
Eugene V. Rostow

Follow this and additional works at: http://digitalcommons.law.yale.edu/ylj

Recommended Citation
Available at: http://digitalcommons.lawyale.edu/ylj/vol82/iss4/10

Reviewed by Eugene V. Rostow†

In our "troubles" about Vietnam, Professor John Norton Moore has been an active belligerent on the home front. He has participated in a long cycle of debates before innumerable conferences, symposia, teach-ins, colloquia, and congressional and other committee hearings. He has spoken on television, and written regularly for the law journals.

In this role, Moore earned high and equal respect from those who agree with him, and from those who do not. This is a considerable achievement, both of mind and of spirit, for our troubles over Vietnam have been more vehemently emotional, and less accessible to reason, than any we have had to endure since the Civil War. And the sector where Moore has been active—that of contention about the legality of our course in Indo-China—was necessarily the eye of the storm. We are people of the Book. To our minds, whatever we dislike intensely must also be illegal. The claim that the policy of the United States in Indo-China violated international law, or the law of our own Constitution, was the natural, and indeed the nearly indispensable predicate for a vast and inflamed literature charging the nation with immorality, aggression, imperialism, and other sins and crimes hideous to our notion of ourselves as a people.

Confronting this outcry, Moore remained unflappably the professor: courteous, moderate, scrupulous in his respect for the evidence, meticulously fair to the arguments of his adversaries, and learned, resourceful, and thoughtful in developing his own.

With admirable discipline, Citizen Moore never states his political position on American policy in South East Asia. The reader closes the book without a hint I could detect indicating Moore's opinion about the wisdom, efficacy, and prudence of the nation's course in Vietnam. Professor Moore's subject is its legality, which he vindicates in terms I find unanswerable.

† Sterling Professor of Law and Public Affairs, Yale Law School.
I

While Law and the Indo-China War consists in large part of papers prepared for "Vietnam" occasions during the last five or six years, the title is a misnomer. Less than a third of the book concerns the war in Indo-China. And even within that third, Moore treats Vietnam simply as a case study in international and constitutional law.

Most important books in the history of social studies—perhaps all of them—were tracts for their times, addressed to the issues which happened to be acute at the moment. This is emphatically true of Moore's Law and the Indo-China War. It is a response to the Vietnam tragedy. But that is its least important characteristic. Reaching far beyond Vietnam, it is a major book about certain aspects of the law of nations purporting to govern the international use of force by and from states—certainly one of the three or four genuinely fine works of scholarship on the subject published during the last decade. It also contains an excellent treatment of our own constitutional law on the respective powers of Congress and the President in authorizing the use of force in international relations.¹

Like every other modern student of international law, Moore confronts the challenge of McDougal's magisterial presence.² Moore was McDougal's student, as Schwebel, Falk, Rosalyn Higgins, Oda, Weston, Burke, Reisman, and so many other young scholars were, and are. Like them, Moore found his relationship with McDougal stimulating without being oppressive. McDougal is certainly strong-minded. But he has an innate and unshakable respect for the autonomy of his

¹ J.N. Moore, Law and the Indo-China War (1972) [hereinafter cited to page numbers only]. Considerations of space confine this review to Moore's treatment of certain problems of international law. His three chapters on the constitutional relationship between Congress and the President in making national security decisions, and between both political branches of the government and the courts, are of excellent quality, and, save in detail, I agree with their analysis and conclusions. See Rostow, Great Cases Make Bad Law: The War Powers Act, 50 Tex. L. Rev. 833 (1972).

² There is a terminological problem, and a problem of fairness, in referring to McDougal's writings, even in international law, without referring also to Harold Lasswell's, and to their joint work. The McDougal-Lasswell collaboration has certainly been one of the most important, and most fruitful, in modern intellectual history. Together, they hammered out their particular version of sociological jurisprudence as a jurisprudence of values. The most striking feature of their theory is a scheme for classifying, clarifying and evaluating the variables involved in the analysis of any body of law in terms of the social goals a particular community wishes to see fulfilled by its law. The purpose of each such analysis is to determine (a) whether the law-in-fact corresponds to existing standards of social morality; (b) whether the existing standards of social morality correspond to the aspirations of society for its law; and (c) whether the prevailing aspirations for law match those which McDougal and Lasswell believe should prevail in the long run.
students. Perhaps the most remarkable feature of McDougal's influence as a teacher is that so few of his pupils experience a need to demonstrate their independence by rebelling. Nearly all his students who have become legal scholars use McDougal and Lasswell's basic approach to the study of law—often, as in the case of Falk or Oda, to reach conclusions with which McDougal himself would disagree. But this is the essence of McDougal's work. He has established not a sect, but a school. In almost every case, his students are indeed scholars, not acolytes. What they learn from McDougal and Lasswell is a systematic way to study law, and to judge it, as an integral part of the social process, in its relationship to all the forces, social and moral, which shape the law, and guide its course through time.

Thus Moore starts his book with seventy-five pages which make explicit his view of international law as law, and of the American national interest in its integrity and enforcement.

Moore is concerned with three aspects of international law: (1) with the process through which legal norms are achieved by the interplay in world politics of competing and complementary goals for policy, and above all by "the common interest of states in a reciprocally tolerant international milieu"; (2) with the influence of the existing norms of international law on the behavior of states, and as criteria for appraising their behavior; and (3) with the goodness or badness of the existing norms, evaluated in accordance with personal standards which, he contends, should be accepted as those of the world community at large. Rejecting the naiveté of would-be cynics who claim that international law is an illusion, and the equal naiveté of utopians who overestimate its potentialities in a revolutionary world, Moore defines the international law he is talking about as that concerned with the management of international conflict, especially where there is a risk that military force might be used internationally. What in fact are the expectations of the world community of states about the rightful limits of international conflict? How are those expectations articulated? By whom, and to what extent are deviations prevented or redressed? How effective are these community expectations as norms inhibiting the conduct of states?

Adapting the classification and analytic methods of the McDougal-Lasswell approach, Moore identifies the modes through which world politics secretes world law. By keeping the entire process of world politics in view, Moore puts the successive disputes involving a breach

3. P. 3.
of international peace since 1945 into a perspective which stresses the widespread (though by no means universal) acceptance by states of their common interest in the enforcement of the Charter of the United Nations.

There is an occasional touch of political innocence in the book. For example, Moore writes that action which violates the international community's clear sense of what states should not do by way of using force may entail a high cost even if it does not lead to dramatic sanctions. The Soviet invasion of Czechoslovakia, though a paradigm of unsanctioned action in the traditional sense, was achieved only at a real and perhaps intolerably high cost to Soviet leadership in the communist and third-world nations. The cost was not merely attributable to immediate self-interest or moral revulsion but was in significant measure a product of violation of fundamental community expectations concerning the authoritativeness of such unilateral acts.  

Alas, there is no evidence to support Moore's view. The political influence of the Soviet Union throughout the world was enhanced by the chilling demonstration in 1968 of her willingness to use force effectively for political ends, even against another "Socialist" state. Certain nations of Eastern Europe ruled by Communist parties actually joined in the invasion, although their people surely found the exercise repugnant. Since 1968, all those nations, including Roumania and Yugoslavia, have conducted their domestic and international affairs with acute circumspection. Similarly, for some years after 1968, both North Korea and North Vietnam became more sharply responsive to, and dependent upon, the Soviet Union than before.

In the third world, Egypt, Iraq, Syria, India and many other nations increased their reliance on Soviet support during the same period, often at the expense of Chinese influence, and the Soviet role in Communist and other revolutionary parties and movements became stronger, even in France and Italy. The United States and its allies, respecting Soviet hegemony in Eastern Europe, as they had done since

4. P. 18. See also p. 25.

There are other instances of the same phenomenon. For example, Moore urges that the Legal Adviser of the State Department be called Under-secretary of State for International Legal Affairs, and made an ex officio member of the National Security Council (p. 249), in the hope that considerations of international law be given greater weight in the decision-making process. I have never observed a failure to give the views of the Legal Adviser full consideration in the decision-making process. In any event, he will not be assured a greater hearing by giving him a grander title. It is not unknown for Undersecretaries or even Secretaries to be ignored when Presidents make up their minds.
1945, did nothing to protect Czechoslovakia, although they warned the
Soviet Union, after the event, not to "unleash the dogs of war."

Despite their propaganda, the Western nations hoped that the epi-
sode would help move Soviet policy to accept the principle of mutual
and reciprocal respect for the proclaimed state interests of the other side
which the West regards as the indispensable rule for containing and
ultimately ending the Cold War.

In one significant respect, of course, the demonstration backfired.
China, alarmed by more and more ominous Soviet threats, turned to
the United States in 1971—not because the world had penalized the
Soviet invasion of Czechoslovakia, but because it failed to do so.

But Moore's argument—however weak in this instance—illuminates
the strength and value of his method. Public opinion, where it can be
made manifest, is indeed a source of law. Moore systematically con-
siders all the relevant factors in his effort to make clear the policy
goals various norms of international law should be made to serve,
and the interpretation of the norms required by those policies in
particular situations.

II

The starting point for Moore's book is the controversy over the
legality of American policy in Vietnam, and we should examine that
part of his text first.

The official American theory of the Indo-China war has been that
two Vietnamese states emerged both before and emphatically after the
Geneva Conference of 1954, as confirmed by the cease-fire signed by
the French and the Vietminh, and in effect accepted by the govern-
ments represented at Geneva, and then by the society of nations. The
expectation of the international community, as the United States per-
ceived it, was that those states—South Vietnam and North Vietnam—
like North and South Korea, China and Taiwan, and East and West
Germany, might be united someday by political agreement, but not
by force. This position was the predicate for the SEATO Treaty, and
thus publicly declared to be a state interest of the United States and
of its Allies, vital in their view to their own security, and to the process
of consolidating peace. The use of force by North Vietnam to conquer
South Vietnam (and Laos and Cambodia as well) was therefore im-
permissible—impermissible legally, if the precedents of Greece and

5. Remarks by President Lyndon B. Johnson, Annual Convention of Milk Producers,
917, 920 (1970); Remarks, 125th Anniversary Meeting of B'nai B'rith, Sept. 10, 1968, in
id. at 944, 946.
Korea are valid as a construction of the Charter; and impermissible politically, in the context of the fragile balance of power so laboriously achieved and maintained since 1947, which is all we have by way of peace. The first rule of politics for maintaining that balance, in the official view, is that unilateral change achieved by force cannot be allowed. This was the principle on which American policy rested in each of the successive Cold War crises since 1945—from Iran, Turkey, and Greece to Berlin, Korea, Cuba, and Vietnam. It is the principle on which American policy has insisted so tenaciously in the negotiations leading to the Vietnam cease-fire announced in January, 1973.

