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REVIEWS

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THE REPUBLIC, CONVERSATIONS ON FUNDAMENTALS. By Charles A. Beard. New York: The Viking Press, 1943. Pp. xiii, 365. $3.00.

CHARLES A. BEARD'S *The Republic* was, upon publication, hailed by *The Nation* and *Fortune* as a classic. There must be something exceptional about a book when two groups so divergent as those which these magazines represent both offer unstinted acclaim, although the title's reminder of Plato's immortal work had already invited a comparison. Like Plato's *Republic* Beard's work consists of a fictitious conversation, or rather a series of conversations, such as might occur at his home in New Milford, Connecticut. But whereas Plato casts Socrates in the role of the teacher, Beard pictures himself as the key figure. The discussions are concerned with American government and politics. As a result, they lack that universality which gave Plato's work its philosophical significance. An inquiry into the nature of justice is everyone's concern. Yet, at the same time, preoccupation with an abstract idea will repel those who believe that reality lies elsewhere, in concrete, historical experience. Plato and Beard live in totally different realms of the mind, and the chief concern of the one is at most a minor concern for the other.

Beard has evidently done a lot of reading in *The Federalist*. His book is, in essentials, a modernized version of these papers, written by Hamilton largely in defense of the Constitution, with progressive overtones added here and there. Presumably, Alexander Hamilton would take a different view of some matters, were he living today. I suspect that he would be Mr. Roosevelt's Secretary of War or of the Treasury. In any case, the basic teachings of *The Federalist* concerning constitutional government are here expounded with the Olympian serenity of a past master at "political fundamentals." For whatever one may think of Charles A. Beard's views in particulars, there can be little question that he towers today as the grand old man of the study of American politics in historical perspective. In this preoccupation with American constitutional experience lies both the strength and the limitation of his treatment. It is, of course, impossible to review the many specific questions Beard's volume raises. It is more profitable to consider a few basic issues.

Beard is associated with the economic interpretation of the Constitution. And yet Beard's outlook on the role of ideas in history has undergone profound change. He has for some years been insisting that he was misunderstood. This may be so. But when as lucid a mind as Oliver Wendell Holmes read Beard as meaning "that really the adoption of the Constitution was due to the moneyed interests," [1] others may be pardoned for gaining the same impression.

1. Letter to John C. Wu, June 21, 1928, cited in LERNER, THE MIND AND FAITH OF JUSTICE HOLMES (1943) 434-35.

However that may be, Beard today stresses "the force of ideas in history." [2] "I sometimes think that politics is more of a determining force in history than economics," [3] he says at one point. It is a shift in emphasis, which gives Beard a much more balanced view, but it does not make him a Platonist. Ideas in his meaning of the term are functional, dynamic, changing; they are factors in the historical process working in the minds of men and in time. As such, they are very different from Plato's ideas—timeless, changeless, eternal things, which no finite mind can ever behold directly.

"You do me too much honor by associating me with Socrates. . . . If I possessed even a hundredth part of his acumen in analyzing ideas, I should be happy. But in another way I want to steer entirely clear of both Socrates and Plato. In my opinion, Greek metaphysics has done damage, not good, to the Western world and to Christian thought and practice. If modern Europeans had devoted to the study of *The Federalist* the attention they gave to Plato's *Republic,* they would have been far better off in every way." [4] Cheers from the editors of *Fortune* greeted this pronouncement. I do not agree with it. In point of fact, Europeans have given undue attention to *The Federalist* among American writings on politics (it was the only one included among Meinecke's *Klassiker,* if I remember correctly). This attention to the *Federalist* has been quite unfortunate; the writings of Jefferson, Lincoln, and Woodrow Wilson, to name a few, were really more important. For it is the genuinely democratic, in contrast to the constitutional tradition, which has been lacking in Europe.[5] And while I share Beard's misgivings about Plato, the antidote was not Hamilton, but Tom Paine and Abe Lincoln.

