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REVIEWS

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REVIEWS


The defeat of human aspirations following profound social upheavals is frequently accompanied by loss of confidence in rational methods as ways of resolving the problems of society. This fact is hardly puzzling to those familiar with the psychological and institutional conditions necessary to sustain rational effort. It is nevertheless a striking illustration of the force of romantic illusions that during periods of great social crisis even professional scientists often claim superiority for some oracular "higher wisdom" over the method of science. And there is at least the appearance of paradox in the fact that knowledge acquired through the operation of scientific method comes to be used as evidence for the alleged incompetence of that method to advance the understanding of social questions. Professor Morgenthau's book presents such a paradox. For it aims to show, in the light of evidence drawn from what is presumably a scientific study of human history, that many of our political failures have their source in the attempted extension of scientific method from the natural to the social sciences, and that this method is inherently incapable of solving the problems of the social world.

Mr. Morgenthau maintains that the rationalistic philosophy which supports the faith in the merits of scientific method misunderstands the nature of man, of the social world, and of reason itself. It misunderstands the nature of man, because it fails to recognize that men have spiritual and biological needs as well as rational ones, and because it thereby ignores the irrational forces that exercise supreme power in human action. It misconstrues the nature of the social world, because it does not realize that power politics, rooted in an ineradicable lust for power, is the basic feature of social life. And it misconceives the nature of reason, because it wrongly imagines that reason is causally efficacious in bringing into existence its own ideals, and because it mistakenly supposes that there are universal formulas of human behavior which reason can discover. According to Mr. Morgenthau, the world contains intrinsically irrational and evil forces constantly at battle with one another, so that it is not the harmonious structure "scientism" (his name for the philosophy of modern empirical rationalism) takes it to be. The knowledge required to direct into salutary channels the ineliminable struggle for power inherent in social life cannot be supplied by science. Such knowledge is the possession of the statesman alone,—of that rare creature who recognizes "the eternal laws by which man moves in the social world. . . . The key to those laws. . . is in the insight and the wisdom by which more-than-scientific man elevates his experiences into the universal laws of human nature."

1. P. 220.
Mr. Morgenthau's intended target is the empirical rationalism of modern natural science and the use of its method in social inquiry. His actual fire, however, succeeds only in bringing down the already dead duck of 19th century individualistic liberalism. He makes telling though familiar criticisms of the shallow optimism and the tidy rationalism of what is essentially the philosophy of the Enlightenment; and he scores heavily against those who place a fatuous and sentimental reliance on mere "appeals to reason" for solving the problems of men. But he obtains a crushing victory over "scientism" only by using the debater's trick of so exaggerating the claims of empirical rationalism that even to its proponents the views demolished are legitimate subjects for ridicule. For example, the view Mr. Morgenthau attributes to scientism, that the power of perfectionist ideals is sufficient to transform the actions of men simply through the rational force of those ideals, involves a conception of mind and reason that empirical rationalists themselves vigorously oppose as a superstition. Again, scientism undoubtedly is folly if a representative instance of the operation of scientific method in politics was the use of sanctions in the Italo-Ethiopian war; but, by parallel reasoning, the use of scientific method in medicine is also folly if the use of horoscopes by "scientific" astrologers may be taken as representing that method in the study of the outcome of some disease.

A coherent view as to the nature of the scientific method he ostensibly criticises is not one of Mr. Morgenthau's prominent possessions. He apparently believes this method is competent to establish only "single tangible facts," though he also seems to hold that it can be employed successfully only in those domains where events are subject to strictly universal laws. On the other hand, he accepts uncritically the interpretations of modern physics popularized by Eddington and Jeans; and by shutting his eyes to the great precision with which many events can actually be predicted, he is able to affirm a radical "indeterminism" with respect to the behavior of all individuals—as if the statistical character of current theories of sub-microscopic particles disproved the causal nature of macroscopic transactions. But Mr. Morgenthau also declares that "The social sciences do not need to be brought to the level of the natural sciences; they are already there as far as the logical structure of their laws is concerned." He thus succeeds in leaving his readers completely at sea as to why, if this is the case, scientific method is less applicable in the social than in the physical domains of nature. In spite of all that has been written on the subject, he still thinks the plurality of causes and of effects are "facts" which a scientist must recognize as impediments. And he

2. P. 173.
3. P. 104.
4. P. 220.
5. P. 131.
8. P. 127.
regards the alleged inability of men to become aware of the "inner consciousness" of their fellows as a serious obstacle to the use of scientific method in human affairs— as if the possibility of reliable causal imputations (in the conduct of industry or foreign affairs, for example) depended exclusively on a direct apprehension of psychic qualities. The difficulties a social scientist faces in carrying on his inquiries are undoubtedly grave. Is it necessary to invent spurious ones?

