
Lest we forget that the Supreme Court of the United States is also a court of law, here is a volume of solid and conscientious scholarship concerned exclusively with the judicial framework within which the Court operates. The first edition of this work is recognized as the authority in its field. But fifteen years have passed since its publication, and three generations of justices have scribbled in its margins. Brief consideration of the Court’s recent history makes it apparent that more than a pocket part was required to bring the first edition up-to-date. Messrs. Wolfson and Kurland, both former Supreme Court law clerks, have not confined themselves to collecting cases, although their efforts on that score have been exhaustive. Where necessary, they have made a fresh start, as in their discussion of the scope of certiorari jurisdiction. They have also added a very useful division on judgments and mandates, as well as certain hitherto unpublished opinions of individual justices.

To the reader who knows the original of this volume one need say no more. Others should be warned that it is a Treatise, and, like most Treatises, better adapted to close analysis than to an overview of the subject. Further, its subject is a very narrow one, covering only those jurisdictional problems that relate directly to the Court itself. Other issues of federal jurisdiction, much mooted in Supreme Court opinions, are not within the book’s compass. Wisely, it does not attempt to discuss the substantive purposes for which jurisdictional standards are invoked; and the authors are quick to recognize the chameleon character of such standards as the “political question”, treating it with appropriate brevity. The newcomer to the Supreme Court bar would do better to begin with Messrs. Stern and Gressman’s excellent handbook, Supreme Court Practice. Indeed, he may never have occasion to look further. But he will want to make sure that the ultimate authority is within reach.

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Mr. Chen’s volume comes from the press like a breath of musty air from the scholastic cells of Ancient Paris. In the old days, in those cramped cubicles Thomists and Scotians could not for the life of them decide whether God’s works were good because he created them, or whether he created them

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because they were good. Mr. Chen cannot for the life of him decide whether
states are recognized because they are states or are states because they are
recognized, although he argues on behalf of the first proposition. 1

What Mr. Chen is talking about is a pattern of ceremonial behavior indulged
in by Heads of States, at least since Solomon received Sheba. 2 While Solomon,
being the wisest of men, undoubtedly had no illusions that he was creating a
state by receiving Sheba, the meaning of such behavior continues to be a topic
of conversation in classrooms, not to mention foreign offices. Mr. Chen’s
description of the patterns in which this ancient ritual presently appears is
excellent. Recognition may be carried out not only by receiving ambassadors 3
but by express statements (to anyone who happens to have an ear cocked in
your direction), 4 by signing a bilateral treaty with the thing to be recognized, 5
or by various covert activities termed “implied recognition.” 6 How to classify
behavior that involves participating in an international conference or a multi-
lateral treaty is a problem with which Mr. Chen struggles fruitlessly. 7

Anthropologists consider ceremonials part of a “culture” and let it go at
that. 8 Psychologists are apt to find the ceremonial a “neurotic discharge”
of tensions of one sort or another. 9 Mr. Chen thinks that the ritualistic
behavior with which he is concerned has something to do with a “higher
law” 10 or with an “objective criterion.” 11 The theory—which he says is
“declaratory”—is that international law is a “higher law” to which all “states”
are “subject.” 12 An uncertain agglomeration of people becomes a “state”
when it fulfills the requirements of the “objective criterion.” 13 Thereafter it
is a “subject” of international law, whether states that already have made the
grade “recognize” it or not. Provided you’re not troubled by what “being a

1. “… the constitutive view is confronted with theoretical difficulties. For instance,
it completely fails to explain how the first States came into existence. In assuming that
recognition is binding only inter partes, it is forced into the absurd conclusion that
States can exist only in a relative sense. This consequently makes it difficult to explain
how a body not itself existent in the eyes of another can perform an act which creates
the legal personality of that other body.” p. 4.

2. 1 Kings 10:1-13. Perhaps it was Sheba who “recognized” Solomon. “… [S]he came to prove him with many hard questions," but having seen that the King was wise
(verse 4), prosperous (verse 5), and just (verse 9), and having exchanged gifts (verse
10-13), she went home content. The modern ritual is remarkably similar.

4. p. 192.
5. Ibid.
7. pp. 201-216.
9. H. S. Sullivan, The Meaning of Anxiety, in Psychiatry and in Life. 11 Psy-
chiatry 1, 11 (1948).
11. p. 4.
12. p. 26 et seq.
13. p. 54 et seq.
subject of international law” might mean, the only problem left is the “objective criterion.” Mr. Chen must tell us what it is, and since it is not presented as Mr. Chen’s personal criterion, he must tell us how he found out about it.

The criterion, as Mr. Chen sees it, requires that a state, in order to be such, must have: (1) people, (2) territory, (3) a government that (a) preserves order, and (b) is independent. The people need not be of any definite number, race, creed, or nationality; it’s just necessary that there be a few humans more or less related to each other (i.e. a “community”). The boundaries of the territory need not be capable of precise demarcation; it’s just necessary that the people live somewhere. The government evidently must both preserve order and be independent; one alone is insufficient. The central point of this criterion is, obviously, the “government.” In order for a community to become a state, it is essential that certain persons within the community be obeyed by the rest of the community, and that these men obey no one outside the community. This is all that has to happen.