Why bother with this detail? Because it is highly symptomatic of Beard's nationalism, a strand which runs all through his treatment and comes into full bloom in his chapter entitled, "The Republic in the World of Nations." Here the isolationist position is given a persuasive setting by stating the opposing views in so inadequate a fashion as to be laughable. Unfortunately, these caricatures are rather true to life. The burning need of America's participation in world affairs is too frequently presented in such confused and sentimental ways as to be self-defeating. Magistrally, Beard announces at the outset of the discussion: "In my opinion, the supreme object of American foreign policy should be to protect and promote the interests, spiritual and material, of the American people, and, subject to that mandate, to conduct foreign affairs in such a manner as to contribute to the peace and civilization of mankind." [6] Amen. Who could possibly disagree? But does he permit any of his interlocutors to state the case for the internationalist position in those terms? Or does he attempt to prove that isolationism achieves this supreme object? In September, 1940,

2. P. 1.
3. P. 316.
4. P. 301.
5. See FRIEDRICH, THE NEW BELIEF IN THE COMMON MAN (1942) c. II.
6. P. 307.

Beard published an article in *Harper's Magazine,* entitled "Giddy Minds and Foreign Quarrels." In this article he ridiculed the President and all those who thought that the war that was being fought in Europe had something to do with that supreme object of American foreign policy. The article cried out for a reply; I wanted someone to say, "A stitch in time saves nine." Such a reply was never made. But a special edition of the article was sold in tens of thousands to confuse the minds of men who within a little more than a year had to don a uniform to fight in the most gigantic conflict America ever has gotten into. Why was it gigantic? Because we waited until the conflagration had reached our own backyard. Those who wanted the United States to interest herself in the fire when it had merely a small start—Hitler destroying democracy in Germany—and who later urged that America aid the allies because they were our ramparts, were denounced as giddy minds who wanted the United States to engage in foreign quarrels, as meddlers who wanted America to swim against the stream of the wave of the future.

It is a frequent reaction of readers of the Platonic dialogues to get very tired of and even irritated with Socrates. His being always in the right, and with a slightly patronizing air at that, they find hard to endure. This reviewer has to confess that there are recurrent moments when he likewise feels a bit annoyed with Beard. This was the more upsetting to the reviewer as he has cherished for many years a profound affection for the philosophical farmer of New Milford. His gentle irony, his keen sense of humor, his range of human sympathies, all endear him to those who know him well. Above all, his sterling character born of deep conviction makes him a true representative of the common man, that is the mainstay of a free people. The scorn which he heaps upon the mere intellectual runs like a red thread through these discourses on political fundamentals. Take, for example, this sample. "Beard: Which Walter Lippmann? Whiteworth: What do you mean by that? Beard: I mean that in the course of his meanderings he has been on nearly every side of every question, in one way or another, from socialism to world salvation."[7] Beard has hoed a straight row. He has always been, and he remains in this book, the ardent American progressive, the friend of the people, the believer in the American destiny.

And this brings us back to our original query. What is it that makes *The Republic* at this time appeal to both conservatives and liberals? Part of the explanation may, of course, lie in the fact, if it be a fact, that the people writing the two magazines are of rather similar opinions. In any case, the positions of the liberal conservative and the liberal liberal and the radical liberal have had a tendency to merge under the pressure emanating from the Fascist and Communist elements. Beard is certainly neither one nor the other. He has a firm grip on the quintessence of American constitutional democracy. He has, at the same time, honest doubts concerning its viability in and applicability to

7. P. 289.

contexts other than the American. These doubts are not without foundation. Yet this reviewer believes that they are going to turn out true only if American policy is guided by them. We have arrived at a juncture in world affairs where we have an opportunity to shape the world in our image, if we will. If our faith in our own convictions is not strong enough, the world may go another way. So doing, it may one day turn upon us. It is upon this score that Beard fails us, believers in America's spiritual destiny, at this decisive hour. Yet even the founders of the Republic had this faith. In Beard's beloved *Federalist* we read: "It seems to have been reserved to the people of this country, by their conduct and example, to decide . . . whether societies of men are really capable or not, of establishing good government from reflection and choice. . . . The crisis, at which we are arrived, may be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act, may . . . deserve to be considered as the general misfortune of mankind." [8] Beard exclaims toward the end, when opposing the gloomy prophets of fate: "Besides fate or determinism, there is *creative intelligence* in the world, and there is also *opportunity* to exercise our powers, intellectual and moral." [9] Why does our beloved uncle Charley refuse to recognize the direction in which that creative intelligence is pointing all over the world today? The world is one and yet it is not. There lies the task of the future.

