Book Reviews

Stephen J. Field: Craftsman of the Law. By Carl Brent Swisher. Washington, The Brookings Institution, 1930. pp. viii, 473. $4.

MR. SWISHER'S biography of Justice Field is valuable. It lacks qualities which in Beveridge's *Life of Marshall* somehow turn faults into assets. It is skimpy in the sort of background which humanizes the interests and ideas to which judges react. Field himself would stand clearer if others of the *dramatis personae* of his life figured as more than names—in particular, such judicial colleagues as Waite, Miller, Bradley, Harlan, and perhaps also Gray, whom Field is said to have characterized in an unprintably robust phrase. But I find myself uninterested in pointing out either the faults or excellences of this careful and intelligent book—and very much interested in Justice Field. There is precedent if not justification for attempting, in lieu of criticism of a biography, a condensed re-statement of its subject matter. This is a review of that sort—an outline of some of the more striking of Field's judicial acts, attitudes and effects, with which Mr. Swisher, though the survey does not closely follow his own and mentions lines of cases which he omits,[1] will, I think, on the whole agree.

Justice Field's forbears were Puritan ministers. His brother David Dudley Field, under whom he got his early legal training and experience, would be as interesting a subject for biography as Justice Field himself: among the clients whom he served well, though sometimes not over-scrupulously, were Jay Gould and Boss Tweed; his leisure was given to the reform and codification of law and procedure. Another brother, Cyrus Field, laid the Atlantic cable and made much money in railways.

In 1849, at the age of thirty-three, Stephen Field migrated to California. There he pushed himself to the top through the confusion of the Gold Rush, and practiced law and politics with such success as to become in 1858 a member of the Supreme Court of the state. In 1863 Congress, to tie California to the Union and to weaken the pre-war Democratic majority of the Supreme Court, provided for a tenth justice; Field, backed by Leland Stanford and his brother Dudley, was appointed.[2]

Field sat in the Supreme Court for thirty-five years, all but connecting the era of Taney with that of Holmes. But his significant activity, often a dissenting one, was mainly before 1890, during the chief justiceships of Chase and Waite.

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[1] In locating Justice Field's more important opinions I have been greatly helped by the use of his own collection of them, *Some Opinions and Papers of Judge Field,* privately bound in six volumes, now the property of Professor Frederick C. Hicks.

[2] His subsequent career included colorful extra-judicial episodes to which only bare allusion is here possible: his fight as a member of the Electoral Commission for the seating of Tilden; the effort, financed and managed by his brothers, to make him Democratic candidate for President in 1880; the killing by his bodyguard of his former colleague in the Supreme Court of California, David Terry.

The court under Waite was more "radical"—in the sense of conservative of democratic reality—than it had ever been before or has been since. Within ten years after Field's appointment all but one of the pre-Civil War justices had been replaced by Republicans. Their Republicanism was that of the Civil War period—a comparatively Jeffersonian Republicanism, idealistic and humane, with faith in a democracy that involved human dignity and independence, substantiality of popular participation in the determination and control of public policy, reasonable if not equal opportunity for all to obtain as well as to pursue happiness, a considerable generality of mutual sympathy, decency, forbearance and good-will. Some of the new justices had been lawyers for great financial interests. But practice had not yet become specialized. They had been lawyers for ordinary men as well. They shared the ordinary man's anxiety as to the effect upon him of industrial expansion and the concentration of wealth. They were also, it is true, more or less imbued with that sense of the glory and grandeur of our national wealth and prosperity of which Andrew Carnegie's *Triumphant Democracy* (1886) is the naive classic expression—a feeling which, however, moderated in the six lean years following the Panic of 1873. But they wanted the great new United States to be rather an enlargement than a subversion of the United States in which they had grown up. That United States was in danger. How could it be saved without the help of legislation? Conditions being new, legislation must be experimental. Legislative power must therefore be comparatively free.

Until 1890, with exceptions noted later, nothing that could be called social legislation was held unconstitutional. Of course the single motive suggested was perhaps never the sole one, and was sometimes outweighed by others—as doubtless in the *Legal Tender Cases*.[3] But I am not aware that peculiar pressures were important when later the court sustained the power of Congress to make paper money legal tender even in the absence of such needs as those of war[4]—a holding, in effect, that the proposal of the Greenbackers was constitutional. Aside from acts relating to the South, the only other important federal legislation questioned and sustained was that provoked by the Credit Mobilier scandal; the constitutionality of the act authorizing Federal suit to compel restitution of the spoils was, to be sure, barren;[5] but the *Sinking Fund Cases*[6] sustained what Congress might have made a drastic power to constrain and direct a privately owned federal instrumentality. The police power of the states was not only described as comprehensive, but allowed to operate as such. Broad language, still conventional, which in the light of its subsequent use we are now trained to read as meaningless,[7] was then used as meaning what it said. The police power was power to control and regulate the use of private liberty and property in the public interest, as that interest was seen by the

[3] 12 Wall. 457 (U. S. 1873) (Field, Chase, Nelson and Clifford dissented).

[4] Juillard v. Greenman, 110 U. S. 451, 4 Sup. Ct. 122 (1884) (Field dissented).

[5] United States v. Union Pacific Ry., 98 U. S. 569 (1878).

[6] 99 U. S. 700 (1878) (Field, Strong and Bradley dissented).

[7] Field contributed to this, conceding in his dissenting opinions the abstract statements of the majority, but striving to restrict their practical application. He could say, for example, that "the harshness, injustice, and oppressive character of laws" did not invalidate them—provided they were within "the legitimate scope of legislative power." Missouri Pacific Ry. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110 (1885). But in the light of his conception, discussed *infra*, of the "legitimate scope of legislative power," this was a mere jingle of words.

legislatures. No constitutional limitation required that its exercise be reasonable. The legislative duty of reasonableness was not subject to judicial supervision. If legislation was unreasonable or oppressive, the remedy was with the people, at the polls.[8] A corporate charter was a contract of constitutionally protected obligation; but no grant of remunerative privilege therein was immune from being cut down or rescinded by the legislature in the exercise of its police power. It would be *ultra vires* the legislature to contract away its police power.[9]

The social legislation held unconstitutional was Reconstruction legislation.[10] But here again the court was conservative of democratic reality. For democratic local control of local affairs could have no substance if, through Acts of Congress, the interests of so important a part of the people of the South as the ex-Confederates could be denied expression. The stepping-stone to the vacation of federal Reconstruction legislation, or its attrition by construction, was the majority decision in the *Slaughter House Cases*[11]—which, sustaining an unconscionable local regulation against the claim that the "rights of man" which it invaded were protected by the Fourteenth Amendment as privileges or immunities of national citizenship, was virtually a holding that that amendment, if construed as intended by its draftsmen, would unconstitutionally subvert the American system. As to the specific policy of local autonomy in the South, Field agreed with the majority; indeed he had wished to start earlier,[12] and wanted to go further.[13] Yet in his dissent in the *Slaughter House Cases* he claimed a federal judicial power to protect the people from their own state governments quite as revolutionary as the enlarged federal legislative power which in other cases he agreed with the court in denying. It may be permissible

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[8] Slaughter House Cases, 16 Wall. 36 (U. S. 1873) (Field, Bradley, Swayne and Chase dissented); the Granger Cases—Munn v. Illinois, 94 U. S. 113 (1876) and cases following (Field and Strong dissented); Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992 (1887) (Field dissented). The Slaughter House legislation was pretty surely vicious; the Granger rate legislation was impressionistic and much of it probably "confiscatory;" the outlawry of oleomargarine was at least a questionable legislative policy.

[9] The railway rate group of Granger Cases, *supra* note 8; Butcher's Union Co. v. Crescent City Co., 111 U. S. 746, 4 Sup. Ct. 652 (1883). Field's differences with the majority were as to the scope of the police power; see also his dissents in the Spring Valley and Railroad Commission cases, *infra* notes 27 and 29. In other respects he went as far as anyone in shaving down Marshall's conception of immunity under the contract clause; see cases collected and cited in THAYER, CASES ON CONSTITUTIONAL LAW (1896) 1678-1782.

[10] United States v. Reese, 92 U. S. 214 (1876); United States v. Harris, 106 U. S. 629, 1 Sup. Ct. 601 (1883); Civil Rights Cases, 109 U. S. 616, 3 Sup. Ct. 18 (1883); *cf.* United States v. Cruikshank, 92 U. S. 542 (1875); Virginia v. Rives, 100 U. S. 313 (1879).

[11] *Supra* note 8.

[12] He joined in Grier's hot protest at the court's resignation to losing its opportunity to pass upon Reconstruction legislation in the McCardle Case. SWISHER, STEPHEN J. FIELD 160-161.

[13] He dissented in the cases finding jury laws and usages discriminatory against negroes. Ex parte Virginia, 100 U. S. 339 (1879); Strauder v. West Virginia, *ibid.* 303. Also from the holding that state election officers could be made punishable by Act of Congress for misconduct in Congressional elections. Ex parte Siebold, *ibid.* 371; Ex parte Clarke, *ibid.* 399, 404.

to wonder whether he would then have advanced that claim had the question been of protecting carpet-baggers from state laws inspired by ex-Confederates instead of *vice-versa*.

Other holdings of unconstitutionality gave stringent efficacy to specific constitutional guaranties of popular personal liberties,[14] including the guaranty of due process of law in its "definite meaning" of due procedure in the enforcement of law.[15] Field was a leader and frequent spokesman of the court in the protection of such liberties, dissenting from any relaxation of procedural safe-guards under pressure of natural impatience with their tendency to obstruct substantial justice.[16] In the first labor injunction case which reached the Supreme Court he wrote the opinion holding that the complainant had an adequate remedy, if he were entitled to any, at law, and that there was no jurisdiction in equity.[17] He read into the due process clause the doctrine—which had had theretofore to rest upon general principles of the nature of sovereignty—that state power might not constitutionally, even when it might physically do so with benign results, operate beyond the geographical boundaries of the state.[18] To protect a more vital liberty—that from oppression because of race—in Chinese, though not in negro, cases he blew away the fair surface of enactments and denied effect to covert discriminatory legislative intentions.[19]

In personal liberty cases Field's devotion to democratic values was deep and real.' When he differed from the majority of the court, the difference was not in kind but in degree. The same is doubtless true of his difference in property cases; but his angle of departure from the line of the majority in such cases was much wider—perhaps 90° or more, sometimes approaching 180°. In the Supreme Court of California his main work had been to draw a holy circle of protection for the few more far-sighted adventurers

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[14] Cummings v. Missouri, 4 Wall. 277 (U. S. 1867); Ex parte Garland, *ibid.* 333 (both *per* Field, for a court divided five to four, holding test oaths unconstitutional); Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524 (1886) (unconstitutional self-crimination, search and seizure); Ex parte Robinson, 19 Wall. 505 (1873) (*per* Field, reversal of summary disbarment for contempt); Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301 (1888) (jury trial); Kilburn v. Thompson, 103 U. S. 168 (1881) (no power in Congress to punish a witness for not answering questions as to matters with respect to which it was held that Congress had no business to inquire); *cf.* In re Pacific Ry. Comm., 32 Fed. 241 (1887), where Field relieved Leland Stanford from explaining the disposition of a "slush fund."