Three competing theories challenge this thesis.

The first is that the war between North and South Vietnam has been a civil war, not an international war. The Soviet Union took the same position with regard to the war in Korea. On August 3, 1950, speaking of Korea, the Soviet spokesman at the Security Council said:

As regards the war between the North and South Koreans, it is a civil war and therefore does not come under the definition of aggression, since it is a war, not between two States, but between two parts of the Korean people temporarily split into two camps under two separate authorities.

The conflict in Korea is thus an internal conflict. Consequently rules relating to aggression are just as inapplicable to the North and South Koreans as the concept of aggression was inapplicable to the northern and southern states of America, when they were fighting a civil war for the unification of their country.6

Moore effectively marshals the evidence to demolish this argument, as applied to the Vietnam case. The history of the Geneva Conference justifies the conclusion, at a minimum, that the parties expected the cease-fire partition of the country at the 17th parallel to result in another “divided country,” like Korea and Germany, “which, sooner or later (probably much later) would somehow be reunified.” 7

6. 5 U.N. SCOR, 482nd meeting 5 (1950).

Within their respective zones ... the DRVN and SVN (later, the RVN) governments exercised functional sovereignty in 1955 and 1956; that is, each governmental entity controlled the civil service, bureaucracy, police, and armed forces, and each entity had brought a modicum of order, at least temporarily, to the areas under its jurisdiction.

The real settlement at Geneva, Moore concludes, was partition, since the parties never really agreed to much more than a territorial division and a cease-fire (p. 419). See also B. Murty, Vietnam Divided v, 171-76 (1964); Wright, International Law and Civil Strife, 1999 Proc. Am. Society Int. Law 145, 151.
ference, Cooper says, gave "international blessing to the independence of Laos and Cambodia and establish[ed] two political entities in Vietnam." 8

Whatever the parties may have intended at the time, however, it is manifest under standard rules of international law and practice that for some twenty years there have been two states within the Vietnamese nation, to borrow Chancellor Brandt's phrase about the situation in Germany, as there are in Korea. 9 The General Assembly of the United Nations recommended United Nations membership for South Vietnam three times. Many nations have diplomatic relations with South Vietnam or North Vietnam. Both North and South Vietnam exercise the normal authority of governments within their territories at least as effectively as most governments, and more effectively than many. In 1957, the Soviet Union supported a package deal for the simultaneous admission to the United Nations of North and South Vietnam, North and South Korea, and East and West Germany. One can test the seriousness of the Soviet assertion that it is lawful to unite divided nations by force by imagining their reaction if West Germany decided one day to liberate East Germany, with the backing of its NATO allies.

As Moore emphasizes, there is no way to distinguish the legal and political problems of Korea and of Vietnam. 10 Like Vietnam, Korea is a "country," a "nation," divided against its will by the circumstances of world politics. Indeed, the Korean people are far more clearly a nation, ethnically and historically, than the inhabitants of the areas we now call Vietnam—more unified in religion, language, and background, with a longer experience of shared cultural and political experience. The Korean people, under Japanese occupation since 1895, were promised their unity and independence by the Soviet Union and the Western Allies at Cairo and Potsdam. Soviet forces accepted the Japanese surrender north of the 38th parallel in 1945.

8. Cooper, supra note 7, at 98.


Installing a Communist regime in their zone, they blocked all efforts to obtain a free election in North Korea, while in South Korea, a regime developed which the General Assembly in repeated resolutions characterized as

[A] lawful government . . . having effective control and jurisdiction over that part of Korea where the Temporary Commission was able to observe and consult and in which the great majority of the people of all Korea reside . . . . [T]his Government is based on elections which were a valid expression of the free will of the electorate of that part of Korea and which were observed by the Temporary Commission; and . . . this is the only such Government in Korea.1

When North Korea invaded South Korea in 1950, the Security Council—the Soviet Union being absent in protest against the presence of Nationalist China—noted that there had been an "armed attack upon the Republic of Korea by forces from North Korea" and determined "that this action constitutes a breach of the peace."12

If North and South Korea are two states within the contemplation of the Charter—and no other premise can support the conclusion that the use of force from North Korea to conquer South Korea in 1950 was a "breach of the peace" and an "aggression" justifying both South Korea's self-defense, and armed assistance to South Korea by many states—the same judgment is required a fortiori for the relationship of North and South Vietnam during the hostilities of the last fourteen years.

The critics of the legality of the American course in Vietnam do not, at least in their professional writings, really deny the fact that there are two Vietnamese states with as much right to international protection against "armed attack" as South Korea had in 1950.13 In-

11. See Higgins, supra note 10, at 159.
12. Id. at 160.
13. The best known of these critics, Professor Richard A. Falk of Princeton, attempts to distinguish the legal problem in Vietnam from that in Korea on the ground (1) that the armed attack of North Vietnam on South Vietnam, assuming that it occurred, was "covert" rather than "overt," a distinction whose relevance to the legal problem is obscure, to say the least; and (2) that there was a "global consensus" in support of defensive action by South Korea, whereas no such consensus existed in support of South Vietnam's rights, at least by 1966 and 1967.

The first of Falk's arguments is simply incredible. The argument of "uncertainty" about North Vietnam's role in the war could not have been made with any conviction in the early sixties. See D. Pike, War, Peace, and the Viet Cong (1969); Viet Cong (1966); S. Hosmer, Viet Cong Repression and Its Implications for the Future (1970). After 1968, and especially after May, 1972, it could not have been made at all.

Falk does not, of course, deny that North Vietnam has intervened with military force in South Vietnam. Instead, he argues that North Vietnam made great efforts to keep...
stead, they move to a second theory to justify the armed attack by North Vietnam against South Vietnam. They claim that the reunification of North and South Vietnam was promised the Vietnamese people by the great powers through a referendum in 1956. The failure to hold that referendum, they argue, entitles North Vietnam to seek national unity through military means in the name of self-determination.

Again, Moore has little trouble in disposing of the point.

In the first place, as he shows conclusively, no such international promise was made, since the only possible source of such a "promise" is the reference to elections in paragraph 7 of the Declaration issued by the Co-Chairmen of the Geneva Conference at its conclusion.14

its policy "covert" rather than "overt"—presumably by insisting on the fiction that it has not intervened at all.

[Therefore, and this is critical for my approach, a unilateral defensive extra-territorial response to covert coercion cannot possibly acquire the same legitimacy as would such a response if made to overt coercion. For these reasons I find it inappropriate to rely upon the Korean analogy; the Spanish Civil War I continue to regard as a helpful precedent because there was no counter-intervention undertaken [against Italy and Germany] (emphasis added).


The sequence of the sentences is astonishing. The Chinese said that their troops in Korea were volunteers, yet Falk continues to support American policy in Korea. And in Spain, Germany and Italy made no effort to keep their intervention "covert." Surely the decision of the Western nations not to help the government of Spain during the Spanish Civil War, and the inability of Spain to strike back at Italy and Germany, does not prove that they had no right to do so under international law. Failure to do all one is legally entitled to do in a given instance hardly proves that legal rights have ceased to exist.

As for Falk's second argument, the state of world opinion in behalf of South Korea's right of individual and collective self-defense was hardly a "global consensus" in 1950. As Falk notes, both the Soviet Union and Communist China, as well as the Communist nations of Eastern Europe, bitterly opposed what the United Nations did. Public opinion in the United States and other countries did not turn against the war in Vietnam for years after it had been authorized and begun. Falk nowhere explains why the state of public opinion (as distinguished from official decisions) determines the legality of war. R. Falk, Legal Order in a Violent World 263-70 (1968); I THE VIETNAM WAR AND INTERNATIONAL LAW 499-500 (R. Falk ed. 1968).


The text of Article 7 of the Final Declaration of July 21, 1954, issued by Great Britain and the Soviet Union as Co-Chairmen of the Geneva Conference, is as follows:

7. The Conference declares that, so far as Viet Nam is concerned, the settlement of political problems, effectuated on the basis of respect for the principles of independence, unity, and territorial integrity, shall permit the Vietnamese people to enjoy the fundamental freedoms, guaranteed by democratic institutions established as a result of free general elections by secret ballot. In order to ensure that sufficient progress in the restoration of peace has been made, and that all the necessary conditions obtain for free expression of the national will, general elections shall be held in July 1956, under the supervision of an international commission composed of representatives of the Member States of the International Supervisory Commission, referred to in the agreement on the cessation of hostilities. Consultations will be held on this
That Declaration was supported generally by four of the nine participants in the Conference, and formally rejected both by the United States and South Vietnam.

In the second place, even if there had been such a pledge, the use of force by North Vietnam to unify the nation could not be squared with the Charter of the United Nations. Article 51 of the Charter, acknowledging the inherent right of self-defense, is the only exception to the rule of Article 2(4) forbidding "the threat or use of force against the territorial integrity or political independence of any state." But the concept of the sovereign right of self-defense embodied in Article 51 of the Charter, however broadly construed, cannot be made to cover the breach of international agreements as an inherently coercive act, in itself justifying a counter use of force by the state aggrieved. This is precisely what was determined by the international community with respect to the British and French attack on Egypt in 1956, and in the Korean case as well. In the Suez crisis of 1956, Britain and France justified their limited attack on Egypt in part by the claim that the Egyptian nationalization of the Suez Canal violated its international obligations, embodied in treaties. Similarly, in the Korean case, the invasion was justified on the ground that Korea had not yet been unified by political means, although the

subject between the competent representative authorities of the two zones from July 20, 1955 onwards.

Quoted in R. Randle, Geneva 1954, at 570-71 (1969). Randle concludes that on any one of the possible theories as to the juridical status of South Vietnam, it violated no rules of customary international law or treaty law in refusing to be bound by the political provisions of the Declaration. Id. at 447, 454.

15. Except for a use of force undertaken or authorized by the United Nations itself.

It is sometimes claimed, as the United States did during the Cuban Missile Crisis of 1962, that under Article 52, and Chapter VIII more generally, regional organizations may use force even without Security Council authorization, and without regard to the limitations of Article 51. Moore discusses this claim at 146 and 392-38. I agree with him that the American argument based on Article 52 cannot be reconciled with the basic plan of the Charter, particularly its concept of the Security Council, to say nothing of the language of Article 58, which provides that "no enforcement action shall be undertaken under regional arrangements or by regional agencies without the authorization of the Security Council," language notably different from that of Article 51. As Moore points out, such a rule would give regional organizations at least the powers of the Security Council to use force by their own fiat, sans veto, sans Secretary General, sans debate, and above all sans the presence of all--or indeed, in the case of the Arab League, considered as a regional organization, sans the presence of even one of the permanent members.

