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Book Reviews

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BOOK REVIEWS

MODERN DEMOCRACIES, by James Bryce (Viscount Bryce). New York, 1921. The Macmillan Company. Vol. I, pp. xiv, 508; Vol. II, pp. vi, 676.

This is a book that every lawyer should read and every law student should be required to read. It is the culminating work of a masterly mind that for over fifty years has been studying governments, ancient and modern,[1] and meantime the writer has had the practical advantage of holding high and responsible offices, including that of British Ambassador to the United States. Viscount Bryce speaks plainly of American national, state and municipal shortcomings in government, especially the last, but it is done in a kindly vein. He is a friend of America and gives us credit for much.[2]

The immense value of this book to all thinking Americans is shown by a few references to the wealth of information, political philosophy and warnings scattered throughout its 1117 pages. He says that the ultimate test of democracy is what it "has accomplished or failed to accomplish, as compared with other kinds of government, for the well being of each people."[3] He points out that "The ancient world, having tried many experiments in free government, relapsed wearily after their failure into an acceptance of monarchy and turned its mind quite away from political questions" and not until the sixteenth century was any persistent effort made to win political freedom.[4] During the long intervening centuries when a rising occurred it was for good government and not self government. "Men were tired of politics. Free government had been tried and had to all appearance failed. Despotic monarchies everywhere held the field." Bryce very pertinently asks, "Who can say that what has happened once may not happen again?"[5] Until a few years ago Asia had always been subject to kings or tribal chieftains, however selfish or sluggish.[6] The Grecian and Roman free institutions were due, not to theories, but to resistance to lawless oppression by a privileged class.[7] True the American Revolution was in the name of abstract principles and the doctrine of man's natural rights,[8] but the French Revolution was chiefly to get rid of galling privileges and then for fourteen years a military dictator was tolerated.[9] In Germany a fifty-year contest for constitutional freedom ceased when military success in 1870 brought prosperity, even with oligarchic rule.[10] In fact popular government has generally been established to get rid

[1] Vol. II, p. 122.
[2] Vol. II, pp. 154, 165.
[3] Vol. I, p. 6. See also Vol. II, p. 358.
[4] Vol. I, pp. 12, 27. See also Vol. II, p. 599.
[5] Vol. I, p. 27. See also Vol. II, p. 600.
[6] Vol. I, pp. 24, 25.
[7] Vol. I, p. 26.
[8] Vol. I, p. 33.
[9] Vol. I, p. 37.
[10] Vol. I, pp. 39, 40.

of grievances or obtain tangible results, and then interest in it has generally declined.[11] "As a rule, that which the mass of any people desires is not to govern itself but to be well governed."[12] It is conceivable that some day the process may be reversed and that impatience with the shortcomings of democracy may lead to monarchy or oligarchy.[13]

The statement in the American Declaration of Independence that all men are born equal refers to natural equality of faculties and rights, but this equality soon develops into inequality in character and capacity, and to reconcile equality as a doctrine with inequality as a fact is one of the chief problems of every government.[14] Ability to read may not qualify for self government, and Bryce asks, "Will elementary schools started among the Filipinos qualify them for the independence promised after some twenty years of further tutelage?"[15]

A beautiful tribute is paid by Viscount Bryce to George Washington and Abraham Lincoln where he says that they furnish a tradition to all Americans of all that is highest and purest in statesmanship and unselfish patriotism and faith in the power of freedom.[16] Bryce shows his faith when he says that "if you can get at the people—for that is the difficulty—things will usually go well. But the people must have time."[17]

The first democracy was at Athens and it was brought to an end by the Macedonian conquest; otherwise it might have contributed still more to the development of democratic institutions.[18] Plato and Aristotle would have described the present Central and South American republics "as forms of Tyranny, i. e. illegal despotisms resting on military force,"[19] but a change is taking place and "The General is being replaced by the Doctor of Laws, and the man of law, even if he be tricky is less dangerous than the man of the sword."[20]

There is nothing to indicate that democracy retards or hastens the growth of science, art, learning or polite letters. These come and go from causes never yet discovered, and apparently are not affected by the form of government.[21]