How Mr. Chen came to know that acquiring “statehood” is so simple a matter is somewhat obscure. He says he got the statement of the criterion from Prof. Oppenheim; but Oppenheim merely formulated it, he didn’t create it. Many other authors are cited, some criticized for failing to grasp the nature of the criterion, some praised for their clear perception, notably Prof. Brierly (maybe it’s Brierly’s criterion). Mr. Chen also talks about the behavior of states in recognizing other states, but this seems inconclusive because states have not always honored the “objective” criterion. (When this happens, the states are, of course, “delinquent.”) It may be that Mr. Chen has had a revelation, but considering that God failed to intervene in order to settle the question of whether His Intellect precedes His Will or vice versa, it seems doubtful that He would move to quell so tea-sized a tempest.

Whether the ritual is performed in accordance with an “objective criterion” or not, once it has been performed certain consequences occur in courtrooms. Before recognition, an allegation of non-recognition is a good defense

15. Ibid.
16. p. 56.
18. “The introduction of extraneous requirements other than those stated above, such as the degree of civilisation, the legitimacy of origin, the religious creed and the political system of the new community, would shift the basis of recognition from the objective test of State existence to nebulous, intractable considerations.” p. 60.
19. p. 55; the citation given is 1 OPPENHEIM 114.
20. p. 27.
21. p. 54.
22. See TILLICH, SYSTEMATIC THEOLOGY 118 (1951): “There is no reality, thing, or event which cannot become a bearer of the mystery of being and enter into a revelatory correlation.” Tillich links the experience of revelation to “ecstasy,” “miracle,” and “ontological shock” or “the threat of non-being”. See generally, pp. 106-159.
23. The question seems to have become rather a dead issue in the modern world.
24. See the summary beginning p. 166.
against rights asserted under the law of the unrecognized state. After recognition, the principles of Conflicts of Law govern this situation. Before recognition the unrecognized state cannot sue in the courts of an unrecognized state but after recognition it is given legal capacity as a matter of "comity." Such consequences as these are important in terms of the lives of the people they affect; in these consequences the meaning of the recognition ritual should be sought. Nor can the desirability of attaching these consequences to the ritual be determined by scholastic controversies between the "constitutivists" and "declarativists."

Many writers, including Mr. Chen, are unhappy with the fact that the lives of private citizens are sometimes disrupted by actions of foreign offices. Individuals may discover that courts refuse to act on the evidence of their rights because the foreign office has failed to perform the ritual of recognition. Mr. Chen argues effectively that private rights claimed under foreign law should be treated according to the principles of Conflicts of Law, regardless of recognition.

In matters of "public law," however, the present supremacy of the Foreign Office seems justifiable. Recognition is a weapon of national power policy. It may be used to enable friendly states to fulfill their policies in the courts of other nations or to dignify their policies with the stamp of international legality. With respect to antagonist states, recognition policy may be used to deny them such power advantages. The United States used recognition in this way to the disadvantage of the Peoples Republic of

25. This is true even though "acts" of unrecognized states performed within their territories may be given effect under the authority of Salimoff & Co. v. Standard Oil of N. Y., 262 N.Y. 220, 186 N.E. 679 (1933).


27. This is the much-debated consequence of a Tory Lord Chancellor's refusal to take judicial notice of the Helvetian Republic, which had been established by revolution on the inspiration of the Evil Napoleon. Dolder v. Bank of England, 10 Ves. 352 (1805).


29. p. 166 et seq.

30. STRAUSZ-HUPÉ & POSSONY, INTERNATIONAL RELATIONS 2 (1950): "Foreign policy aims at the acquisition of optimum—and sometimes of maximum—power. The attainment of power is the supreme political goal."

31. Foreign policy becomes "power policy" in the actor-antagonist situation. Foreign policy may, but need not, have created this situation (it is more likely that the antagonism arose from other, e.g. economic, causes). Once the antagonistic relation exists, however, it can be resolved only by removing the causes of antagonism. If the actor loses power in relation to the antagonist without having removed the causes of antagonism, the actor will probably suffer at the hands of his antagonist, or will be compelled—in order to prevent this result—to resort to more drastic measures of maintaining his position in the struggle.
China in the United Nations and at the signing of the Japanese Peace Treaty at San Francisco. Mr. Chen, now Professor at Tsing-Hua University in Peking, has harsh words of reproach for “power politicians.” He would undoubtedly like us to recognize the New China. But in so far as recognition might increase the power of our antagonist—while not removing the grounds of antagonism—such a move might necessitate resort to less peaceful means of establishing and preserving a power advantage.

In the final analysis, Mr. Chen has done a fine job of collecting and analyzing recent cases on the problem. His arguments, however, are at times vainglorious, at times vexatious, and nearly always superfluous. If labels be necessary, why should not the ritual of recognition be considered “declaratory” for purposes of enforcing private rights and “constitutive” for purposes of power policy?

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32. Relations between the United States and the People’s Republic of China appear to have the actor-antagonist structure. Therefore, the considerations set forth in the previous footnote apply.


34. p. 3.

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