The separate and more general question as to the legitimacy of the international use of force in behalf of the self-determination of peoples is discussed, infra, at pp. 847-48.

Korean people had been assured independence and reunification at Cairo and Potsdam, and in a succession of General Assembly Resolutions thereafter. As Moore points out, quoting McNair, the breach even of a treaty can never as such amount to an "armed attack" justifying a resort to force in self-defense.

The third argument of those who contend that the American course in Vietnam is illegal rests on the opposite premise: that there are indeed two states in Vietnam, not one; that a prolonged civil war has been taking place within the state of South Vietnam (a civil war which has long since reached the level of "insurgency" or even "belligerency"); and that North Vietnam and other states are entitled under international law to assist the insurrectionary group, the N.L.F.

Since the normal rule of international law is that during a civil war states may assist the widely recognized government of the state concerned if they wish to do so, but not the rebels, this astonishing assertion requires some acrobatics. The "traditional" international law on the subject, the critics allege, is obsolete, because it is designed to preserve "the status quo," and oppose "revolution." They claim that it should be and perhaps already has been discarded, both in theory and in practice.

Once again, Moore answers his opponents clearly, analytically, and conclusively. The rule of the Charter, and the overriding policy goals of international law, he contends, justify South Vietnam (conceded to be a separate state for the purposes of this argument) in defending itself against any and every form of armed attack, including regular or irregular military assistance to guerrillas, partisans, terrorists, or

---

17. The documents are conveniently summarized or reproduced in Higgins, supra note 10, at 153-72.
18. P. 564.

We will later come back to the problem of intervention in civil wars. Although, regrettable (sic), lawyers of repute have been found to justify, not in terms of policy but of international law, unilateral interventions of which they approve politically, there cannot be any serious doubt that such unilateral military actions designed to change the political regime of another country—whether they come to power by democratic means or by a coup d'etat—are patently incompatible with the very foundations of international law, which is built on the legal sovereignty of states and their right to determine the form of their regime. Neither the assertion of "socialist solidarity" nor the Johnson Doctrine which—going far beyond the actual policies of the United States—would claim a unilateral right to displace any "Communist" regime, as determined by the United States—has any place in contemporary international law. Id. at 47.

The more general problems raised by Moore's treatment of the subject are discussed at pp. 848-49 infra.
armed bands conducting an insurrection within South Vietnam. By the same token, the United States and other nations are privileged under international law to assist in the defense of South Vietnam. In accordance with the *Caroline* principle, and the many accepted instances, before and since, in which the principle was applied to large scale and to small scale hostilities, both South Vietnam and its allies are legally entitled, in the conduct of their collective self-defense, to carry the war to its sources in Cambodia, Laos, and North Vietnam.\(^{20}\)

\(^{20}\) See ch. 10, particularly at pp. 488-510.

It is worthwhile to recall the circumstances of the *Caroline* case.

During an insurrection in Canada in 1837, the insurgents secured recruits and supplies from the American side of the border. There was an encampment of one thousand armed men organized at Buffalo, and located at Navy Island in Upper Canada; there was another encampment of insurgents at Black Rock, on the American side. The *Caroline* was a small steamer employed by these encampments. On December 29, 1837, while moored at Schlosser, on the American side of the Niagara River, and while occupied by some thirty-three American citizens, the steamer was boarded by an armed body of men from the Canadian side, who attacked the occupants. The latter merely endeavored to escape. Several were wounded; one was killed on the dock; only twenty-one were afterwards accounted for. The attacking party fired the steamer and set her adrift over Niagara Falls. In 1841, upon the arrest and detention of one Alexander McLeod, in New York, on account of his alleged participation in the destruction of the vessel, Lord Palmerston avowed responsibility for the destruction of the *Caroline* as a public act of force in self-defense, by persons in the British service. He therefore demanded McLeod's release. McLeod was, however, tried in New York, and acquitted. In 1842 the two Governments agreed on principle that the requirements of self-defense might necessitate the use of force.

Mr. Webster, Secretary of State, denied, however, that the necessity existed in this particular case, while Lord Ashburton the British Minister, apologized for the invasion of American territory.


The correspondence on the subject between Great Britain and the United States accepted and confirmed (1) the responsibility of the United States for any use or threat of force from its territory to assist revolutionary activities in Canada and (2) the right of the British to invade the United States in time of peace—and in advance of an actual attack across the borders—for the limited purpose of attacking and dispersing the guerrillas in the absence of effective action to that end by the United States, which owed Great Britain a legal duty to do so. *See also* 11 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 211-36 (1968) (discussion of the use of neutral territory as a base of operations or for hostile expeditions against other states). The *Caroline* principle was accepted as part of the law of the Charter in the Corfu Channel Case, [1949] I.C.J. Reports 4.

The argument that international law should confine the exercise of the right of self-defense to the territory of the state being attacked is one of the more bizarre features of the legal literature seeking to justify "wars of national liberation" and other wars which appeal to the writers as ideologically sound. *See* R. Falk, *LEGAL ORDER IN A VIOLENT WORLD* 227-28 (1968). Moore is much too kind to this assertion. P. 258. Men cannot be expected to await a threatened attack in their own territory. International practice has long accepted that fact about the nature of man, and of states. Experience with the problem is discussed in the diplomatic notes about the fate of the good ship *Caroline*, and reflected today in Israeli attacks in Jordan, Lebanon and Syria, intended to persuade those governments to fulfill their international legal obligation to prevent irregular military forces on their territory from operating against Israel. *See also* I.C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 240-44 (2d rev. ed. 1945) (American expedition into Mexico to check cross-border raids by Villa in which the Mexican authorities had failed to prevent); Rostow, *supra* note 1, at 895-92 (United States invasions of Spanish Florida to disperse guerrillas operating from that sanctuary against United States territory).
Book Reviews

The applicable rules of international law on the subject have been restated over the years in a succession of carefully considered General Assembly Resolutions, based on extended studies, committee reports, and debates. In 1950, the General Assembly

condemning the intervention of a State in the internal affairs of another State for the purpose of changing its legally established government by the threat or use of force

1. Solemnly reaffirms that, whatever the weapons used, any aggression, whether committed openly, or by fomenting civil strife in the interest of a foreign Power, or otherwise, is the gravest of all crimes against peace and security throughout the world . . . 21

In 1954, the International Law Commission defined as offenses against the peace and security of mankind the tolerance by a state of the use of its territory by armed bands or terrorists planning to make incursions into another state, or by groups intending to foment civil strife in another state.22 And in 1965 the General Assembly condemned armed intervention and subversion, direct or indirect, and indeed every other form of interference in the internal affairs of another state, as a violation of the Charter.23

It is important, Moore urges, that the policies expressed in these documents be enforced with special strictness for nations divided by the Cold War, which are neuralgic focal points of dangerous great power rivalry.24 Moore concludes that for Vietnam “the Charter proscription outlawing the use of force as a modality of major change is the most crucial norm for appraisal of the war.”25

Examining the available data, he finds that North Vietnamese participation in the rebellion against the government of South Vietnam was publicly evident at least by the late 1950s—well before the first major American military response, in 1961.26 While international practice and a large majority of the authorities have always upheld the legality of international military assistance to a government deal-

25. P. 461.

841
ing with an insurrection, and denied the legality of military assistance to the rebels, all the authorities (including those who question the standard rule, or wish it were otherwise) agree that friendly states may assist a government in putting down a rebellion when others have converted a civil war into an international war by assisting the rebels.\textsuperscript{27}

By any standard, Moore concludes, the United States assistance to South Vietnam has been "a paradigm of lawful collective defense under Article 51 of the United Nations Charter."\textsuperscript{28}

III

But the exercise of answering the standard arguments against the legality of American and other foreign assistance to the government of South Vietnam is no more than a prelude to the intellectual challenge which attracts most of Moore's interest and energy in \textit{Law and the Indo-China War}.

Step by step, he is drawn by the process of debate into reviewing, restating, and revising the international law about foreign participation in civil war. Here, I believe, his argument is more doubtful, at least for the present reviewer, than his treatment of the legal issues with regard to the Vietnam war itself—more doubtful, that is, as a reading of the expectations of the international community, rather than a personal version of what the law should be.

Like many of those with whom he has debated, he falls into the habit of characterizing the basic policy of international law in this regard as "the traditional view,"\textsuperscript{29} excessively formal, abstract, and simplistic. And he gives much too much deference to the fashionable protest that the classical rule—which would allow international assistance to governments but not to rebels in civil war situations—is a bulwark of the status quo, a veritable "Maginot line for vested privileges, deterring necessary reforms in feudal or totalitarian societies . . . ."\textsuperscript{30}

Many Americans, perhaps most Americans, rally automatically to this bugle call. They cannot view themselves as "reactionaries" or even as "conservatives," and find it difficult not to be defensive before the charge that a rule of international law might delay or even suffocate

\textsuperscript{27} P. 463. See Friedmann, \emph{supra} note 19, at 64. The debate is reviewed at pp. 848-49 \textit{infra}.

\textsuperscript{28} P. xxv.

\textsuperscript{29} See, \textit{e.g.}, pp. 87-88.

\textsuperscript{30} P. 88.
“progress.” Naturally, they think, if a rule could have such an effect, it must be wrong. Perhaps it isn’t really the rule, or should in any event be changed.

It is surprising that Moore seems to accept this proposition as a self-evident axiom. He does not belong to any of the fashionable cults of violence. Nor is he one of those “sad liberals” who have come to the conclusion, “since decolonization, that a collectivized, secretive, and totalitarian society is ‘the only thing natives understand.’”

The battle cry, “Down with the status quo,” is both erroneous and irrelevant: erroneous, because most revolutions occur without international assistance; and irrelevant because it ignores the distinction between matters primarily of international and of domestic concern which is fundamental to world politics and to international law. International law is not against revolutions or social change. It is against the international use of force, whether for conquest or pillage, or to advance a cause deemed sacred. Revolutions occur constantly without international assistance. The French, Russian, Chinese and Cuban revolutions took place without benefit of international military aid. Governments have been changed by force more than twice a month during recent years, usually without significant international assistance to the revolutionaries. Enforcing Article 2(4) of the Charter rigorously would have little effect on the number of revolutions that take place, although no doubt such enforcement would affect the outcome in some important instances.

But Moore follows his interlocutors down a slippery slope, and finds himself, I think, in needless difficulty.