Mr. Morgenthau's positive proposals as to how social problems ought to be approached exhibit an irresponsible romanticism. He rejects "scientism" because its universalist conception of social laws is allegedly unhistorical—though already J. S. Mill, for example, was entirely clear that the principles of Ricardian economics are applicable only under certain historical conditions. But what is sauce for the goose is evidently not sauce for the gander, for as the passage cited above shows, Mr. Morgenthau has no scruples in affirming "eternal" laws, provided that "more-than-scientific" man asserts them. There can be no mistaking Mr. Morgenthau's low opinion of what controlled inquiry can contribute to the understanding of social processes, or his enthusiasm for men of "higher insights." He has the courage to say that "There is no indication that the trained social scientist as actor on the social scene is more competent than the layman to solve social problems, with the exception of technical problems of limited scope"; and he does not hesitate to assert that "while fundamental social problems are impervious to scientific attack, they seem to yield to the efforts of ill-informed men who, while devoid of scientific knowledge, possess insights of a different and higher kind." Advances made through institution of rational methods of inquiry into such matters as public health, treatment of the insane, administration of the law, or education of the young, are apparently insignificant and merely technical achievements in his eyes! Just what social problems exist which are not specific and technical, is not clear from Mr. Morgenthau's rhetoric. And it is worth at least passing mention that the high esteem he exhibits for the daemonic "ill-informed" man endowed with a "higher kind" of wisdom, involves a fundamental surrender of critical intelligence to dogmatic authority. For to accept an insight simply because it is claimed to be a higher wisdom, is to declare as out of bounds the demand for a critical public appraisal of policies arrived at by such insights.

The pinnacle of political wisdom, Mr. Morgenthau contends, is recognition of the tragic character of life. Life is necessarily tragic, according to him, simply because all action is inherently "sinful" and "evil"—sinful and evil, since the springs of action are "irrational" forces, and the consequences of our actions can be neither calculated in advance nor controlled. However,

9. P. 129.
12. P. 212.
political success must be measured by the degree to which one can maintain and increase his power over others;\textsuperscript{15} and accordingly, "To know with despair that the political act is inevitably evil, and to act nevertheless, is moral courage."\textsuperscript{16} Mr. Morgenthau does not realize that his supposition that forces are inherently irrational is intelligible only on an anthropomorphic conception of nature. For the term "irrational" is meaningful only if the term "rational" is—and how is one to conceive of "rational forces" if not on the hypothesis of an over-all plan and design? Indeed, Mr. Morgenthau's entire conception of human nature is built squarely on Calvinistic foundations, though without benefit of Christian theology. He defines the good life (with, however, a despairing "alas!") in terms of domination over others; but he thereby deprives himself of any basis for evaluating political behavior except in terms of successful assertion of power. His political ethics is thus inherently amoral, and in his conception of things the anguish of those who have succumbed in the struggle for power must simply be accepted as part of the irremediably sinful character of the world. That Mr. Morgenthau should think this is higher wisdom is certainly good reason for adopting a tragic view of life!

Mr. Morgenthau has misconceived the issue which those who see some hope in the extension of scientific method to social problems regard as central. His emphasis is on intuition and insight as sources of political wisdom, and he appears to think proponents of scientific method wish to exclude artistic and religious experiences as contexts in which inspiration and belief may arise.\textsuperscript{17} But what is at stake in the debate between himself and "scientism" is not any question concerning the sources or origins of political ideas and values; what is at stake is the question how claims to knowledge and wisdom may be warranted. The recommendation to use scientific method is the recommendation of a way for deciding issues of factual validity and adequacy; it is not the recommendation of an exclusive way in which the universe may be confronted and experienced. Until Mr. Morgenthau recognizes this difference between questions of validity and of origin, he will be fighting with wind-mills. And until he proposes a better and more reliable method for establishing claims to knowledge than the method of science, his eloquence in behalf of "more-than-scientific" man will count as eloquence in behalf of intellectual obscurantism.

\textit{Ernest Nagel}\textsuperscript{†}

\begin{enumerate}
\item P. 196
\item P. 203.
\item P. 123.
\end{enumerate}

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This treatise on the two chief outcasts of our constitutional system, the alien and the Asiatic, is a timely probing of the depth of our American democracy. Its list of legal atrocities constitutionally committed upon Americans or would-be Americans who did not have the foresight to be born in the proper places has all the macabre fascination of old ethnology books which recount the horrors found by missionaries among benighted peoples lacking properly supported agencies of civilization and true religion.

