

REVIEWS

THE INDIAN PROBLEM : REPORT ON THE CONSTITUTIONAL PROBLEM IN INDIA.
By R. Coupland. New York: Oxford University Press, 1944. Pp. 711.
\$5.00.

THIS important work on India is in the form of a report to the Warden and Fellows of Nuffield College, Oxford, a fact which explains some of its faults from the point of view of the general reader, as well as many of its virtues from the point of view of the serious student of Indian affairs. It is not easy reading, especially for Americans who lack the background and the "feel" of Indian history. On the other hand, it deserves careful study in this country, for it contains the only accurate and comprehensive account which has appeared of the first experimental beginnings of self-government by the Indian people. Under an act passed by the British Parliament in 1935, governments were organized in eleven Indian provinces, in which Indian ministers, responsible to legislatures elected on a wide suffrage, formulated policy and directed administration in all provincial affairs. While these governments lasted (and some of them are still in existence) there was little or no interference in their conduct of business either by the central government of India or by the provincial governors. Professor Coupland's detailed account of the conduct and accomplishment of these purely Indian administrations takes up almost half of the book, and conveys the impression that the political education of the Indian people has gone further than has been generally recognized. The ministers, with few exceptions, proved themselves "capable and hard-working men with a high sense of public duty and responsibility";¹ through bitter experience they learned the necessity of maintaining law and order, even though in so doing they had to use the officials of the Indian Civil Service, whom they had denounced before they took office. In finance their policies were conservative and sound. In spite of the need for economy they succeeded in passing important measures of education and social reform, especially agrarian reform, and in making some headway in the uphill struggle against illiteracy and poverty.

Seven of these governments were in the hands of members of the Congress Party, who resigned in a body when India was brought into the war by the Indian central government. Professor Coupland is critical of the policy of the Congress Party at every stage of its development since 1918, and not least during the years when these governments were in office. All Congress ministries were bound to obey decisions of the Party's central Working Committee, and were thus "responsible" to an outside organization rather than

1. Part II, p. 155.

to the elected legislature. He condemns the "totalitarian" methods of the party in refusing to admit the right of any other group to speak for the Indian people. Yet he acknowledges that the Congress ministries had more stability and actually accomplished more in their short two years in office than the four non-Congress ministries. To the reviewer it would seem that the most serious case he makes against the Congress is in his chapter on the Moslem reaction,² where he shows that the steady growth of Moslem separatism has been in large part due to the claim of an organization, dominated in its thought and policy by the great Hindu leaders, to be the only "national" party.

Although it is one of the merits of the volume that such a large part of it is devoted to Indian as against Anglo-Indian politics, there is also an excellent treatment of the constitutional changes wrought by the British Parliament since 1833, of the Montagu-Chelmsford reforms, of the Simon Commission, of the Round Table Conference and the Act of 1935, and of the Cripps Mission. The final section deals with prospects for the future of India. As an apologist for British policy (and, in spite of his studied fairness, he is presenting the British case) Professor Coupland is not always as convincing as one would expect from the scope and depth of his knowledge. The argument suffers from the somewhat surprising defect, considering the author's long and distinguished career as a professor of imperial history, that it is legalistic and theoretical rather than historical and practical. Thus, in his discussion of the Cripps Mission, he rests his case, in the last analysis, on the impossibility of making a change in the Indian constitution, as established by Act of Parliament, until the war is over. "It should be sufficiently evident from the previous chapters of this report," he writes, "why the immediate conversion of the Executive Council into a cabinet equipped both *de facto* and *de jure* with 'full powers' was impossible. For it would mean that the final stage of India's advance to full national freedom had been crossed in a single stride."³ To which the student of British imperial history can only reply "What of it?" Surely Professor Coupland remembers that self-government was granted to the Canadians, not by Lord Durham or by the British Parliament, but by a stroke of the pen of the Secretary of State after years of legal argument which proved conclusively that councillors in a distant province could not be "responsible" to a provincial legislature.⁴ And that self-government was granted to the Boers in the Transvaal in 1906 without the formality of an Act of Parliament, because Sir Henry Campbell-Bannerman was determined they should have it, and knew that such an act could not pass the House of Lords.⁵ To the

2. *Id.* at Chapter XVII.

3. *Id.* at p. 286.

4. 6 CAMBRIDGE HISTORY OF THE BRITISH EMPIRE (1930) 324-6

5. ENSOR, ENGLAND, 1870-1914 (1936) 389; 2 SPENDER, THE LIFE OF SIR HENRY CAMPBELL-BANNERMAN (1923) c. XXIX. On page 237 Mr. Spender writes, "To the great majority of British Unionists and to an immense number of outside observers in Europe, it seemed very near an act of madness to let the Boers have the opportunity of 'winning back by the ballot box what they had lost in the war.'"

reviewer it would seem that the transition from the imperial control to colonial self-government has always been made "in a single stride," and has usually been due to the happy inspiration of a single minister in Whitehall. Granted that an Act of Parliament was necessary to change the central government of India, Professor Coupland cannot suppose that if Messrs. Amery and Churchill had proposed one modelled on the British North America Act, it would have been rejected by their own cohorts, or that its acceptance would even have consumed time needed for other business. In 1942 there were undoubtedly grave practical considerations against such actions by the ministers. They stood to lose the support of those very elements in India on which they had counted for the defense against Japan—the enlisted army, the majority of whom are presumably not in favor of Congress dictatorship, and the Indian princes, whose wealth and influence have always been at the disposal of the King-Emperor in time of war. In return they could expect only the fitful support of the Congress leaders in so far as they were not swayed by Gandhi's pacifism. It was a difficult decision; but the friends of England in this country would like to think that it was not made on the legalistic grounds which Professor Coupland expounds at such length.

