BOOK REVIEWS


Obarogie Ohonbamu†

World leaders, primarily through the United Nations, have been almost unanimous in their wholesale condemnation of the ubiquitous, arbitrary violation of basic human rights by sovereign states, but very little has been done in practice to end abuses of this nature.

On the international scene, the individual's fundamental rights and freedom are now widely acknowledged, especially after the external effects of Hitler's tyranny clearly demonstrated that, humanitarian considerations apart, it is generally in the interest of world peace that states not have unfettered freedom to deny their citizens the basic human rights. Hence, when the United Nations came into existence after the Second World War, one of its main concerns or objectives was "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . ." ¹

To further the equality of all member nations, large and small, as well as their security against external attack, the U. N. Charter went on to provide as follows: "The Organization is based on the principle of the sovereign equality of all its members." ² "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations." ³ There is an obvious dilemma here.

If a state deprives its citizens of their fundamental human rights, what can the United Nations do? According to the positivist doctrine, only states are subjects of international law. Consequently, the individual is accorded no claimable rights under the positivist view.

The basis for this position, as explained by Oppenheim (and thus far acknowledged by the International Court) is that "[s]ince the Law of Nations is based on the common consent of individual States, and

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¹ U.N. CHARTER preamble.
² U.N. CHARTER art. 2, para. 1.
³ U.N. CHARTER art. 2, para. 4.
not of individual human beings, States solely and exclusively are the subjects of International Law.\textsuperscript{4} \textsuperscript{6}

But Grotius would not concur in this conclusion. In his view a state could, on the grounds of humanitarian consideration, intervene in the affairs of another state to protect its inhabitants' human rights:

Though it is a rule established by the laws of nature and social order, and a rule confirmed by all the records of history, that every sovereign is supreme judge in his own kingdom and over his own subjects, in whose disputes no foreign power can justly interfere. Yet where a Busiris, a Phalaris or a Thracian Diomede provoke their people to despair and resistance by unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations. Thus Constantine took up arms against Maxentius and Licinius, and other Roman emperors either took, or threatened to take them against the Persians, if they did not desist from persecuting the Christians.

Admitting that it would be fraught with the greatest dangers if subjects were allowed to redress grievances by force of arms, it does not necessarily follow that other powers are prohibited from giving them assistance when labouring under grievous oppressions.\textsuperscript{5}

Vattel, another eminent international jurist, vehemently disagrees with Grotius:

No foreign state may inquire into the manner in which a sovereign rules, nor set itself up as a judge of his conduct, nor force him to make any change in his administration. If he burdens his subjects with taxes or treats them with severity it is for the Nation to take action; no foreign State is called on to amend his conduct and to force him to follow a wiser and juster course.\textsuperscript{6}

From the foregoing it is clear that under existing institutions fundamental human rights can exist only in a utopian world of rhetoric and semantics. In his home country the individual is often at the mercy of an omnipotent government. On the international level he remains unrecognized as the subject of legally enforceable rights. Where then can he turn?


\textsuperscript{5} H. Grotius, The Rights of War and Peace bk. II, ch. XXV, §8 (A. Campbell transl. 1901).

\textsuperscript{6} E. de Vattel, The Law of Nations or the Principles of Natural Law bk. II, §55 (C. Fenwick transl. 1916).
In the interest of such "helpless" individuals Luis Kutner has made an eloquent plea for the establishment of a world court of habeas corpus, to guard against arbitrary and capricious governmental action. In *The Human Right to Individual Freedom—A Symposium on World Habeas Corpus*, Kutner has compiled a collection of essays contributed by an eminent group of jurists from every part of the world. Roscoe Pound, Quincy Wright, William O. Douglas, Dr. Udo Udona, and Prince Sihanouk are among those who, in this collection, have expressed their views on the fundamental rights of man. Although some of the essays are reprints of earlier articles, most are newly conceived.

The writ of habeas corpus has proven to be the most effective means of protecting the citizen against arbitrary arrest and illegal detention. In Nigeria, for example, the Republican Constitution of 1963, the Habeas Corpus Law of Western Nigeria and the Mid-Western State, and the Habeas Corpus Acts of 1679 and 1816, as well as the English common law, provide the machinery for release via habeas corpus. The Nigerian procedures protect the individual entitled to bail, and the right of those detained to a speedy trial.

But against the omnipotent and oppressive state, manned by "tin gods," the writ in practice becomes almost powerless—and this can be not only demoralizing, but spiritually enslaving as well. Dr. Udo Udoma has expressed the problem well:

The thought that a citizen or national can be detained without charge or trial must of necessity affect the morale of the local population. Courage and boldness among the population become rare commodities. Detentions of this kind destroy individual originality and engender the belief among the people that any criticism of the activities of state officials is a crime, even though proper criticism ought to be accepted as a *sine qua non* for the proper functioning of a democracy. Fear and a feeling of insecurity are generated; and individual freedom, the very foundation of a democratic society based on the rule of law, which should germinate and flourish in every society, is thwarted and destroyed. Man thus becomes a mere cog in the wheel of the state so that to all intents and purposes he is given the impression that he was created for the state instead of the state for him.

In such circumstances, if the free world is to have a meaningful survival, it becomes the duty of all men of good will throughout the world—the idealist, the humanist, the Christian, and the true and sincere democrat, of whom there are many, who believe in a free society and a world in which the rule of law must reign supreme—to unite together to find a way of releasing mankind from this new chain of bondage.
and oppression and thereby bring an end to the prevalent venomous practice of arbitrary arrest and detention.\textsuperscript{7}

The genesis of such an international effort may well occur in the concept of a world court of habeas corpus. Indeed, a treaty statute establishing such a court, first proposed before the American Bar Association in 1959, has undergone several revisions since that time.

This is certainly a most laudable proposition, but if the experience of the International Court of Justice in the Hague is at all indicative, it would appear that the proposed habeas corpus court would accomplish little that is constructive. The solution may lie, however, in the approach which Leonard Suttin, Chairman of the U. S. Foreign Claims Settlement Commission, has proposed:

Surely regional international courts of world habeas corpus are within reach and once created and obeyed, will permit those who in good faith adhere to the precepts of the U.N. Charter to see to it that at least in their countries there is protection against arbitrary arrest and unlawful detention. Hopefully then, this safeguard can gradually but surely be extended to all men everywhere.\textsuperscript{8}

Peace in the last analysis, as the late President John Kennedy often said, is basically a matter of human rights. It is therefore painfully obvious that if we are to have lasting peace, we must use every effective weapon to strike at those who abuse human rights—and who thereby divide man from man, and nation from nation.\textsuperscript{9}


JUDICIAL REVIEW IN THE CONTEMPORARY WORLD.

Adolf Homburger †

Professor Mauro Cappelletti, Europe’s leading authority in the field of comparative civil procedure,1 tells us that his book is “primarily meant for students.”2 He overestimates American familiarity with constitutional processes in other parts of the world. Few Americans, whether students, teachers, or practitioners, know how the civilians allocate functions between the judicial and political branches of government in a clash between constitutional imperatives and law of a lower order. Perhaps American unfamiliarity with civilian institutions may be explained on the grounds that judicial review of legislation in civil law countries is of recent origin, going back to the periods following the First and particularly the Second World Wars,3 and that the American literature on the subject is meager. Professor Cappelletti’s book fills the need for more information with a thoughtful, tightly written and easily readable study that places the systems of the Western World in comparative perspective and describes and evaluates their leading characteristics. In a very real sense, the book complements and fulfills the mission of the valuable collection of monographs on contemporary constitutional review, published by the Max-Planck-Institute in 1962.4 Although the author aims at basics rather than technical details, the rendering of the subject is never superficial. The text is documented by a wealth of information assembled in footnotes that contain a great deal more than reference materials. At times the reader regrets that the author relegated provocative thoughts and creative comments to footnote status.

In presenting the materials, the author adopts the method of the modern comparative school that “seeks to combine the virtues of both natural law and positivism by adopting the realistic methods of positivism in the search for common elements in legal institutions of various

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1 The author is Professor of Law at Stanford University and the University of Florence and Director of the Institute of Comparative Law at the University of Florence. Among his numerous publications, the best known in the United States include THE ITALIAN LEGAL SYSTEM (1967) (with J. H. Merryman and J. M. Perillo) and CIVIL PROCEDURE IN ITALY (1965) (with J. M. Perillo).
2 M. CAPPETELLI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD vii n.1 (1971).
4 MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, VERFASSUNGSGERICHSBARKEIT IN DER GEGENWART (1962).
nations and the common values expressed in them." Since protection of individual rights guaranteed by the constitutions of the modern world depends on the availability of effective remedies, the relevance of the author's search for "the common core" of constitutional control devices will not be lost on the reader. A careful study of the book will reward him not only with a deeper understanding of our domestic institutions, but also with the comforting thought that our system today still shows remarkable strength and inspires imitation by other systems. On the other hand, experience with the American system abroad exemplifies the difficulties of transplanting legal institutions into foreign soil that is not properly prepared for them.

The first half of the book, comprising a preface and chapters I and II, contains mainly introductory and historical materials. The book opens by contrasting two fundamentally different methods of control of constitutionality: political and judicial. The former is usually preventive, forestalling unconstitutional exercise of legislative power, while the latter is remedial, correcting legislative transgressions. The Italian system serves as the author's example of a country with dual controls, judicial and political, the latter exercised through the President of the Republic. France and the Soviet Union are examples of countries that reject judicial control altogether, relying exclusively on political control devices, albeit, as the author points out, for entirely different historical and ideological reasons. Rejection of judicial control in Soviet Russia reflects its conception of unitary state power and its opposition to the "bourgeois doctrine" of separation of powers. Resistance to judicial control in France, on the other hand, is traceable to that country's bad experience with the judiciary in pre-revolutionary days and the glorification of the doctrine of separation of powers in pure form.

Professor Cappelletti sees possibilities for evolution in the direction of judicial control, at least in countries such as France where rejection of judicial review reflects the purists' notions of separation of powers. The author's hypothesis is supported by the history of the French "Cour de Cassation" which started out as an organ of legislative power and eventually became an organ of nonconstitutional judicial review. Perhaps more significant, as noted by the author, is the trend

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5 M. Cappelletti, supra note 2, at ix (footnote omitted).
6 Id. 1-24.
7 Id. 1-2.
8 Id. 6.
9 Id. 7.
10 Id. 3.
11 Id. 12-16.
12 Id.
of the French "Conseil D'Etat" to exercise a measure of control of constitutionality in reviewing abuses through administrative acts.\textsuperscript{13}

The author concludes the first part of his study with a highly interesting synopsis of historical antecedents of judicial review.\textsuperscript{14} In whirlwind fashion he takes us through the centuries from the days of the Greco-Roman civilization, through the early Church, the medieval scholastics, the French Parliaments, the English courts of equity, and the period of enlightenment philosophers, to modern times. As do some other scholars, Professor Cappelletti questions the thesis that judicial review of legislation was a distinctive American contribution to political theory, and suggests that the American version of constitutionalism was but "the logical result of centuries of European thought and colonial experiences . . . ."\textsuperscript{15} More specifically, the notion of a supreme law came naturally to the Americans who lived under colonial charters and were quick to substitute constitutions for the charters and judicial review for review of colonial laws by the Privy Council.\textsuperscript{16}

I attribute little significance to this historical explanation for the purpose of determining the question to whom the world is indebted for modern constitutionalism. Yet the ability to fashion ways and means by which vague theories are translated into operational reality is an American characteristic. Few discoveries, if any, are made in a vacuum. The credit rightly belongs to him who draws the spark from the charged atmosphere, even though he did not create the tension. Professor Cappelletti agrees that prior to the formation of the American system "nothing similar had been created in other countries"\textsuperscript{17} and that the "worldwide movement [toward rigid rather than flexible constitutions with supremacy over other laws] was effectively begun by the American Constitution of 1789 and its courageous interpretation by the Supreme Court."\textsuperscript{18}

The second half of the book is devoted to a comparative analysis of modern systems of judicial review in the Western World. The author selects two prototypes for intensive discussion: the American Constitution of 1789, as interpreted by the Supreme Court, and its structural opposite, the Austrian Constitution of 1920-1929, a brainchild of the distinguished Austrian jurist Hans Kelsen. While attention is focused primarily on these two archetypes, Professor Cappelletti also manages to acquaint the reader with variations and modifications represented in

\textsuperscript{13} Id. 16-19. A brief interlude is devoted to a review of special remedies of judicial control of constitutionality that developed in entirely different cultures: the Anglo-American writ of habeas corpus; the Mexican \textit{amparo contra leyes}; and the German \textit{Verfassungsbeschwerde}. All were fashioned for the protection of important individual rights. Such special devices demonstrate that a similar response may be expected to similar needs wherever they arise. \textit{Id.} 19-23.

\textsuperscript{14} Id. 25-43.

\textsuperscript{15} Id. 25.

\textsuperscript{16} Id. 36-41.

\textsuperscript{17} Id. 25.

\textsuperscript{18} Id. 27.
the constitutions of many other countries. Thus we find West Germany, Italy, Cyprus, Turkey, and Yugoslavia in the Austrian camp, and Denmark, Norway, Sweden, Switzerland, Canada, Australia, and even countries of the Eastern World, such as Japan and India, in the American camp. Mexico and Ireland, according to the author, fall neatly within neither the American nor Austrian models, instead exhibiting "mixed" or "intermediate" characteristics. Subjects of comparison are the organs, process, and effects of judicial control.

Starting with a penetrating discussion of organs of control, chapter III contrasts the American "decentralized" and the Austrian "centralized" systems. Under the Austrian system, the judiciary of the ordinary courts, both high and low, must obey and apply all statutory law whether or not it conforms to the commands of the Constitution. Control of constitutionality, considered a predominantly political act, is within the exclusive jurisdiction of a centralized judicial organ, the Constitutional Court of the Republic. In contradistinction, under Chief Justice Marshall's interpretation of the supremacy clause of the American Constitution, the power to review constitutionality of legislation in the United States rests with all judicial organs, state or federal, from top to bottom.

The author's rationalization of Austria's centralized system is unassailable. The civilians, for ideological and historical reasons, lean toward a sharper doctrine of separation of powers than we do. Secondly, if all civilian courts were free to resolve constitutional questions, the absence of any doctrine of stare decisis in civil law countries would leave the judges of each court theoretically free to determine the constitutionality of a law for himself. And finally, the European career judges are not "suitable" for the quasi-political task of determining constitutional issues.

Professor Cappelletti does not deal with the question whether the judges of the centralized constitutional courts of the Austrian variety are well equipped to handle controversial constitutional questions in a non-conceptualistic and socially responsible manner. For example, are "part-time judges" who exercise judicial functions on the Constitutional Court as a "side-line" in addition to their chief occupation (as provided by the Austrian Constitution) "suitable" arbiters of constitutionality? Even though they may not be drawn from the political branches of government, one wonders if they are likely to resist outside pressures when called upon to render politically sensitive or unpopular decisions.

19 Id. 46 n.5.
20 Id. 45-68.
21 Id. 69-84.
22 Id. 85-96.
23 Id. 53-66.
24 See Melichar, Die Verfassungsgerichtsbarkeit in Österreich, in MAX-PLANCK-INSTITUT, supra note 4, at 448.
25 Id. 446-47.
The considerations that determine the choice of the organs of review also affect methods of review (covered in chapter IV of the book) and the effect of the decisions (covered in chapter V). Under the American system, constitutional questions are determined as part of the adversary process whenever relevant to the determination of a concrete case. Under the Austrian system, by contrast, constitutional issues are segregated from the rest of the case and submitted to the Constitutional Court for separate determination. As provided by the original Austrian Constitution, the initiative to bring a question before the Constitutional Court lay only with certain political organs—for example, the federal government with respect to legislation of the "Länder." As time went on, however, even the Austrians modified their original position by a slight move toward decentralization. Under a 1929 amendment to the Constitution, the ordinary courts of last resort may initiate a review proceeding by the Constitutional Court when the question is relevant to the determination of an actual controversy. Pending determination by the Constitutional Court, proceedings in the ordinary court may be stayed. Other countries, such as Germany and Italy, went one step further, vesting the initiating power in lower courts.

Finally, with respect to the effect of the constitutional determination, the decision of the Austrian Constitutional Court simply invalidates the unconstitutional statute, binding everyone just as though it had been repealed by the legislature. Under the American system, in theory at least, the judgment of a court, even if it be the United States Supreme Court, does no more than preclude application of the unconstitutional statute to the particular case pending before the court. As a practical matter, however, under the doctrine of stare decisis, the decision, when rendered by the Supreme Court, invalidates the statute almost as effectively as a decision of a civilian constitutional court.

In a thoughtful evaluation of risks inherent in the two systems, Professor Cappelletti highlights two serious shortcomings of the centralized system. First, it has failed to produce a judiciary that possesses "constitutional consciousness." Lack of constitutional responsibility tends to produce a corresponding lack of sensitivity to constitutional problems in the country. Secondly, the centralized system, with its disjointed consideration of constitutional issues, tends to foster an abstract, conceptualistic, and rigid approach to constitutional problems. Turning to the American system, the author points to an array of devices by which the courts may evade or postpone the determination of

26 M. CAPPELLETTI, supra note 2, at 72. "Länder" are political subdivisions analogous to states or provinces.
27 Id. 72-77.
28 Id. 75.
29 Id. 85.
30 Id. 86.
31 Id. 79-83.
constitutional issues in a particular case without striking down a statute that is in fact unconstitutional. The "political question," "case and controversy," and "standing" doctrines are examples of such devices of evasion. While the author expresses some concern about the desirability of avoiding or disguising the disposition of sensitive constitutional issues, he feels that on the whole the American system works well and assures the continued effectiveness of judicial review without excessive political disturbances.

I would stress another salient feature of the American system. Perhaps its greatest virtue is its tendency to encourage constitutional evaluations on a nationwide scale reaching to the judicial grass roots. Constitutional doctrine is created in test tube fashion in literally thousands of courts all over the nation, day by day and case by case, by giving each judge, high or low, the opportunity to speak at least the first, if not the last, word on any constitutional issue. By contrast, concentration of constitutional competence in a single unitary court not only dulls "constitutional consciousness" in the performance of judges' daily duties, but also stifles experimentation by lower level courts and smothers the initiative of individual judges in dealing with crucial societal issues. Defective in many ways as the American system may be, hobbling along on decentralization, diffused consideration of constitutional issues, and the doctrine of stare decisis, it provides a generally effective structure within which the constitutional conscience of the entire nation may evolve and find expression.

One last observation must not be omitted. While the author underlines the different methods of constitutional control, he places even greater emphasis on trends toward unity. Indeed, the search for the "common core" of the various systems of review is a leading theme that runs through the book. It is the author's thesis that, in response to the experience of history and to the molding forces of practicality and efficiency, the countries of the Western World are steadily moving toward a harmonization of methods employed to protect the values enshrined in modern constitutions. Thus, the author reminds us that the very existence of constitutions and of courts with power to review constitutionality, the dilution of the doctrine of separation of powers in the civil law orbit, the accommodation by the United States Supreme Court of cases outside traditional limits of the "case and controversy," "justiciability," and "standing" doctrines, and the gradual transformation of that court into "a special organ of constitutional review"\textsuperscript{32} are symptoms of assimilation of the control mechanisms of the Western World.

The book ends on a happy note of unity and ultimate victory of constitutionalism: "The two worlds are becoming one, certainly in terms of the questions that have been discussed . . . ."\textsuperscript{33}

\textsuperscript{32} Kauper, \textit{The Supreme Court: Hybrid Organ of State}, 21 Sw. L.J. 573, 577 (1967).

\textsuperscript{33} M. Cappelletti, \textit{supra} note 2, at 100.
The boundary between the realms of law and economics is, happily, not impenetrable. Venturesome chiefs among the tribes on each side of the border cross it without passport or self-consciousness. One thinks of Yale's archetypal interdisciplinarian, Walton Hamilton, and, on the current scene, of such dashing cross-border raiders from the law side as Baxter of Stanford, Turner of Harvard, Dam of Chicago, Fulda of Texas. The economists have countered with, among others, Adams of Michigan State, Phillips of Pennsylvania, Stigler of Chicago, Caves and Kayser of Harvard, Levin of Hofstra. In this select group, Alfred E. Kahn's writings on antitrust policy have long since established his place. His latest work, here reviewed, carries border-raiding to a new level of penetration, and raises the question whether the border exists in reality or only in the habits of academic curriculum planners. One is driven to reconsider the fundamental relation between the two social sciences.

It is the beginning of an answer to that problem to say that The Economics of Regulation would be an entirely satisfactory text for use in educating lawyers. It summarizes, accurately and brilliantly, what courts, administrative agencies, and—most important—private managers are doing with regard to a wide spectrum of legal questions: utility rates and services, discrimination, intermodal competition, national planning, and integration, among others. It subjects this activity to a critique that is the product not only of the special mathematical tools of the economist (mercifully adapted to the fumbling hands of beginners), but also of a mature, confident and witty humanism. "Legal" materials certainly could not provide a clearer path to comprehension of this range of official and "private" behavior. Indeed, Kahn's treatise is superior to the ordinary law school casebook precisely because it superimposes on the conventional inquiries—about judicial review, legislative intent, precedent, primary jurisdiction—insistent queries about allocation of resources, effectiveness of market competition to set socially desirable prices, and demonstrable shortcomings of regulatory

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alternatives to market competition. This benefit derived from the use of an economics treatise in educating lawyers is comparable to the gain that economics students might realize if they studied the institutions of economic regulation from a sophisticated legal casebook, where they would be driven to take allocation of governmental power as seriously as allocation of resources. Allocations of power—between judges and commissioners, between the executive and the legislature, between political powers and private oligarchs—sometimes seem to make economic analysis subordinate or peripheral to the decisionmaking process, to the vast and uncomprehending irritation of inexperienced economists.

But Kahn's treatise hardly requires supplementation on the "legal" side; its basic organization reflects his sensitivity to the institutional setting in which economic "laws" must operate and be, only partially, respected. The first volume is devoted to "principles," the second to "institutional issues." As he passes from volume I's "rules for the efficient pricing of public utility services" to volume II's "real world of ignorance, error and corruption, where all institutions are in varying degrees imperfect," the author offers a gentle admonition to those of his fellow-professionals who might prefer to linger in their familiar world of mathematical models:

[T]he economist, like anyone else, spends most of his time doing the things that he is trained to do. In this, he is like the man who, having dropped a coin on the sidewalk on a dark night, looks for it under the street light, not necessarily because he thinks that is where it probably has come to rest but because that is the only place he has any hope of finding it. The rules for efficient pricing flow out of the main stream of microeconomics as it has developed during the last century or two; that is our streetlight, and we make such use of it as we can. . . . [But] the normative rules of economic behavior and performance . . . tell us absolutely nothing about how to achieve these results. This is what we mean by the institutional problems of regulation or of the ordering of the economy generally: by what kinds of institutional arrangements can we obtain the maximum assurance (compatible with such noneconomic values as security, freedom, due process of law, and so on) that the goals will in fact be achieved? 2

The style of The Economics of Regulation is as agreeable as the intellectual merit is commanding. Humor, irony, modesty, and candor leaven these pages. Kahn can illustrate the problem of allocating common costs among different users of the same equipment by

reminding us that "the same mains carry gas to numerous customers for heating, cooking, clothes-drying, and suicide." 3 By way of demonstrating that non-economic considerations often prevail over marginal-cost pricing, he contrasts the billions spent on space exploration with the meager appropriations for "the deplorably pacific War on Poverty." 4 And a playful passage on "externalities" includes the reflection that "It is to my interest to have you use water freely—perhaps more freely than you would if you had to pay the MC of supplying it to you—especially if I ride on the subway next to you." 5 Kahn recurrently admits the limitations of economic expertise, as in the engaging footnote:

The reader will have to make his own allowances for the possibility that most economists expressing such an opinion—including this one—may not be unbiased. It is very difficult for anyone but a pure theorist—"pure" in more than one meaning of the word—to admit that he simply does not know enough to be able to give useful advice, for which he is often well paid. 6

Everywhere the mood is questioning, exploratory, rather than dogmatic. The teacher has led his pupils through a forest of interesting perplexities to a point where the woods may (or may not) be thinning out to a clearing. The student senses that it is for him to go on towards the light. There is no highway. He must make his own path.

I shall comment briefly on some of the main questions to which Kahn addresses himself. These include: (1) where to draw the line between free competition and government controls, a balancing of the deficiencies of "the market" with the institutional shortcomings of regulation; (2) to what extent should regulated prices reflect investment, i.e., some kind of "rate base"; (3) how should joint costs be allocated among different classes of customers so as to avoid discrimination, and in this connection, what limits should the government impose on competitive pricing by regulated firms.

Kahn, of course, is no blind believer in the absolute virtue of the free market. If he finally opts for a presumption in favor of free enterprise as against government controls, and for according the narrowest scope to the doctrine of "natural monopoly" on which so much of the regulatory structure is sought to be justified, it is only after a revealing account of market imperfections. Real markets rarely conform to theoretical models. Capital and labor respond sluggishly to shifts in costs and demands, often remaining frozen in sectors of overproduction rather than moving into sectors where high profits signal a need for expanded operations. Buyers and sellers frequently do not have the

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3 1 A. Kahn, supra note 2, at 77.
4 Id. 191.
5 Id. 194.
6 Id. 196.
prompt and full information about product quality and prices that perfect competition posits; and advertising assiduously circumscribes rationality of choice. The optimum scale of operations may require plants of such size that only a handful of firms can “compete” oligopolistically.

To these fairly obvious imperfections in the market, well known to many educated non-economists, must be added certain others perceived by modern economics as necessary qualifications to crude Adam-Smithism, viz., “externalities,” “neighborhood effects,” and “second-best” considerations. Kahn discusses these luminously. A free market cannot allocate resources efficiently if producing firms do not bear the social costs entailed in production. If a petroleum refinery pollutes the air and water in its neighborhood, renders nearby homes uninhabitable, or imposes exceptional maintenance costs on neighboring businesses, exceptional public service costs on the municipality, and exceptional medical costs on the nearby population, its costs, and consequently its selling prices, will understate social costs. When important social costs are thus “external” to the enterprise, more gas and oil will be sold, and more resources will be allocated to their production, than proper social accounting would sanction. Purchasing power and productive resources thus absorbed will be diverted from enterprises that do “pay their own way” or from production of goods and services in the public sector. Per contra, if a private business confers benefits on others, for which the producing firm is not in a position to charge, the value of such beneficial activities as set by the market will be lower than we would prefer when the beneficent “neighborhood effects” of the activity are taken into account. For example, the private operation of a fire-fighting company for profit would confer benefits not only on its subscribers but also on their neighbors for whom the risk of conflagration would be reduced. The inability of the firm to secure compensation for these benefits means that the firm’s customers must pay somewhat higher prices: fire-fighting will be less pervasive than collectively we desire. Kahn has his own engaging and instructive variant on this theme, which he calls “the tyranny of small decisions.” He reflects amusingly on the decline of railroad commuter service. He is himself an inveterate motor commuter on publicly financed highways. But there come snowy days in winter when he wants to go to town by train. The availability of reliable back-up train service to meet such needs is of value to him (and to millions of his fellow suburbanites). But the railroad has no way of selling him this limited insurance policy; and if it had, he probably wouldn’t buy it anyway: the individual risk is too insignificant, and each motorist would count on the daily riders to assure the availability of the back-up service. Result: a flow of revenue from the regular users that does not reflect the total benefits conferred; eventually, restriction of service or, alternatively, a public subsidy that replaces the impracticable “small decisions” with a large one.
"Second-best" theory is one of the most intriguing insights that economics has to offer on the question of when to require (or permit) the market to govern. If two products are more or less substitutes for each other, e.g., oil and natural gas, and the price of one is kept above its marginal cost, whether by private monopoly or government regulation, society may be best advised to keep the price of the other above its own marginal cost. It might be argued, for example, that the price of natural gas should not be allowed to fall to its minimum production cost as long as the price of oil is artificially inflated by government import restrictions and restraints on domestic production. Otherwise, the artificially high oil price would encourage a more rapid utilization of gas than comparative social costs would justify. "Thou shalt not optimize piecemeal," pronounces William Baumol in Welfare Economics and the Theory of the State. Kahn, as well, recognizes that the usefulness of counter-inflating the gas price would have to be appraised in the light of still other possible substitutions, e.g., coal and nuclear energy in place of gas and oil. Thus, "second-best" considerations take one ever further afield from the immediate issue, giving rise to McKie's skeptical observation that, "If we had to correct every misallocation in the economy before proceeding against any problem, we could never have any policy for improvement at all.

An inventory of defects in the functioning of markets in the real world seems to demand that we turn to some more responsive system of harnessing individual efforts and choices to the chariot of national well-being—or so it seems until Kahn brings the institutions of public regulation under his microscope. Then the market begins to present itself in the same light as democracy in Winston Churchill's famous dictum: the worst of all governments until one looks at the alternatives. Kahn stresses the essentially negative role which administrative agencies seem condemned to play. The important initiatives almost invariably remain with private management, subject only to rare interventions by the regulatory authorities. Funded at ridiculous levels, overwhelmed by astronomical numbers of transactions to be controlled, harried by executive pressures, steering a tortuously political course under in-

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7 Id. 70, quoting W. Baumol, Welfare Economics and the Theory of the State 30 (2d ed. 1965).
9 Cf. 2 A. Kahn, supra note 2, at 327-29.
10 See id. 326 n.3, relating to the Congressional hearings on Senator Metcalf's proposed "Utility Consumers' Counsel Act of 1969." It appeared, inter alia, that the chief accountant of the Massachusetts Department of Public Utilities, responsible for auditing the returns of 14 electric, 26 gas, 6 phone, and 63 water companies, 88 bus and street car lines, 816 securities brokers, 2599 moving firms, and 15,055 truck carriers, was paid $11,752 per year and had as his entire staff one other accountant and a clerk. Cf. In re American Tel. & Tel. Co., 32 F.C.C.2d 691 (1971), in which the Federal Communications Commission decided to defer indefinitely the major and unique investigation of A.T.&T.'s investment and operating expenses which it had previously ordered (27 F.C.C.2d 151 (1971)), on the ground of lack of sufficient resources. The Commission soon reversed itself after public and congressional outcry. See 40 U.S.L.W. 2504 (F.C.C. Jan. 28, 1972).
tentionally ambiguous legislative guidelines, the agencies falter before their staggering tasks. It is essential to cut back their responsibilities to the limits of possible achievement, hence to leave to the free market as large a territory as we can cordon off within the regulatory regime. Skeptical as he is about regulation, Kahn nevertheless defends it against extreme attacks from right and left. The Chicago School economists, who argue that regulation is a useless and expensive exercise that saves the consumer nothing in the long run, get a respectful hearing, but eventually run into some devastating questions about cases where regulatory agencies demonstrably cut hundreds of millions of dollars from the bills that consumers had to pay. The Marxist thesis, that regulation in a capitalist regime cannot be anything but a facade for exploitation, and that nationalization is the only answer, meets a sobering query about the dubious performance of the American Post Office and other nationalized monopolies abroad. The complex truth that evades all simplifications is that regulation, like antitrust, does indeed sometimes function as a reassuring facade for the consolidation of private economic power. But that is only to say that institutions can be perverted, that power can be usurped, that impulses which lead to the enactment of laws must be constantly reinvigorated. As I have elsewhere pointed out in criticizing Galbraith's airy dismissal of the antitrust laws, these institutions, at the very least, assert the principle of public accountability for monopolists' decisions. And the very existence of forums in which those decisions may be challenged drastically moderates the behavior of management.

At all events, the "natural monopoly" case, if no other, seems to call for regulation, and Kahn turns his attention to the proper definition of this category. Some productive processes can be carried on at progressively lower unit costs as the scale of operations increases. In such cases it would appear desirable to concentrate production in the largest single unit, i.e., to favor monopoly. But, as Kahn points out, this conclusion is based on a "static" analysis; it fails to take account of the possibility—nay, the probability, that competition would set a faster pace of technological innovation, as well as encourage cost cutting and service improvement. The static gains derivable from concentration may be more than offset by the dynamic gains which rivalry offers. "May be"—hence the necessity for a common sense balancing of the visible potentials, a common sense illuminated by the fullest knowledge of technological trends, the best available data on cost curves, a realization of the extent to which substitute products (themselves not

112 A. Kahn, supra note 2, at 108-12.
12 Id. 328.
monopolized) provide the competitive goad that would otherwise be lacking inside the natural monopoly, and a tough-minded appraisal of the progressive or reactionary character of the management of particular monopolies. It is typical of Kahn's even-handedness that he awards A. T. & T. high scores for management and technological innovation while excoriating the discriminatory and tying practices by which the firm has artificially enlarged its "natural" monopoly.16

Kahn's principle that the natural monopoly concept must be jealously confined has several interesting corollaries. Pipelines, if in themselves natural monopolies, should not be integrated with petroleum production, an activity by no means subject to continuously declining costs. Similarly, local gas distribution should not be combined with an inherently competitive retail operation like the sale of household appliances, nor with housing construction designed to preempt markets against alternative fuels and power sources. Giving full force to this position we might say that if the economies of scale demand giant units of production (hence few firms) in automobile assembly or in basic steel and aluminum production, it becomes even more imperative that these "naturally monopolistic" activities be divorced—in cases of metals, from fabrication, and, in the case of auto manufacturing, from the manufacture of automobile parts and the wholesaling or retailing of automobiles. The same principle has, in fact, been accorded recognition in American law for some time. Section 1(8) of the Interstate Commerce Act (the so-called "commodities clause"), restricting railroad transportation of goods in which the carrier has a commercial interest, is among the earliest examples. More recent legislation confines banks and public utility companies to activities "incidental to" the core enterprise.18

The second of Kahn's themes concerns the role which investment values should play in regulating prices. The author provides a lucid review of conventional legal concepts and issues: fair return on a fairly valued rate base, prudent investment, and reproduction cost, among others. But there are surprises and illuminations in store for some of his lawyer readers. Liberal lawyers have been brought up with a devout respect for Justice Brandeis' campaign, eventually successfully, to substitute prudent investment for reproduction cost as the base upon which a fair return should be computed. Yet here is a liberal economist to remind us that there is something to be said for using reproduction cost, at least from the point of view of efficient allocation of resources. Such a view derives from the principle that resources will be best allocated if each user must pay the additional cost which his particular use

15 2 A. Kahn, supra note 2, at 299-300; cf. id. 140-52.
entails. That cost can hardly be determined by reference to capital investments made long ago, i.e., to historic costs or prudent investment. It must be determined rather by the discounted value of what it will take to replace the productive capacity consumed by the user, whenever in the future such replacement becomes necessary. It is only the "crippling administrative infeasibility" of this "economic" standard that renders it unacceptable.\(^\text{17}\) This observation by the author, however, makes mincemeat of his concomitant remark that there is, in this regard, a "major discrepancy between the economist's prescription for optimal pricing and the [legal] approach . . . ."\(^\text{18}\) For the legal approach, from Brandeis onward, has always rested heavily on "administrative infeasibility": the intolerable fluctuation of rates calculated on shifting estimates of reproduction costs, the impossibility of reliably forecasting the date of future capital retirements (or costs on that date), and the virtual absence of a rational basis for selecting an interest rate for discounting the investment required in the future so as to arrive at a present cost attributable to the user. The economist referred to in Kahn's statement about "discrepancy" is obviously not Kahn, whose institutional views are evident on every page of his work.

But administrative feasibility is not, after all, the prime criterion of utility regulation. Not even "fair return"—read "minimum return"—if you will—to investors is the goal or test of the system. The real objective is low prices and improved service. This may well be attained by regulation that allows a generous return to capital if, at the same time, such regulation provides management with powerful incentives to prune away useless expenses, to market aggressively so that the declining-cost character of the business is fully exploited, and to explore new technologies imaginatively and prudently. Incentive effects of regulation are the central concern of Kahn's analysis. It is from this point of view that he examines rate-base pricing, and, particularly, the well-known "A-J-W effect." A-J-W postulates that a regulatory system which correlates return to investors with size of investment gives management a strong incentive to inflate the investment base. The inflation referred to need not be any crass misrepresentation or overvaluation; it is, rather, an excessive investment of real resources, even a deliberate choice of a relatively inefficient capital-intensive method of producing the service. One thinks, for example, of the temptation facing the management of Megalopolis Electric Company when it can meet an increasing demand either by building a high-cost plant in the city (with all the externalized costs of air and water pollution) or by buying power cheaply from a neighboring producer with low investment costs and excess capacity. Kahn discusses strikingly the A-J-W impact on investment in the nuclear power and satellite communication

\(^{17}\) A. KAHN, supra note 2, at 89.

\(^{18}\) Id. 88-89.
fields; but, with characteristic even-handedness, points out that assurance of a return on investment may encourage ventures in new technology and serve to offset the natural tendency of a monopolist to keep output below the socially desirable level.

The third of Kahn's major themes calling for discussion involves the question of how joint or common costs should be allocated so as to promote efficient use of resources. This problem, and its relation to questions of "discrimination," can best be presented by illustration. A power plant, a telephone system, or a gas pipeline must be built large enough to handle the load at times of peak demand. Consequently, during off-peak periods there will be idle capacity which might be sold at "bargain" prices, yielding some return to the seller above out-of-pocket costs attributable to the particular transactions. Do such bargain prices "discriminate" in favor of off-peak customers, enabling them to enjoy service without contributing their share to the capital costs? Kahn believes that it is vain to seek a separate "cost" for each of jointly produced products. Only the aggregate cost of jointly produced units can be measured; and price policy must be directed at aligning the joint price with that joint cost. What part of the joint price is to be contributed by the users of product P and what part by the users of product Q is determined not by their respective costs but by the character of their respective demands. It may be that there are substitutes for product P, so that P can be sold only at a competitive price determined by those substitutes. P should then be sold at that price, however small a contribution this makes to joint costs. Q, with no substitutes and an inelastic demand, will be priced at what the traffic will bear. The joint resources will be employed to their utmost, and the additional capital that society would have to dedicate to the production of P-substitutes if P could not be sold at "nondiscriminatory" prices is conserved. Q-users have no ground for complaint, for, however small the contribution of P-users to the joint costs, the cost burden on Q-users is correspondingly diminished. The alternative is no contribution at all if P cannot be sold. For those who may be troubled by the complete divorce between cost and pricing in the analysis, economists' magic has made it possible to translate the rationale from the language of demand into the language of cost. The concept of "opportunity cost" permits one to say that the cost of P, in the example

19 A. KAHN, supra note 2, at 52.
20 Id. 107.
21 Throughout this discussion I am speaking only of joint costs, not costs exclusively attributable to production of one of the joint products. Also, "cost" is here used to refer to the kind of long-run marginal cost that economists would probably accept as a criterion of regulated prices. See 1 A. KAHN, supra note 2, at 83-86, 88-103.
22 "Opportunity Cost" is what the seller foregoes when he disposes of the last unit of product P to the customer "at the end of the queue". Cf. 1 A. KAHN, supra note 2, at 79-80, 93-94 n.11. This is equivalent to the price that the next potential buyer would have been willing to pay. Thus, opportunity cost strikes an uninitiate
above, is whatever the seller can get for it, so that there is no economic
discrimination in the P-Q price differential, or—put another way—so
that any discrimination that is present is cost-justified.

Acceptance of this line of argument would have led to the opposite
result from that reached in the much publicized Ingot Molds Case,\(^2\)
where the Supreme Court sustained the Interstate Commerce Com-
mission in refusing to allow a railroad to lower a rate below fully dis-
tributed cost when the effect would be to take all the business away from
competing truck and barge lines. Kahn categorically condemns the
decision;\(^24\) and in so doing he has, for once, slighted the "institutional"
considerations that actually determined the outcome. The Court was
confronted with a legislative mandate to protect the "inherent advan-
tages" of competing modes of transportation. The phrase is undefined
in the statute, but it was clear from the legislative history that Congress
had rejected a formulation which would have awarded the palm of
inherent advantage to the carrier with the lowest incremental costs.
Since the ICC had generally employed fully distributed costs in deter-
mining which of two modes was inherently cheaper, and since Congress
(after a bitter controversy over the issue) had not reversed the Com-
misson's historic policy, the Court was far from egregious error in
holding that Congress had intended the Commission to retain its dis-
cretion to define inherent advantage in terms of fully distributed cost.
From the institutional point of view, Ingot Molds is no more than a
decision as to which agency—Congress, the Commission, or the
Court—should make the economic choice. It certainly was not an
instance in which lawyers or judges overrode the judgment of econ-
omists; the Supreme Court explicitly disclaimed that, admitting that the
soundness of the economic views advanced was "not especially relevant
to the result we reach."\(^25\) The decision is all the more understandable
in that the economic issue hardly lends itself to categorical disposition.
Kahn himself, notwithstanding the general principle favoring use of the
productive unit that incurs the lowest marginal cost, recognizes that
some circumstances require constraint on a utility's freedom to compete
on the basis of marginal cost:

There remains the possibility that although it may be more
efficient for society, in the static sense, to permit a public

\(^{23}\) American Commercial Lines, