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The Equality of States, a Study in the History of Law

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denouncing of it as robbery to the hailing of it as the foundation of civilization. In the first place, the very concept of property differs in the minds of the various writers. In the second place, both the rational attacks and the rational defenses are afterthoughts of history and not bases for institutions of any kind.

There is no doubt a need in the world today for the criticism of legal institutions by some criterion outside of the law itself. Rational support and assailing may, of course, imply such a criterion, though it frequently means nothing more than the assumption that the parts of the law ought to be consistent with each other regardless of the consequences. More often it means the assumption that an ideal consistency must be established in the universe by bending the law and everything else to fit a philosophic scheme in some one's mind. Such is the apparent meaning in this book. But of rationalism in the sense of a careful study of how legal principles work out in life there is very little. That which Mr. Justice Holmes hopes for in his Introduction, when he takes the purpose of the book to be to "help us look the facts in the face" is deliberately excluded because the editors "have not thought it worth while to deal with any theory of legal institutions which did not at least connect itself with some fairly general scheme of things." It is precisely the old-fashioned arm-chair generalizations that they have favored which Mr. Justice Holmes condemns when he repeats: "Most even of the enlightened reformers that I hear or read seem to me not to have considered with accuracy the means at our disposal and to become rhetorical just when I want figures."

As to the general plan of chopping up and pre-digesting more or less wholesome books for the student — books to which he could be sent with the aid of a two page syllabus — I might quote another sentence used in the Introduction to illustrate a quite different point: "I cannot but reflect that my neighbor is better nourished by eating his own dinner than by my eating it for him." If any more volumes are to appear in the truly valuable Modern Legal Philosophy Series, may one not venture the hope that they will stick closer to the traditions of the series, and never approach again that justly derided type of book of which it has been said that the editor sits down with paste-pot and shears and a dozen books and rises with the manuscript of a thirteenth in his hand?

NATHAN ISAACS.

THE EQUALITY OF STATES: A STUDY IN THE HISTORY OF LAW. By Julius Goebel, Jr. New York: Columbia University Press. 1923. pp. 89.

This is a reprint in book form of three essays recently published by Dr. Goebel in the COLUMBIA LAW REVIEW. The author attempts, as he himself has expressed it, "to indicate that the historical background of the doctrine of equality of states in international law is of considerable importance not only for the purpose of fixing the origin of the doctrine as a coherent principle of law, but also because it indicates how necessary and inevitable the notion has been from the very inception of international relationships in Europe." (pp. 88–89)

To this end, Dr. Goebel's first essay is devoted to "Classical and Mediaeval Theories of Equality," including something from each of the major developments in philosophical, religious, and legal writing from Cicero to Bartolus. In his second essay, entitled "Equality in Mediaeval International Relations," he sketches the imperial claim to universal dominion, the opposition offered by the Church and by the growth of territorial power among the nobles, the relations among the free lords of France

before the consolidation of the monarchy, the disintegration of the Empire, and the relationships between more or less independent monarchs of the Middle Ages in matters of precedence, in correspondence, in arbitrations, and in the making of treaties. The third essay, a little too pretentiously entitled "Equality in International Law," traces the development of the notion of the State as a juristic person, the growth of ideas of law during the Protestant Reformation, the principles thought to underlie the Grotian system, and the contributions of Hobbes and Pufendorf, concluding with what the author regards as the earliest statement of the modern doctrine of equality in the *Tractatus de Jure Suprematus* of Liebniz. There is no index.

In fairness to the author, no less than to those who may read his book, it must be said at the outset that the work at times smacks a little too strongly of polemics. The author apparently approaches his study with a point of view already well-defined. The Foreword gives warning of "the views for which he contends." He tells us at the very beginning that he is "inclined to side with the jurists who have looked upon the equality of states as a mere corollary of the ideas of independence and sovereignty." (p. 2) He is "one brought up in a belief in the indissoluble relationship between sovereignty and the power to conduct foreign relations." (p. 49) He submits that he has adduced enough evidence to "shift the burden of proof." (p. 58) Although he stops with Leibniz, and too modestly refers to his own incompetence to make the penetrating study of the conception of equality in modern international law which the subject deserves, he nevertheless gives us the benefit, by way of conclusion, of his own preconceived notions on the whole matter. (pp. 88–89)