Today, more than ever, such a study has meaning even for native-born Americans of whitest ancestry. For none of us can be sure of rights which are denied to the meanest member of society. And since the Supreme Court in Korematsu v. United States¹ has held that American citizens of a feared or hated stock may be taken from their homes and put behind barbed wire without notice of charges, indictment, jury trial, or other opportunity to be heard in self-defense, all of our civil rights are subject to forfeiture if nations or races from which any of us are descended become feared or hated.

Indeed, the implications of the Korematsu case go even further. For, apart from the fact that a number of American citizens, of the same racial strain as Korematsu, refused to take a test oath of allegiance after imprisonment, the only ground advanced in the Supreme Court opinion for upholding the domestic deportation of American citizens without trial or hearing was the ethnological ignorance of the Court as to the truth or falsity of the theories upon which the military acted.

The language of the Court, "we cannot reject as unfounded. . . . We cannot say that the war-making branches of the Government did not have grounds for believing. . . . we could not reject the finding . . . ," taken in conjunction with the anthropological opinions of the Commanding General concerning "ties of race, culture, custom and religion," leaves all our civil rights dependent upon race theories of generals and upon the extent to which judges are equipped to identify decayed anthropological doctrines.

The extent to which discriminations based on race and alienage have been written into our Federal and State laws, particularly in the years since the first World War, is not generally appreciated. So far as I know, the only comprehensive effort to trace the scope of such discrimination prior to Professor Konvitz's work was made under Nazi auspices in an effort to prove that Americans were doing circumspectly or hypocritically what the German Government did more honestly.²

The list that Professor Konvitz gives us of discriminations against aliens

1. 323 U. S. 214 (1944).
and Asiatics that have been upheld by the courts is impressive and dismaying. About a hundred Supreme Court cases bearing on the constitutionality of such discriminations are patiently analyzed. The cases cover exclusion and deportation of persons considered to be aliens, disallowance of citizenship, denaturalization, exclusion from various professions and occupations, disabilities with respect to landholding, segregation, miscegenation, registration, and internment. What stands out in a review of these cases is the consistency with which the Supreme Court has followed the pseudo-science of the "superior Aryan race" invented by the precursors of Fascism, Gobineau and Houston Chamberlain. And this, as Professor Konvitz demonstrates, has not been merely a matter of yielding to popular waves of hysteria that culminate, from time to time, in legislation. Rather, the Court has repeatedly pressed the claims of racist theory beyond any existing legislative expression. Although Congress put a stop to the naturalization of Chinese in 1882, it was the Supreme Court, speaking through Mr. Justice Sutherland, that in 1922 put a stop to the naturalization of other Asiatics. As when it put a stop to the naturalization of Asiatics it provided itself with a bootstrap to uphold discriminatory land laws, a year later.

"It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries."  

Thus we denied the most basic of human rights to half the world's population, discredited western liberalism in Asia, and stirred up resentments which finally culminated in war. It became a simple matter thereafter to argue that descendants of human beings so mistreated by us must hate us, that "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken," and that as a matter of self-preservation we must put behind barbed wire the children of parents whom we wronged a generation ago. This pattern, based on fear or hatred of racial groups we have injured, is not entirely a new pattern in American constitutional law. It began in our relations with Indians—about which Professor Konvitz is substantially silent, despite the claims of the blurb writer on the back cover. It took new roots when Congress decided in 1882 that the best way to stop violence against Chinese immigrants was to bar them from our land and that the best way to prevent violation of their rights as citizens was to prevent those who were already here from acquiring citizenship. But the real impetus to racial intolerance came in the wake of the first World War, in

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accordance with a Chinese proverb that the first result of a war is for the
adversaries to adopt each other's vices. It was in that atmosphere that we
wrote on our statute books in 1924 that Germans are four times as worthy of
admission to our country as Hungarians, that Japanese are not worth admit-
ting at all, etc. And it was in this atmosphere that Justice Sutherland, in 1923
and 1923, wrote the historic opinions of the Supreme Court which put a stop
to the naturalization of Japanese, Hindus, and other Asiatics, on the basis of
a super-Aryan myth that excludes even the original Aryans of India, not to
mention children born in Bethlehem and other towns of Asia Minor.