CARL J. FRIEDRICH †

LAWFUL ACTION OF STATE MILITARY FORCES. By Edmund Ruffin Beckwith, James G. Holland, George W. Bacon, and Joseph W. McGovern. New York: Random House, 1944. Pp. xviii, 216. $3.00.

No more extraordinary result of our dual system of government exists than our system of state military forces. Unquestionably the system seems stranger to us than it did to the framers of the United States Constitution, who had no difficulty in visualizing the states in their former status of full sovereignty. It is hard to realize that a state may, under section 10 of article I of the United States Constitution, wage war if invaded or in imminent danger, not merely in the sense that an aroused citizenry, in the phrase of William Jennings Bryan, would leap to arms between sunrise and sunset, but in the same sense that Russia is now waging war against Germany. Then, too, there is an eerie quality about a state of affairs under which a young broker who has joined the "squadron" can be called to the telephone at a deb party and find himself in a couple of hours at a gate in a barbed wire fence around a steel mill hold-

8. HAMILTON, THE FEDERALIST (1788) No. 1, 1-2.

9. P. 342.

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ing a rifle and peering through the cold dawn at a threatening mass of pickets. Strange as the condition has been, people have accepted it like the weather. The introduction to *Lawful Action of State Military Forces* modestly states the authors' "belief" that it is the pioneer book in its special field. The statement might truthfully have been made much stronger. The subject is so difficult that it has taken a hundred and fifty years to get up the courage to tackle it. The lawful action of peace officers is probably just as difficult a subject, but the insolubility of that mare's nest of hair-line distinctions in the matter of the peace officer's right to arrest will never be cleared up so long as peace officers have that best of all defenses, "I am judgment-proof."

The young broker in the squadron has no such defense and his problems are even more difficult. As the introduction to *Lawful Action of State Military Forces* puts it: "The constitutional provisions authorize the maintenance by a state of military forces but inflexibly require that in every circumstance such forces are governed by the law of the land. All the rules of permissible action when state troops are on domestic duty are referable to this standard, so that in contrast to the unlimited violence which the soldier metes out to foreign foes his action at home is always restrained by the civil law." [1] In other words, the state militiaman is given the responsibility of producing military results but is deprived of full military powers. The Supreme Court in *Luther v. Borden* [2] settled everything with the pronouncement, "No more force . . . can be used than is necessary to accomplish the object," and took up the next case.

How lawyers ever kept to such a straight and narrow path of practicality as have the authors is almost beyond comprehension. Few would have the self-control to avoid the primrose path of speculation as to how, with state militia outlawed by section 61 of the National Defense Act of 1916,[3] guardsmen could be taken into federal service under their oaths as state militiamen.[4] Yet even the annotated, as opposed to the bare-text, edition of the book contains a minimum of logomachy. No better illustration of the way in which the handbook gets down to the facts of life can be found than its treatment of the problem of when to shoot into a mob. The tragic "volley over the heads of the crowd" is properly condemned. Gunfire "should never be employed ineffectually or as a mere threat." [5] The authors are willing to concede that picketing can be peaceful, yet go as far as to say that when picketing in the particular dispute has always resulted in violence for which the pickets or their sympathizers were responsible, then the right of picketing must give way before the more necessary obligation of the state to preserve law and order. Evidently, how-

1. P. xv.
2. 7 How. 1, 46 (U. S. 1849).
3. 39 STAT. 166, 198 (1916), 32 U. S. C. § 194 (1940).
4. Sweetser v. Emerson, 236 Fed. 161 (C. C. A. 1st, 1916).
5. P. 104.

ever, the authors have not stretched their consciences by making things clear which actually are confused. There is, or used to be, a system of teaching law under which the subject is carefully shorn of all inconsistencies and the right answers to the examination questions are those which flow logically from the "first principles" with which the teacher has chosen to start—splendid training for the young folks, but one must not forget to tell them that the ammunition with which they are being furnished is blank. There is no such danger here. The occasional statement in the book, "That is a question which has not yet been decided"—as, for instance, with respect to the jurisdiction of military commissions and provost courts over civilians—heightens the impression given the reader that he is receiving instruction, not mere mental training.

