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NEUTRALITY

By EDWIN BORCHARD*

BEFORE 1914, it was hard to find much difference of opinion among American citizens about the proper policy of the United States in relation to foreign wars or even foreign affairs. That policy, with respect to Europe, was dictated by geographical factors and by a colonial and continental history that left little room for debate. Detachment from Europe’s political entanglements, non-intervention in its internal affairs, and neutrality in its wars were the keynotes. After 1898 the acquisition of Asiatic possessions turned America to a Pacific orientation marked by uncertainty and the assumption of unnecessary risks. The desire to play a leading part, without adequate equipment thereto, led to poorly comprehended commitments on the Open Door, and exposed the United States to temptations to intervene which even the proposed withdrawal from the Philippines has not suppressed. On the American continent, a more natural political interest, accentuated by propinquity in Central America, prompted occasional intervention and a standing warning to Europe against political encroachment.

After 1914 a marked change occurred, especially in relation to Europe. For a variety of causes set out in numerous books, America lost its bearings. The magnitude of the European contest, association of cultural and economic interests with one side, and extraordinary ineptness in dealing with the legal problems involved, ultimately induced a state of hysteria which plunged the nation into war. The European feud, more senseless than its predecessors of earlier centuries, was pictured as a struggle between morality and immorality, and in the search for an explanation to the American public for the country’s departure from its fundamental traditions, there was invented at the last minute that curious battle-cry of making the world “safe for democracy”. This must have surprised some of the Allied governments. It was in that era that there was born the ideal of allied force in the service of righteousness, later called “collective security”, which has done so much to prolong the world’s misery by viewing the world through the doctrinaire spectacles of political theology instead of with the open-minded detachment of a physician seeking a correct diagnosis of a social disease. The war produced a psychosis, continued in the Treaty of Versailles and its aftermath, of which Articles 10 and 16 of the Covenant were an exemplification rather than an antidote. Historians and psychologists will in due course explain why some of the principal governments of the western world so long divorced themselves from reason and experience, and immersed in illusions, permitted the corrosion of the political and economic structure.

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For it is an unfortunate fact that the attempt to maintain the adventitious status quo of 1919 through devices of the Covenant and by more formal military alliance resulted in an intensification of nationalism almost unprecedented. At the same time, the less informed were led to believe that phrases such as “collective security”, interpreted by the League of Nations, manifested a growing internationalism and disposition to adopt peaceful processes in the adjustment of international differences. The disintegration, however, was a fact, the pacification but a fiction. When we consider the progress that had been made in the 19th and early 20th centuries in the development of arbitration and conciliation, it seems deplorable that since 1917 the world’s moving forces should have come under the domination of a psychology which encouraged treaties and pacts signally devoid of conditions essential to international appeasement, while cherishing the delusion that peace was being promoted by arrangements for the use of combined force against any revoler against the status quo, vilified in advance by the opprobrious name of “aggressor”. Of this process perhaps the most unfortunate phase was the popular illusion that peace might be assured by bestowing seductive names such as “collective security”, “preventing war”, “international cooperation”, on contrivances, like sanctions, which were hostile and warlike in character. In defense of this form of deception, it can only be said that it was not new. Article 47 of the Treaty of Westphalia, 1648, embodied a similar device. As Judge John Bassett Moore has said, all human history is characterized by the tendency to seek salvation in phrases rather than in acts.

We were told during the Great War that the balance of power and military alliances were the source of the world’s ills and that these ills could be cured by replacing alliances with a League of Nations—once inadvertently called a “disentangling alliance”. But just as an alliance is a combination of two or more nations seeking certain common ends, so the “collective security” of the League was marked by an identical characteristic—it sought the attainment of common ends by the use of coercion and military force. But it is to be feared that the education of men’s minds to the compulsive features of “collective security” has had disastrous effects. It has diminished appreciation and respect for the less dramatic peaceful processes of effecting change and settling disputes. It has led to a disparagement of the century-old peace-preserving institution of neutrality, with which the theory of united coercion is incompatible. It has induced a revival of ancient and unworkable theoretical distinctions between a just and an unjust war. It has caused a denunciation of tried experience and detachment in seeking sensibly to understand and hence intelligently to conciliate conflicting claims. Indeed it has brought about a practice of passing moral judgments upon national ambitions and mass movements, in the name of a supposedly ideal scheme the real character and practical effect of which its votaries failed adequately to pene-
trate. One of the sad concomitants of this tragedy of errors is the neglect of those elementary considerations of human experience which distinguish friendship from hostility, peace from war, conciliation from intransigence, negotiation from dictation. Indeed, it was not uncommon to hear the developments of the 19th century decried and depreciated as international anarchy, because forsooth the European War broke in 1914, whereas the "new" system of "enforcing peace" was extolled as ushering in the reign of wisdom, justice and righteousness. This system was pictured as the "new" international law; hence all the old law that conflicted with the ideal had to be attacked as obsolete if not indeed obstructive. Neutrality, a hard-won institution which since the 16th century had served to keep a large part of the world at peace under the regulation of law, an institution which peacemakers had cherished as one of the most constructive achievements of a slowly developing civilization, fell under the ban of the "new" school of peace through combined force. And so effectively did this false theory help to prevent the rebirth of the process of appeasement that the world now stands aghast before the new disasters which threaten.