[15] Ex parte Milligan, 4 Wall. 1 (1867); Pennoyer v. Neff, 95 U. S. 714 (1877) (decision by Field).

[16] Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569 (1882) (Field thought that a lawyer summarily disbarred for participation in a lynching had not had due process); Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 133 (1894) (his dissent, with Fuller and Brewer, was from a decision sustaining a statute authorizing destruction of illegal fish nets without any procedure).

[17] Francis v. Flinn, 118 U. S. 385, 6 Sup Ct. 1148 (1886).

[18] Pennoyer v. Neff, *supra* note 15; State Tax on Foreign Held Bonds, 15 Wall. 300 (1872) (a five to four decision); Western Union v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126 (1886); *cf.* O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. 693 (1892); the extra-territoriality of the crime was one of the grounds of Field's dissent from a decision sustaining what amounted to a life sentence for shipping liquor from New York into Vermont.

[19] SWISHER, STEPHEN J. FIELD c. 8. The theory of his Circuit decisions was adopted in Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064 (1886).

against squatters who had carelessly assumed that vast vacant areas were in truth, as they seemed, no man's land, or any man's—validating paper titles under more or less convincing claims of Mexican grants.[20] In the Supreme Court of the United States his main dissenting force was toward setting up a definite super-constitutional immunity of private property from regulation in the public interest. He denied that any public interest, save in life under circumstances as of war or earthquake, could have priority.[21] "Where property is insecure, the rights of persons are unsafe. Protection to the one goes with protection to the other; and there can be neither prosperity nor progress where either is uncertain." [22] He resolutely refused to weigh—or even to see—facts tending to compel qualification of his dogmatic assumption.

His claims were on occasion frankly super-constitutional. "For acts of flagrant injustice such as those mentioned [legislation requiring that a ten cent dollar be accepted at face value] there is no authority in any legislative body, even though not restrained by any express constitutional prohibition. For as there are unchangeable principles of right and morality, without which society would be impossible, and men would be but wild beasts preying upon each other, so there are fundamental principles of eternal justice, upon the existence of which all constitutional government is founded, and without which government would be an intolerable and hateful tyranny." [23] Acceptance by the Pacific railways of the conditions of the Acts of Congress in aid of their construction—acceptance actually of liberal benefits—constituted, he thought, a contract; from private rights vested thereunder the federal government could not, even in the interest of the honesty and solvency of the railways, subtract. That no constitutional provision forbade federal impairment of the obligation of contract was immaterial; it was enough that there was no power expressly given so to invade inalienable rights of man.[24]

His practical effort, however, was to fix for legislative power limits much more definite than a mere variable inference from "unchangeable principles of right and morality" and "fundamental principles of eternal justice." His

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[20] SWISHER, STEPHEN J. FIELD 82 *et seq.* He was following the precedents made in Louisiana and Florida cases, as to which see Nelles and King, *Contempt by Publication* (1928) 28 COL. L. REV. 401, 423 *et seq.*

The contrasting realism of Field's analysis and valuation of interests when property absolutism was not involved was strikingly illustrated in another California case, Ex parte Newman, 9 Cal. 502 (1858). The question was of the constitutionality of a Sunday law. The reasoning of Terry, then Chief Justice, was used later by Field in such cases as Powell v. Pennsylvania, *supra* note 8. "A pursuit," said Terry, "which is . . . lawful...for six days in the week" cannot "be arbitrarily converted into a... misdemeanor on the seventh. Men have a natural right to do anything which their inclination may suggest, if it . . . in no way impairs the rights of others." To Field, dissenting, the protection of labor from the power of capital seemed "the highest office of our laws;" moreover, "it is not for the judiciary to pass upon the wisdom and policy of legislation." This opinion is more fully quoted, SWISHER, STEPHEN J. FIELD 77 *et seq.*

[21] Munn v. Illinois, *supra* note 8.

[22] Address to N. Y. State Bar Association, Feb. 4, 1890, 2 SOME OPINIONS AND PAPERS OF JUDGE FIELD, *supra* note 1, at No. 28.

[23] Dissenting in the Legal Tender Cases, *supra* note 3, at 670. See Corwin, *The "Higher Law" Background of American Constitutional Law* (1928-29) 42 HARV. L. REV. 149, 365.