The problem for international law, he would agree, is not whether most Americans, or most American writers about international law, find a rule “reactionary,” but whether that rule represents the expectations of the world community, and is necessary to the possibility of peace within it. In international law studies, Moore says, our goal should be to understand the community policies at stake; to clarify and define them as they bear on the circumstances of particular cases; and to determine the respective weight we should assign to each relevant variable in deciding whether a given use of force does or does not transgress community norms.

Moore’s analysis defines “intervention” in a foreign civil war with precision. It is, he points out, the most important problem in world

politics today, next to that of nuclear deterrence. In a turbulent world, revolution has become endemic, particularly in the Third World. In many cases foreign states, large or small, intervene in such conflicts, which are nominally intrastate in character, but often involve the international use of force. Putting economic, political and cultural intervention to one side, he focuses on "coercive actions by one international actor aimed at the authority structures of another and effectuated through military strategies."32

For the simple rule of traditional international law, Moore would substitute a complex body of rules. Such rules, he claims, would reconcile the policies authoritatively expressed by the international community in their application to twenty-one archetypical situations of "intervention," divided into six classes. These situations range from claims not relating to authority structures (military assistance to widely recognized states in the absence of internal disorder, assistance to such states in controlling internal disorder, and military intervention for the protection of human rights), through intervention in anti-colonial wars, wars of secession, indigenous conflicts for the control of internal authority structures, external initiation of the use of force to impose internal authority structures, and intervention in cold-war divided nation conflicts. Although Moore is usually careful in distinguishing the law that is from the law he wants to see developing, he comes close to claiming that the treatment he proposes for the external use of force in these twenty-one cases does in fact represent "the present international law of non-intervention in internal conflict as well as present community consensus permits."33

Moore's classification of the kinds of internal disorders likely to trigger the international use of military power is by far the best analysis which has yet appeared. It is rooted in reality, and sensitive to the forces which animate world politics today. It is not and cannot be comprehensive, for, as Hamilton once remarked, "the circumstances that endanger the safety of nations are infinite."34 For example, the secret emplacement of Soviet missiles in Cuba in 1962, which Moore perceives as a coercive threat justifying the American response, fits into none of his categories.

Moore reaches conclusions about the legality of intervention in each of the situations he analyzes by evaluating the relative weight in each case of three variables: the policies favoring self-determination, self-defense, and the protection of human rights. The heart of his con-

32. P. 129.
33. P. 280.
tention in these chapters is that international law should be deemed to admit these three possible policy justifications for the international use of force by states, rather than self-defense alone—not in all cases, and only after a vote by the Security Council or the General Assembly, but in at least fifteen of the twenty-one situations into which he divides his subject.35

Moore’s analysis, if accepted, would have two effects. It would enlarge the possibility of foreign intervention on the side of the rebels in civil wars, especially in behalf of claims of national self-determination. Correlatively, it would restrict the right of governments to obtain foreign assistance against an insurrection, if it were generally thought that claims of national liberation, or of human rights, outweighed in each instance those of public order.

Moore would require at least a General Assembly Resolution before the legal right to use force internationally for these purposes came into being. But such a requirement would be difficult—indeed, in my judgment, impossible—to enforce under any imaginable model of world politics in the near future.

Moore is not altogether consistent in the view that policies favoring self-determination and humanitarian intervention can justify the international use of force, as well as that authorizing individual and collective self-defense. Sometimes he argues that the policy of minimum public order is such an overriding policy goal of the world community that a rather restrictive concept of self-defense against “armed attack” should be the only possible basis for the unilateral use of force by or from states.36 But in chapters three and four he contends that the accepted right of a state to aid another in putting down a rebellion should be restricted, and that states should sometimes be allowed to use force internationally (at least when such use of force would not unduly alarm a great power, or lead it to respond) in order to assist rebels asserting “valid” claims of self-determination, especially in situations they deem anti-colonial, and to protect fundamental human rights, particularly where there is a threat of widespread loss of human life, or where internal authority structures have collapsed or have proved incapable of maintaining order.

IV

The result of accepting Moore’s argument—and especially his first claim for a right to use force internationally in behalf of the self-

35. Moore’s argument in this regard is summarized at pp. 274-82.
determination of peoples—would be a far-reaching change in the norms and aspirations of international law, and, I conclude, a catastrophic change in international politics. It would gravely limit the inherent right of collective self-defense basic to the theory of Article 51. And it would take a long step towards recognizing the legality of "wars of national liberation." If Moore's view were accepted, it would no longer be correct to assert, as nearly every text-writer does, that Article 51, and the panoply of self-help which it authorizes, is the only possible legal justification for the unilateral use of force by states. States could also claim such justification under the license of General Assembly Resolutions—and, inescapably, in accordance with their own interpretation and application of Moore's theorem.

Since Moore is by no means alone in making proposals of this kind, the argument should be examined carefully.

The Charter of the United Nations is necessarily the starting point for an appraisal of Moore's conclusions. The Charter was achieved at a rare moment of time—a moment of relative harmony among the nations which came together as a constituent assembly at the end of a desperate war they had barely won. Their purpose was to establish a world organization—an organization not of people but of states, and of states deemed "sovereign." Their Charter was a constitutive act, like the Constitution of the United States—an attempt to state fundamental principles for organizing a world community of states. The Charter is not the whole of international law, any more than the written Constitution of the United States is the whole of our constitutional law. Like the Constitution, the Charter is sketched against a tenacious background of custom, practice, history and hope; and, like the Constitution, or any other body of law, it evolves continuously in response to social and moral changes in the external world, and to changes in its own code of aspiration as well. It is an effort to re-

orient and in some areas to restate pre-existing international law. It
should be read, as our best judges have always read the Constitution,
in its matrix of purpose, with primary emphasis, always, not on the
words alone, in isolation, but on the underlying theory of governance
the words seek imperfectly to express and to fulfill.

What is that theory of governance, with regard to the responsibility
of states for the international use of force? The Charter articulates
and in itself represents a number of axioms, postulates, and aspira-
tions for the society of nations: to defend and advance fundamental
human rights and the equality of men and women, and of nations
large and small; economic welfare and social justice; respect for the
integrity of treaties and other sources of international law; friendly
relations among nations based on the principle of equal rights and
self-determination of peoples; and, above all, international peace and
security. If there is any one proposition on which all students of the
United Nations agree, it is that the overriding purpose of the Charter
was to restrict the use of force in international relations. They do not
all agree on the extent of that restriction. But if the Charter does not
revise preexisting international law in this regard, it is hard to imagine
what it can be supposed to intend.

The means to be used in promoting these diverse and sometimes
inconsistent ends are sharply defined, both by the text and by its
history. They are the familiar procedures of peace, hopefully made
more efficacious than ever before through the organs of the United
Nations, and through its availability as a center of diplomacy—the
means, that is, of international cooperation, negotiation, mediation,
adjudication, and other peaceful processes for promoting agreement
among states. The use or the threat of force is forbidden to states,
save in exercising their inherent right of self-defense and their equally
inherent right to aid other states exercising their right of self-defense.
And Article 2(7) provides that:

[N]othing contained in the present Charter shall authorize the
United Nations to intervene in matters which are essentially within
the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present
Charter; but this principle shall not prejudice the application
of enforcement measures under Article VII [the ultimate exer-
cise of its peacekeeping authority by the Security Council].38

As Gunnar Myrdal has recently remarked, the Charter is a covenant among states. "The name of the system of intergovernmental organizations," he writes, "is logically fallacious. Indeed, the very first words of its Charter, where the active subjects enacting it are said to be 'we, the peoples of the United Nations,' is a pious falsehood."30

The proposition is basic, and inescapable. The world political process involves many transnational elements, but, especially where the use of force is concerned, its atoms are states—states which have never been more diverse in race, history, culture, religion, ambition, and social organization, and never more closely pressed together by technology and fear. Few states, however "national," consist in fact of a single "people." Spain, for example, is one of the oldest of modern "nations." But it contains a number of distinct peoples—Catalonians and Basques, as well as Asturians, Galicians, and others less sharply marked. Most other states—from the smallest African ministate to Belgium, Switzerland, Canada and the U.S.S.R.—contain more than one "people." To legitimate the international use of force in behalf of the self-determination of peoples would threaten the integrity of nearly every state. Like the movement of nationalism which destroyed the Austro-Hugarian Empire, and corroded the possibility of international equilibrium in the early years of this century, a strong international movement for self-determination would force many states to suppress liberty in the name of security, as the only alternative they perceive to anarchy. And it would grievously weaken the safeguards of peace.40

To seek peace in such a world, international law has no alternative but to insist on the Charter principle that the unilateral use of force by or from states can only be justified as individual self-defense under Article 51, and as aid to states exercising their inherent right of self-defense. The customary international law right of humanitarian intervention in situations of chaos and massacre survives under the Charter, presumably as a form of limited self-help under Article 51 to remedy catastrophic breaches of international law which could not otherwise be cured (i.e., the failure of the state in question to meet its international responsibility for minimal standards of human decency). A genuinely humanitarian intervention should not threaten the territorial integrity or political independence of a state, and thus

should not be regarded as transgressing Article 2(4). In this respect, the intervention in the Congo was in marked contrast to that in Bangledesh.

These twin principles—the non-use of force and the autonomy of states—are the foundation of the Charter, and of the system of law built upon it. They are the only conceivable rules of peace for the states system we have inherited, and within which we have no choice but to live.

The Security Council is given broad powers by delegation from the membership to exercise “primary responsibility” for maintaining international peace and security, both through methods of persuasion, and, when the Council can agree, through the use of force in the name of the United Nations to deal with threats to the peace, breaches of the peace, or acts of aggression. The general paralysis of the Security Council as a consequence of the Cold War has meant that the United Nations itself has rarely been able to deal with threats to or breaches of international peace. To protect their primal security, therefore, nations have had to rely on their own forces, or on those of allies; as a result, the concept of individual and collective self-defense has been given considerable scope through its application on many occasions. Under these circumstances of insecurity, as Ross concludes, “it is a fiction”41 to talk of the Charter, which allows the use of force “only in self defense or as a contribution thereto, and as a public exercise of force authorized by the Security Council,”42 as though it were valid international law.