The American Constitution "was virtually a new invention, a legitimate offspring of democracy, and an expedient of practical value, because it embodies both the principle of Liberty and the principle of Order."[22] The only material which history furnished to the framers of the American Constitu-

[11] Vol. I, pp. 41, 59.
[12] Vol. II, p. 501.
[13] Vol. I, p. 42.
[14] Vol. I, pp. 61, 62.
[15] Vol. I, pp. 73, 79.
[16] Vol. I, p. 139.
[17] Vol. I, p. 150. See also p. 452.
[18] Vol. I, pp. 181, 182, 185.
[19] Vol. I, p. 187.
[20] Vol. I, p. 207.
[21] Vol. I, pp. 324, 325.
[22] Vol. II, p. 10.

tion was from the republics of antiquity.[23] But it has been subjected to unforeseen strains and "The wonder is, not that the machinery creaks and warps, but that it has stood the strain at all."[24] He points out that no President, except Lincoln, has been a true orator.[25] Speaking of the American courts, he says, "They become what may be called the living voice of the people. because they are in each State the guardians of that Constitution through which the people have spoken and are still speaking till such time as it pleases them to amend the fundamental instrument."[26] American lawyers will be pleased to read Viscount Bryce's statement that "legal education is probably nowhere so thorough as in the United States."[27] He says, "The leading State Universities of the West are a promising offspring of popular government, repaying its parental care by diffusing a wider judgment and a more enlightened zeal for progress than is to be found elsewhere in the mass of citizens."[28] And again, "The number of men who have graduated in some place of higher instruction is probably ten times as large (in proportion to population) as in any part of Continental Europe, and much more than twice as large as in Great Britain. These men have done much to leaven the voting mass."[29]

The great service that democracy has rendered and is still rendering is in preventing government from being conducted for the benefit of a class, and this struggle is unending, "for Nature is always tending to throw Power into the hands of the Few."[30]

The above are a few of the striking facts and conclusions with which this work abounds. They have been collected during a long lifetime of experience and study. Bryce himself says that his book is to furnish facts and such explanations as may enable the readers to draw their own conclusions.[31] As he well says, "It is Facts that are needed: Facts, Facts, Facts."[32] His whole book is a monument of and to legal research for facts—a branch of knowledge that hitherto has been too much neglected. And nowhere are there richer mines of facts and opportunities for legal research than in the study of the workings and changes in American national, state and municipal governments. The future of democratic institutions throughout the world will be profoundly affected by the success or failure of those institutions in America, and the flood of light that can be thrown on the whole subject by systematic legal research, directed by the great Universities, will go far towards guiding the people towards correct conclusions.

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[23] Vol. II, pp. 3, 165.
[24] Vol. II, pp. 25, 26.
[25] Vol. II, p. 67.
[26] Vol. II, p. 84.
[27] Vol. II, p. 88.
[28] Vol. II, p. 97.
[29] Vol. II, p. 116.
[30] Vol. II, p. 549.
[31] Preface, p. VIII.
[32] Vol. I, p. 12.

A TREATISE ON INTERNATIONAL LAW, by Roland R. Foulke, of the Philadelphia Bar. Philadelphia, The John C. Winston Co., 1920. Two volumes. Vol. I, pp. 482, lxxxviii; Vol. II, pp. 518, lxxxviii.

There would seem to be at least three sufficiently plausible reasons for the appearance of a new treatise on international law. For one thing, such a treatise might well be written for the purpose of arranging the subject matter according to some more logical and effective scheme of classification. A great deal may be said in criticism of traditional classifications. For another thing, a new treatise might well present new and more scientific analysis of no inconsiderable part of the subject matter. Analytical investigation in the light of modern developments in jurisprudence is urgently needed in the field of international law. Finally, a new treatise affords an opportunity to bring the subject matter up to date. There will be new editions of some of the standard treatises, of course, but the experiences of the past decade make new editions seem a little inadequate.