In a less hysterical age, the "new" theory could not have gained so many adherents. For its perpetuation, it was necessary to keep up the fictions of the War and to disregard time-tested axioms concerning the nature, the growth and administration of international relations. Disregarded were the fundamental differences between the formulation of municipal law within a state, handed down by a recognized superior alone possessing the instruments of societal coercion, and the growth of the more primitive international system which develops by custom and treaty among equals, in which there is no superior legislator, no authorized enforcing agent for the group, no disarmament of the constituent members. These differences were glossed over, and a scheme was devised for judging fellow-members and enforcing the judgment by combined coercion.

Such a system postulates a mature society with an authorized law-giver, obligatory adjudication, willingness to accept adverse judgments or societal coercion. It assumes that the judges are unbiased, actuated only by objective considerations. Among sovereign nations such a system is a wishful dream. So long as it seemed to serve the interests of certain states, nothing was done to puncture the illusion; but the moment that the system came up against the ambitions of strong Powers, in or outside the League, the sorry truth was revealed. And now, even its original sponsors and supposed beneficiaries have turned their backs upon the illusion, hoping against hope to recover the lost ground of negotiation, conciliation and appeasement as the only practical methods of preventing war.

But for the fact that the unfortunate ideology of Articles 10 and 16 preached oblivion for neutrality, and especially American neutrality, it would not be necessary to spend so much time and space in exposing the dangers of the "new" system. But its devotees were fond of drawing the
analogy to a private legal system or to personal relations, and asked, "If a bully assaults Mr. Milquetoast, you wouldn't stand by in safe neutrality and watch the unfair assault, would you?" This seemed to the propounders unanswerable. But only slight examination will disclose the impropriety of the analogy. Nations, like all living organisms, are subject to the law of evolution and life. At any given time, some will flourish, others decline. If a nation is virile and prolific, if the doors to emigration are largely shut, if it lacks raw materials and markets, if it sees less sturdy neighbors in possession of colonial resources, the urge to expansion may become irresistible—even though expansion be unwise and unprofitable. These are biological considerations, in which ethics play only a minor role. Unless then the world is prepared to recognize and satisfy such a country's needs or assumed needs by negotiation, an explosion is quite possible. Some weakly held territory or aging state is then in danger. This has been the traditional, if unfortunate, method of readjusting the tenure of the earth's crust, and until we find a better method, the old one will be hard completely to outlaw. Should third states venture to intervene, they would risk the welfare of their own people and would be morally obliged to furnish a solution for the problem of over-population, poverty, lack of markets, etc.¹ Heretofore, experience has shown that it is not wise to interfere in such issues, unless some national interest is at stake. This may not seem altruistic, but it has proved the only practical way of avoiding even greater evils. Had the Hoare-Laval compromise been accepted by the emotional adherents of collective security in England, some of the humiliations and disasters that subsequently developed might have been avoided. It may be better under some circumstances to permit a political readjustment, even territorial, than to seek to endow an existing status quo with moral sanctity. State ethics and personal ethics are not identical. A government is responsible for the life and prosperity of its own people, and dare not risk their very existence on the adventurous effort to right distant "wrongs", the origin of which it may not understand and should not seek to oversimplify. Intervention is a delicate instrument. Ineptly employed, it might be calamitous. Hence experience has dictated its reservation for exceptional cases only, in which vital interests are at stake. The theory that war anywhere justifies intervention, that "peace is indivisible", is merely the thoughtless jargon of "collective security".

But it is a fact that the destructiveness of modern war makes it more important than ever to avoid its recurrence. What has been done since 1917 is no contribution to that end. The interdependence of a narrowing world might have been remembered at Versailles. If the constant danger of war is to be surmounted, thought should be given to the revival of the

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¹ We may leave aside for the moment the equally potent historical and psychological causes of conflict.
well-tried methods of restoring trust among the nations and then working
to develop the existing institutions for cooperative effort to appease, con-
ciliate and adjust conflicting claims. The task is now infinitely more
difficult than it was before April 6, 1917, when the United States offi-
cially abandoned neutrality.

II

Before discussing the recent American neutrality legislation and the
possibilities of its revision, it may be well to dispose of certain illusions
commonly associated with the supposed function of international law
in preserving peace. It will then be necessary to show that the very idea
of "enforcing peace" by collective coercion has done much harm, and has
weakened the law. That is true also of the notion that all treaties are
sacred and that neutrality has become obsolete.

1. That international law should preserve peace. A distinction must
be made between international politics and international law. Only after
politics has done its work does law enter the field. International law, for
example, did not make the treaties of 1919. They were the result of poli-
tics. Law cannot control all the political action of states and statesmen,
inspired as they often are by biological, historical, and psychological im-
pulses and grievances. Nor does international law control those internal
policies of states, such as the size of armies, navies, and tariff walls, which
lie close to the foundation of international political relations. Much in-
ternational action, therefore, has roots in primitive urges which escape com-
pulsory or legal control. Law, moreover, must take human and national
nature as it finds it, and can only regulate that part of state conduct which
by custom and treaty has proved susceptible to control by definite rule.
This covers a considerable field, such as delimitation of jurisdiction among
the states, their daily diplomatic intercourse in the conclusion and con-
struction of treaties, the protection of citizens abroad, the settlement of
disputes and the rules of war and neutrality.

But law cannot dictate national policy, nor does it as yet have much
control over the competition for prestige and power which is inherent in
the international system. In other words, the bulk of those factors which
make for conflict are political. To hold international law responsible for
controlling these dynamic political forces is to misunderstand the nature
of the forces and the nature of law. It had been the effort of interna-
tional law, operating with the admittedly sensitive sovereign nation-state,
to endeavor to take ever wider areas of international action out of the
domain of pure politics and bring them into the domain of law. Much
success had been achieved, as in extradition, administrative unions, and
arbitration. But that process, voluntary and resting on persuasion, re-
quires trust and a cooperative spirit among the nations. What we have
seen in the last generation has not been calculated to promote either trust or genuine cooperation.

2. That “collective security” is workable or beneficial. What has been said indicates that there is no such thing as “collective security”. It is a benevolent slogan. Its use is characteristic of the modern era of debating issues with a vocabulary of seductive catchwords. In practice we have found that the collectivists do not remain collected and that the divergence of their interests is disclosed as soon as they are asked to act. The theory of Article 16 of the Covenant implies that states may undertake war in the interests of other nations, not in their own. But European nations at least do not act on such awkward theories.

Notwithstanding this impracticability, the system of threat, of boycott and of sanctions, superimposed on the “peace” treaties, has produced collective insecurity on a scale hitherto unknown. It has brought collateral misfortunes not originally contemplated. The very threat of cutting a nation off from its necessary supplies at a time when it may need them most is not conducive to trust or cooperation. It produces fear and bitterness and a determination to become self-sufficient, thus diminishing international trade. It also creates a special incentive to the conquest of the territory and materials that are needed for national self-sufficiency, for no nation wishes to be at the mercy of others in the present period of collective and reciprocal distrust and fear.

No one denies that it is unfortunate that nations on occasion erupt and invade foreign territory. But when one examines history it cannot be called novel. The real issue is, “has anything been done to neutralize the causes and incentives of eruption?”

I think the no’s have it. Until we find some better way of making eruptions unnecessary by taking into full account the manifold reasons for readjustment or expansion, we shall have to accept the lesser evil of occasional individual small wars as against the greater evil of collective or world wars. But only in an intelligent understanding and deflation of the causes of conflict is there hope of diminishing the outbursts of national ambition. Nor can nations be made safe by external combinations from the consequences of their own mismanagement and ineptitude, of enfeebled population and diminishing resources, material and spiritual. Many nations do themselves more harm than do outsiders. The attempt to uphold a decaying status quo might be anything but constructive. National territory is not like personal property, with possession guaranteed by law. National territory is held in more precarious tenure. So long as its occupants are able materially to defend it, and so long as powerful neighbors find it preferable and politic to manifest self-restraint, the occupants are likely to retain possession. Constant alertness is an incident of statehood. These matters lie in the field of politics.
3. *That all treaties are sacred.* Treaties are not like private contracts. Treaties vary in scope and character. The more political the treaty the more vulnerable it is to change and obsolescence. The more legal it is, the more likely it is to be conscientiously observed.

Political treaties record political arrangements. If the political arrangement is sound, in the interest of all the signatories, and embraces more or less permanent conditions, the treaty confirming it is likely to survive. If the political arrangement is artificial, not responsive to actual physical conditions or potential change, the treaty recording it is likely to be broken and to disappear. Heretofore, these questions were considered in the field of politics. Now by an excess of virtue and misunderstanding they seem to have been transferred to the field of morals. This brings confusion rather than appeasement to international relations.

Peace treaties imposed under duress are necessarily vulnerable. We had not heretofore assumed that there was a moral issue involved in maintaining a peace treaty that no longer reflected the distribution of force which made the treaty possible. The idea that the treaties of Versailles, Saint Germain, Trianon and Neuilly laid the foundation of a new legal order which ought to be sanctified neither amuses nor instructs. In fact, it defies experience. Peace treaties are likely to survive when they correctly reflect the new distribution of power and obtain a moderate acquiescence from the vanquished. By and large, the Americans and the British have been good peace makers, because as a rule they did not overreach themselves but looked intelligently to the future. Such perspicacity was not particularly in evidence around Paris in 1919.

To denounce the disruption of such peace treaties as immoral is not impressive. Disruption is a natural consequence of unintelligent treaties. It is not a question of justice or of dictation but of workability. So, with less important political treaties, such as the Nine-Power Pact. Such treaties are temporary *modi vivendi.* They are usually sufficiently vague so that no legal case can be built out of them. But even if they were precise enough to permit that, they would still be vulnerable to the dynamics of political change.

The Nine-Power Treaty was based on a condition contrary to fact—the supposed territorial and administrative integrity of China, which the Western Powers had done so much through the nineteenth century to undermine. How far Japan will seek to close the door of opportunity in China remains to be seen. The Western Powers will be heard in that matter, and Japan will probably not run the risks which exclusion of Western opportunity would entail. But to make a moral issue out of Japan’s attempt to substitute pro-Japanese for anti-Japanese governments in China—especially after the admissions of the Lansing-Ishii agreement—or to invoke the deceptively hollow Kellogg Pact, with its reservation of the privilege of waging wars of defense, of which each signatory
is the exclusive judge, is to invite war on conditions hardly propitious. Just now, the Kellogg Pact looks like a temptation to intervention and war. To assume that certain countries, and certain countries only, incur the obloquy of "treaty-breaker" is to overlook the necessary differences in types of treaty and to elicit invidious comparisons which may disclose forgotten skeletons in the national cupboard. Treaties should be observed and for the most part are observed. But there is no profit in growing maudlin because vague political *modi vivendi* become obsolete by change of circumstances. The doubter might peruse the evolution of the constitutional provision that no state shall pass any law impairing the obligation of contract. The Minnesota Mortgage Moratorium case is but an exemplification of the fact that even contracts must yield to the exigencies of changed conditions and public needs.

And here another fact deserves consideration. The growing tendency of peace-lovers to arouse public opinion on behalf of the outlawry of war, compulsory arbitration and non-intervention has forced nations to subscribe treaties committing themselves, in principle, never to make war or to suppress it by joint action, and to submit all disputes to arbitration or conciliation. Good as the intention of the proponents of these measures may be, their efforts have not always proved constructive, because they were making demands on nations which nations could not fulfill—the world being what it is. The desire to hasten peaceful processes beyond the circumstances from which international relations spring has had a retarding and discouraging effect. Thus, the Kellogg Pact produced nullifying "reservations" which not only stultify the purpose intended, but legalize wars in unprecedented fashion. The commitment to Article 16 has evaporated under the stress of actual facts. The demand for obligatory arbitration has produced crippling exceptions, so that arbitration has probably retrogressed. The broad commitment of the United States to non-intervention at Montevideo was accompanied by a vague speech designed to safeguard qualifications. If intervention in an unknown future does take place, it will give rise to recriminations. No great nation can conscientiously make these commitments. When they are broken or said to be broken, it is not an evidence of obloquy or bad faith, but an indication that such treaties should never have been signed, and that the public opinion which insisted upon them was ill-informed. The growth of law among the nations has a more practical and less emotional inspiration.

4. *That neutrality is obsolete.* The theory of combined group action against the aggressor is incompatible with the neutrality of any member of the *posse comitatus*. We were told that it was cowardly and immoral to stay out of wars to suppress an aggressor.

2. 290 U. S. 398 (1934).
What we have already seen of the development of the theory of suppressing aggressors will have indicated its impracticability and its danger. As the premise falls, the conclusion that neutrality has become immoral or illegal should also disappear. Now that the European democracies have abandoned the unworkable theory of coercion for the more hopeful policy of negotiation, perhaps we shall regain our traditional respect for neutrality. The plain fact is that only theorists had ever assumed that neutrality had become obsolete. Throughout all the period since 1919, no nation has repealed its neutrality laws, the Permanent Court at The Hague has applied the obligations of neutrality, international conferences have reaffirmed neutrality. Few professionals became so romantic as to suppose that an institution centuries old, which had contributed enormously to the localizing of wars and to the peace and tranquillity of many nations, could be wiped out by a new paper scheme for policing the world.

But the struggle between the proponents of intervention and of neutrality in the United States is by no means over. The interventionist argument for enforcing peace has aesthetic attractions which cannot be denied. The fact that they crumble at the touch of reality does not weaken their appeal for many people. But if neutrality were to be abrogated or to become obsolete, the only perceivable alternative is continuous and general war without constructive possibilities. While idealism has its place, even in international relations, romance should be confined to domestic relations.

From the fiery crucible of many a war there was gradually evolved a group of principles and rules by which belligerents and neutrals achieved reasonably definite guides for the conduct of their reciprocal relations on land and sea. No nation was always a belligerent, and even the belligerents, while under temptation to overstep the bounds, appreciated the dangers of violating rules of law. Treaty, custom, prize courts, claims commissions, diplomatic settlements, had over a period of four centuries developed a great body of rules founded on intelligent principles for regulating the relations between belligerents and neutrals. These were known to informed persons and afforded a compass by which to guide the ship of state through dangerous waters. Belligerents had an incentive to observe them in order to hold down claims and to avoid the risk of adding to the list of their enemies; neutrals, in order not to expose themselves to legitimate criticism, damages and attack and not to risk plunging their people into war.

Neutrality is an old institution, which finds its source in candor, in the obligation to hold the scales even, to remain a friend of both belligerents, to lend support to neither, to avoid passing judgment on the merits of
their war. It assures both belligerents that they are dealing with a friend, not a disguised enemy. The belligerents must know who is in the war and who is not. Hence the importance of the neutral Government’s motives and intent.

In return for obligations assumed by a neutral, the belligerents undertake to respect his rights as a neutral, including the right to stay out of the war. There are those who regard this life-preserving role as insufficiently heroic and who recommend joining in foreign wars on the “right” side as a “world service”. But they seem unaware of the humiliations which the “servant of mankind” brings to his own people and the confusion which interference in foreign quarrels spreads to the rest of the world.

This is not the place to examine how the United States slipped into the European War in 1917. That has been documented in several recently published books. In brief, however, the main reason is to be found in a departure from those fundamental precepts of candor, impartiality and detachment which neutrality imposes on a neutral. You cannot help one side at the expense of the other and hope to remain neutral or escape the penalties of unneutrality. You can’t have it both ways. If you wish to remain neutral you must also respect the obligations of neutrality, know what is neutral and what is not, and display some capacity to handle yourself. When, however, you openly disregard the rules and take legal positions that are unsustainable, you are soon hopelessly entangled.

The Neutrality Act of 1937 was the outcome of a struggle between two extreme groups, the sanctionists, who desired to discriminate against the “aggressor” in the embargo of American arms and other commodities, and the insulationist Nye school, who desired first a mandatory embargo on as many commodities as possible, then limitation of belligerent trade to the pre-war quotas, then “cash-and-carry”. The historic and legal neutrals only came into the issue to endeavor to prevent either group of extremists from running away with the law.

The sanctionist school undertook to discontinue the principle and practice of neutrality, by seeking to obtain for the Executive the discretionary power to embargo discriminatorily with as few restrictions as possible—in other words, the power to act unneutrally.

This policy has had ardent defenders. Although it is now under something of a cloud, the demand for joint action of the so-called “democratic” nations against Japan and Fascism is its direct progeny. It doubtless inspired the President’s “quarantine” speech of October 5, 1937, in Chicago. The idea is embodied in that provision of the Executive trade agreements which permits an embargo on shipments to the disfavored nation, not only of arms but of commodities “needed in war” or of “other

3. Cf. TANSILL, AMERICA GOES TO WAR (1938); BORCHARD & LAGE, NEUTRALITY FOR THE UNITED STATES (1937).
military supplies”. It is perhaps not fully appreciated that a sanctions policy and a trade promotion policy are inconsistent. The idea encourages the “taking of sides” and, it is to be feared, resents obstacles to belligerency, such as the Ludlow Resolution for a popular referendum as a condition of a declaration of war to be conducted on foreign soil.

A second school of thought, seeking its authority in history and in law, and skeptical of the possibility of reforming the world by paper formulas, has preferred to have the United States actually stay out of foreign wars and employ the well-known standards of candid neutrality to achieve that end. This school deplores departures from neutrality, because experience has taught that they usually mark the road to war. This school observes that no other nations have succumbed to fanciful notions of “discriminatory” neutrality—a contradiction in terms—or to the sacrificial insulation against trade with belligerents which the Nye group in Congress would have the United States adopt.

The contribution of this neutral school to the Neutrality Act of 1937 was an insistence on impartial and equal treatment to both belligerents, and in conjunction with the Nye group, a prohibition upon American citizens to take passage on belligerent vessels. They would have preferred a simple declaration that such citizens, like those in a war zone, assume their own risks, for the prohibition may operate with severity if other vessels are not available. This school also advocated the prohibition to use American ports as sources of supply to cruisers at sea, and keeping armed vessels, surface or submarine, out of American neutral ports, as did Holland during the late war. They supported the Nye group in their demand that a mandatory arms and loan embargo be also imposed, even though at times an arms embargo might work hardship on weaker Powers, as in the case of China and the Spanish Loyalists, and that the manufacture of arms and ammunition in each nation might thereby be augmented. This school has no sympathy with the view that the United States must inevitably be involved in a large foreign war whether it wishes or not.

A third school of thought on neutrality is an outgrowth of the Nye investigation on the influence of bankers and munitions makers during the late war. This school ultimately took the initiative in 1935 in getting legislation on the books, and some of the more drastic features of the Act of 1937 emanate from it. This school is thoroughly neutral, has no use for the inflammatory conception of “aggressor”, and is determined to stay out of foreign wars. It would insulate the United States through prohibiting trade with the belligerents, so far as possible. Its intentions are excellent. It proceeds, however, from certain premises that I think are false, and does not make adequate allowance for the consequences of its policies. Its position is based in part on the premise that American neutral trade and the injuries to that trade got us into the last war and
that, if we have little or no trade, at least in American bottoms, the incentive to conflict will vanish. But the picture isn't so simple as that. Trade did not embroil the United States; it was sheer unneutrality, the favoring of one side against the other, the writing of "strict accountability" notes claiming immunity for American citizens on armed and unarmed belligerent vessels from unwarmed submarine attack, and the refusal to admit any connection between Allied and German reprisals. Nor did the bankers or the munition makers, however interested, write the ultimata which finally led to intervention. The economic interest, I firmly believe, was far less a factor than political romance. No legislation can effectively prohibit that.

The other error of the Nye school, it is submitted, is the belief that economic distress at home will have few if any repercussions. Even the limitation of trade to pre-war proportions, for which it got Administration support in 1936, would serve little practical purpose, and the difficulties in the administration of such a policy would be great. Embargoes have had a rather sorry history in the United States, and in 1812 nearly brought about the secession of New England from the Union. Moreover, to withhold goods from people who need them will be regarded as a hostile act, likely to violate commercial treaties and to arouse antagonism and challenge. The embargo obsession, it may be hoped, will soon pass.

The Nye school was mainly responsible for the "cash-and-carry" provision written into the Act of 1937, though it yielded to objections by limiting the provision to two years. As contrasted with the mandatory prohibition on arms exports and loans and travelling on belligerent vessels, the cash-and-carry provision can come into effect only at Presidential discretion and then only as to goods, presumably contraband, which the President places on a special list. These may then be carried only in foreign vessels and after payment in cash or short-term bills, so that title passes out of American into foreign hands. The general theory is that American commerce would be kept on the seas, while it would yet be exempt from the risks of American entanglement because practically all of it would be under foreign flag and under foreign ownership. It is not believed to be practical, is probably unenforceable, and would unnecessarily damage American foreign trade. Besides, in the selection of commodities for the special list, an unneutral President could in fact aid or injure one side, and that could hardly fail to expose the United States to the charges and consequences of unneutrality.

There are other features of the "cash-and-carry" policy which deserve consideration. In so far as it is designed to keep American-owned trade and American ships out of belligerent zones and out of belligerent trade, it will probably reduce the American market even in time of peace. An unreliable supplier will be replaced by one more reliable. The very un-
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certainty of the commodities that may be "embargoed" stimulates the foreign search for other sources of supply and for substitutes, even synthetic. This restrictive policy contributes to the growing demand for self-sufficiency, not to speak of conquest. The policy of the Act is thus in conflict with the Trade Agreement policy of Secretary Hull. A continental enemy of England (or Japan) is especially exposed to the rigors of the Act, for such a country may not be able to charter the necessary ships or command the necessary cash. The Act would thus make the United States the unintentional ally of England, and by furnishing a provocation to submarine and air reprisals against American commerce with England might arouse ill-feeling here, even though the ships sunk might not be American.4 Should a great European War actually break out, much of the American merchant marine, on which so much time, thought and money has been and will be spent, is likely to be laid up in idleness, unless neutral trade can be quickly developed. A strong Power will find it difficult to renounce trade.

The American producers of raw materials and especially of agricultural crops might find their customary markets, both in peace and in war, greatly limited and gradually diminishing. Already the American cotton-grower has felt the competition of Egyptian, Brazilian and, possibly soon, Chinese cotton. Trade-restriction policies are likely to have a similar effect on other raw materials. Even the supposed secondary aim of the Act, to withhold from belligerents the so-called sinews of war and thus reduce their staying powers and shorten the war, an aim hardly likely to be realized, does not warrant these untried experiments, the effects of which on American commerce can hardly be anything but deleterious. An inept or unneutral administration will not be deterred by these restrictions from incurring the risks of intervention, for the many provisions of the Act which come into effect only at Presidential discretion afford plenty of opportunity to take sides or involve the United States.5 The further possible purpose of the restrictions, to prevent a war boom in the United States, is more likely to be attained, although there are considerable foreign credits available to several potential European belligerents.

Although the Act is popularly called a Neutrality Act—Senator Pittman called it the Peace Act of 1937—numerous provisions have no relation to neutrality, but purport to constitute an attempt to avoid American

4. Goods, other than arms, which the President fails to place on his special list, may still be carried in American vessels. But as the goods must be foreign-owned, they are likely to be enemy-owned, thus exposing the American carrier to special danger. If the purpose of the Act is to save the lives of American seamen, as Senator Pittman contended, then logically American ships ought not to carry anything to belligerents.

5. President Roosevelt in his Chautauqua address of August 14, 1936, uttered a profound truth when he said: "The effective maintenance of American neutrality depends today, as in the past, on the wisdom and determination of whoever at the moment occupy the offices of President and Secretary of State."
entanglement by removing the opportunity or the temptation to injure American life or property. American citizens may still freely travel on non-belligerent vessels in the war zones, where, however, they should be deemed to assume all the risks.

Several features of the Act warrant special comment. The provision of Section 4 which exempts from the operation of the Act, with certain exceptions, American republics at war with a non-American state, goes much beyond the Monroe Doctrine, and is a gratuitous promise of unneutralinity and therefore of probable intervention in wars which it may not be in the American interest to join. The permitted exception of Canada and Mexico from the provisions of the embargo on discretionary commodities may prove embarrassing in refuting protests from an enemy of Great Britain.

The Act also applies to “civil strife”, if the President thinks it of sufficient magnitude or conducted under such conditions that the export of arms and ammunition would endanger the peace of the United States. This is a curious provision. It was incorporated as a result of the January, 1937, Resolution prohibiting the shipment of arms to Spain, a resolution enacted in the belief that it would help the Non-Intervention Committee in London enforce non-intervention in Spain and prevent the spread of the Spanish civil war. In fact, it operated to disable the recognized government of Spain from purchasing here the arms which international law, the commercial treaty and American precedents entitled the government to obtain, and placed the Franco rebels, whose belligerency was not then recognized (unless the Resolution accomplished that result) on a parity with the legitimate government. The motive was not bad, but the result was not to prevent intervention in Spain. The belated effort in May, 1938, to lift the embargo against the Loyalists would now be unneutral and would not compensate for the earlier departure from precedent. In a civil war on the American continent, the Act would conflict with the treaties of Havana (1928) and Buenos Aires (1936), which oblige third countries to assist the legitimate government against rebels, and this is the way in which the Congressional Resolutions of 1912 and 1922 on the supply of arms to countries in revolution have been construed.

The mandatory embargo on arms, etc., and the discretionary embargo which the President may impose on secondary commodities apply not only to shipments to belligerents, but “to neutral states for transshipment to such belligerents”. This seems unwise. It compels the United States to determine whether a shipment destined to a neutral country, even though paid for and going in a foreign vessel, will find its way into a belligerent country. It is a new application of the doctrine of continuous voyage or transport, always vigorously protested by neutrals as an improper interference with inter-neutral trade. Now, in the zeal to choke
trade, the United States assumes the self-injuring burden of undertaking to pass on the difficult question of whether a commodity destined to neutrals is likely to reach a belligerent and thus bring into force the provisions for cash payment, non-American carrier, license, etc. And if the quarrels with the belligerents are thereby thought to be avoided, it may be said that the capturing belligerent may not agree with the administration's decision and that neutral countries may object on general and on treaty grounds to have their legitimate trade thus impaired.

IV

On the first occasion for the application of the Act of 1937, the war in China, the administration declined to put it into effect. The reason has not been stated, except that the President does not "find" that a "state of war" exists. One teacher has told us that there is no state of war because China and Japan have not called it a war, because they maintained in 1937—very faintly—diplomatic and consular relations—now severed—and because third states have not proclaimed their neutrality, although it is added, without evidence, that these states operate on the principle that they are not bound by the obligations of neutrality. "If the law supposes that," said Mr. Bumble, "... the law is a ass, a idiot." Such misconceptions should not prevail. War is a fact and does not depend for its recognition as such upon a declaration of war, upon the names the parties assign to their conflict, upon a proclamation of neutrality, or upon the special condition of their diplomatic relations. In a war not conducted at sea, proclamations of neutrality are not common and belligerents may for reasons of policy not exert their full belligerent rights. In Europe, as during the Franco-Prussian War, it has not been uncommon to continue reciprocal trade during war and consuls are not always withdrawn. The Foreign Offices of European countries are doubtless applying to the Sino-Japanese War the appropriate rules of neutrality, as presumably is the Department of State, for none would seek to expose itself to the charge of taking sides and incurring the enmity or reprisals of the belligerent discriminated against. Even in the shipment of arms to both belligerents, neutrality is being observed. To conclude that the conflict now raging in the Far East is not a state of war is to open up vistas of future large-scale slaughter in a state of perfect peace. This is the road to anarchy.