[24] Dissenting in the Sinking Fund Cases, *supra* note 6, at 762.

working definition of the police power was a specification of permissible legislative objects: public health, peace, morals, education, good order, increase of industries, development of resources, and addition to wealth and prosperity.[25] His more abstract statement in *Munn v. Illinois*[26] allowed the legitimacy of "legislation which secures to all protection in their rights, and the equal use and enjoyment of their property." This was immediately qualified, however, by the limitation: "Whatever affects the peace, good order, morals and health of society, comes within its scope.... What is termed the police power of the state, which, from the language often used respecting it, one would suppose to be an undefined irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects." And since Munn and Scott's warehouses "are not nuisances" ("their occupation of receiving and storing grain infringes upon no rights of others, disturbs no neighborhood, infects not the air"), the rate regulation in question "is nothing less than a bold assertion of absolute power by the State to contract at discretion the property and business of the citizen." In all his essays toward comprehensive definition of the police power the phrase "general welfare" is conspicuous by its absence. Man by the social contract had granted to government no such roving commission. A state could obtain the power to regulate the rates of a public utility only by express stipulation in consideration of some special privilege which the state had a right to withhold, such as incorporation, monopoly, or eminent domain; neither the grant of privilege without express reservation of regulatory power nor the existence of virtual monopoly would support the power.[27] He long denied that the decisions from which he dissented had established regulatory power—finally conceding it with respect only to public utilities which had received from the state consideration which would support a power of regulation as upon a theory of implied contract.[28] But this was not until it had become clear that the court, largely over-ruling *Munn v. Illinois*, would hold that the reasonableness of rates is a judicial question and that unreasonable rate regulation is a deprivation of property without due process of law.[29] He stood fast to

[25] Barbier v. Connolly, 113 U. S. 27, 31, 5 Sup. Ct. 357, 359 (1885). He was not illiberal in seeing legislation as reasonably related to one of these definite objects. Barbier v. Connolly, *supra;* Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730 (1885) (in which Mr. Swisher sees inconsistency with his concern to protect Chinese from discrimination); Missouri Pacific Ry. v. Humes, *supra* note 7; Minneapolis & St. Louis Ry. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207 (1888); Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 232 (1888); Crowley v. Christenson, 137 U. S. 86, 11 Sup. Ct. 13 (1890). See also the cases in which the question was one of interference with interstate commerce or a federal instrumentality: Welton v. Missouri, 91 U. S. 275 (1875); Tiernan v. Rinker, 93 U. S. 123 (1876); Webber v. Virginia, 103 U. S. 344 (1881); Sherlock v. Alling, 93 U. S. 99 (1876); Mobile v. Kimball, 102 U. S. 691 (1880); Bridge Co. v. United States, 105 U. S. 489 (1881); Escanaba Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. 185 (1882); Miller v. Mayor of New York, 109 U. S. 385, 3 Sup. Ct. 228 (1883); Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313 (1886).

[26] *Supra* note 8, at 145, 148.

[27] Dissents in Granger Cases, *supra* note 8, and in Spring Valley Water Works v. Schatker, 110 U. S. 347, 4 Sup. Ct. 48 (1884).

[28] Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47 (1888); Charlotte, C. & A. Ry. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. 255 (1892).

[29] Railroad Commission Cases, 116 U. S. 307, 331, 6 Sup. Ct. 334, 335.

the end against the "loose" doctrine that the mere fact of helpless dependence of a large public upon a private business which competition had ceased to regulate gave the state power to do so.[30]

On the surface, his bows to the state power of limiting and regulating corporations may seem inconsistent with his sense of the sanctity of property. But it was as a party Democrat that he stood for "strict construction" and state's rights. His concern for them was always subordinate to his concern for property absolutism, even though subversive of democratic reality, and for federal judicial power in aid of it. In the interstate commerce cases in which he wrote, conflict between these two concerns was not importantly involved; although his decisions marked some enlargement of the federal preserve, they offended no popular interest; and he showed in them genuine desire for a sensible coordination of federal immunity with state power which would not result in a lacuna of power as to matters which, within his narrow conception of the legitimate bounds of legislative power, demanded the attention of *some* government.[31]

The state power over corporations which Field most vigorously maintained has been in fact rather a constitutional nuisance than a power of much practical importance. A corporation is not a "citizen," it is an "artificial person"; only natural persons can be citizens. A corporation of one state is not, therefore, entitled to the privileges and immunities of citizens in other states. A state may condition or forbid the business of a foreign corporation within its borders for any reason or for no reason. Field was the right arm of the court in maintaining through the second half of the nineteenth century this product of the metaphysical and practical ingenuity of Marshall and Taney.[32] He supported it upon the practical ground that since incorporation is a special privilege and not a right of man, state legislatures might limit, forbid, or regulate grants of incorporation as they deemed conducive to the best interests of the state—a power which would, however, be useless if they could not exclude or regulate corporations of other states.[33] In practice in Field's time the special privilege of incorporation could actually, under general incorporation laws, be obtained and abused by any Tom, Dick and Harry. The possibility, doubtless always remote, of any state's making substantial fruitful use of its power of restrictive regulation of corporate enterprise was destroyed by the decisions divesting the power with respect to foreign coporations in

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(1886); Dow v. Beidleman, 125 U. S. 180, 8 Sup. Ct. 1028 (1888); Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 702 (1890).

[30] Concurring in Brewer's dissenting opinions in Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468 (1892) and Brass v. Stoeser, 153 U. S. 391, 14 Sup. Ct. 857 (1894). In the Spring Valley Water Works case, *supra* note 27, he argued that the mere fact that a company owned the water supply of San Francisco did not make it a monopoly, for any five persons might lawfully incorporate a competing water company.

[31] In addition to interstate commerce cases cited *supra* note 25, see cases in THAYER, *op. cit. supra* note 9, at 1909-2190. For evidence in interstate commerce cases of his desire to limit legislative power it is necessary to examine his votes in cases in which he did not write an opinion. He concurred in the emasculation of federal regulation of interstate corporations by the first great decision under the Sherman Act: United States v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249 (1895).