With that characteristic love of buck-passing which is so fundamental a
part of the judicial process the ethnic views of the Court in 1923 were as-
ccribed to the Founding Fathers, who were not present to deny the charge. The
draftsmen of the 1790 Naturalization Act, we are told, had thought of white
men as blue-eyed and light complexioned and while the word "white" might
possibly be stretched to cover the "dark-eyed, swarthy people of Alpine and
Mediterranean stock," it could not be stretched to include Caucasians of
darker hue. One wonders: Is this a nation or a beauty contest that Justice
Sutherland is talking about?

So far as I know, the annotators have never gone to work on the Declara-
tion of Independence. But when they do, they will find in Professor Kon-
vitz's book a good many potential footnotes to the phrase about all men being
created equal: for example, that Chinese immigrants are unable "to make any
change in their habits or modes of living"; that English aliens cannot be
trusted to operate pool rooms in a law-abiding manner; and that the Anglo-
Saxon names of our earliest legislators are an index of their racial origin and
of an intent to legislate for "their kind." These are cardinal dogmas of a
judicial anthropology that will one day have the same respect from thinking
men that is now paid to the judicial economics of earlier decades.

The case materials and the legislation with which Professor Konvitz deals
are dissected with a deft scalpel that uncovers the unspoken premises and
hidden consequences of statutes and decisions. Relevant legal and sociological
literature is brought to bear on the issues analyzed. Frequent reference to
arguments in briefs before the Court illuminates the scope of decisions. Apt
quotations from biographies of the justices help to clarify judicial motiva-
tions. The volume is thus an excellent example of the realistic jurisprudence
that has now moved from the stage of manifestoes and polemics to the stage
of constructive workmanship.

If there are weak spots in the volume, it is only fair to say that, by and

large, they are not original with the author. One finds, for instance, the common notion that propositions are either positive or negative and that the latter are harder to prove than the former—which overlooks the ever-present possibility of finding positive synonyms for negative terms and *vice versa*. There is the unguarded statement that immigrants do not furnish their share of leaders of liberal and radical thought which is no truer than the view that immigrants are as a class liberal or radical. The statement that Arizona Indians may not marry whites has not been true since 1942. In Arizona, Indians are the only people who can marry whom they please. But these, like the typographical errors that mar some footnote citations, are all trivial defects in a work that contributes so largely to the understanding of our Constitution and our national ethics.

One's chief regret is that the volume is too short. The author's sympathy for the downtrodden leads him to terminate his analysis when he finds an injury done to an alien here which we should resent if it were done to an American abroad. But this appeal to justice is generally unconvincing to those—and they are not all "corrupt politicians"—who think a nation's judges and law-makers have enough to do in protecting their own citizens. What would carry more weight in such quarters—which are highly and properly influential—would be a demonstration that while discrimination seldom destroys an outcast group, it very often corrupts the group that practices it and comes to rely upon it.

We have developed a civilized criminal law not by idealizing burglars, but by recognizing that the welfare of each of us depends upon the existence of legal procedures that accord even to burglars certain basic constitutional rights. Perhaps if the defenders of our civil liberties made less effort to arouse sympathy for cranks and Communists whose rights have been invaded and concentrated more on the harm that is done to the public health and safety when certain necessary apertures in the social anatomy are sealed, they would find more receptive audiences. Certainly the right to advocate unpopular ideas is of interest to very few, but the right to hear and consider such ideas put forward by others is of interest to all of us.

So, too, I think that a critique of our treatment of Asiatics and aliens, as of Negroes, Indians, Jews, and other under-privileged minorities, would be far more effective if, instead of concentrating on the effects of persecution upon the lives and feelings of the victims, a stronger analysis were made of the effects of such persecution in weakening our democracy, threatening our peace and security, imposing upon our Government new burdens of bureaucracy, and undermining the national economy. It seems to me that the critique

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13. P. 223.
15. P. 232.
which Professor Konvitz gives us would be vastly strengthened if he went on to analyze the injury done to society when we cannot hire a nurse to tend a sick child because she has not yet been naturalized, or cannot be naturalized because of her ancestry; when we cannot buy fresh and wholesome vegetables at reasonable prices because good farmers are driven off the soil for racial reasons; when we find ourselves involved in war situations because State legislatures are reckless in their insults to foreign nationals without ballots; when we are deprived of the aid of great scientists and much-needed technicians by a gerrymandered immigration law which makes the acceptability of pilgrims to these shores dependent upon their ancestry rather than upon their capacities to contribute to American life; or when our intellectual life and the development of a more mature labor movement are dampened by threats of deportation and by the growth of a "thought-police" bureaucracy that shows no signs of dissolving as our alien population dwindles.