On the whole, Professor Coupland throughout does better by the Indian actors in his drama than he does by the British. The study is fully documented, and one can follow Indian opinion year by year in the speeches and writings of the leaders of the various groups. One can follow also the changing opinion of Englishmen from Macaulay down, but with it all the author somehow fails to convey the extraordinary place held by India and Indian problems in the thinking of British statesmen for the last hundred and fifty years. On page eight he actually reduces the constitutional status of India to that of a crown colony and implies that its government was modelled on the previous experience of Britons in empire building. Yet the most important fact in Anglo-Indian history is that the government of India was slowly and painfully built, stone upon stone, by Britons in Calcutta and Westminster who had nothing but their own powers of observation and their soaring imaginations to guide them in their efforts to control, and at the same time to protect from injustice, the teeming millions for whom overnight they had made themselves responsible. By the labors of Clive and Warren Hastings, of Charles James Fox and Burke, of the younger Pitt and Henry Dundas, and of countless other politicians and officials, the best form of government ever devised for purely imperial purposes was constructed in the century after the collapse of the first British empire. In comparison with this achievement the administration of the first crown colonies, Ceylon and Trinidad, and even of the future dominions, were matters of trifling importance to most Englishmen. Throughout the greater part of the nineteenth century India was the foundation stone on which the structure of Britain's overseas expansion, both economic and political, was based. It was the determining factor in much of Britain's foreign policy; without India there might have been no Congress of Berlin and

no occupation of Egypt. Unless one understands its over-all importance in the British scheme of things it is difficult to see why so much ink should be spilt by English writers on the subject of its form of government; or why high-minded men, like Lord Halifax and Sir Stafford Cripps, should endure such searching of soul when they think of relinquishing their responsibility for the safety and welfare of those groups and interests in India which have in the past been under the protection of the British Raj. Most of this knowledge Professor Coupland can take for granted among his English readers, but it should be emphatically stated for Americans.

HELEN TAFT MANNING †

THE ITALIAN CONCEPTION OF INTERNATIONAL LAW. By Angelo Piero Sereni. New York: Columbia University Press, 1943. Pp. ix, 402. \$5.50.

LET the reader be warned at the outset lest he be misled by the title of this book. Dr. Sereni does not claim that there exists anything like a specific conception of international law unique to Italian scholars or statesmen. To be sure, there has evolved a body of thought in Italy which is often referred to as the "Italian school" of international law. The discussion of its characteristic features, however, forms only the third and fourth parts of the book. What the author has actually set out to do—and has achieved with great success—is to render a systematic account of the contribution which Italian scholars and Italian diplomatic practice have made in this field of law throughout the centuries. Since the writings of Italian international lawyers are little known in the Anglo-American world, this study will be particularly welcome to American and English readers. Moreover, as far as I know, a detailed history of the development of international law in Italy has not been written before in any language. Dr. Sereni has thus rendered a service to the study of international law everywhere.

The history of international law in Italy is intimately tied up with the evolution of international law in Europe and, at the same time, with the political history of Italy and her struggle for national unity. The author tells his story with a vivid awareness of this international and national setting. He begins with the Italy of the Renaissance,¹ which provided a fertile soil for the growth of international law. An intense international life, due to commercial expansion and the growth of autonomous city-states, gave rise to international law problems at an early period. Roman law, revived in the world-famous universities of Italy, furnished the theoretical basis upon which it was possible

† Professor of History, Bryn Mawr College.

1. Part I.

to construct the legal framework of the nascent international community that emerged from the disintegrating Holy Roman Empire. Dr. Sereni traces fundamental canons of international law, such as the autonomy and equality of states, back to the struggle of the city-states to emancipate themselves from the Emperor and to their struggle for balance of power among themselves. I think he is right in considering Bartolus of Sassoferrato (1313-1357) the first theorist of international law; indeed his evaluation of this great jurist forms one of the best parts of the book. Equally interesting is his analysis of the work of Gentili (1552-1608), that great Italian expatriate who taught at Oxford, held public offices in England, practiced law in London, and planned, in his *De jure belli*, an international community based on solid principles of law.

In the practice among the Italian states, an entire system of diplomatic relations and consular representation developed in this period. Numerous treaties were concluded with regard to communications, the protection of citizens abroad, extradition, and the recognition of civil and penal judgments; mediation and arbitration were used as peaceful means of settling disputes; certain rules of land and sea warfare were established, as well as the first principles of neutrality. Thus, as the author shows, "in the limited society of the Italian states there arose principles and rules of international law which were later extended to the whole of Europe."²

The second part ("The Period of Foreign Ascendancy") covers the period between, roughly, the second half of the sixteenth century and the end of the eighteenth century. It was a period of political and economic decline when the center of the intellectual, economic and political life of Europe shifted from Italy to other countries. Italy's main contribution to international law in that era was the formulation of rules of neutrality, especially in maritime warfare, both in doctrine and in practice (proclamations of neutrality).