A rule does not become valid law simply because it is written on paper. Article 2(4) is the expression of an idealistic aspiration that does not correspond to an effective conception of law and justice, and it is therefore unsuitable as a guide to a moral and legal judgment of the actions of a state. Naturally, I do not mean that a state that feels itself injured or threatened shall be able to turn to the use of force without more ado, but only that any judgment of such a state must be based on consideration of the circumstances in every single case.43

The ultimate question raised by this aspect of Moore's analysis, then, is whether the self-determination of peoples and the protection of human rights (presumably beyond the existing limits of Ar-
ticle 51) should be considered as possible justifications for the international use of force by states. When a "people" within a widely recognized state is rebelling, or attempting to secede, under circumstances in which Moore would consider the goal of self-determination to out-balance that of minimum world public order, he would deny states their usual right to aid the first state in putting down the rebellion. He would recognize, on the contrary, a right to assist the rebels. Similarly, the world is full of states which, in the eyes of some or many beholders, violate fundamental human rights, or even minimal standards of human decency. Confronting such phenomena, should international law authorize large or small states to invade at will in the name of achieving, let us say, equal treatment for women, universal suffrage, freedom of travel, or the elimination of racial or religious discrimination?

Moore seeks to soften the implications of his thesis by contending that only a collective decision by the United Nations—conceivably even by a regional organization—could bring such "rights" into existence. Acknowledging the paralysis of the Security Council, he would treat resolutions of the General Assembly as authoritative declarations of international law, despite the fact that Articles 9-22 of the Charter say that resolutions are no more than "recommendations," save for exceptional cases like Articles 17 (budget) and 85 (trusteeship territories).

While some Resolutions of the General Assembly, genuinely supported by states representing the bulk of the world's population and leadership, should indeed be taken seriously as evidence of the state of opinion of the world community, many are irresponsible political gestures, justified by their supporters on the ground that they are only recommendations, and make no real difference anyway. Moore acknowledges the unrepresentative and occasionally "schizophrenic" character of the General Assembly.44 But he finds it preferable to pretend that the Assembly is a parliamentary body rather than to assert publicly that states have a unilateral right to use force internationally in civil wars to support rebels whose cause they regard as just.

By formulating the question in this way, Moore forces himself to choose between the horns of a non-existent dilemma—a dilemma entirely of his own making. His basic error is to accept his opponents' major premise: that what he calls the traditional rule (allowing inter-

national assistance to states but not to rebels in a civil war) must be revised in order to allow "revolution" some scope against the Maginot Line of the status quo. It is no wonder that at this point his argument becomes a classical Parkinsonian retreat from reality.45

There is no chance whatever, and no present prospect of a chance, to persuade the Security Council or the General Assembly to adopt responsible rules providing for the continuous surveillance of intervention in civil disputes, the reporting of arms assistance, and the other desirable proposals Moore makes for strengthening international peacekeeping machinery.46

The sensible course, I submit, is to reject Moore's premise—that the "traditional" rule is dead, or, in the nature of the states system, can or should be killed. Then one can reject both halves of his argument: the thought on the one hand that states can or should be denied their inherent right to obtain assistance from others in putting down a rebellion, and conceded a legal right to help certain approved revolts against the authority of a state; and, on the other, the hair-raising proposition that the General Assembly can assert the power to waive the applicability of Article 2(4), and make authoritative pronouncements of international law by the simple device of passing Resolutions.

One can test the implications of Moore's theory by asking a hypothetical question. Suppose a revolt "begins" among the Macedonians in Greece, and increases to the level of "insurgency" or even "belligerency." Greece's NATO allies would be required by Moore's version of international law to become neutral, or at least to keep their aid to Greece below the pre-insurgency level, unless it could be clearly and publicly established by a U.N. fact-finding commission that the rebels were receiving substantial military assistance from abroad. If the General Assembly passed a resolution blessing the struggle of the Macedonian people for self-determination, it would become lawful for Bulgaria, Roumania and the Soviet Union to assist the rebels in Greece, and unlawful for Greece's NATO allies who recognize the government of Greece to come to her aid.

This cannot be the law. However much weight one gives to certain General Assembly Resolutions, no such resolution can strip a state of its legal right to defend itself, and to receive military assistance from others who recognize its government. Nor can other states be deprived of their equally fundamental legal right under Article 51

to help a state, which, in its judgment, and theirs, is indeed validly exercising its inherent right of self-defense.

The inherent right of individual and collective self-defense confirmed by Article 51 of the Charter is the ultimate bulwark of national safety—the right to fight for survival when the Security Council and every other institution for keeping the peace fails. The exercise of the right of self-defense is expressly left under the Charter to the state which feels itself threatened, and to those which choose to go to its aid. The prior permission of the Security Council is not required, as is the case for enforcement action by regional organizations under Article 53. The Security Council can overrule what has been done in the name of individual and collective self-defense under Article 51. It also has extensive—but hardly unlimited—discretion under Article 39 and Article 2(7) to classify a given situation as a threat to peace. It would stand the Charter on its head, however, to suppose that the Security Council had the legal power to determine that the continued membership of the Ukrainian S.S.R. in the Soviet Union, or of Quebec in Canada, or of Ulster in the United Kingdom, constituted a threat to the peace, as a deprivation of rights of self-determination possessed by the peoples concerned. And, in any case, action by the Council is subject to the veto of any permanent member.

All students of the subject agree that Article 51 was one of the most fully considered provisions of the Charter at San Francisco, and that without it the Charter would not have been approved and ratified.

The contention that the General Assembly can do what the Security Council cannot do—narrow and even annul the rights of self-defense confirmed in Article 51—is thus simply untenable. It cannot be reconciled with the basic conception of the United Nations as an organization, and with the nature of the relationships among states, and between states and the United Nations, which characterize world politics today.

This reasoning would deny the ultimate autonomy of states within the state system—the degree of autonomy they expected, and were assured, at San Francisco. It stands on the same footing as a claim, if one could conceive of it being put forward, that Congress could pass a statute depriving small states of their right to equal representation in the Senate.

What Moore disparages as the "traditional" rule of international law on the subject, however many times he calls it "abstract," "conceptual," "sterile," and "simplistic," is not nearly so dead as he sug-
gests. I should contend on the contrary that it is basic to the con-
ception of the world community as a community of states in the
turbulent last third of the twentieth century. In the Biafra case, like
that of Ceylon and Tanzania, and of Greece in the late forties, it is
apparent, as a matter of descriptive analysis, that the international
community accepted it as the order of nature that governments could
legally obtain international assistance in putting down insurrections,
while open or covert assistance to the rebels under such circumstances
was treated as obviously and categorically illegal. And both in the
Hungarian case of 1956, and the Czech case of 1968, the argument be-
fore the United Nations and elsewhere was not that the Soviet Union
could not legally assist a widely recognized government which asked
it for help in suppressing a rebellion, but that there was no such
government, and a fortiori, no such request for assistance. The inter-
vention in the Congo that ended the secession of Katanga rested on
precisely the same principle—that nations could assist the government
of the Congo, at its request, but not the secessionists.

However much one may regret the outcome in some situations
governed by this rule, the alternative would lead to even worse re-
results—an endless war of all against all.

Moore writes as if the disastrous non-intervention policy pursued
by France and Britain during the Spanish Civil War of the thirties
had somehow become, or for some unexplained reason should now
become, the norm of international law. No doctrine could more
gavely threaten the possibility of peace. At the whim of the General
Assembly, it would annul Article 2(4) as an influence on national poli-
cy, by denominating “wars of national liberation” as just wars, exempt
from the restraints of the Charter. Moore’s careful caveats would soon
be engulfed. Why, after all, should the Germans or the Koreans be
denied international law “rights” which the Assembly might be willing
to acknowledge for the Biafrans, the Blacks of Angola and Mozambique,
the Palestinians, or the Lithuanians? What nations would be willing
to fight if these “rights” were exercised without the formal blessing
of a General Assembly Resolution?

47. See Campbell, The Greek Civil War, in International Regulation of Civil War,
supra note 36, at 37, for a particularly graphic analysis of the interplay of political and
legal factors determining the outcome of the insurrection in Greece during the late
forties. Britain and the United States assisted the government of Greece, while covert aid
to the rebels came into Greece from Yugoslavia, Albania, and Bulgaria. See also The
International Law of Civil War, supra note 36; Higgins, Internal War and Inter-
national Law, in III The Future of the International Legal Order 81, 117-21 (C.
Black & R. Falk eds. 1971) (questioning capacity of General Assembly to legitimize inter-
national intervention in behalf of rebels in civil war).
The United States went to great lengths in Greece, in Berlin, in Korea, and in Vietnam to uphold the principle of Article 2(4). At Suez, the United States opposed her two closest allies at the time, Britain and France, in the Article's defense. Although Moore himself intends the opposite result, his argument would sweep those precedents away, and accelerate the trends in world politics which are weakening the safeguards against anarchy so painfully achieved since the seventeenth century. As Michael Howard points out with terrible perception,

[P]artisan operations . . . [are] a retrograde step to the sporadic and uncontrolled violence, the isolated and reciprocal atrocities, of which war had so largely consisted before the state had acquired a monopoly of force and channeled it along rational and purposive ends sanctioned and to some degree controlled by international law.48 . . . The whole governmental control of violence which made . . . peace possible at all is being rapidly eroded.49

V

The degradation of public discourse, and even of academic discourse, has been the most grievous of all the blows the experience of Korea and Vietnam has inflicted upon the American spirit. In this perspective, Moore's work stands out as a shining exception, not because this reviewer happens to agree with many of his conclusions, but because Moore adheres throughout his book to the highest standards of intellectual and moral discipline. Ten years hence, he will have nothing to regret in looking back on his writings of this melancholy period. On the contrary, he has succeeded in transubstantiating the raw materials of the Vietnam debate into a serious contribution to scholarly thought.

Moore's basic purpose in Law and the Indo-China War is to examine certain critical problems of international law in their full context of world politics. Indeed, his goal as a scholar is to formulate the law as a method for helping to govern the process of world politics. He criticizes governments for reaching political decisions without giving sufficient weight to considerations of international law. Rather to this reviewer's surprise, the major flaw in Moore's book is a cer-

tain innocence about the tragic quality of world politics. In proposing preferred policies for the international law of intervention in civil wars, he does not in my judgment base his scheme squarely on the nature and necessities of the political process. His doctrine would recognize a limited right to wage international war in behalf of the self-determination of peoples, and a parallel narrowing of the legal right of states to assist other states in the suppression of rebellions against their authority. I am not persuaded by his argument for the constitutionality of his thesis as a construction of the Charter. And I am convinced that his view on this subject, if accepted, would make international peace even more difficult to achieve than is the case today.

True to himself, Moore has confessed error on this important aspect of his argument. In a paper now in press, he substantially modifies his position. Thus he demonstrates once again, on difficult terrain, not only the intellectual strength but the moral quality of his character as a scholar.