The excellent discussion of the use of state troops under the constitutional provision for their employment to repel invasion was happily of more obvious importance when the Japanese still held Kiska and Attu and the Germans still held Stalingrad. No one would, however, advocate its omission on that account. It is to be hoped that England had something comparable ready in the dark days of the Battle of Britain. Surely, we had nothing of the kind.

It is hard to find fault with the manual. At first blush, some of the decisions when translated into soldier's language are startling. For instance, it is stated that the courts will not review a refusal of the governor to call out the troops, but that if the governor does decide to call them out, the courts will review his decision if the facts compel a finding that his action was designed to serve an illegal purpose or was capricious or arbitrary.[6] Few lawyers have realized that the effect of *Sterling v. Constantin*[7] on the doctrine of the separation of governmental powers was to form a rule that while the court cannot order out state troops the federal court, at least, can order them back; but that seems to be the simple truth and another of the difficulties of state soldiering.

To an outsider it appears to have been a mistake for such a practical treatise to have forsaken the term "martial law." One cannot but regret that some other way was not found for emphasizing the theme of this book that there is no such thing as martial law and that what is commonly meant by the term is the state of affairs that exists wherever competent authority has directed that local executive power shall be partly or wholly exercised by the military commander during the emergency. It is all very well for the authors, at the first place where the subject comes up, to explain that the better term "martial rule" will be used instead. Some, indeed it is to be hoped a great many, will read from cover to cover; but more will use the book as a source of answers to particular problems. They are likely to be puzzled by the use of an unfamiliar term for a familiar idea, just as lawyers are tormented by

6. P. 45.
7. 287 U. S. 378 (1932).

the modern special-definition form of statute, each word of which, like Humpty Dumpty's, "means just what I choose it to mean—neither more nor less."

Perhaps we are given all that there is on the right of state troops to enter without a warrant, but after reading the book one is still puzzled by that problem. In nonessential matters the advice seems sometimes too timid. Of all the measures which might be used to prevent the recurrence of illegal sales of liquor, destruction of the stock seems the most reasonably required, yet the state soldier is cautioned against it. Much of our liquor legislation is directed toward the well-known propensity of alcohol to run through a keyhole. Yet no one could ask for a more encouraging treatment of the fundamentals, such as the critical question of the use of force: "The troops act in defense of all the people and will never be on the scene except in time of great public danger so that it may be appropriate for them to use a degree of force which will be instantly decisive although such force might be excessive if used in the ordinary police control of individual wrongdoing. Should an officer or soldier be brought before a military or civil court on the charge that he used excessive force, the court will take into account the facts as the officer or soldier had reason to believe them to be at the time he acted." [8]

The title of the book, *Lawful Action of State Military Forces,* is to some extent a misnomer, unless read in the light of the difficulty of expressing two differing ideas in one phrase. About a quarter of the text is devoted to military justice as affecting the members of the armed forces themselves. Far from the book's being any less valuable on that account, it is more valuable than its title indicates. The state soldier who is to be called upon for legal advice or action will find within its covers (especially the edition containing in a supplement annotations on the law, a list of forms, and a topical summary of the rights of officers and men) about everything there is to know about this hitherto untouched subject.

It is not safe for a common lawyer to say that the book ought to be in the hands of every state soldier; that involves the expression of an opinion in the field of military policy. But it is safe to say that, if it is good for a given state soldier to know the law of his profession, he ought to have this book. The authors who have set out into the unmapped wilderness of their subject and given their services, and the publisher which has done its part at cost, deserve the thanks of the country for their patriotic enterprise.

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8. P. 100.

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MAJORITY RULE AND MINORITY RIGHTS. By Henry Steele Commager. New York: Oxford University Press, 1943. Pp. 92. $1.50.

MR. COMMAGER'S little book is a reconsideration of a very old, a very basic, and a very challenging question, "the problem of majority rule versus limited government." [1] His treatment, however, is limited to American experience: and his book resolves into a bitter attack upon judicial review.