It is well that one who appraises a course of decisions should make explicit the ethical assumptions from which he proceeds. This Professor Konvitz does with candor. On the title page of the volume appears a provision of the Mosaic law: "But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself."\(^\text{18}\) Judged by that civilized standard we have fallen a long way in the last quarter century of our national life: Yet, for the sake of the record, it should be noted that this was a statutory standard to which even the judges and administrators of the nation to whom the Mosaic law was given often failed to adhere. There is not much to choose between the "chosen people" theories of Ezra in Ezra 10: 16-17 and of Justice Sutherland in 260 U. S. 178 and 261 U. S. 204.

Still, the commandment of Leviticus 19: 33-34 retains its vitality and its capacity to inspire human effort after more than 20 centuries. Perhaps the Declaration of Independence will, too.

FELIX S. COHEN\(^\dagger\)


From the moment I became interested in Constitutional Law, the works of Edward S. Corwin of Princeton have been indispensable to me. First I was told, and then I learned for myself, that in the field of the Constitution and the Supreme Court he is a leading historian, interpreter and commentator.\(^\text{1}\) Needless to say, I turned to this volume of five lectures on Total War and the

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1. One may note, with or without comment, how many great students of the Constitution and the Court do not teach in law schools.
Constitution with high hopes. Except for the final lecture, it has both disappointed and annoyed me.

The principal drawback in these lectures is, I fear, that Mr. Corwin is riding several horses at once. For one thing, he seeks to present a running commentary on the events of the last six years, some of which he connects with the Constitution, some of which he doesn’t. For another, he seeks to present an analysis of constitutional development during the war years, which in itself gets tangled because it proceeds both on the level of judicial activity as demonstrated in pronouncements of the Supreme Court and on the level of governmental activity in the context of the distribution of power both within the Federal Government and between state and nation. On top of this he discusses the Constitution in its relation to the United Nations. This last point, it is only fair to note, is at least dealt with as a unit in a lecture entitled “Total Peace and the Constitution.”

It is the commentary on the events of the last six years which particularly annoys me. It seems to me that Mr. Corwin is simply rehashing, on a somewhat higher intellectual plane than is customary, to be sure, the isolationist-interventionist battle which preceded the war and affected the activities of the Government during the war. Such a rehash at this time does little more than cause one to cluck sagely or gnash his teeth angrily in accordance with the appropriate prejudice acquired while the controversy raged. And when Mr. Corwin attempts to evaluate the events he is commenting on, he gets into the fix that comes to anyone who tries to resolve the pre-war battle—that is, he can’t prove his point. For example, he notes that after the passage of the Lend-Lease Act, President Roosevelt tended to follow a course of executive initiative of a type “which, invoking the ‘Commander-in-Chief’ clause or some even vaguer theory of ‘executive power,’ proceeds to stake out Congress’ course by a series of fait accomplis.” This seems a fair statement. But then he observes that this course would “have produced a serious constitutional crisis had not the Japanese obligingly come to the rescue.” To which some would answer: but the point is, the Japanese did oblige. Others would rejoin: but if Roosevelt had not so acted, the Japanese would not have. At this point both sides would produce mountains of captured enemy documents, testimony in War Trials, intelligence reports, not to mention Investigating Committee Reports, majority and minority. And everyone’s prejudices would be reinforced.

Mr. Corwin’s analysis of constitutional development during the war years, though not particularly colored by the pre-war isolationist controversy, is subject to other drawbacks. It is one thing to analyze the work of the Court; it is another to analyze the activity of the Government in general. To mix them is

2. Perhaps he would prefer the word “disintegration.”
3. Mr. Corwin begins and ends the volume with references to the atomic bomb.
5. Ibid.
confusing. What the Court said is significant in marking the changes in the Constitution that have meaning for the future. What actually happened during the war may or may not be significant. When Mr. Corwin observes that Congress restricted judicial review by limiting attacks on the validity of price regulation to proper review in the Emergency Court of Appeals, he notes something of significance. When he observes that the Office of Censorship censored letters to South America that were pessimistic about the home front, he notes something insignificant. The first observation points up a potential limitation on judicial review, acquiesced in by the Court, that was produced by and because of the war, and that may live on. The second observation either points out that some people do stupid things during a war, or that total war is total; either seems confined to war-time, seems to be something that will happen in any war, and seems to have little or no relation to the Constitution.