In the revision of the Neutrality Act which will probably be undertaken in the January, 1939, session of Congress, it is believed that Congress should either (a) repeal the entire Act and depend on the rules of international law, the existing neutrality statutes and the constitutional duty of the President not to involve the United States in a foreign war, or (b) reserving to itself, with the President, the privilege of
determining the existence of a "state of war", Congress should retain
the present Act, amending it in the particulars above mentioned only.
The second alternative is preferable.

It is the writer's opinion that the United States, as a strong neutral,
has at its disposal the necessary means to insist upon the observance
of its rights as a neutral. The fact is that practically all the provisions
in the Act, outside of the "cash-and-carry" section, could have been
applied by the Wilson Administration, had there been then a serious
purpose to prevent American entanglement. Congress, in 1916, was
eager to pass the Gore-McLemore Resolutions providing in effect that
American citizens took passage on armed belligerent vessels at their own
risk, a rule of common law and common sense so elementary that it
really required no legislation to affirm it; the prohibition of loans needed
only an Executive frown; Congress granted unsolicited the unused power
of reprisal and would willingly have placed an embargo on arms until
both sides respected American neutral rights. An Executive order pro-
hibited the use of American ports as bases of supply and could have
prevented the admission of submarines and armed merchant vessels. It
was not the absence of statutes which produced American entanglement.
And while the enactment of the present statute is an expression of Con-
gressional purpose and a direction to the Executive, there is in it no
 guaranty of American neutrality.

But with the passing of the emotional faith in sanctions, the demand
for Executive discretion to act unneutrally may diminish. The cash-and-
carry policy, however well intentioned, has aroused so much justifiable
criticism that it is hoped that it may be repealed. So should be the
provisions for unneutrality in a war in which a Latin-American country
is engaged, the provisions relating to civil war, and the injurious pro-
visions relating to American enforcement of the continuous voyage or
transport doctrine on American trade. The belief that embargoes prevent
involvement, or should be used to chastise, disarm, or starve foreign
belligerents should be dissipated, for not only are embargoes ineffective
to that end but they set in motion collateral and consequential forces
dangerous to peace and the well-being of the American and foreign
people. Twenty years of effort to set up new ways of running the world
have produced only confusion and an intensification of nationalism and
armament heretofore unknown. Now, international law and experience,
including the time-honored practice of neutrality, may justly claim the
right to be heard again.

This does not mean that no change in the rules can be discussed. On
the contrary, the calling of a Third Hague Conference to deal with and
to strengthen the rights of neutrals against submergence by belligerent
encroachment would be a sign of returning balance and reconstruction.
The uses of the air arm, the submarine and the abuses of the Great War
by belligerents must receive considered attention as among the essential
conditions to any possibility of a limitation of armaments. Belligerents
must be limited in their privilege of interdicting neutral trade by an
abuse of the conceptions of contraband, blockade and continuous trans-
port. Expansion in the lists of contraband in the late War not only ruined
the safeguards for neutrals in the Declaration of Paris, but made the
position of the neutral carrier worse than it was before 1856, when at
least it received freight. The category of contraband must be limited to
its original function of controlling the supply of lethal weapons and
admitted military equipment. And it seems especially important that
the provision of the Rio Janeiro Anti-War Treaty of 1933 by which the
signatories, including the United States, agree to adopt in their character
as neutrals a solidary attitude, should be universalized. Very little has
been done to carry out this commitment. The Havana Convention of
1928 contains a code of neutrality, not greatly different from the estab-
lished law. But whereas the United States declined in 1914 to cooperate
with the Scandinavian neutrals in preserving the rights of neutrals, in
which all have a common interest and need a common front, as in 1780
and 1800, the demand for such cooperative action is now more insistent;
and as part of a Hague Convention or otherwise provision for such
unity should now be initiated.

The failure of the attempts of recent years to discountenance neutrality
as a philosophy and a practice should have done something to restore
its prestige. Those who took the long view of national evolution and
international relations never had much doubt on that score. To be sure,
neutrality is not a cure for war and makes no such professions. But
it has done much to place non-intervention in foreign wars on a legal
basis, has done much to ameliorate the duration and the barbarity of
war, has narrowed the area of conflict, has kept a large part of the
world at peace, and has been conducive to the making of sensible treaties
of peace. In a world of motley competitive nations this is no mean
achievement. However much we may work upon removing the causes
of conflict, upon devising methods of international cooperation and peace-
ful processes of settling conflicts, it would be a mistake to weaken
neutrality. Especially is this true in the United States, whose entire
history is associated with the growth of neutrality and advantage from
its practice.

6. The fact that so much trade is now state-owned or controlled will necessarily
expand the duties of neutrals.