[32] HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918) c. 3-7.

[33] Paul v. Virginia, 8 Wall. 168 (U. S. 1868).

interstate commerce. For an essential prerequisite of effective regulation of economic conditions in a state is power to reach the great corporations which operate in many states; their transactions have no less effect within a state when, instead of both, only one of the termini is local. In the first case emasculating state power as to such corporations Field fired dissenting guns [34]—which, however, for once he did not stand by. Little remained of absolute state power over foreign corporations except, while Field survived, power to subject them to discriminatory taxation for the privilege of doing such business as was wholly intrastate.[35]

Neither was the content which Field allowed to the power of a state with respect to its domestic corporations very substantial. The state could tax their franchises rather ferociously.[36] Field held, however, that the property of the Southern Pacific could not be assessed or taxed otherwise than as other property in California was assessed and taxed—defeating the effort of a reform movement to end a notoriously corrupt immunity from taxation.[37] The state could, of course, determine on what terms and conditions it would grant privileges of incorporation in the first instance. And having granted charters, it could, provided it had reserved such power, alter or amend them—at least to the extent of changing their phraseology. But insofar as property and specific powers or immunities of money-making value were granted by charter or acquired by corporations subsequently, Field contended that they could not be divested without violation of the rights of man. Corporations, not being men, had no such rights themselves; but the natural persons behind them had.[38]

As against the inalienable right of man to get all he can and keep all he can get, Field could see the interest of men generally only as spoliative and predatory. He was clearly aware of the problems of the time: that with increase of property and wealth "the inequalities in the condition of men become more marked and disturbing;" that "enormous aggregation of wealth possessed by some corporations excites uneasiness lest their power should become dominating in the legislatures of the country and thus encroach upon the rights and crush out the business of individuals of small means." But though private power over-shadowing government was so fixing the conditions of men as constantly to depreciate the value of their equal privilege to pursue happiness, he could not conceive legislative power as extending to prevention or remedy. The lesson of unrest was simply this: as unrest increases "it becomes more and more the imperative duty of the court" unhesitatingly to enforce "constitutional" guaranties of private rights.[39]

His reference was to a super-constitutional immunity of private, including corporate, property from regulation in the public interest as conceived by legislatures. "Constitutional" protection of this super-constitutional im-

[34] Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1 (1877). Field was moved by the fact that the decision admitting the Western Union into Florida destroyed the property of the local company in its statutory monopoly; it would seem that he would have been likely to have dissented in Gibbons v. Ogden, 9 Wheat. 1 (U. S. 1824).

[35] Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737 (1888).

[36] Home Life Insurance Co. v. New York, 184 U. S. 594, 10 Sup. Ct. 593 (1889).

[37] SWISHER, STEPHEN J. FIELD c. 9.

[38] Dissents in Spring Valley Waters Works case, *supra* note 27, and in Stone v. Wisconsin, 94 U. S. 181, 183 (1876).

[39] Address, *supra* note 22.

munity had been a definite object in his participation in the forging of a new constitutional instrument—perhaps not yet at the time of the *Slaughter House Cases*, but surely later. The ultimate "construction" of the due process clause as meaning that legislation may not be "arbitrary" and must be "reasonable" was flagrant forgery. For it is not a construction of the words "deprive of liberty or property without due process of law." It depends upon a construction of the word "law." From Field's assumption that the power of legislatures to make law is subject to super-constitutional limitation it follows that legislative "acts of flagrant injustice" are not *law*. Since they are not law, they cannot be enforced by any procedure, due or undue. But it is because they are not law that they are void—not because they do anything "without due process of law." And the law by which they are not law is not the Constitution, but the "higher law" variously seated in various judicial consciousnesses.

Until the end of Field's time the court shrank from the enormity of incorporating this "higher law" into the due process clause by force of sheer assertion, striving, for instance, to explain its ultimate holding that imposition of unreasonable rates is a deprivation of property without due process of law as a holding of unconstitutionality, not for substantive unreasonableness, but for procedural undueness in denying judicial hearing upon the question of unreasonableness.[40] Field himself would obviously have preferred the linguistically more plausible incorporation of the "higher law" into the Constitution which he proposed in the *Slaughter House Cases*—by assertion that the "unalienable rights" with which man is endowed by Nature or Nature's God are "privileges and immunities of citizens of the United States." Failing in that, however, he became assiduous, sometimes with and sometimes without Bradley's assistance, in claiming immunity for inalienable rights under the due process clause. The pressure succeeded, not by convincing reason, but through failure of opposition. For twenty odd years following the first launching of the idea in the court by Bradley and Swayne in 1873,[41] though it was not accepted, no justice went on record as rejecting it. In *Munn v. Illinois*, for example, Waite largely conceded by not denying Field's abstract contention as to judicial power. Some early "authority" for it was to be found in cases where judicial indignation at the boiling point could find no other reed to lean upon.[42] The Waite court itself made an authority for super-constitutional power on "general principles."[43] But objections to such naked super-constitutionalism were obvious, and might become clamorous.[44] Yet the possibility of a power with which so much justice could be done (no judge of course would feel that he could not be trusted with it) was constantly seductive. It was repelled only for want of respectable constitutional vestments. But time and iteration made the due process clause seem a sufficient covering.[45]

Though it would be undue to claim for Field alone the credit or discredit of this achievement, no other judge has higher title to it. In this, and in

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[40] See *supra* note 29.