51. Moore, Toward an Applied Theory for the Regulation of Intervention, in Law and Civil War in the Modern World ch. 1 (J.N. Moore ed. 1973) (in press, Johns Hopkins University Press) (He abandons the position taken in Law and the Indo-China War that the General Assembly as well as the Security Council may authorize interventions otherwise impermissible, and qualifies the authority of the Security Council to act in such cases by noting that the Council must not act ultra vires. Pp. 35-36 of mimeographed text). In other respects, Moore's new analysis of proposed standards for judging the legality of intervention in civil wars seems only imperceptibly different from that in his book, and remains subject to the criticisms suggested at pp. 853-54 supra. For a clear review of the existing law on the subject, and modern practice, see I. Brownlie, International Law and the Use of Force by States 317-33 (1968).
In the past twenty-five years a number of historians, political scientists, and lawyers have addressed themselves to the major aspects of and actors in the Supreme Court’s past; happily, a portion, albeit a small one, of this growing literature is of great merit. But no comprehensive examination or appraisal of the Court, from 1790 to the present, was even in prospect until Congress, seeking a fitting use for the residual estate Justice Holmes left to his country, commissioned a multi-volume History of the Supreme Court. It was appropriate for Congress to make this enterprise the nation’s monument to the judge who, as only Marshall before and no one since, personified the Court and wrought its history.

To Julius Goebel, Columbia’s eminent specialist in seventeenth and eighteenth century American legal institutions, went the honor of writing the first of the eleven projected volumes. The first part of Professor Goebel’s book is devoted to the background—pre- and post-Revolutionary—of the Court’s establishment and early years. This background does much to illuminate the second part of the book, which recounts the pioneering work of the twelve Justices (and the District Judges with whom they sat on circuit) who preceded Marshall. It will also serve as an indispensable introduction to the ten following volumes of the History.

Of this background the most rewarding portion, probably because the terrain is least familiar, is the earliest, in which Goebel turns to English precedents for the American institution of judicial review. These precedents are chiefly of two sorts. First there are cases from Coke’s Reports. Of these the best-known is *Dr. Bonham’s Case* because of its oft-quoted and ambiguous rhetoric:

---

† Southmayd Professor of Law, Yale Law School.

1. C. Warren, The Supreme Court in United States History (rev. ed. 1947), although readable and informative, does not deal with the history after 1918.

2. The devise amounted to $263,000. In 1955 Congress added to this sum an amount in lieu of interest and established the Oliver Wendell Holmes Devise Fund to support the publication of the History. Paul A. Freund, Carl M. Loeb University Professor, Harvard University, has served as editor-in-chief. Two volumes of the History have appeared: J. Goebel, Antecedents and Beginnings to 1801 (1971) [hereinafter cited to page number only]; C. Fairman, Reconstruction and Reunion, 1864-1868, Part One (1971).
And it appears in our books, that in many cases, the common law will control Acts of Parliament and sometimes adjudge them to be utterly void. 3

But Goebel concludes that this case was less influential than earlier opinions in which city or guild ordinances underwent judicial scrutiny. We learn, for example, that in 1590, Coke, as counsel for the City of London, argued in defense of a challenged ordinance that:

all such ordinances constitutions or by-laws are allowed by the law, which are made for the true and due execution of the laws or statutes of the realm, or for the well government and order of the body incorporate. And all others which are contrary or repugnant to the laws or statutes of the realm are void and of no effect. 4

Coke was not merely making a concession arguendo. He was stating a doctrine that was shortly to mature in judgments invalidating city ordinances and guild rules. 5 Goebel argues:

These cases and others in other contemporary reports have usually been viewed by historians as but a phase of the aggressive reassertion of judicial authority by the common law courts in which Coke played so major a part. They are obviously something more. . . . The courts offered remedy for the protection of the common law rights of individuals, and in so doing reaffirmed the supremacy of this common law. The sovereign authority of this law was further emphasized by solemn judgment that not even a royal patent could validate a void ordinance, and further, that royal grants against common right were void. To pronounce such judgments was no small thing at a time when these courts had dangerous competitors, and is properly to be accounted a bold vindication of a constitutional principle. 6

The second set of precedents forms the bridge from English to American law. These were the occasions, few in number but significant in implication, when the Board of Trade (administratively) and the Privy Council (judicially) nullified colonial legislation as transgressions of charter limitations or royal prerogative. Here, Goebel draws heavily, with handsome acknowledgment, on materials "exhaustively and expertly examined by Professor Joseph Henry Smith" in Appeals to the

3. 8 Coke Rep. 107, 118a (1610).
5. See Clark's Case, 5 Coke Rep. 64 (1590); Davenant v. Hurdis, Moore (K. B.) 576 (K.B. 1599); The Case of Monopolies, 11 Coke Rep. 84b; Case of the Tailors of Ipswich, id. at 53a (1615).
Privy Council from the American Plantations. Goebel argues persuasively that by the time the colonists had begun to challenge actively the navigation and tax laws imposed by a Parliament in which they had no voice, these two sets of precedents had coalesced in "a fundamental political conviction" that:

government must be conducted in conformity with the terms of the constitution. . . . What was not fully established was where the ultimate decision on conformity or repugnance was to be lodged. Everything in the experience of the American lawyers, intellectual and practical, had prepared the way for committing this power to the judicial.

With 1776 and freedom from Parliament came freedom from these occasional constraints—whether regarded as restrictive or protective—of the Privy Council and the Board of Trade. The concept of defined authority was of course embodied in the constitutions of the newly sovereign states, but, Goebel finds, in the first years of independence the "drift was toward subversion of the original design of limited constitutional government and its replacement by the unrestraint of English parliamentary hegemony." Whereupon, Goebel leaves the weakened English cases and takes up the chase anew—tracking the hare of judicial review across more familiar American landscape in: (1) pleadings, and tentative judicial utterances, in state cases prior to the Constitutional Convention; (2) the Convention debates; (3) pamphleteering (including The Federalist) antecedent to, and the debates in, the ratifying conventions; (4) the enactment of the Bill of Rights; (5) the enactment of the Judiciary Act; and (6) pre-Marshall instances of Supreme Court Justices speaking to the constitutionality of legislation or articulating the proposition that the determination of constitutionality is a judicial function.

Goebel's confident penetration of the post-Revolutionary materials
on judicial review is masterful; he is for the most part in full and unchallenged command. Yet, remembering that in earlier portions of the book Goebel built upon or noted the shortcomings of the work of other students of the pre-Revolutionary period, one wishes that he had not approached the post-1776 years as if he had, among the present generation of historians, exclusive jurisdiction—studiously ignoring the research of many of those who have come after Charles Warren, Edward Corwin, and Charles Beard. As Morton Horwitz has observed "this approach seems...unfortunate."17

Particularly, I deplore Goebel's unwillingness to come to grips with any aspect of the work of the late William W. Crosskey.18 Since Professor Crosskey, in his controversial—and much controverted—Politics and the Constitution, examined in even greater detail than Goebel many of the same problems, this omission seems difficult to justify.

One would, for example, expect to learn much from Goebel's assessment of Crosskey's view of the pre-Convention state court cases. Finding the cases "[i]n large part imaginary," Crosskey concluded that

they are, as a whole, unimpressive as a basis upon which to infer that the right of judicial review was considered generally, in the states of America, to be a normal and usual incident of "judicial power"; when the Constitution of the United States was put together. ... So, the list of relevant precedents...when the Constitution was drawn, actually established no more, at most, than a right in the courts, in two or, possibly, three of the thirteen states, to carry on their own constitutional functions...and...disregard any act of the legislature which, in their judgment, sought to compel them to proceed differently.19

Goebel acknowledges that the state court cases had no more "than a remote effect upon the then-current trend" to "parliamentary hegemony," but nevertheless sees them as having

established...that issues of constitutionality might be raised in litigation, and that courts in discharge of their duty to administer justice must take cognizance of such and adjudicate them.20

These quotations may, on quick reading, suggest a minor difference in emphasis, but their implications are of major significance. Goebel

20. P. 142.
sees in these early state precedents the American roots of that general power of judicial review we now take for granted. Crosskey, however, distilled from the same cases authority for the much narrower concept of judicial review which he believed to have constitutional legitimacy:

"[T]he Court does no more than perform, according to its best judgment, the duties which these several provisions [of the Constitution defining and describing the exercise of the judicial function]... impose directly upon it... free of interference either by the President or by Congress." 21

Crosskey may well have been wrong, even very wrong, both in his evaluations of the state cases and in his ultimate conclusions about the scope of the "judicial power" conferred by Article III of the Constitution. But it would have been instructive for those of us who, unlike Goebel and Crosskey, are not steeped in the primary sources, to be informed by Goebel as to where and how Crosskey's analysis went astray. 22

Similarly, it would have been instructive to have had Goebel discuss Crosskey's contradictory reading of certain primary data used by both. For example, both eschewed reliance on Daniel Call's 1827 reconstruction of Commonwealth v. Caton, the Virginia Court of Appeals decision which Reporter Call characterized as:

"[T]he first case in the United States where the question relative to the nullity of an unconstitutional law was ever discussed before a judicial tribunal: and the firmness of the judges (particularly Mr. Wythe) was highly honorable to them; and will always be

21. 2 CROSSKEY, supra note 18, at 1004. Any generalized power of "judicial review against Congress" was, in Crosskey's view, "not intended, or provided in the Constitution; it was a product of the events and policies of later times." Id. at 1046. But see the Court's entitlement and obligation "to defend all those rights of the nation against the states..." Id.

22. Not having examined the primary sources, and hence being forced to rely on comparative evaluations of Crosskey's and Goebel's work, I am intuitively convinced that Crosskey took too restrictive a view of the state cases. Agreeing with Crosskey that the state cases do not evidence "that... judicial review was considered generally... to be a normal and usual incident of 'judicial power' when the Constitution of the United States was put together" (see p. 859). I also agree with the late Henry Hart, whose conclusions appear fully to support Goebel's (see p. 859), that the state cases seem to show that:

"[P]ower [of judicial review] had been repeatedly asserted, seldom if ever flatly negatived, and on at least three occasions actually exercised before the Constitution was signed.

Hart, Professor Crosskey and Judicial Review, 67 HARV. L. REV. 1456, 1463 (1954). I further agree with Hart that the state cases do not show that the power asserted was deemed to be limited to instances of invasion of judicial authority by other branches of government. Id. But I also agree with Hart that "[I]o evaluate his [Crosskey's] conclusions precisely would require an independent study of the sources." Id. It seems regrettable that Goebel's "independent study of the sources" did not, at least in passing, take into account Crosskey's earlier study and inconsistent inferences.
applauded, as having incidentally, fixed a precedent, whereon, a
general practice, which the people of this country think essential
to their rights and liberty, has been established.23

Crosskey (like Louis Boudin twenty years before)24 found Call guilty
of embroidering on the extant records, and perhaps even of fabricating
some out of whole cloth.25 Crosskey therefore chose to rely on notes
contemporaneous with the case and a letter to Madison, written at the
time of the case by Presiding Judge Edmund Pendleton26—the very
respected senior jurist who was later to preside at the decisive Virginia
ratifying convention. Goebel also notes inconsistencies between Call
and Pendleton, and confines himself to the latter's notes.27 The oddity
is that working from the same notes, Goebel and Crosskey disagreed
not only with Call but with each other as to how many of the eight
Court of Appeals judges acknowledged a judicial power to declare laws
unconstitutional.