According to Mr. Commager, American democracy embodies two fundamental principles: "the principle that men make government, and the principle that there are limits to the authority of government." [2] A philosophy of the "tyranny of the majority" was formulated by conservatives desirous of protecting minority rights. Not content with limiting the jurisdiction of government through checks and balances, they added the new institution of judicial review.[3] Mr. Commager develops what he characterizes as the Jeffersonian contention that judicial review is "wrong in theory and dangerous in practice," [4] and argues that American experience justifies Jefferson's faith "that men need no masters—not even judges." [5] The majority-minority paradox is resolved in favor of the majority. He concludes that we should "take more seriously" Jefferson's "faith in majority rule and his fear of any institution which repudiates the philosophy of majority will or deprives it of the advantages of free play," [6] and that we have no reason to be less confident than Jefferson was "of the ability of majorities to tolerate dissent or of the safety with which error may be tolerated where *reason* is left free to combat it." [7]

The question which Mr. Commager discusses is one which has been heatedly debated among the present members of the United States Supreme Court and his book is dedicated, appropriately enough, to Justice Frankfurter, who, in his opinions in the *Jehovah's Witnesses* cases, has consistently upheld the right of legislative majorities to regulate this religious minority, and who has cautioned his colleagues that their use of the judicial negative in the field of civil liberties may jeopardize democratic processes.[8] Mr. Commager, however, takes a much more extreme position on the vexing question of judicial review than the Justice whom he admires. As Justice Frankfurter has pushed further the Holmes doctrine of "the reasonable man," so Mr. Commager's condemnation of the use of the judicial negative is more sweeping than Frankfurter's. In stating the issue in such dogmatic "all" or "none" terms he weights the scales in favor of his "none" verdict. Justice Frankfurter's position is more

1. P. 4.
2. *Ibid.*
3. P. 79.
4. P. 80.
5. P. 82.
6. *Ibid.*
7. P. 83.
8. West Virginia State Board of Education v. Barnette, 319 U. S. 624, 646 (1943).

guarded. In discussing the role of the Court in the *Gobitis* case, for example, he says that "guardianship of deeply-cherished liberties may be safely entrusted to legislatures *where all the effective means of inducing political change are left free from interference.*" [9] The qualification is important, and it is one which Mr. Commager does not make.

Several important phases of the majority-minority issue are omitted from Mr. Commager's discussion. He fails to give due emphasis to the fact that today's "minorities" may be tomorrow's "majority" and that in the long run restrictive legislation may stifle the very "majority" which he holds so dear. Perhaps the most serious limitation of the study is its preoccupation with the individual and its failure to give proper weight to the importance of the group character of present-day society. As Mr. Riesman has suggested, the time has come for a reorientation of our discussion of civil liberties issues in terms of the role played by groups in public affairs.[10] The same would seem to be true in the case of the majority-minority paradox.

One may agree with much of Mr. Commager's criticism of the use of judicial review in the past and yet not agree with his argument that it has no place in the future. As Justice Robert H. Jackson pointed out before he became a member of the Supreme Court: "The vice of judicial supremacy, as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts." [11] Is it not possible that judges with a proper sense of restraint may reforge it into an important instrument of democracy by using it to keep open the avenues of peaceful and democratic conciliation? It is a thesis suggested by Justices Stone and Jackson in their opinions in the *Jehovah's Witnesses* cases [12] and ably argued by Mr. Lusky in the pages of this *Journal*.[13] It is a point of view which Mr. Commager mentions, but fails to explore fully. Although "the real battles of liberalism are not to be won in any court," as Mr. Commager very properly points out, the fight may well be lost there.

LOUISE OVERACKER †

9. Minersville School District v. Gobitis, 310 U. S. 586, 600 (1940) (italics added).

10. This point is ably discussed by David Riesman in *Civil Liberties in a Period of Transition* in PUBLIC POLICY 1942, 33-96.

11. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941) 321.

12. See Chief Justice Stone's opinion in United States v. Carolene Products, 304 U. S. 144, 152 (1938) and his dissenting opinion in Minersville School District v. Gobitis, 310 U. S. 586, 605 (1940); see also Mr. Justice Jackson's opinion in West Virginia State Board of Education v. Barnette, 319 U. S. 624, 625 (1943).

13. Lusky, *Minority Rights and the Public Interest* (1942) 52 YALE L. J. 1.

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CRIMINAL CAREERS IN RETROSPECT. By Sheldon and Eleanor Glueck. New York: The Commonwealth Fund, 1943. Pp. x, 380. $3.50.