The first "Italian school" of international law arose during the nineteenth century in the period of the *Risorgimento*³—curiously enough, out of the ideas of two political exiles. It was Mazzini who formulated the "doctrine of nationalities"—an eminently political theory, aimed at furthering the unification of Italy in a national and liberal state. Starting from the proposition that nations are human associations determined by common language, geography and history, Mazzini proclaimed these principles: that every nation should be organized as a unit, govern itself and be independent of foreign domination, and that the government of every nation should be based on the consent of the governed. This political gospel, for which "thousands perished on the Austrian gallows, in the prisons, and on the battlefields,"⁴ inspired Mancini's conception of the national state and of an international juridical

2. P. 121.

3. Part III.

4. P. 159.

organization which should settle disputes by means of international arbitration. Mancini's influence on private international law not only in Italy but on the entire continent is well known: it resulted in the rule that questions of capacity, status, family relations and succession were governed by the national law rather than the law of a person's domicile. While Dr. Sereni seems to favor this conflict-of-laws rule, he shrewdly points out the weaknesses of the doctrine of nationalities in public international law and the fact that it contributed to the problem of national minorities, one of Europe's gravest inheritances from the first world war.

Yet it should be kept in mind that the doctrine was founded upon a spiritual and moral idea—the will of a given population to live as one, and the equality of nationalities—and thus is in sharp contrast with the barbarian racial theory of National Socialism which was aped by the fascists in Italy. Indeed, so vigorous was the continued influence of the liberal creed of the *Risorgimento* that the author is justified in speaking of the “nonexistence of a fascist theory of international law.”⁵ Other than in Germany, where authors like Carl Schmitt translated the power aspirations of the Nazis into jaw-breaking pseudo-scholarly terms of “international law,” none of the Italian scholars of international law became subservient to fascism in their writings. Dr. Sereni, who was himself a teacher of international law, is justly proud of this fact; and it is not minimized by the reasons which explain the tolerant attitude of the fascist dictatorship toward the current doctrine of international law. On the one hand, fascism was not interested in scholarly theories, Italian scholars having concentrated on theoretical problems of international law rather than on practical questions, while, on the other hand, it approved of the prevailing “positivist” school of international law because it was opposed to natural-law thinking.

This positivism⁶ developed as a reaction to the idealistic and “political” teachings of the “school of nationalities.” Its outstanding exponent is Anzilotti, well known as a member of the Permanent Court of International Justice. Anzilotti stressed a vigorous distinction between positive law and metaphysical justice, between legal and ethico-political problems of international relations. To him, the one and only source of international law is international agreement among sovereign states, based on the rule *pacta sunt servanda*. This rigid view has been modified by the younger generation of international lawyers in Italy,⁷ with whom the author identifies himself. Yet he is a stout “positivist” and treats natural law as a dead issue. Since I believe that natural law cannot be brushed aside so lightly, this appears to me the one flaw in an otherwise excellent and brilliant book.

Not the least merit of Dr. Sereni's work is that he does not confine himself to the development of international-law theories. He also shows the effect

5. Chapter XIV.

6. Chapter XII.

7. Chapter XIII.

which theories have had on political action and diplomatic practice, and vice versa. His chapters on "International Relations of the Kingdom of Italy"⁸ and on "Domestic Legislation and Cases Concerning International Matters"⁹ have immediate practical usefulness. That he is fully aware of the new problems created by the rise of totalitarian regimes is shown in the discussion of fascist practices.¹⁰ The lesson he derives therefrom is one that should be taken to heart by all those who are concerned with post-war problems. "The totalitarian regimes, such as Italy and Germany, which did not establish a full-fledged collectivistic organization, derive considerable advantage from the fact that international rules still presuppose a distinction between public and private activities"¹¹—just as they profited, we might add, from the traditional distinction between the "internal" and the "external" affairs of a state. If international law is to survive, its essence must be safeguarded against all attempts at profiteering by means of antiquated rules.

M. MAGDALENA SCHOCH †

THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835. By Charles Grove Haines. Berkeley and Los Angeles: University of California Press, 1944. Pp. 679. \$6.50.

ON his last Sunday in Richmond as President of the Southern Confederacy, Jefferson Davis received a caller who became immediately aware that the President was suffering an acute slump in his temperament. "You seem to be in very low spirits, Mr. President," said the visitor; "am I to infer that Richmond will fall shortly?" "Oh, yes," answered Mr. Davis indifferently, "Richmond will have to be abandoned within a few hours; but that's not what worries me." "Is the rumor true then," the visitor persisted, "that General Lee is about to surrender?" "Oh, yes," replied the President in the same tone, "General Lee will be compelled to give up his arms within the present week; but that's not what I am most thinking of." "Do you mean to convey," pressed the now startled visitor, "that the Confederacy itself is about to collapse?" "Oh, yes," said Davis listlessly, "the Confederacy is already a thing of the past to all intents and purposes, but that's not what I am most concerned about. What grinds me is the fact that after it is all over some d——d Yankee will write the history of it!"

This possibly apocryphal tale will serve to suggest something of the motivation of Professor Haines's volume.

8. Chapter XVI.

9. Chapter XVII.

10. Pp. 306 *et seq.*, 352 *et seq.*

11. P. 308.

† Harvard Law School (on leave of absence).

The following passage from his introduction furnishes the key to his purpose:

"The extent to which the members of the Supreme Judiciary and the tribunal itself have participated in and have influenced the political and partisan activities of the time has, in my opinion, received inadequate consideration.

"Moreover, those who have attempted to evaluate the contribution of the Supreme Court to American legal and political thought have not infrequently viewed the development of American history from the standpoint of a bias favorable to one of the great political factions which has struggled for ascendancy and power. Thus, the story of the Court has usually been told in such a way as to defend and laud the federalist and nationalist policies and principles and correspondingly to depreciate and condemn the local, particularist, and democratic principles and traditions in the American way of life."¹

So Professor Haines feels that he has a duty, not so much to correct the bias he deplores in such works as Warren's *Supreme Court in United States History*² and Beveridge's *Life of John Marshall*,³ as to offset it with a kind of countervailing bias. "No attempt has been made," he writes with commendable candor, "to present a nonpartisan account of the development of American constitutional law."⁴ Indeed, he questions whether such an attempt would be possible of realization, even if in the circumstances it were desirable, for the writing of history like the administration of justice is, he asserts, affected by the "personal peculiarities, predilections, and political leanings" of the historian.⁵ Thus history escapes Napoleon's stigmatization of it as "a lie agreed upon" only because the historians are not agreed.

I must say that I regard Professor Haines's scepticism as excessive, and I think his pages suffer thereby in that he frequently treats matters which are susceptible to factual proof or disproof, in some measure at least, as if they were matters as to which the historian's judgment was bound to be merely subjective. Indeed, he sometimes does worse, presenting an obviously subjective speculation in words implying that it is based on a considered review of available facts. Thus he writes at one place, "On the whole, it is apparent that it would have been possible to get along with a reasonable degree of satisfaction and success under the reputedly decrepit Articles."⁶ "Get along"—for how long? "Satisfaction"—to whom? "Reasonable degree"—by what test? Certainly, so loose a conjecture unanchored to anything approaching a secure factual

1. Pp. 3-4.

2. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY*, 2 vols. (rev. ed. 1932).

3. BEVERIDGE, *THE LIFE OF JOHN MARSHALL*, 4 vols. (1916).

4. P. 4.

5. Pp. 4-5.

6. P. 95.

mooring is unimpressive when laid alongside, say, James Madison's contemporary recital of the conditions which brought about the Convention of 1787. Moreover, if one permits one's mind to travel the short distance between Washington's inauguration and the diplomatic crisis of 1793, which divided American opinion so sharply, and to a dangerous extent along sectional lines, one can but wonder what, in such a situation, the Congress of the Confederation would have been able to do.

Nor can one concede Professor Haines his assumption that the cause of democracy and the cause of States Rights were, even between 1789 and 1835, one and the same cause, even though both suffered at times from the Court's pro-property and nationalistic trend. The interest of the slave-holding South in the partnership imagined by Professor Haines was from an early date increasingly centered upon States Rights, while the advance of democracy came to be confined more and more to the northern and western states. Moreover, the particular States Rights creed to which Professor Haines gives most attention is that which took its rise from the Virginia and Kentucky Resolutions and was later revised by Spencer Roane and John Taylor of Carolina, under the patronage of Jefferson in his declining days. The central idea of this creed was that the final construction of the powers of the national government belonged to the states acting, according to the Resolutions, through their respective legislatures, or, according to Roane and his school, through the several state judiciaries. Either view inferentially charged the men who so laboriously established the Constitution with spending months and years at the frivolous employment of weaving a rope of sand. And, had these views prevailed, the American people, rigged out in all their democratic finery, would eventually have had no place to go.

Professor Haines's case against the Court is for the most part his case against Chief Justice Marshall. It comprises the following points: (1) While judges make law always, inevitably, Marshall out-Heroded Herod in this respect, seizing the opportunity afforded by his office, first, to make himself the exclusive mouthpiece of the Court on the most important occasions, and, secondly, to read into the Constitution the pro-property and nationalistic tenets of the old Federalist party. (2) Thus, "continuing the work of Washington and Hamilton," he "transformed a document essentially confederate in nature into a charter for a national union," and at the same time paved the way, through his "persistent and uncompromising hostility to democratic ideals and principles," for the Court to become in later times the "defender of the interests of capitalism."⁷ Yet (3), in the very act of straying from "the path of strict duty as a Judge," Marshall, ever adept "in using the camouflage of legal logic to conceal his partisan or political designs," sought to indoctrinate the country in the belief that "this department can listen only to the mandates of the law," and "has never grasped at ungranted jurisdiction."⁸

7. See pp. 619-23 and notes.

8. *Ibid.*

My comment on all this is that I regard Chief Justice Marshall as having shown himself in his famous opinions a far better historian than Professor Haines is in the volume before us.⁹ And in justification I desire to quote a part of Justice Henry Baldwin's striking tribute to Marshall shortly following the Chief Justice's death—it being remembered that Baldwin was a States Rights Democrat of the moderate Jacksonian school. Marshall's maxims of constitutional interpretation, says Baldwin, were two: first, that the Constitution "was designed for immortality"; second, that "we must never forget that it is a constitution we are expounding."¹⁰ And, Baldwin goes on, "no commentator ever followed the text more faithfully, or ever made a commentary more accordant with its strict intention and language:" "he never brought the powers of his mighty mind to find some meaning in plain words . . . above the comprehension of ordinary minds;" "he knew the Framers of the Constitution, who were his compatriots," and hence as its expositor, "he knew its objects, its intentions."¹¹

Again, as to the "confederate nature" of the Constitution, I wish Professor Haines would lay the Virginia and Kentucky Resolutions alongside the opening paragraphs of Marshall's opinion in *McCulloch v. Maryland*,¹² and then compare both with the statements which he himself quotes from Samuel Adams and Luther Martin,¹³ as well as with the great mass of similar material contemporary with the adoption of the Constitution which I brought together years ago in my *Doctrine of Judicial Review*.¹⁴ This evidence shows beyond peradventure that, in the substantially unanimous opinion of that time, the Constitution owed nothing to the principle of State Sovereignty but was to be imputed, just as the state constitutions were, to *individuals* possessed of the primitive right of choosing their own political institutions. And a question of *imputation* it is solely, for no one raises any important question respecting the course of events by which the Constitution was framed, adopted, and set going.

Finally, let me ask, *was* Marshall such a thorough-paced hyperite as Professor Haines seems to think, when he declared that "this department can listen only to the mandates of the law" and so on? I can't see that he was. For one thing, Marshall did not share the great revelation, which so many legal writers currently display such enthusiasm in spreading—more enthusiasm than discrimination at times—that judges inevitably make law. He was, therefore, much less aware than an old-fashioned judge would be nowadays that there was anything to be concealed when he followed his "hunches." Indeed, it is highly doubtful if it ever occurred to him that he had anything to conceal on this score.

9. I have, of course, naught but admiration for his excellent *AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* (2d ed. 1932).

10. Parenthetically it may be remarked that Professor Haines himself admits that ". . . the federal Constitution necessarily dealt with issues of great political and economic significance." P. 654.

11. BALDWIN, *VIEW OF THE CONSTITUTION* (Philadelphia, 1837) 3, 100-12, *passim*.

12. 4 Wheat. 316, 400 *et seq.* (U. S. 1819).

13. Pp. 103, 108.

14. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* (1914) 81-103.

He certainly made no bones about articulating his "major premises," in other words, those very tenets of Federalism of which Professor Haines so much complains. These, he thought, with good reason, expressed the intentions of the makers of the Constitution, and ought therefore to govern its interpretation, it being then commonly agreed that the intention of the law-maker should be controlling.¹⁵

One further cause for discontent with Marshall's performance Professor Haines finds in the fact that his views were neither those "of the majority of the Nation during the period of their adoption by the Court, nor the only rational views which could be entertained."¹⁶ Marshall himself would have heartily concurred in the first branch of this charge, his own belief being that the views of the majority were heading back to the very confederatization of the Union which it had been the chief purpose of the Constitution to get rid of, and that it was his sworn duty to oppose this tendency, albeit the cause he represented was foredoomed to defeat. As to the second branch of the charge, is it not asking rather too much to demand that a Judge's views should be "the *only* rational" ones possible; is it not enough if they are rational? Actually, the sole alternative views suggested in Professor Haines's pages seem to be the preposterousities before mentioned of Jefferson, Roane, Taylor & Co.

There are a number of other matters on which I should like to take issue with Professor Haines, but this review is already much too long. Professor Haines revives old controversies but contributes few new facts and nothing new in the way of analysis toward their final settlement. His volume distills just enough of the acridity of the old quarrels it retells to season a not unpleasant escape from today's stern realities. Still I wish Professor Haines had devoted his time, learning, and skill to a more useful task. Had he shifted his attention almost exactly one hundred years to the role of the Supreme Court between the death of Waite and the decision in the *Schechter* case he could have given us a volume which badly needs doing.

EDWARD S. CORWIN †

PHILADELPHIA LAWYER: AN AUTOBIOGRAPHY. By George Wharton Pepper. Philadelphia and New York: J. B. Lippincott Co., 1944. Pp. 407. \$3.75.

LIVES of great lawyers are prescribed reading for the younger members of the profession and afford their elders the vicarious enjoyment of famous battles won or lost, or triumphs of skill and professional ingenuity reaping their just reward. Often, too, such biographies are authentic contemporary

15. See, *e.g.*, his words in *Gibbons v. Ogden*, 9 Wheat. 1, 188-9 (U. S. 1824).

16. P. 623.

† Professor of Jurisprudence, Princeton University.

social documents, since the attorney so sedulously represents the prevailing sentiments of at least the upper and most successful stratum of his society. This frank personal history deserves reading on all these grounds, and not the least because it shows so clearly how determinedly the leaders of the bar of our era have set themselves against those social reforms which are far-reaching along lines realistically democratic.

To those who know Senator Pepper—wise, witty, and urbane, one of the two or three leading advocates of our generation—it is not surprising that his book should touch so many points of interest or show so full and rounded a career. He seems in fact to have had every qualification for success in the true American way save two—he was not born in a log cabin or reared in dire poverty. Indeed, in one of his revealing comments about himself, he confesses that, while he can realize the hardships of a soldier's life, he has had no real contact with the thoughts and desires of the taxi driver, the share-cropper, the miner, and finds it harder to appreciate the anxieties of the so-called "underprivileged." The son of a Philadelphia physician and grandson of a lawyer of note, he grew up in a congenial environment and achieved a natural social and intellectual success in college and law school at his native University of Pennsylvania. Then, entering upon practice in one of the larger city firms, he spent over twenty years as a part-time law teacher at his alma mater, reorganizing what soon became the important *University of Pennsylvania Law Review*, introducing the case method of teaching there, and forecasting modern curriculum integration of courses by joining "corporations" and "partnerships" to form the law of "associations." At twenty he was, *mirabile dictu*, a Democrat, but by twenty-five he was safely in the Republican fold. Before and during the early days of World War I, he not only was for preparedness and war, but appears to have been something of an internationalist. While the reasons for the transition are not made clear, he took the stump in opposition to President Wilson's peace plans even before the Senate coalition against the Versailles Treaty developed, and his effective campaigning then seems to have brought him to the attention of the Republican leaders.

Then followed his term as Senator, his intimate relations with Presidents Harding, Coolidge, and Hoover, his later Court battles and triumphs against New Deal legislation, the presidency of the American Law Institute, the vice-chairmanship of the Advisory Committee of the Supreme Court on the Federal Rules of Civil Procedure, the American Bar Association medal for distinguished legal service, innumerable college honorary degrees, and the other high honors our society delights to bestow on those who serve it devotedly and without too great deviation from the normal.¹ Interspersed are work of the

1. Room is lacking for any extended reference to the author's famous cases, often taken as a matter of public service entirely, for such distinguished clients—if that term is applicable—as the Senate against the President or vice versa. Perhaps the most renowned of his victories was that in the Agricultural Adjustment Act case, where his stirring peroration: "Indeed, may it please your Honors, I believe I am standing here

most extensive character for his church, both locally and nationally—he has, as he points out, a simple religious faith—and gifts and works for charitable and educational purposes, including prizes established at two colleges, where the prize winners now rise up to call him blessed. There is no doubt that he is a really good citizen; and, particularly because my own views on many matters are unlike his, I am glad to make this simple statement wholeheartedly. And now in his seventy-eighth year he still leads an active and a busy life. Rising at 6:45 to setting-up exercises, shower, and a light breakfast, he commutes into the city for a happy day, where even Miss May, who hands him his paper at the newsstand, is convinced that the Democrats must be “run out of Washington” if we are to win the war.

I suppose such a life leads inevitably to anti-New-Dealism, in all its works and even ideas and aspirations, and that, too, of the most staunchly determined kind. It is a phenomenon of our times that, while individual lawyers, and particularly younger ones, not to speak of that hybrid animal the law professor, have labored hard to develop and then to enforce legislation to ameliorate the condition of the masses, yet the top practitioners almost uniformly have lent their souls' beliefs, as well as their talents, to the opposition. A striking example is the well-nigh complete obsession of the American Bar Association with fears of governmental activity, even under the pressing necessity of war. I must confess, however, that I was not prepared to find the Senator, so generally suave and judicious, here so definitely enlisted in the extreme, even bitter, opposition. And I had thought that, whatever might be the mutual irritations and dislikes of opposing political personalities of the time, the worth of much of the recent legislation was now generally conceded. But I cannot find that here; all seems bad or at the very least unsportsmanlike. Express condemnation is liberally sprinkled throughout the book; it goes so far that even the legislation creating the Tennessee Valley Authority—perhaps the most spectacularly successful of all New Deal measures—becomes “the bill setting up the stormy T. V. A.” There are a dozen or more references to the President, some brief and indirect, some of several pages each, and all of them derogatory. This includes his associates and advisers—“that motley group” known as the Brain Trust; while the “dead hand” of the New Deal “rests heavily upon American life.” Thus the New Dealers were “so unlovely in their entire lack of sportsmanship”—“the world's poorest losers”—when they objected to Supreme Court decisions against them; yet elsewhere we find that the Court has now become “just another federal agency.” And the late Wendell Willkie, who achieved the author's enthusiastic acclaim in his earlier political activities, appears to have lost it when he rose above party lines with

today to plead the cause of the America I have loved; and I pray Almighty God that not in my time may ‘the land of the regimented’ be accepted as a worthy substitute for ‘the land of the free’ ” [United States v. Butler, 297 U. S. 1, 44 (1936)] is the subject of some sparkling comment by Thurman Arnold in *THE FOLKLORE OF CAPITALISM* (1937) 150.

"his apparent ignorance of the first principles of party organization" and internationalist views which did "more credit to his heart than to his head."

This attitude is beautifully epitomized in the author's account of an incident not without local interest. He tells how in November, 1914, President Hadley tendered him the Deanship of the Yale Law School, which caused him to consider anew his decision to relinquish teaching for practice, but with the same conclusion. And then he says—quotes, capitals, and all—thus: "If the 'Liberals' who now dominate the Yale School read this they may well shiver at their narrow escape."² I cannot now claim to be official shiverer for the School, but I must confess to some sympathetic tremors at the thought of such intransigence dominating the School in stony opposition to a decade of fruitful legislation.

The dominance of our profession in matters governmental from the early days on has often been considered. Not so often have we had evaluations of the role played by the lawyer in opposing developments which now in the light of history seem inevitable. There have been a few such, however; one recalls, with sorrow at his early demise, that brilliant study by Professor Corwin's student, Dr. B. R. Twiss, entitled *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court*,³ showing how our most brilliant barristers have led, if not shepherded, the opposition to all recent social legislation, from the income tax on. But this statement, without more, is obviously an oversimplification; the lawyers do but faithfully represent the class to which they belong. One may perhaps wonder the more at the bitterness of class feeling in classless America as compared, say, to England, where the Tory party has long since sponsored the enactment of legislation still looked at askance here. The Tory does seem, however, to have a sense of obligation to the "lower" classes which is incompatible with the democratic tradition where the spirit of enterprise and the spirit of buccaneering often appear to coalesce. Of course, *noblesse oblige* has its own limitations; it is highly paternalistic, it may breed servility, and it is not extended to outsiders even in the Empire itself. And doubtless the pioneer spirit which was taught to push all incompetents down as it surged forward was necessary to conquer a virgin territory and make it fruitful. Now, however, with the passing of the frontier, that spirit has less place. It should yield more and more to that sense of responsibility to the entire social group which an older civilization may tend to develop. If such an ameliorating trend does appear, softening and thereby strengthening the American way of life to make it flexible and accommodating to changed demands, I expect autobiographies of future bar leaders may disclose what for all its charm I find sadly missing here, namely, a willingness to accept, nay to share, real adventures in democracy.

CHARLES E. CLARK †

2. P. 108.

3. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* (1942).

† United States Circuit Judge, Second Circuit Court of Appeals.

PREJUDICE. JAPANESE-AMERICANS: SYMBOL OF RACIAL INTOLERANCE. By Carey McWilliams. Boston: Little, Brown & Co., 1944. Pp. 337. \$3.00

THIS book tells of the removal from the Pacific Coast of our fellow citizens of Japanese ancestry and their Japanese parents, of what led up to it, and of what has and may come of it. The removal was compelled by military power as a measure of war. Less than one hundred and fifty thousand people were directly involved, and in the military history to be written the event will have no great place, but the political and social results may show it to have been the most consequential single domestic measure adopted during the conflict. The book is admirable as a piece of reporting of recent happenings (it is the first book entirely devoted to this subject). It deserves praise in larger measure because it shows the wider importance of the evacuation, an importance beyond immediate military considerations which exists for all Americans, whatever their ancestry. This importance lies in the increased danger to us from our own racial intolerance, brought about by the evacuation and its attendant events.

The book may be reviewed under propositions expressing some of these more general truths.

First, anti-Japanese agitation is a form of race prejudice and as such separates us from our friends and unites us with our enemies. The evacuation included all persons of Japanese *ancestry*, including seventy thousand citizens most of whom were loyal to this country and its ideals. Both before and after the evacuation agitation has been directed against a group assumed to be composed of all the same kind of naturally dangerous people, dangerous because of their Japanese ancestry. As General De Witt said, "A Jap's a Jap. . . . It makes no differences whether he is an American . . . he is still a Japanese and you can't change him."¹ It appears to be the racial kinsmen of our Oriental enemies alone who are singled out for repressive action; indeed, in California agitation against the American Japanese has been led by men named Goethe, McClatchy, Costello. The evacuation must be understood as one of a series of related events of which others are the denial of the right of naturalization to Oriental aliens, and the passage of anti-alien land laws. One effect of this racial discrimination is to drive away from us thousands of young Americans who happen to have Oriental faces. A more important effect is the degradation of ourselves to the evil level of our Nazi enemies. Anti-Japanese agitators would make the American-Japanese into a pariah people, objects of hatred because of their ancestry. This is American Fascism.

Second, prejudice is a source of political power; the unscrupulous minority use this power to wrong the majority. McWilliams shows that Japanese militarists used anti-Japanese action and agitation in California to induce in the Japanese people a state of mind that would support war with the United States.

1. P. 116.

American agitators also used the power for political advantage. The first long chapter of the book is concerned with "The California-Japanese War." In this "war" a minority of Americans committed the United States to anti-Oriental policy and action. Not even today, in California, is it true that most people support the campaign conducted by demagogues and pressure groups against Americans of Japanese origin. In this respect California is only one extreme example of a situation general in America: where population is heterogeneous and composed of immigrants, a small coherent minority, using the political power latent in intolerance, can commit the majority to a course it would not otherwise follow.

Third, not only are legislation and administrative action expressions of collective attitudes, but the opposite is also true: legislation and administration shape collective attitudes. When we pass a law or issue a formal order we make stronger that part of our conviction which feels itself consistent with the law or the order. McWilliams makes the important point that agitation against the Japanese-Americans on the Pacific Coast *increased* after they had been removed. We took away from a danger zone everybody who had a Japanese ancestor; therefore—in this primitive logic—everybody who has a Japanese ancestor is dangerous. Confinement of these citizens and aliens was not intended when evacuation was first planned, but now that they have been confined some feel that very fact justifies a campaign of hatred against these same people. The decisions of the Supreme Court on the constitutionality of the evacuation² and subsequent confinement³ will affect, of course, public sentiment toward the Japanese-Americans, but one wonders if this effect can be as great as that previously brought about by a military order.

This book is an account of trouble and confusion on America's great new frontier. The post-war world will have two great powers, Russia and the United States. Among her doctrines Russia includes that of racial tolerance, and between that country and our own lie the Oriental peoples, a third of the world's population. Our future in large measure will depend upon the character of the relations we establish with these Asiatic peoples.

Carey McWilliams has a special role in American life. He is the trial lawyer for the disadvantaged minority. He presents the unpopular side of the case that it may be fairly tried in the forum of national opinion. His mind is clear, his heart is warm, and there is no timidity in him. We thank him for his brief, his book.

ROBERT REDFIELD †

2. *Toyosaburo Korematsu v. United States*, 65 Sup. Ct. 193 (U. S. 1944).

3. *Ex parte Mitsuye Endo*, 65 Sup. Ct. 203 (U. S. 1944).

† Professor of Anthropology and Dean of the Division of the Social Sciences, University of Chicago.

ARTICLES OF AGREEMENT: INTERNATIONAL MONETARY FUND AND INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT: UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE, BRETTON WOODS, N. H., JULY 1 TO 22, 1944. U. S. Treasury, Washington, D. C. Pp. x, 89.*

"FULL employment" on a global rather than on a national scale is a bold and intriguing goal. The Bretton Woods agreements outline the financial machinery which their framers believe essential to the attainment of a balanced growth of international trade on a multilateral basis and thus to the achievement of high levels of employment and real income throughout the world.

Fund and Bank, while distinct entities with different purposes, supplement one another. The Fund seeks exchange stability by eliminating unnecessary risks and harmful pressures on the economies of participating countries. It seeks this not merely by acting as a clearing agency with which participating nations exchange their own currency or gold for the currencies of other countries, but even more by placing the Fund's foreign currency resources at the disposal of a member with temporarily unbalanced international payments. Devaluation in an orderly manner is permitted within limits in the event of fundamental disequilibrium remaining unadjusted after the time afforded a member to take corrective action. Since the Fund deals only with Treasuries, central banks, stabilization funds, etc., of members, it merely provides exchange for these authorities when the ordinary transactions of their nationals reveal a shortage of foreign currencies. On its part, the Bank supplements private productive foreign investment both by guarantees and participations and by direct investment of its own when private capital is not available on reasonable terms. It assures funds both to reconstruct devastated countries and to develop the productive resources of its members, thus helping to raise their "productivity, standards of living, and conditions of labor."

The present plans represent mere modifications of the Joint Statement of Experts (which resembled the White and Keynes plans of the spring of 1943—the former in structure, the latter in substance) and of the United States Treasury Bank plan of the fall of 1943. Hence criticisms of the earlier plans have been transferred to the agreements. Much American opinion is suspicious of what it regards as plans to place American resources at the disposal of foreign debtors, while British opinion fears restriction of national freedom of action in dealing with undeniably pressing problems.¹

* This pamphlet prefaces the text of the articles of agreement of both Fund and Bank with Secretary Morgenthau's eulogistic closing address to the Conference.

1. Among American discussions see address by W. W. Aldrich before the Executive Club, Chicago, Sept. 15, 1944, N. Y. Times, Sept. 16, 1944, p. 1, col. 2; Goldenweiser and Bourneuf, *Bretton Woods Agreements* (1944) 30 FED. RES. BULL. 850; Brown, *The International Monetary Fund: A Consideration of Certain Objections* (1944) 17 U. of CHI. J. BUS. 199.

The proposals temper principle with realism. Throughout, technical provisions seek to make the broad framework fit the needs of the moment. The plans envisage a post-war world in which Great Britain, her foreign investments largely gone and owing (principally within the Empire) blocked sterling balances of some \$12 billion, can maintain her standard of living only by achieving a three-fold post-war objective of high employment, balanced payments (by increasing exports rather than incurring foreign loans), and restored convertibility of sterling into other currencies. The plans, however, admittedly constitute but one element necessary for the reestablishment of sustained international trade and prosperity; they can take the place neither of sound domestic policies nor of adequate commercial policies, and their final success depends upon the existence of such policies. In particular, the United States must recognize the responsibilities of her position and be willing to import goods and services in increased quantity, if the plan is to work. But there appears to be a large gap between the long run view that no one nation can be soundly prosperous unless other nations are prosperous also and the payments between them are in balance, and the short run view that a nation having hugely expanded and distorted productive capacity (developed under stimulus of war while acting as an arsenal of democracy) and its resulting favorable balance of trade, should readily throw open its markets to foreign goods after hostilities cease, regardless of the immediate impact upon its own high level of activity and employment. Moreover, it may be asked what goods and services are the other nations to export? Is not immediate coordination of domestic policy and commercial policy a crucial phase of post war economics?

Among the many detailed objections raised to the plans, several criticisms in terms of immediate operations may be mentioned briefly:

1. The Fund (with its initial resources of \$8.8 billion) is in danger of becoming frozen by reason of acquiring automatically, at their instance, the currencies of debtor nations unable to meet external obligations. The Bank, it may be added, can select its borrowers and is not open to the same objection. The answer given is several fold. Sovereign states need the assurance given by "lines of credit." "Conservative" rather than debtor nations control the Fund, and reliance can be placed upon the pressure exerted by the management and the self-interest of debtors whose individual financial shares will be relatively small in relation to their own probable total requirements.

2. Stabilization is not assured. Devaluation, exchange restrictions, and outright defaults by debtors are in fact furthered, especially since the Fund may not reject a proposed devaluation because of the domestic social or political policies of a member. The answer is to contrast true (flexible) stability with mere rigidity, to call attention to the safeguards vested in the management, and to note that small nations rather than large are likely to wish to depreciate currency. It should be noted, however, that the United States could not undertake depreciation without disrupting consequences.

3. The Fund plan omits important areas, notably the unfreezing of British blocked balances. The answer suggested is that the British prefer to deal with the matter themselves, and that it appears likely that they will succeed gradually in unfreezing through exports those sums not continued as working balances in London.

4. The Bank (with its initial resources of \$9.1 billion) represents an elaborate organization for carrying poor risks. Is it too large? Would not direct loans by the United States through the Export-Import Bank, for example, be preferable?

Leading alternative proposals are several in number. Restoration of a full gold standard is hardly practicable. Some favor a "key currency" approach, whereby the pound-dollar rate is first stabilized. This is regarded as far simpler to achieve than the broad and elaborate plans proposed at Bretton Woods, and has much to recommend it. Finally, it has been suggested that the Bank but not the Fund is needed.

In terms of long-run considerations, the plans represent an interesting conception of international financial machinery. They illustrate the conflict in the work-a-day world between far-seeing ideals and immediate practical objectives, as well as the vital interdependence of the financial and economic phases of life. In view of existing national rivalries and preoccupation with national goals, it seems likely that the plans must be subjected to some modification before they will meet with the approval of the forty-four participating nations.

W. H. STEINER †

† Professor of Economics, Brooklyn College.