Mr. Foulke's *Treatise on International Law* appears to have been inspired in some measure at least by each of the above considerations. The author hopes that he has "succeeded in a more logical arrangement than that commonly found in the writers." He observes that a subject like international law, cultivated in practically the same furrows for many centuries, offers "a rich mine for analytical investigation," and he writes, as he remarks in his preface, "in the attempt to clear away some of the many obscurities and misconceptions which pervade the subject of international law and which are not only discouraging to the student but irritating to the mature reader." Finally, in his own peculiar way, the author has attempted to bring his treatise up to date.

As regards classification, the author's achievements on the whole seem to be somewhat meager. He divides his work into four parts: Part I, Preliminary; Part II, Substantive International Law; Part III, Remedial International Law; and Part IV, Summary. There are three chapters in Part I entitled respectively Definition and Nature of Law, Facts of International Life, and Definition and Nature of International Law. The chapters in Part II are as follows: Intercourse Between Independent States, The Territory of an Independent State, The Open Sea and Branches Thereof and the Maritime Belt, Treaties, Independent States and Aliens, and State Conflicts. The chapters in Part III are entitled respectively: Redress for Damage to a State Interest, War, Neutrality, Conduct of Hostilities, Property in War, Public Property in War, Private Property on Land and in Maritime Belt in Time of War, Private Property on the High Sea in War, Private Individuals in War, and Character of Individuals and Property. This scheme in outline follows the traditional division of the subject into introductory matter, peace, war, and neutrality. There are numerous innovations in terminology as well as in the order of the chapters and the arrangement of their content. The advantages derived from the new terminology and arrangement are not always obvious. But it is worth something that the author has had the courage to launch an attack upon an archaic and illogical system.

In the matter of analytical investigation the author has made more substantial contributions. It is in this respect, indeed, that his treatise is most valuable. The reader may be prejudiced at times by the author's habit of introducing an analysis with the suggestion that writers on international law are hopelessly confused in respect to the topic under discussion and that the author will now proceed to set them right. It may be felt that analogies with the principles of municipal law have been used too freely. The reader will probably disagree with many of the conclusions, some of which may even seem a bit fantastic. Throughout the treatise, however, the serious student will find essays in analysis which will repay careful study. Part I especially contains excellent analytical work, including matter upon which every young graduate student in international law might well be required to sharpen his wits. An able lawyer, familiar with legal concepts and accustomed to accurate legal reasoning, has applied himself to the theories of international law advanced by the leading English and American writers. The results are sometimes startling, usually suggestive, and frequently illuminating.

The treatise does not, unfortunately, bring the subject matter adequately up to date. Some of the most valuable of recent monographs seem to have been overlooked. The great mass of material to be found in the legislation, orders, cases, and state papers of the recent war has received insufficient attention. Possibly the omission was deliberate. The occasional reference which the author makes to the events of the war would seem to indicate that he is in no temper to appraise those events in scientific fashion. A few of his reflections, indeed, read rather more like something from our recent departments of propaganda.

The gravest defects in the treatise are due primarily, it would seem, to the very limited categories of sources upon which the author has relied. Of the periodicals, he makes frequent and somewhat promiscuous references to the American Journal of International Law and to some of the leading American law reviews, but almost no references of any significance to the many excellent periodicals published abroad. Surprisingly little use is made of arbitrations, treaties, state papers, cases, or other source materials. For all that is indicated in the text or footnotes, such documentary collections as Sturdza, Hertslet, the British and Foreign State Papers, and the monumental Martens collection may have been left practically untapped. Well known monographs by Baldassarri, Catellani, Demorgny, Lammasch, Moulin, Niemeyer, Politis, Strupp, Wehberg, and many others are either not cited at all or cited only by author and title. There is practically no evidence in the text indicating that such studies have contributed anything to the author's conclusions. G. F. von Martens, Vattel, Bynkershoek, and others are cited only in the English translations. Klüber, Bluntschli, Pradier-Fodéré, and Huber are cited only at second-hand. Calvo, Fiore, Holtzendorff, Liszt, Nys, Bonfils, Despagnet, Heffter, F. de Martens, Moser, Piédelièvre, Rivier, and other authors of standard treatises are not cited at all. On the other hand, there are 185 references to Hersey's elementary text-book and 285

references to Halleck. It may be inferred that the work is based largely upon what is available in fifteen or more of the better treatises and text-books, written in English.

A survey of the sources used provokes misgiving as to whether the author was really prepared to write a treatise. Would it have been possible to present his contributions along the line of critical analysis in a smaller work on the theory of international law? Making due allowance for unfamiliarity with the continental literature, such a work could have been admirably done. Many of the criticisms which are likely to be aimed at the treatise could have been avoided.

As the work stands, it has a unique but somewhat restricted value. It is unfortunate that it should have been prejudiced by the extravagant, not to say ridiculous, claims which the publishers have made for it.

EDWIN D. DICKINSON.

OUTLINES OF HISTORICAL JURISPRUDENCE. By Sir Paul Vinogradoff, F.B.A., Fellow of the Russian Academy, Corpus Professor of Jurisprudence in the University of Oxford. Volume I, Introduction, Tribal Law. Oxford University Press, London, Edinburgh, Glasgow, New York, Toronto, Melbourne, Capetown, Bombay. Humphrey Milford, 1920. Pp. X, 428.

The title itself of this latest production of the leading English historian of law seems in a way a challenge to our up-to-the-minute twentieth century sociological jurisprudence which is the prevailing style, but Vinogradoff's historical jurisprudence is a very different thing from that of Savigny, which finally gave us a natural law with an historical content, or even from that of the English comparative jurists of the nineteenth century, who apparently assumed, "that all nations are constituted on the same lines and reproduce the same characteristic features in their treatment of economic and social problems." (Cf. p. 148). Vinogradoff would have the student of historical jurisprudence "trace the life of juridical ideas in their action and reaction on conditions"; that is, while "the order followed by legal history is chronological, that followed by historical jurisprudence is, ideological." (p. 155).

With this purpose in mind he gives in this first volume a careful re-examination of the basic legal institutions of tribal society and promises a second volume treating the jurisprudence of the Greek City on the same plan. In the execution of this he follows the lead of Maitland, whom he characterizes as the "most brilliant legal historian of modern England," in his scepticism as regards generalizations. On that much discussed question as to whether primitive society was arranged on the matriarchal or the patriarchal model, Vinogradoff says, "considering the immense variety of conditions in ancient times, it is improbable that any exclusive theory will be true in all cases." This is but one of the many instances which show that the author has successfully steered clear of the difficulties and dangers of the ideological method of presentation, which he himself admits, and has presented

in a new and clearer light the facts of primitive society "as he sees them for the God of things as they are." Furthermore, his discussion of juridical ideas as they act and react on their surroundings give to his work a sociological coloring that brings it into harmony with that of other twentieth century jurists.

His attitude toward the subject of jurisprudence in general is shown in the Introduction which constitutes about one-third of the present volume. He would draw upon the subjects of logic, of psychology and of social science in order to coördinate and explain legal rules and to assert rights. The data of ethics, he says, form a most important chapter of psychology, history cannot be contrasted with the theoretical study of law because it provides one of the essential elements of legal method while philosophy forms, as it were, the atmosphere for all scientific studies. Following the plan suggested he discusses in his first chapters the relation of law to the several subjects above mentioned and to political theory. The chapter on Law and Logic shows by many instances taken from English Law the futility of the common practice of our courts of always seeking definitions of law from which to deduce conclusions rather than by proceeding inductively to determine the rights of the parties under all the circumstances. He shows that this mechanical jurisprudence of the courts frequently brings us to the most irrelevant conclusions. He cites here also some of Ihering's brilliant and caustic criticisms of the way our Teutonic brethren have by this process built up their fantastic "jurisprudence of conceptions," but concludes that the abuse of logic ought not to obscure the value of the method when properly used. The syllogism still remains a valuable legal instrumentality but major premises must from time to time undergo a process of revaluation. Here it may be remarked that the statement that "utility, public interest, morality and justice are constantly claiming their share in the thoughts of the lawyer" might well be compared with Justice Brewer's statement in *Mueller* v. *Oregon,* to the effect that "we take judicial cognizance of matters of general knowledge," as showing that both the English jurisconsult and the American jurist are affected by the sociological tendencies of their environment. The same coloring is evident in the chapter on Law and Psychology. As regards the question of criminal responsibility "society understands that it has not a single force, accumulated and isolated in a single individual to contend with, but that it stands face to face with a complexity of forces converging in an individual." Hence the necessity for an individualization of the penalty. "The punishment is to fit the moral case of the criminal as the drug has to fit the pathological case of the sick man." Furthermore, while the author follows Kant in saying that the imperative of duty—what Carlyle calls the sense of the oughtness—is a category of the human mind, nevertheless, he follows Durkheim in saying that it is the influence of society which has penetrated us with the beliefs, religious, political and moral, which govern our conduct.