All through these lectures Mr. Corwin alternates between brilliant analyses of significant points and almost querulous complaints against excesses by the executive branch. I suspect the almost querulous air stems from a recognition that careful analysis of the constitutional aspect is frequently futile. One can note, with or without regret, that during the war Congress delegated almost unlimited power to the President, that the President assumed much power without specific grant, and that in most instances there was no way to litigate what might otherwise have been great constitutional issues. But in many cases one is met with the incontrovertible fact that while the fighting was in progress there was nothing else to be done. Consequently, though the events may be regretted, they can hardly be condemned. Put another way, an analysis of the distribution of power among the three branches of government during this period is not fruitful if it is designed to demonstrate by nice distinctions what was good and what was bad. All one can really do is state that the executive branch took the ball and ran like mad.

When Mr. Corwin turns from the domestic scene to the United Nations he gives a more satisfying performance. This discussion is not without lapses into further belaboring of the isolationist-interventionist quarrel. In general, though, Mr. Corwin sticks to the point and discusses the relevant problems of fitting our participation in the United Nations, especially in the Security Council, into the framework of our constitutional system. He is especially able in dialectical presentation of the confusions in the meaning of "sovereignty" as it relates to the power of an international organization to commit this country to a given course of action. But, he implies, talk of "sovereignty" is simply a matter of dialectics. More to the point, he asserts that "The fundamental obstacle to a world state is, of course, lack of international community of understanding and felt interest." After noting that in 1789 the colonists had such a community of interest, he ends with an unresolved dilemma.

7. P. 166
"World community?—without it there can never be world government. World government?—without it there can never be world community."  

In his final lecture, Mr. Corwin tosses aside his ineffective complaining and presents an acute evaluation of the significance of total war on the Constitution. Here Mr. Corwin tersely points out the shift from a "Constitution of Rights" to a "Constitution of Powers," the decline of dual federalism, the erosion of strict separation of powers, and the narrowing of judicial review. Though he may dislike some of these trends, he faces up to the necessity of correcting whatever he dislikes by improving the legislative and executive branches, not by resort to the Constitution, or the Court. Individual rights, he believes, will be safeguarded in the long run only by "such constitutional arrangements as best promise that necessary things be done in time, but that the judgment that they are necessary be as widely representative as possible."  

If this lecture had been expanded and had replaced most of the earlier lectures, I would have been full of enthusiasm. As it is I can only say that except for the drawbacks inherent in a compressed statement, this final lecture reviewing the effect of the New Deal and the two world wars on the Constitution leaves almost nothing to be desired.  

GEORGE D. BRADEN†


Professor Carlston's book is a significant contribution to the field of international law. In the last few years a rapid expansion has taken place in the literature of international arbitration and several eminent authors have attempted to develop a system of international arbitral jurisprudence. While most of these works follow the simple chronological treatment of listing individual cases and the various publications in which they were found, Carlston's book is a well-organized and systematic survey of theory and practice, of legal literature and arbitral precedents. This is a valuable reference work which should be of immense help to the law maker and to officials of states which will want to settle their disputes by tribunals acting as courts of law.

The book effectively places arbitration within the broad structure of a post-
war international security organization. The United Nations Charter specifically cites arbitration as a primary means of settling disputes, "the continuance of which is likely to endanger the maintenance of international peace and security." With the prospect of greatly increased recourse to arbitration by states at variance, this process well deserves the special attention of lawyers and students of international relations.

International arbitration is a judicial process; as such, at every step of arbitration procedural assurances that parties shall not be deprived of their fundamental legal rights have to exist. Professor Carlston emphasizes these procedural details and their technical implications. Consequently, the book is rather difficult and involved, but the task of reading it is rewarding because of its valuable methodological features and careful selective approach. The author succeeds in blending a review of doctrinal literature with numerous case-illustrations and with a survey of recent judicial sources, such as decisions by the Permanent Court of International Justice.

The treatment itself follows closely the major phases of the arbitration process. To this reviewer the chapters on jurisdiction, on the doctrine of essential error, the finality of the award, and on future progress seemed to be provocative and significant contributions to the mushrooming literature of international arbitration. The introductory chapter on Procedure is primarily a detailed elaboration of one of Carlston's earlier articles in which he defined the scope of arbitral procedure as one of facilitating "in the most effective way the functioning of the tribunal." He has also correctly observed that there can be no systematic body of procedural rules in international arbitration. "Procedure is no unalterable course of conduct to which all tribunals must adhere. It should always be adapted to facilitate the course of the particular arbitration and to enable the economical accomplishment of its task within the time fixed."

The concept of administrative flexibility governs the author in his discussion of minimum procedural standards. These standards are directly influenced by a combination of impalpable yet legally relevant elements, such as the nationality, or the good or bad faith of judges. Recent arbitration cases have revealed new and imaginative means of influencing judges while keeping beyond the pale of established criminal corruption. Carlston cites the

3. Carlston, Procedural Problems in International Arbitration, 39 Am. J. Int'l L. 426 (1945). The section on procedure covers essentially the same ground as chapter VI of J. H. Ralston's The Law and Procedure of International Tribunals although Carlston treats some aspects in more detail. Ralston, however, discusses certain important questions which are practically ignored by Carlston. For example, the subject of Agents and Counsel is well covered by Ralston (at 192-7), while Carlston's book contains only scattered references to it in connection with discretionary power, rulemaking power, and settlement of claims. There is, however, no comprehensive treatment of this issue in the book.
notorious Lehigh Valley R. Co. v. Germany case as an illustration of the role of human intangibles in the judicial process of arbitration. This interesting section is reminiscent of Frederick S. Dunn’s discussion of the same issue. Accepting the arbitrator’s nationality as one of the unacknowledged factors of international jurisprudence Dunn observed that the national members “are usually not looked upon as representatives of their own country’s interests but as impartial judges . . . Nevertheless, it might be expected that their nationality would generally lead them to decide cases in favor of the contentions of their own government, and undoubtedly the factor of nationality does so operate in a number of cases."

The heart of Professor Carlston’s book, covering approximately half the actual length of the work, is the section on Jurisdiction, which analyzes the legal principles establishing jurisdiction of arbitral tribunals. The author points out two important influencing factors, namely the scope of the tribunal’s powers, and the sphere of activity permitted to it by the arbitral agreement and by international law. Within this jurisdiction, whether expressed or implied, the tribunal is canalized.

Arbitral tribunals are most seriously limited by barriers of a constitutional nature. Carlston discusses several significant cases in which domestic constitutional limitations produced excess of jurisdiction and led to arbitral nullity. The author here presents his own careful translation of Central and South American precedents. In the Panama-Costa Rica Boundary Dispute, for example, the Foreign Minister of Panama reaffirmed his country’s position in the following terms: “My Government is constitutionally unable, even were it disposed, to consent to the annulment of the . . . award and the resubmission of the whole question to a new arbitrator.”

To avoid the pitfalls of such limitations a definite compromis must establish the jurisdictional powers attributed to the arbitrators. A decision is null whenever the arbitral tribunal has determined questions that are not within its competence. Excess of jurisdiction leads to an analysis of the doctrine of essential error which involves an erroneous appreciation of fact or law and results in an unjust or unsound decision. Arbitral opinions so based inevitably lead to a nullity of the award.

One of the timeliest discussions is that on the finality of the award and on the extra-legal considerations threatening the process of international arbitration. The author reviews several major extra-legal factors and draws valuable illustrative material from the well-known Peru-Ecuador boundary dispute. The most significant factor is undoubtedly the vital interest of one or both participating states. In no other case, states the Peruvian memorial sub-

mitted in this boundary dispute, "has such a large extent of territory been involved; in none have such vital interests been endangered. For this reason, arbitration, which is the best method of solution of matters of this character, is the worst for the present case." 11 This treatment of the "vital interest" problem is closely correlated with a vast and growing literature exploring the inevitable interrelationships of international legal procedures and questions of vital interest. According to Brierly, it was common practice to include in arbitration treaties a clause reserving from arbitration differences which affected the participants' vital interests. "The implications of such a clause were clear. It meant that although states might be willing to accept the decision of a court on differences of secondary importance, they were not willing to do so if the matter at issue was one on which they regarded it as absolutely essential to have their own way." 12

Professor Carlston also reviews the major legal threats to the finality of arbitral awards, such as an invalid or void compromis, excess of jurisdictional authority and proved corruption of an arbitrator. 13 The Hague Conventions of 1899 and 1907 attempted to codify these major "causes of nullity," but, with one or two exceptions (Art. 48 of the Convention of 1899), they could not achieve more than vague and fairly generalized definitions. Carlston is right in his concise conclusion that: "The individual judgment of States rather than the judgment of a court, in international law, determines questions of nullity." 14 In matters of finality of award international tribunals are still guided by the basic maxim of Roman law: Arbiter nihil extra compromissum facere potest, a premise generally accepted by all major civil law countries.

The author advocates establishment of an international system of appeal procedures whereby claims of nullity of awards could be judicially determined. The whole complex problem of nullity would indeed be considerably simplified if an international tribunal were to regulate the various acts of doubtful validity which may occur in the international order. The brief chapter on Future Progress summarizes the principal conclusions but fails to give an integrated picture of the many complicated facets of international arbitration. While a universal code of international arbitration procedures would be impractical in Carlston's opinion, a flexible, elastic system of procedural methods could be worked out to general advantage. Arbitration procedures for the solution of such typically post-war controversies as boundary disputes and accumulations of international claims of varied character or war damage claims, 15 would be particularly useful in developing a system of international jurisprudence.

The faults of this book are primarily errors of omission. Nowhere do

11. P. 209; Professor Carlston's own translation.
we find a discussion of the problem of the voluntary or compulsory nature of international arbitration, of the types of reservations inherent in arbitral matters of a compulsory character. While this question is fraught with the peculiar political difficulties of persuading or even coercing sovereign states, no writer on international arbitration can afford to dismiss the problem in its entirety. From a methodological aspect, the author has exaggerated the significance of Latin American cases to the exclusion of other valuable sources of arbitral precedents. There is no discussion of the Soviet practice, or rather dislike, of methods of international arbitration. Yet, it is at least worthy of note, that Soviet political philosophy has been unfavorably disposed to arbitration of Russian rights. Experiences in the only recent Soviet case of arbitration, the Lena Goldfields Case (not mentioned in the book), were most discouraging to all participants.\(^\text{17}\)

The author's strong insistence on Latin American cases yields, however, many valuable results. It was particularly in Central and South America that pressures, politically significant, though legally more or less unacknowledged, asserted themselves through the device of international arbitration. The judicial institution of arbitration served for diplomatic protection of nationals, and the means of diplomatic protection, in turn, served "as a substitute for territorial conquest in bringing the Latin-American states within the orbit of international trade and intercourse."\(^\text{18}\)

On the whole, Professor Carlston's book fulfills admirably the twofold purpose of a warning and a guide in revealing the technical intricacies of international arbitration. The concrete suggestions offered throughout the book, its detailed bibliography and table of cases will undoubtedly aid the student and enable the parties of a dispute to make recourse to arbitration both safe and wise. This work has a substance and practicality so often missing in treatises on international law.

Andrew Gyorgy\(^\dagger\)


Professor Binkley has chosen a timely moment to bring out a new edition of The Powers of the President, which now appears under a more appropriate and meaningful title. The problem which the author sets out for himself—an


17. Lauterpacht, Annual Digest of Public International Cases 1929-1930 426 (1935). Carlston has also dismissed several well-known cases of French and German arbitral practice.

18. Dunn, op. cit. supra note 6, at 58.

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historical examination of the relations between Congress and President—is peculiarly relevant at a time like the present, when the White House and the Capitol are controlled by rival parties. And yet it is not too much to say that the present difficulties in securing cooperation between Chief Executive and Congress are mere exaggerations of a situation typical to the American constitutional system. For the American system of separation of powers inevitably creates a permanent tug-of-war between President and Congress, a contest in which balance spells deadlock and action requires superiority of forces on one side or the other. As a reading of President and Congress indicates, this is a contest that has gone on since Washington's second term, and one that may be expected to continue indefinitely under the American constitutional system.

With that exuberance customary among publishers, the dust jacket of this volume states that the 1937 book "has been completely rewritten, revised, and brought up to date." A comparison of the two texts indicates, however, that except for an occasional new introductory paragraph at the head of a chapter, a transfer of some material from the final chapter to the first, and the addition of one unilluminated chapter on the Presidency in World War II, the new edition is substantially identical with the old. Those who have already read The Powers of the President will find little profit in reading President and Congress.

For those who have not read the earlier edition, President and Congress is a useful and often revealing study of the historical relations between the two policy-making branches. Professor Binkley is more concerned with cyclical than with secular trends; the book's chief interest lies in its exploration of the cyclic shifts of power from President to Congress and back, and the historic reasons explaining each particular change in the relationship. But the long-run secular changes that in some fields of action must inevitably weaken Congress vis-a-vis the President are not explored. The enormous growth of the Administrative branch, the inevitable and indispensable expansion of executive discretion, the gradual change from the negative state of laissez faire to the positive service state—such secular developments as these are exerting and no doubt will continue to exert an important pull in the field of forces that lies between President and Congress. Yet it is these developments that Professor Binkley has left largely unexamined.

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The Editors take pleasure in dedicating this issue of the Journal to Professor Moore upon his retirement from the active faculty. His insight long ago made him a leading practitioner, scholar and philosopher; his fierce devotion to the teaching process has for forty years inspired and terrified students of law.