THE Gluecks' achievement is unique. For over fifteen years they have followed the life course of 500 youthful offenders after their release from the Massachusetts Reformatory and published results after every five-year span. This volume embraces the third such span.

The average age of the men at their discharge from the reformatory was twenty-five years. They are, consequently, about forty years old now and well along in middle life. The authors started with 510 men of whom 439 were still living at the onset of the investigation presented in this volume.

Five full stories of the lives of nine of the men are given as fair examples, and in the ensuing chapters reference is repeatedly made to these life-histories. In the first part of the book there are chapters presenting and discussing statistical material on environmental circumstances, family relations, and economic responsibilities, work and leisure, criminal conduct, differences and resemblances between various offenders, reasons for relapse into delinquency.

Concerning criminal conduct the authors say: "Obviously, the improvement in the third over the second period is less marked than between the second and first." [1] During the report period 208 men (of 439) were arrested, "which represents 57 per cent of the group about whom the information was known and applicable, as compared with 55.1 per cent arrested in Period II and 70.7 per cent in Period I." [2]

The chapters of the second part of the book deal with the response of offenders to peno-correctional treatment, their behavior during treatment, and successes and failures inside and outside of institutions. Some boys do better under parole, some in institutions; reasons for this difference are discussed. Better natural endowment plays a role in favor of freër treatment. A few men did well in the armed forces (the report period ends 1937!); some did not.

Criminal Careers in Prospect is the title of the book's third part. Its chapters are devoted to predicting behavior during the fifteen years of observation and under various forms of extra- and intramural treatment. In the last chapter implications of the findings are developed.

There is an appendix with definitions and three appendices with elaborate statistics. The alphabetic index should be mentioned for completeness' sake and for the regrettable reason that there are still scientific books published without an index.

In the last chapter a number of proposals are presented. Offenders ought to be classified according to prediction or predictability. According to these predictions correctional measures should be instituted. The retributive-expiative theory should not dictate sentences. This criminological or penological

1. P. 124.
2. P. 109.

approach can only be performed by a board consisting of particularly trained specialists (including judge, psychiatrist, psychologist, social worker).

One paragraph in particular sums up clearly how the authors have come to see their fundamental problem:

"We are thus led to the conclusion that it is not primarily or fundamentally either chance or the fear of punishment, but rather the presence or absence of certain traits and characteristics in the constitution and early environment of the different offenders, which determines their respective responses to the different forms of treatment and determines, also, what such offenders will ultimately become and what will become of them. Those who behaved well, either during or after treatment, were, as a class, more favorably endowed by Nature and circumstanced by Nurture than were those who did not respond well." [3]

It appears to me that in this book "the presence and absence of certain traits and characteristics in the constitution" are given more leeway than they had been given before. The overwhelming influence attributed to the environment, particularly in the earlier years of life, is dimmed down a little. It must, of course, be realized that constitutional assets and liabilities can only develop and function in environments. The great task is to find out which environmental factors fit best with which potential assets and which environmental factors disfavor the development of potential liabilities. We certainly are glad that in this tremendous task criminology has begun to coöperate in research and in practice. Sheldon and Eleanor Glueck have been doing pioneer work in the field and have done it very well.

EUGENE KAHN †

TRADING WITH THE ENEMY IN WORLD WAR II. By Martin Domke. New York: Central Book Co., 1943. Pp. xvi, 640. $10.00.

THE development of economic warfare, which has reached proportions never heretofore known, is evidenced in this country, aside from blacklists, preëmptive buying, etc., by the "freezing" of the funds of all European and Japanese foreigners through whom American assets might have reached the enemy countries, and by the vesting of new powers in the Alien Property Custodian. The vast occupations of the enemy Powers have seriously modified the old conceptions of nationality or domicile as the test of enemy character, and have expanded greatly the administrative definitions and classifications of "enemy" and "ally of enemy." The "loyalty" test beclouds former categories. The expansion of the concept of "enemy nationals" and of "nationals of a designated enemy country" has made the experience of earlier wars somewhat less useful, and has made an authoritative guide to their interpretation indispensable.