In a study thus affected it is not surprising to find that the author aims his lance occasionally at straw men of his own manufacture. Now that he has had his tilt, the play need not be spoiled if a dummy or two should be removed. For illustration, out of a brief sketch of ancient and mediaeval ideas of natural law, natural equality, and the state of nature, with which the present reviewer introduced a study of the development in theory of the doctrine of state equality in a monograph published a few years ago, Dr. Goebel constructs the following: "The supposed historical antecedents of the doctrine of the equality of states . . . are said to have been the Stoic theories of natural law, the natural equality of man and a state of nature as they were successively adopted apparently without substantial modification by the Roman jurists, the Patrist philosophers and the theologians of the Middle Ages." (p. 1) No one having any knowledge of the matter has ever entertained belief in any such neat and simple dogma as this. Nor was the chapter which appears to have been a *bête noir* to Dr. Goebel intended to give currency to any such pedantic formula. For another illustration, the author says that "writers treating of the law of nations often give the impression that the great work of Grotius marked the commencement of the habitual observance by states of rules regulating their relations with one another." (p. 30) There was a time, no doubt, when this naïve notion had sufficient currency to warrant attention. But surely no one in this generation regards international law as "having sprung full fledged into the ken of man in the year 1625." (p. 30) These are two examples selected from among those which have seemed the more striking to the present reviewer. The *tour de force* required to demolish such straw men achieves no particular advantage and is disconcerting to say the least.

Less serious, no doubt, but leaving much the same unpleasant impression upon the reader, is the author's disposition to refer somewhat smartly to those with whom he disagrees. The effect is especially unpleasant when

the reference is gratuitous. There is a flavor of this, for example, in a reference to Bryce (p. 30) and also in a reference to Michael. (p. 39, n. 24) Contempt for Carlyle's study of mediaeval political theory is ill-concealed (*e.g.*, p. 18, n. 46), while those who have ventured to approach the baffling problem of state equality from a different viewpoint or who have arrived at different conclusions are lumped together as "misguided publicists" and apologists for *Machtpolitik*. (p. 1) A book unaffected by such mannerisms would have been more likely to be appreciated for what it is really worth.

Working down from Cicero, in his first essay, the author arrives at somewhat negative conclusions as regards the influence of ancient and mediaeval speculation about natural law, natural equality, and the state of nature upon the modern doctrine of the equality of states. But if the author will now check his results by working back toward the period of these same speculations from the doctrine of state equality as it finds typical expression in the works of modern publicists and in modern incidents as a starting point, he may find evidence which points to a closer connection than he is at present willing to concede. His second essay is an interesting and valuable review of mediaeval practice. Whether the practice considered was enough to justify the sweeping generalizations of later jurists, writing under the influence of natural law ideas, may still be doubted. The author thinks that too much emphasis has been placed upon the influence of natural law ideas (*e.g.*, p. 47) and finds in the conduct of mediaeval international relations a source of greater significance. But the fact remains that the doctrine of state equality was formulated and given its modern twist very much under the influence of speculation about natural law and natural right. The doctrine's common statement and some of the most important applications sought to be made of it during the past century derive much more directly, in the reviewer's opinion, from this latter source than from such mediaeval controversies as the one about the Emperor's alleged obligation to hold stirrup for the Pope.

Whether we agree with his conclusions or not, we are indebted to Dr. Goebel for a useful study, from one point of view, of a subject which requires critical examination from many points of view. The pessimistic note in his Foreword was quite uncalled for. There is no likelihood that his essays will stand in history as "a mute Cassandra" to warn wicked statesmen of the error of their ways. But account should be taken of them by all who attempt an examination of this difficult and important problem.

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HANDBOOK OF COMMON-LAW PLEADING. By Benjamin J. Shipman. Third Edition. By Henry Winthrop Ballantine. St. Paul: West Publishing Company. 1923. pp. xxii, 644.

The first and second editions of this book, which is one of the Hornbook Series of the West Publishing Company, appeared in 1894 and 1895 respectively. The earlier editions were based very largely upon Serjeant Stephen's famous treatise, and the author seemed to share with Stephen his unalloyed admiration of that system of pleading, which has been found so inadequate to modern needs that it has been rejected in England and in a majority of the American States.

The attitude of Professor Ballantine, the editor of the present edition, is much more critical. He regards the study of common-law pleading as useful, not because of its excellence as a system of pleading, but because a