In the chapter on Law and Social Science the author says that there is an element of truth in each of the theories as to the nature of the State;

namely, that it is an "embodiment of power," an "organic growth" or a "judicial arrangement," but that the share to be assigned to each is "bound to vary in accordance with the epoch and the country." This last statement suggests Stammler's "ideal of an epoch," though the author in another connection (p. 146) speaks slightingly of Stammler's contributions to jurisprudence. Vinogradoff defines the State as "an organization enforcing social order by means of legal rules."

The last half of the Introduction examines critically the work of the analytical school in the chapter on the Rationalists. In the succeeding chapter on the Nationalists the author credits the Historical School and the Romantic movement with having established the doctrine that institutions have an organic growth and with having given us a wider view of individual and social psychology. In his chapter on the Evolutionists the author goes beyond Ihering's teleological view to an idealistic one in the suggestion that it is "not wrong or presumptuous to reflect on the general principles which in the present state of civilization we ought to accept as the guiding lights for legislators and reformers."

The author would probably resent an attempt to definitely place him in any one of the accepted schools of jurisprudence but his book shows that his preëminent achievements in the field of historical jurisprudence have given him a broad outlook over the entire field of legal theory and make him a sane critic of contemporary jurists, though one may possibly feel that he has underestimated the achievement of some of his Transrhenish brethren. Possibly this may be excused as a reflex of the present world psychology.

J. H. DRAKE.

THE LIFE OF JOHN MARSHALL. By Albert J. Beveridge. Houghton Mifflin Co., Boston and New York. Four volumes, pp. lxxxii, 2412.

A valid excuse exists for writing something more of Senator Albert J. Beveridge's life of John Marshall, even though the book has already been in print for many months. The book is growing on the American public and its fame will be greater twenty years from now then it is at present. The great debt which the American people, and especially the American bar, owe Senator Beveridge is a debt that has not yet been fully realized. Comparatively few lawyers have read the work.

Strange that John Marshall, our greatest Chief Justice, should have had to wait a century for justice to de done him, and to his ability and influence on the life and institutions of America. The Beveridge life is the first one that presents the great jurist adequately and there will be no other life of John Marshall, for there is no need of one. The work need never be done again, for it has been brilliantly and satisfactorily done. The fame of Senator Beveridge as the author of the "Life of John Marshall" will outlast his fame as a Senator, an orator and a leader of the Progressive movement in the Republican party.

The objection to the book that it is prolix, is not well taken. The sub-

ject could not have been treated in smaller space and its importance justified the most exhaustive treatment possible.

No other characteristic of the book is more marked than the charm and brilliancy of its style—vivid, animating, thrilling in its word pictures. What a superb special correspondent Senator Beveridge would have been! For this is not merely a lawyer's book. Although it deals with legal themes and cases and the life of a man whose fame rests almost solely on the cloister-like atmosphere of a supreme court, the book is as interesting to a layman as to a lawyer.

As a panorama of American history of revolutionary days and the succeeding generation, it is a genuine contribution to American history; as a thrilling picture of the acts and cross-currents of the politics of the first generation of American public life, it has no superior; as a faithful portrayal of such men as Washington, Hamilton, Jefferson, Adams and a host of revolutionary characters, it will bear a sustained interest to every reader of good books and historical subjects in America.

One of its most notable distinctions is the story of how Marshall formed his opinions of the need of a strong central government during the dark days at Valley Forge when a weak and powerless Continental Congress could not supply America's freezing and starving troops with clothes and food. Marshall served all through Valley Forge side by side with Washington and the real John Marshall was formed then.

The finest chapter in the whole four volumes is that on the ratification of the Federal Constitution by the Virginia convention. This chapter is a distinct contribution to American history, no matter whatever else has been written of the event.

The only criticism of the book that can be suggested, and it is not a fundamental one, is that the trial of Aaron Burr is given too much space and too elaborate a treatment. The subject does not justify either the space given to Burr nor the partiality to him plainly shown by the author. The trial of Burr was without question a notable event and the opinions of Marshall, who presided, on the law of treason, form an important chapter in the development of that law; but the life of John Marshall did not require any vindication of the career of Aaron Burr, if indeed Burr is entitled to one, and we say this without wishing to revive an ancient historical controversy.

The book abounds in fine and accurate pen pictures of Marshall the soldier, the man, the devoted husband to an invalid wife, the jolly comrade at sessions of his club, the sportsman, and the just judge. We find Marshall the man, much like other human beings, and the cloud-like cloak which has so long enveloped the great personality with a grave and judicial austerity is removed and we see a real man of flesh and blood, whom anyone would delight to know and hold fellowship with.

Beveridge is markedly fair to Jefferson and the Democrats of that period. Thus, he preserved the truth and the fairness of history that make historical writing live long after the author is gone. We feel that the author is him-

self an inherently fair man in his judgments and treatment of partisan opponents.

Of course the heart of the book is that part dealing with the great decisions of Marshall upon the Supreme Bench of the United States. With the history of these famous cases, their origin, the facts and the far-reaching importance of his decisions we can hardly deal, but Senator Beveridge has handled this portion of his task with consummate skill.

These four great cases constitute a quartet of judicial landmarks in the growth of American constitutional law and the development of the power of the Federal government:

> *Marbury* v. *Madison* decided that the Supreme Court may consider the constitutionality of a law passed by Congress and may declare that law unconstitutional.
>
> *McCulloch* v. *Maryland* construed the "elastic clause" of the constitution and held that the Federal government has not only those powers expressly given it by the constitution but also all powers needed to carry the foregoing powers into effect.
>
> *The Dartmouth College* case held that a charter to a corporation is a contract, the obligation of which cannot subsequently be impaired by any act of the legislative power.
>
> *Gibbons* v. *Ogden* construed the interstate commerce clause of the constitution, giving the widest possible construction to the word "regulate" and holding the power of the Federal government over interstate commerce to be supreme and untrammeled.

The result of this great line of decisions was effectively to establish the supreme power of the Federal government, to make it a nation in the real sense of that word; to give to corporate property a security and a stability which told mightily in that marvelous industrial development which characterized the nineteenth century.

There were other great decisions, but these stand in a class by themselves.

We may say of his treatment of these cases that:

1. It is adequate. It will satisfy the most exacting lawyer, the most learned student of American history.

2. The handling of what might be considered dry and musty decisions is brilliant and fascinating. It takes a master both of style and treatment to handle these themes in a way to interest laymen as well as searchers for historical facts and students of law. This Senator Beveridge has done in masterly fashion. The pages seem to move with living figures of that day; we follow the development of the case, the argument of the great lawyers, the human motive and cross-purposes that enter into every case with almost breathless interest.

3. The book is unusually valuable in giving a true historical setting for each of the great cases decided by Marshall. Probably the student of history and of the development of American constitutional law will find his greatest

interest in this feature of the work. There is a growing insistence in modern law school teaching that leading cases be studied in the light of the historical conditions that gave rise to them, and in this we have but another evidence of the close and vital connection between law and history, between the development of a nation's jurisprudence and its general course of history. Law is not something removed and apart from human life; it is the very breath and vitality of the life of the state, and its development is but the state's development. Society is constantly engaged in a struggle to express its ideals in law. No man did so much to express American constitutional ideals and Federal ideals in law, as did John Marshall.

As we read the book we are filled with admiration for the long, exhaustive labor, the painstaking research that the author obviously put into his work. It must have been a genuine labor of love; nothing else could have held the author to such a laborious task.

No lawyer can afford to miss this great work; every student of American history will find it of particular value; every American should read it. The entire American bar owes Senator Beveridge a debt of gratitude for his life of John Marshall, and he who reads it will be a better American for having done so.

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