It is common ground among Call, Crosskey, and Goebel that Chan-
celler Wythe—law tutor of Jefferson and Marshall, later a delegate to
the Constitutional Convention and the Virginia ratifying convention
—avowed such judicial power.28 And it is also common ground that

23. 4 Call. (8 Va.) 5 (1782). The case involved the effect of pardons voted by the House
of Delegates for persons convicted of treason in the Revolution. The Attorney General
(Edmund Randolph) contended that the pardons, not concurred in by the Senate, were
ineffective, in the face of a statute apparently vesting the power to pardon traitors in the
General Assembly as a whole. Counsel for the prisoners argued that the statutory limi-
tation on the authority to pardon conflicted with a provision of the Virginia Constitu-
tion. A majority of the judges found the statute valid and hence the pardons ineffective.
But how many of the judges acknowledged a power to disregard a statute found to be
invalid is in doubt. See pp. 861-63.
24. 1 L. BOUDIN, GOVERNMENT BY JUDICIARY 531-35 (1932).
25. 2 CROSSKEY, supra note 18, at 952, 960.
26. Id. at 958.
27. P. 126. The standard biography of Pendleton utilized the Pendleton notes exten-
sively but relied unquestioningly on Call in setting forth the opinion delivered by Chan-
celler Wythe. 2 D. MAY, EDMUND PENDLETON 1721-1808, at 197-98 (1929). Crosskey, a
year after publication of Mays' work, cast serious doubt on Call's version of Wythe's
opinion. An anthology of constitutional materials, published thirteen years after Cross-
key's book, quotes from Call's version of Wythe's opinion, and points
out Louis Boudin's
doubts of the authenticity of Call's report, but does not mention Crosskey. 1 L. POLAK,
The Constitution and the Supreme Court: A Documentary History 189 (1969). One
can only surmise that the anthologist was lamentably wholly unaware that Crosskey had
studied the Caton case in depth. In R. BERGER, CONGRESS v. THE SUPREME COURT (1969)
which Goebel does not mention, see note 18 supra, the author refers to the doubts about
Caton expressed by Boudin and by Crosskey, though Berger is "little disposed to rely on
either . . ." Id. at 103. In his most recent book, Impeachment: The Constitutional
Problems (1973), Berger refers twice to an earlier book (id. at 209 n.85, 212 n.98) and
once to an article by Goebel (id. at 4 n.26); he also cites Crosskey's opus three times (id.
at 77 n.124, 91 n.178, 153 n.141).
28. What is doubtful here is just how Wythe articulated his position. Crosskey de-
clined to credit, and Goebel seems to have reserved judgment on, the magnificent words
attributed to Wythe by Call:

I have heard of an English chancellor who said, and it was nobly said, that it was
his duty to protect the rights of the subject, against the encroachments of the crown;

861
Pendleton explicitly refrained from expressing a view as to whether such a power existed. Pendleton's notes, moreover, apparently refute Call's statement that Chancellor Blair (later a delegate to the Constitutional Convention and a Justice of the Supreme Court),

and the rest of the judges, were of opinion, that the court had power to declare any resolution or act of the legislature, or of either branch of it, to be unconstitutional and void . . . .

According to both Goebel and Crosskey, Blair was noncommittal on the existence of such a power, while Judge Lyons was quite outspoken as to its nonexistence. Goebel also adds that Judge Dandridge "declined the question." Given Pendleton's position, this would appear to mean that at least four of the eight judges reserved judgment or were against any judicial power to nullify legislation. Crosskey read the Pendleton notes to mean that, excluding Lyons, five of the eight judges were noncommittal (although four of those five—Blair, Pendleton, Cary, and Chief Justice Carrington—appear to have viewed the challenged statute as constitutional); only Wythe and Mercer recognized the power, and only Mercer voted to exercise it. But Goebel asserts that: "Five [judges] decided explicitly or by inference that the Court of Appeals had the power to declare a law void for unconstitutionality." Just how Crosskey counted five as noncommittal is unexplained. And just how Goebel counted five as "explicitly or by infer-

and that he would do it, at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely, it is equally mine, to protect one branch of the legislature, and, consequently, the whole community, against the usurpations of the other: and, whenever the proper occasion occurs, I shall feel the duty; and, fearlessly perform it. Whenever traitors shall be fairly convicted, by the verdict of their peers, before the competent tribunal, if one branch of the legislature, without the concurrence of the other, shall attempt to rescue the offenders from the sentence of the law, I shall not hesitate, sitting in this place, to say, to the general court, Fiat justitia, ruat coelum; and, to the usurping branch of the legislature, you attempt worse than a vain thing; for, although, you cannot succeed, you set an example, which may convulse society to its centre. Nay more, if the whole legislature, an event to be deprecated, should attempt to overlap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further.

Commonwealth v. Caton, 4 Call. (8 Va.) 5, 8 (1782).
29. See 2 Mays, supra note 27, at 198.
30. Commonwealth v. Caton, 4 Call. (8 Va.) at 20 (1782). According to Crosskey, Judge Mercer did agree with Wythe on the existence of the power but, unlike Wythe, concluded that the challenged statute was indeed unconstitutional. 2 Crosskey, supra note 18, at 999.
31. P. 127; 2 Crosskey, supra note 18, at 958-59.
32. P. 127.
33. See the summary of the voting in 2 Mays, supra note 27, at 196-201.
34. 2 Crosskey, supra note 18, at 958-59.
35. P. 127.
ence” committed is also unexplained, and very likely unexplainable. One wishes that Goebel had tried to shed light not only on his own arithmetic but Crosskey’s as well.

I have selected this one set of issues—issues which lie at the heart of Goebel’s study—which could have profited from reference to Crosskey’s recent and intensive research. There are others, not bearing directly on judicial review, which Crosskey examined in depth and to which Goebel devotes substantial attention—yet here again Crosskey’s findings of fact and conclusions of law, some consonant with Goebel’s and some not, are passed by in silence.

Crosskey’s extraordinary opus has, of course, fared badly at the hands of many qualified critics, Goebel among them. It also has had its share—some would say more than its share—of praise. I happen to be one

36. See Horwitz, supra note 17, at 1080 n.7.
37. Three issues come to mind. First, whether Charles Warren in his article, Brandeis and the Court in Erie, and Holmes in Black & White Taxicab Co. were right in rejecting Story’s unwillingness in Swift to regard state court decisions as “laws” within the meaning of § 3 of the Judiciary Act. Warren, New Light on the History of Judiciary Act of 1789, 37 Harv. L. Rev. 49, 81-82 (1925); Eric v. Tompkins, 301 U.S. 64 (1938); Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 535 (1928) (Holmes, J., dissenting); Swift v. Tyson, 16 Pet. 1 (1842). Goebel seems to side with Warren, while Crosskey out-Storied Story. pp. 502-03; 2 Crosskey, supra note 13, at 820-21, 866-69, 912-16. A second question is whether the Article III vesting of the “judicial power” in the Supreme Court “and in such inferior courts as Congress may from time to time ordain and establish” was, as Goebel suggests, a constitutional imperative designed “to assure that federal inferior courts must be created, and further that designation of state tribunals would not do.” P. 247. This view is consonant with Story’s, and, apparently, with Crosskey’s. § J. Story, Commentaries on the Constitution 449-52 (1833); 1 Crosskey, supra note 18, at 612-18. This view did not prevail in Congress during the drafting of the Judiciary Act, or at any time since, which Warren viewed as fortunate. Warren, supra, at 631-32.

A third problem is whether, as Goebel concludes, the Judiciary Act did not contemplate a federal common law of crime—a conclusion accorded with Justice Chase’s views and with that later adopted by the Supreme Court in Hudson & Goodwin. Pat. 493-96, 631-32; United States v. Hudson & Goodwin, 7 Cranch 32 (1812). This is contrary to the views of Chief Justice Ellsworth and Judge Peters, of Justice Story, of Warren and of Crosskey. pp. 650-52; United States v. Coolidge, 25 Fed. Cas. 619 (No. 14,837) (C.C.D. Mass. 1815) (disapproved at 1 Wheat. 415 (1816) when the Attorney General declined to urge the Court to reconsider its holding in United States v. Hudson & Goodwin, supra); Warren, supra, at 79; 2 Crosskey, supra note 18, at 767-84. I think it fair to say that Crosskey did not regard the three issues summarized above as discrete: linking and transcending them, for Crosskey, was the overriding constitutional imperative that the Supreme Court was intended to head a national judiciary with authority to review state and federal court judgments on “common law” questions. This, for Crosskey, had as its parallel another constitutional imperative—that Congress was constitutionally intended to exercise general legislative authority, an intention not fulfilled because of latter-day failures to comprehend, inter alia, the scope of the phrase “commerce among the several states.” Crosskey’s constitutional imperatives are heroic in conception but, in my judgment, on balance quite unsupported by the available data.

39. See Clark, Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins, 21 U. Chi. L. Rev. 24 (1955); Hamilton, The Constitution—Pro pas of Crosskey, id. at 79;
who finds the main thrust of Crosskey's several theses wholly unper-
suasive, yet I certainly do not feel entitled to argue that all of his
numerous perceptions are intellectual pariahs. No less a student of
legal history than Arthur Corbin felt Crosskey has produced "a work
of originality and a work of courage" and "that the author's only desire
was to present the truth, that he had used the proper methods of re-
search to determine the facts, and that the facts as he found them had
induced the opinions that he expressed."\textsuperscript{40} Still the real issue goes be-
yond challenges to, and defenses of, Crosskey's intellectual good faith.
The real issue is whether so huge an investigative enterprise as Cross-
key's is to be excluded from the marketplace of ideas. For surely Goe-
bel's non-mention of Crosskey cannot be explained by inattentiveness or
indifference to available data, qualities which are belied by every page
of Goebel's work. The more plausible explanation seems to be that
Goebel has boycotted a book he doesn't like. But such a boycott is in
restraint of the scholar's trade: "The writing of history requires maxi-
mum effort in the discovery of evidence and the utmost candor in pres-
entation, for in no other way can the interests of truth be served."\textsuperscript{41}

To some it may seem captious to fault an author for what he has not
examined. And if Goebel's book were less ambitious, I would be less
prone to criticize. But it is precisely because of its scope and excellence
that I must hold the author to strict account for lacunae which are
unworthy of him. For I wholly agree with Professor Horwitz's assess-
ment that Goebel's book "is likely to remain for a long time to come
the definitive account of American constitutional history from the set-
tlement of America to the Chief Justiceship of John Marshall . . ."\textsuperscript{42}
A book which is to occupy so strategic a place in American historiogra-
phy should illuminate, not obscure, the prior art.