[41] Dissenting in the Slaughter House Cases, *supra* note 8.

[42] Corwin, *The Doctrine of Due Process of Law Before the Civil War* (1911) 24 HARV. L. REV. 366, 460.

[43] Loan Association v. Topeka, 20 Wall. 655 (U. S. 1875), holding void municipal bonds issued to induce a factory to locate in Topeka. The court claimed its "general principles" power only under state constitutions. Davidson v. New Orleans, 96 U. S. 97 (1878).

[44] See Clifford's dissent in the Topeka case, *supra* note 43.

[45] For details of the development see Corwin, *The Supreme Court and the Fourteenth Amendment* (1909) 7 MICH. L. REV. 643.

the use to be made of it, his significance is as a precurser. Except indeed for his interstate commerce decisions, most of what he wrote into the Constitution in his own time with his own hand has become comparatively unimportant. His most important contemporary force was of resistance. In stressing at the beginning the Jeffersonianism of his colleagues I probably exaggerated it. Probably there was never much chance that the tendency of decision would be on from, instead of back from, *Munn v. Illinois*. What chance there was Field prevented. He kept his colleagues aware that their prepossessions, their sympathies, their values and convictions were on the whole pretty much as his. Such leaven of social concern as was working in some of them was working incoherently. A mystic faith in right and rights, somehow established otherwise than by human power, with sanctions somehow higher than those of human use and benefit, was all but universal in a generation endoctrinated not only with the Declaration of Independence but also with the Word of God. To set up an *interest*, even of mankind, against a *right* of man, had a connotation as of time-serving. To contradict the majestic nonsense of Field's abstract conceptions would have been a heresy which no pragmatic faith was yet confident enough to hazard. His unswerving insistence—lucid, eloquent, even, granting his premises, logical—upon the True Word was a tremendous drag against movement in the direction of uncouth social forces. That he was a judge in whose dependability railway magnates could in correspondence between themselves express their confidence[46] did not lessen his weight. It was no disgrace—provided the dependability was not felt as a bought commodity and did not involve submission to dictation. And after the somewhat Jeffersonian Republicanism engendered in the Civil War period had spent itself, what other sort of judge was likely often to be appointed?

Field held back the Jeffersonianism of the Waite court until it was dead, and lived to see the "higher law" not only established in the Constitution but also used as he desired, and, I think, thought that he thought *right*. Chief Justice Fuller made law of his dissenting doctrine that state power to enforce prohibition cannot abridge the inalienable right of a lawful owner of alcoholic property in another state to sell it across state lines[47]—a state of law but for which national prohibition might never have seemed important. The income tax of 1893 was held unconstitutional[48] compatibly with his dissenting opinions in the *Legal Tender* and *Sinking Fund* cases.[49] He was still a member of the court when, in *Allgeyer v. Louisiana*,[50] it was clearly established, through Justice Peckham, that it is deprivation of liberty or property without due process of law to abridge the rights of man. It would be excessive to imply that the subsequent tendency of decision with respect to social legislation, largely subverting the "right" of men in general to a voice in their own destiny, was a personal victory for Field. But the judicial barricade against popular government may owe more to his exertions than to those of any other single member of the court since Marshall.

Yet, whatever may be thought of his works, he is not a repulsive figure. The specific measures against which he fulminated were usually open to just criticisms. Deprecation of the long-run tendency of his pressure

[46] SWISHER, STEPHEN J. FIELD 247.

[47] Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681 (1890). *Cf.* Field's dissent in Mugler v. Kansas, 123 U. S. 623, 675, 8 Sup. Ct. 273, 304 (1887).

[48] Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429, 15 Sup. Ct. 673 (1895); 158 U. S. 601, 15 Sup. Ct. 912 (1895). Field wrote a concurring opinion.

[49] *Supra* notes 3 and 6.

[50] 165 U. S. 578, 17 Sup. Ct. 427 (1897).

springs in part from a traditional faith in popular government whose validity is no longer self-evident. Jefferson would not have owned him as a democrat. But he was never cold; he was always mighty; and, except when hardener by his bigotries, he was not inhumane.[51]

New Haven, Conn. WALTER NELLES.

Social Control of Sex Expression. By Geoffrey May. New York, William Morrow & Co., 1931. pp. xi, 307. $3.

MR. MAY gives in this painstaking study a detailed history of the control of sexual behavior by Anglo-American law. It is a work which has long been needed. In most of the great encyclopedic studies of sex and family organization some consideration is devoted to the problem investigated in this volume, but such accounts are at best fragmentary. Mr. May, in studying in detail the history of the legal control of sex expression, has done a fresh and original piece of work.

The book begins with an analysis of the methods of sexual control existing among primitive peoples. In primitive societies chastity is not regarded, as in some more advanced societies, as an ideal which has a value apart from other factors; it rests upon what the author terms a "property" and a "contamination" basis. In communities where woman is considered the property of man, virginity, for reasons which are still obscure, is regarded as a thing of value, and a father will have to accept a materially reduced bride-price if his daughter has lost her chastity. A belief common among primitive peoples is that woman has a contaminating or devitalizing effect upon man. From this idea grew the many superstitions which attribute to woman the failure of crops, the occurrence of disease and even defeat in battle. The concept of woman as a chattel and the fear of her supposedly magical qualities were especially important among the ancient Hebrews; in addition, the concept of monotheism was so tenaciously held that any intimacy between an Israelite and the follower of another god was regarded as an injury to the Hebrew god, a belief which naturally resulted in a condemnation of the forms of sex expression peculiar to other tribes as heretical. Nevertheless, the sexual morality of the early Hebrews was condemned for its laxity by the Pharisees and the Essenes; and their ethical precepts, mingling with the Platonic doctrine of sex and other influences, culminated finally in the early Christian denunciation of all forms of sexual relationship as mortal sins. This conception of the Christian fathers, with slight modifications, was finally carried over into English law.