3. P. 285.

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Such a guide is furnished by the work of Mr. Domke. He brings to the task not only a wide European experience in the conflict of laws, arising out of the impact of war on private property relations, but has acquainted himself in truly admirable fashion with the statutes, administrative regulations, and cases dealing with all aspects of this complicated subject, not only in this country but in other countries as well. While much of the material on foreign funds and alien property control is statutory, and while he presents the cases at considerable length, the presentation makes interesting reading, in which the background of an expert is evident throughout. Even the occasional foreignisms [1] lend an authenticity to the work which is not unattractive.

One of the manifestations of the new dispensation is the recession of Congressional control, if not indeed of law, and the advance of administrative regulation, if not discretion. This makes the task of the lawyer in weaving his way through the mysterious web of administrative regulation the more difficult. Whereas during the first World War we found that section 9 of the Trading with the Enemy Act [2] afforded a judicial remedy against mistaken seizures by the Custodian, a section which alone was deemed to give constitutionality to the statute, we now find that a claims committee in the Custodian's office decides questions of ownership without judicial review. The contest over this issue is not yet settled.

The occupation of so many countries by the enemy Powers under various régimes, the existence of so many governments-in-exile located at London, has brought to the courts and to the administrative agencies problems rare, if not always unique, in character. The position of Unoccupied France, making a distinction between blocked nationals and enemy nationals, was new. It would be interesting to know how the South American countries that have frozen foreign assets have administered their law. Sometimes persons are exempt from the classification of enemy, but not their property. Only an authoritative guide can clarify the confusion.

Trading is so largely connected with suing that two chapters of the book are devoted to the subject of suits by and against enemies. The new developments of economic warfare have necessitated chapters on Acting for the Benefit of the Enemy, and Blacklisted Individuals and Corporations. Patents and trade marks and licensing, as an exemption from the restrictions of the Trading with the Enemy Act, receive important attention. So does foreign exchange control, independently of freezing, and the many problems involved in the effort of the governments-in-exile to assume control over the assets of their nationals located in third States. Some of these problems in the conflict of laws have not occurred before.[3]

1. See, inter alia, pp. 4, 42, 50, 51, 58, 59, 66, 76, 78, 93, 127, 131, 140, 150, 182, 188.

2. 40 STAT. 411 (1919), 50 U. S. C., App. § 9 (1940).

3. See the reversals by the Second Circuit Court of Appeals in the *Swarzkopf* and related cases, United States *ex rel.* Zdunic v. Uhl, 137 F. (2d) 858 (C. C. A. 2d, 1943); United States *ex rel.* Schwarzkopf v. Uhl, 137 F. (2d) 898 (C. C. A. 2d, 1943).

The body of the work consists of only 381 pages. Approximately 170 pages consist of appendices, embracing statutes, regulations, and judicial opinions, both of this country and of the British Empire, which are important in understanding the interpretations of the Trading with the Enemy Act. This includes the *Colonna* [4] and the *Kawato* [5] cases in the United States Supreme Court, and the *V/O Sovfracht* case [6] in the House of Lords. A table of cases, a list of authors cited, bibliography, and subject index complete a work that must be welcomed by all students and practitioners of these new phases of economic warfare..

EDWIN BORCHARD †

AMERICAN CONSTITUTIONAL DEVELOPMENT. By Carl B. Swisher. Boston: Houghton Mifflin Co., 1943. Pp. xiii, 1079. $4.50.

JUST why historians have pretty generally deserted the field of American constitutional history, once their favorite preserve, is not entirely clear. Perhaps it is because the fashion in which they once studied institutional origins proved to be unrewarding; perhaps, because constitutional history came to be studied so largely in terms of Supreme Court decisions and they felt incompetent in that sphere. There has, at any rate, been a regrettable scarcity of writing in this field by historians. When, for example, the Historical Association published a volume growing out of the 1937 Sesquicentennial meeting of the Association entitled *The Constitution Reconsidered,* only six out of a total of twenty-seven essays dealt with the American Constitution, and only two of those were by historians. In that year Professor McLaughlin published his *Constitutional History of the United States,* a book which clearly belongs to the writing of the previous generation, as indicated both by the point of view displayed in it and by the inclusion of only two chapters (out of fifty-one) dealing with the period since the Reconstruction. Two volumes of Professor Hockett's *Constitutional History of the United States* appeared in 1939, but he drew even less upon recent writings than had Professor McLaughlin, and the second volume ends with the year 1876. A third projected volume has not appeared.

It remained for a political scientist to make the first major attempt to prepare a survey of American constitutional history based upon the writings of the last half-century. It is a very careful and, within the scope of the author's plan, a very thorough piece of work. It is not intended to be a work of inter-

4. *Ex parte* Colonna, 314 U. S. 510 (1942).

5. *Ex parte* Kawato, 317 U. S. 69 (1942).

6. Sovfracht (v/o) v. Van Udens Sheepvaart en Agentur Maatschappij (N. V. Gebr.), [1943] A. C. 203.

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pretation or one which deals primarily with constitutional ideas. Rather is it intended as a descriptive survey, one which will be used most frequently as a text for courses on American constitutional history. It is, in nearly every respect, clearly superior to any of the existing texts.

One of the major differences between Professor Swisher's book and those to which I referred above is indicated by his allotment of space. In the present work a single chapter of twenty-one pages is devoted to the antecedents of the Constitution, while over two-thirds of the book deals with the period since the Civil War, and five hundred pages of that is concerned with constitutional development in the twentieth century. There are five chapters on the New Deal era.

Professor Swisher has performed a very considerable service in organizing and describing the vast amount of material which has poured from the legislative hoppers and the court rooms since the Civil War, but I do regret that the amount of detail in the last two-thirds of the book was at the expense of acute condensation in some of the earlier sections. I can agree that there is a lot of good secondary material on the period leading up to the establishment of the present form of government, and that a careful treatment of the last seventy-five years was more needed than a restatement of what had been done before. But it is to be remembered that Professor Swisher's book is primarily a text; it seems to me that in a book intended to serve that function he has not sufficiently dealt with the essential ideas and institutional practices which go far toward explaining both why we have the system that we have, and why it has been successful.

There was a longer period of constitutional development in this country before 1787 than there has been since 1789. I am not arguing for an equal amount of space for the earlier period, but I do think that any text on American constitutional history should attempt to indicate the development in this country of the theory and practice of representative institutions, the separation of powers, the conception of fundamental law and the practice of written constitutions, the origins of judicial review, and the rise of civil liberties. The Federal Convention of 1787 is entitled to more than four pages in a book in which ten of its pages deal with the story of Muscle Shoals and Boulder Dam, a book that is, after all, devoted largely to the interpretation of the document produced by that Convention.

The discussion of the Articles of Confederation is relatively adequate. The student should get from it an understanding of the contribution made by that important experiment, but I do not see where the student would get any understanding of the nature or importance of the first state constitutions, documents which greatly influenced the work of the founders, any more than he would here obtain any clear idea of the extraordinary amount of basic agreement on fundamental political ideas that there was in the Federal Convention.

The book is focused almost entirely on the development of the national constitutional system, and that is justifiable for the period since the Civil

War. I think that it leads to a somewhat inadequate conception of constitutional development not only for the period before 1787, but also for that between 1789 and 1861.

Mr. Swisher's treatment of the work of the Supreme Court in the decades preceding the Civil War is excellent, as is his discussion of the constitutional problems growing out of the Bank and the slavery controversies. But he says virtually nothing about the great constitutional changes, such as the broadening of the suffrage, which were taking place in the states. He points out, quite correctly, that Congress had, prior to 1860, enacted few regulatory statutes applying to private enterprise.[1] He then goes on to say that "the country was steeped in the laissez-faire ideas of Adam Smith."[2] This view leaves out of account the great mass of state legislation through which the states both regulated and initiated economic enterprise. And there is abundant evidence that the doctrine of laissez-faire was just beginning to be widely accepted by 1860. It did not flourish in this country until the seventies.

But if I am critical of Mr. Swisher's allotment of space and attention in the part of the volume devoted to the period before the Civil War, I have great admiration for his account of the last seventy-five years. His discussion of this difficult period is marked by exceptional clarity and accuracy. It will be of value both as a text and as a book of reference. A very full and careful index adds greatly to its usefulness in the latter category.

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1. P. 272.
2. *Ibid.*

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