Goebel's book, comprehensive as it is, does not fill the field of early
constitutional history. It is a lawyer's history, focusing on legal processes
and institutions. It throws little new light on the ideas which animated
the men who cast off English rule and built a new federal republic. This
is a limitation to be noted, but it is of a very different sort than the one
I have censured. For this is a limitation which describes the outer lim-

\textsuperscript{40} Corbin, Book Review, 62 YALE L.J. 1137, 1144, 1145 (1953).
\textsuperscript{41} Goebel, Ex Parte Clio, 54 COLUM. L. REV. 450, 451 (1954).
\textsuperscript{42} Horwitz, supra note 17, at 1077.
its of the agenda Goebel set himself. Perhaps because he recognized that he is uniquely equipped to handle lawyers' matters, Goebel did not undertake to examine in depth the intersections of constitutional history and political theory and practice. And since important new studies of this sort have recently appeared,43 it is as well that Goebel allocated his own prodigious energies as he did. A major dividend of this extraordinary book is that it will greatly facilitate the further exploration by others of matters not central to its inquiry.


Reviewed by Adam Yarmolinsky†

One comes away from any examination of the major charitable foundations in the United States convinced that seldom have so few been blamed for so much by so many, when they have done so little. But an explanation is not far to seek: in this comprehensive, analytical account of the apex of the philanthropic pyramid, Nielsen observes that "institutions that have operated too aggressively on aristocratic premises in a 'democratic context have often suffered because of it.'"

Towards the top, this pyramid has a particularly small cross-section. The thirty-three general-purpose, grant-making foundations that are the subject of Nielsen's study own more than half the $20.5 billion of assets controlled by approximately 25,000 United States foundations

† Ralph Waldo Emerson University Professor, University of Massachusetts. B.A. 1943, Harvard University; LL.B., 1948, Yale University.

1. W. Nielsen, The Big Foundations 393 (1972) [hereinafter cited to page number only].
of all sizes in business in 1968. And Nielsen reports a 1969 *Fortune* estimate that seven percent of the foundations control ninety percent of foundation assets. Of the top thirty-three, only ten have what Nielsen characterizes as reasonably well-developed and capable staffs; at the point of the pyramid, the Ford Foundation, with more than a third of the group's total assets, has about twice as many professional staff members as the next nine put together.

At the same time, all foundations as a group contributed less than ten percent of the cost of operating the private, non-profit sector of the economy, the so-called Third Sector, even apart from the enormous and growing investment of government at all levels in parallel activities. And most make no distinctive or innovative contributions to the Third Sector. As Nielsen puts it,

> The majority are unprofessional, passive, ameliorative institutions: they basically offer the multitude of useful non-profit organizations in American life which depend on contributions 'another door to knock on' in meeting their current operating needs and capital requirements.

Nielsen points out that even the right-wing foundations have given relatively little to extremist causes. The quality of most foundation giving is determined to a great extent by the shibboleths of "collegiality" or, "We're all upper-middle class WASP's together," which, as Nielsen demonstrates, have been generally applied by foundation boards in coopting new trustees. In fact, one of the most promising developments in the foundation world is the beginning diversification of boards of trustees (notably those of Ford, Rockefeller, and Kettering), although it is probably too early to assess their impact on grant-making policies.

But despite the very limited size of the foundation sector, and the eminent respectability and judicious self-restraint of the largest institutions, foundations as a class have been the object of considerable public hostility over the last twenty years—hostility expressed in political invective from both the right and left, congressional hearings,

---

2. P. 21.
3. P. 24, n.t.
4. P. 323. But some of the smaller foundations, in the $20-20 million range, have quite impressive one or two person staffs.
5. Id.
7. P. 274.
8. P. 408.
Book Reviews

and clearly punitive legislation. And while there is currently a lull in legislative activity, this hostility shows no signs of abating.

The hostility that attaches to foundations is not, however, transferred to individual donors—and for a reason. It is a fundamental tenet of the American ethos that a man should be free to do as he pleases with his own money. If a wealthy individual gains special tax advantages from his gift to a foundation, public resentment attaches to the individual as a taxpayer (or non-taxpayer), and his charitable giving is likely to be thrown into the pot with a variety of other tax avoidance devices. But when an institution is created that symbolizes the avoidance of taxes, that is administered by a self-perpetuating body often excluding those who made the money originally, and that is seen not as doing one particular job—whether educating people, healing them, or ministering to their souls—but rather as a generalized source of power in society—money on the loose—it quickly becomes a target. By its very existence, a foundation is asserting a kind of aristocratic premise, and it need not exhibit any great degree of aggressiveness to suffer the consequences. It is a better target than any honest (or dishonest) businessman because it lacks the excuse that it is only trying to turn a profit. It is a better target than any labor union or any political party because it lacks a constituency, save its own grantees, who are typically outnumbered several times over by unsuccessful grant applicants.

Given these vulnerabilities, and the limited character of their achievements, are the foundations worth saving? Nielsen answers with a somewhat tentative affirmative. In light of the general breakdown of confidence in government and the resurgence of interest in the Third Sector, he is prepared to urge that we take the “gamble” of giving the foundations “a further chance”—in large part because there are no other available “well-funded institutions” to serve as agents of change.

The paradox, as Nielsen recognizes, is that the more foundations begin to do the socially useful job they might do, the more likely they

9. All these phenomena are fully described in Chapter 1, “Philanthropy Under Fire.” Pp. 3-20. The legislative sanctions in the Tax Reform Act of 1969 include the four percent tax on foundation income (arguably to cover costs of administering the Act), preferential treatment for contributions to operating charities both in percentage of income deductible and in valuation of appreciated gifts, and the flat ban on political activity in lieu of the old substantiality test. The new requirement of expenditure responsibility for foundation grants to all but public charities may be justified as a prudent measure to assure that the purposes of the charitable exemption are fulfilled, but it has the practical effect of discouraging contributions to small, new or controversial organizations. See TAX INSTITUTE OF AMERICA, TAX IMPACTS ON PHILANTHROPY (1972).
are to get into trouble with their critics. More grants for the kind of study Ralph Nader has made of Congress\textsuperscript{10} would not endear foundations to congressional leadership; nor would more funding of the kind of study Marian Wright Edelman has made of the pace of school desegregation\textsuperscript{11} endear them to the Justice Department. Playing out another round inevitably means raising the stakes. Yet in the process of reaching this less-than-enthusiastic recommendation for an extended gamble, Nielsen catalogs a number of quite extraordinary enterprises over the last forty years—from Myrdal's \textit{American Dilemma}\textsuperscript{12} to Sesame Street—that might not have been carried off without foundation support.

In a brief Epilogue on "Prospects for Self-Reform and Self-Renewal," Nielsen concludes that the prospects for a successful gamble depend on two conditions:

\begin{itemize}
\item First, if the members of the leadership class of American society, essentially the business class, who control the major foundations, have become sufficiently aroused by the dangers of the present situation to overcome their habitual inertia, and second, if the "public interest" movements such as Common Cause and Nader's Raiders will begin to generate sustained pressure upon foundations for reform. In effect, the best hope for progress rests largely upon a curious combination of forces—the ethic of social responsibility of the old Establishment and the militancy of some of the newer forms of expression of social discontent—working not necessarily in concert but at least on an object of common concern.\textsuperscript{13}
\end{itemize}

Shortly after the publication of Nielsen's book, the American Assembly convened a group, including the heads of several major foundations, as well as non-philanthropoid scholars, journalists, and public officials, to consider the future of foundations. The statement that emerged from their three-day deliberations suggested that:

\begin{itemize}
\item Foundations should offer a wide range of counseling and consulting services to applicants, grantees and other interested parties. . . . [They] must take positive steps to minimize secretiveness.
\end{itemize}


\textsuperscript{12} G. Myrdal, \textit{An American Dilemma} (1962).

\textsuperscript{13} Pp. 433, 434.
... [B]ecause annual reports will not be widely read ... [they] must explore other methods ... of encouraging greater interest, response, and criticism. ... Foundations should view themselves as service resources to grantees as well as providers of funds.14

What the report is saying, in effect, is that foundations need to develop a more active constituency among the people and institutions who depend on them for at least a part—often the critical part—of their support.

Whether it is worth the effort for the Third Sector to provide that constituency is a separate question. I would argue that it is. The Third Sector is currently in serious difficulties, economically and politically. Economically, because most Third Sector activities are highly labor-intensive (schools, churches, libraries, museums, symphonies) and their relative costs continue to rise as their productivity more and more lags behind that of the general economy. It takes as many man-hours to perform a Beethoven symphony today as it did in Beethoven's time. Politically, because the sense of community in the country is being eroded by a host of factors, from increasing suburbanization to decreasing political leadership, and Third Sector support is very much a function of this sense of community.

Even if government financing of the Third Sector is substantially increased (and the current trend both locally and nationally15 seems to be in the opposite direction), there is a need for alternative sources in order to maintain even minimal independence. General public solicitations seem to be increasingly expensive in terms of their results, and individual patrons are hard to find and still harder to educate. The Third Sector needs the foundations; it must help protect them from the Know-Nothings, who resent any expression of disinterested concern for the general welfare. But it also should help protect them from internal decay or ossification, through a continuing process of mutual education. It must encourage them to be more adventurous, more experimental, yet more conscious of their ongoing role in the evolving life support system of the Third Sector itself.

15. Government must learn to take less from people so people can do more for themselves. Let each of us remember that America was built not by government, but by people—not by welfare, but by work—not by shirking responsibility, but by seeking responsibility.

Transcript of President Nixon's Second Inaugural Address to the Nation, N.Y. Times, Jan. 21, 1973, at 40, col. 1.

869
THE
YALE
LAW
JOURNAL

Subscriptions: $15.00 per volume
Canada and Mexico—$15.75
Foreign—$16.00
One volume = 8 issues per year

Address all inquiries to:

YALE LAW JOURNAL
401-A Yale Station
New Haven, Connecticut  06520