Before the end of the thirteenth century the ecclesiastical courts had complete jurisdiction over the sexual life of the people and with the codifi-

[51] One of the most striking evidences that he could feel humble human interests as well as property interests as *rights* is his hostility to the "fellow servant rule" in personal injury cases. For a time he succeeded in getting a divided court to accept the "vice principal" qualification of that rule. Chicago, Milwaukee & St. Paul Ry. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184 (1884). He dissented warmly when the court construed the substance out of this qualification, and imposed its harsher doctrine on the federal courts as "general law" which they must apply even in states whose courts rejected it—somewhat anticipating Justice Holmes' dissenting opinions on "general law" questions. Baltimore & Ohio Ry. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914 (1893).

cation of the canon law the traditions of the Christian doctrines of sexual morality secured a firmer hold on English jurisprudence. It is at this point that the real value and usefulness of Mr. May's study become apparent. In the greatest detail he traces the vicissitudes of the legal control of sexual behavior in England from the Conquest, and in America from pre-revolutionary times, to the present day. The story that he tells is not a pleasant one. It ranges from the complete collapse of morality among the clergy at the time of the Reformation, and the creation of the Court of High Commission by Elizabeth in an effort to regulate the sex life of the people, to the last unsuccessful attempt in Parliament in the nineteenth century to make adultery criminally punishable by fine and imprisonment. In colonial America the laws governing sexual conduct varied from the comparatively lenient provisions of Virginia, Delaware and Pennsylvania to the harsh enactments of Massachusetts Bay where three persons were executed for adultery.

The talents the author displays in recounting social history are, however, not evident when he ventures, in the concluding chapter of the volume, into the realm of social theory. Mr. May concludes from his survey of the manifestations of sexual behavior throughout the centuries and the attempts of society through law to control it, that legal methods of controlling such behavior have been various, and that the Patristic conceptions of sexual morality were the foundations of the moral standards of Western Europe. There is, of course, no element of novelty in either of these conclusions; but it is to Mr. May's credit that he has traced with such precision the attempts and failures of law to enforce the indefensible ideal of chastity advocated by Ambrose and Jerome, by Augustine and Clement of Alexandria. Having established that the regulation of sexual behavior by legal control is almost impossible, he asks the important question: why should the law have continued to maintain the Patristic doctrine of chastity? "Why has the question of morality," he writes, "entered into a voluntary sexual connection which does not injure the two persons taking part in it or any third person, and which, moreover, can do no injury to the child which may be engendered by it? The answer is, that though no individual may suffer by voluntary non-marital sex expression, society conceives itself to be suffering. It is losing potential strength." Mr. May is here, it would appear, attempting to rationalize legal history by showing that the condemnation by the law of certain forms of sexual activity had, in reality, its origin in a belief that the particular forms were anti-social. Yet he shows they were first denounced by Catholic theologians as mortal sins and that as a result of their condemnation by canon law they were gradually secularized into crimes or public wrongs. Nowhere does Mr. May show that after the secularization of these modes of conduct as crimes their continued condemnation by the law was the result of the belief that they were anti-social. The evidence offered in the body of the book supports the conclusion that, having once been established as crimes, they were continued to be regarded as such by the law through inertia, unreasoning respect for authority, and an unwillingness to examine facts in a critical spirit.

But the weakness of the author's concluding chapter does not invalidate his principal thesis or affect the value of his book as a whole. He has set forth the history of the Anglo-American legal control of sexual behavior with great adeptness and penetration, and the laborious spadework evident throughout the volume distinguishes it, on this point alone, as a contribution of value to social history.

Baltimore, Md. HUNTINGTON CAIRNS.

Cases on the Law of Insurance. By William Reynolds Vance. Second Edition. St. Paul, West Publishing Co., 1931. pp. xxiii, 1020. $6.

PROFESSOR VANCE'S new edition of his *Cases on Insurance* represents a complete overhauling of his first edition which appeared seventeen years ago. Many of the cases appearing in the former edition have been supplanted by others of recent date. Several old chapters have been completely reorganized and a few new ones added. This has been done at the cost of 275 additional pages, but the result is worth the price.

An important addition is a section on risk bearing and risk distribution, containing a classification of risks and a discussion of the theory of insurance. Another addition is a chapter on the state control of the insurance business, including cases bearing on the public character of insurance. It may be questioned whether most of this matter should not have been left to a course in public utilities, especially since the strictly insurance material more than consumes the time usually available for the course. Still, completeness requires more than passing notice of this important topic. Of much importance is the new chapter on premiums, covering such matters as the nature of the obligation to pay premiums, time and mode of payment, the requirement of notice and the right to a return of premiums. A new chapter of 140 pages is devoted to accident insurance, an addition well justified in view of the tremendous growth of this type of insurance during the last decade. Liability, guaranty, title, theft, credit, reciprocal and group insurance are given recognition in a separate chapter. The chapters on waiver and estoppel and on the rights of the various parties under both life and fire policies are completely reorganized and enlarged. The result is a material improvement over the same chapters in the old edition. Other valuable features of the book include the stating of stimulating problems and questions in the footnotes, the unlocking of the mine of magazine material by frequent citation of articles, notes and comments, and the occasional sifting into the cases of material on certain economic aspects of insurance.

Professor Vance adheres to his former plan of developing both life and property insurance together. This seems amply justified in waiver and estoppel, and perhaps also in concealment, representations and warranties, but it may be questioned whether in other respects the two types of insurance are not sufficiently different in function and in operation to justify separate treatment. For example, matters affecting delivery of the policy, though still important in life insurance, have come to be of little or no importance in fire insurance; matters of insurable interest, though related, are quite distinct in operation and effect in the two fields; although the consequences of a failure of a condition are probably the same in different kinds of insurance, the facts which constitute conditions are entirely different, and most controversies hinge upon the latter; the content of the rights and powers of the various parties in the two types are quite dissimilar; the interest of the beneficiary in life insurance has no counterpart in property insurance, and the interests of such third parties as mortgagees, bailees, vendees, remaindermen, etc., have no counterpart in life insurance; problems involving prorating, concurrent insurance, co-insurance, blanket and specific policies, etc., arise only in property insurance; and of course, the facts constituting maturity are quite distinct in all branches of insurance. In view of this cleavage, is not a student likely to acquire a more impressive picture of the function and operation of life insurance, for example, if his pursuit of that subject is not interrupted by too frequent excursions into the

fields of fire, marine or liability insurance? Of course it is not meant that analogies from various insurance fields may not frequently be used to advantage. But is there not a certain atmosphere and technique peculiar to life insurance that can more likely be sensed if the student's association with the subject is intimate and continuous? However that may be, it seems certain that a more logical and convenient classification of material is possible if the various branches of the subject are kept separate. A sensible classification of insurance material is a difficult job under any circumtances. With all branches considered together, it is an impossibility.

An examination of Professor Vance's book reveals some of these difficulties. For example, there is a chapter dealing with "rights under a fire policy." Another chapter deals with "construction" of the fire policy. An examination of the contents of these chapters reveals that the first deals with construction of the policy as well as "rights" of the parties, and the second with "rights" of the parties as well as the construction of the policy. The only difference is that one chapter "construes" one group of clauses and the other chapter "construes" another group of clauses, and that the first chapter deals with the rights and powers of the insured and such parties as mortgagees and bailees, and the other deals with the rights and powers of the insurer. The life policy is dealt with in the same way. But far be it from me to criticise a classification merely because it is not "logical." The test ought to be, is it convenient, and it may be that Professor Vance's classification is the most convenient if not the most "logical." As to whether it is possible to attain the latter in the organization of insurance material is doubtful. However that may be, Professor Vance has done better than anyone else who has undertaken the task.

This book is one of great merit, evidencing much painstaking research and thought. The addition of new topics, the reorganization of old chapters, the free use of recent cases, the enrichment of the footnotes with problems and magazine references, and the occasional insertion of extra-legal material combine to make of Professor Vance's new edition a teaching tool of the highest order.

Urbana, Ill. GEORGE W. GOBLE.

Law and Literature and Other Essays and Addresses. By Benjamin N. Cardozo, New York, Harcourt, Brace & Co., 1931. pp. 190. $2.75.

THIS little volume contains seven of the graceful and charming essays for which the distinguished Chief Judge of the New York Court of Appeals is famous. Originally delivered as addresses, they are not, of course, of the epoch-making quality of his lectures on the judicial process. They do, however, give an intimate and revealing picture of the man himself and will be especially welcome to his many friends for this reason.

The first essay on "Law and Literature" was delivered before the Harvard Law School Association and the Connecticut Bar Association and is reprinted from the *Yale Review*. In it he discusses, not without humor mixed with many shrewd conclusions and suggestions, various types of judicial opinions and arguments at the bar. Lawyers may obtain many a hint to aid them in addressing appellate courts if they will study this with care. The judge's conclusion that legal writings may also be literature is one which his own work outstandingly exemplifies.

The second essay, "A Ministry of Justice," delivered before the Associa-

tion of the Bar of the City of New York and reprinted in the *Harvard Law Review* and in the Association's published Lectures on Legal Topics, is a vitally important contribution to the practical aspects of law reform. Experience shows the soundness of Judge Cardozo's view that reform will not proceed of its own worth and that, if substantial results are to be achieved, some agency—perhaps a ministry of justice—must be organized to foster and to develop it.

Other addresses are: "What Medicine Can Do for Law," delivered before the New York Academy of Medicine; "The American Law Institute," given at the Institute's third annual meeting; "The Home of the Law," given at the dedication of the new home of the New York County Lawyers Association; "The Game of the Law and Its Prizes," a commencement address at the Albany Law School; and "The Comradeship of the Bar," an address at the luncheon of the New York University Law School Alumni Association. These, especially the latter ones, show Judge Cardozo in an especially personal mood and are most attractive. Another great judge and essayist, Holmes, has referred to somewhat similar writings as "fragments of my fleece that I have left upon the hedges of life." These fragments of fleece from the judge most nearly in line with the Holmes tradition are an addition to literature, as well as law.

New Haven, Conn. CHARLES E. CLARK.

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