enough should already have been said to indicate that the serious student of administrative law is likely to depend as heavily upon this volume as he already depends upon the Davis treatise. The reader should not, however, expect of the book any more than Professor Jaffe claims for it. This is a collection of provocative, insightful scholarly essays on various aspects of judicial review. It is not meant to be a treatise, nor should it be so judged. No apology is needed for what has not been covered in this volume. What is covered is quite sufficient.

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37. See, e.g., *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir. 1966) (en banc, 5-3 decision).

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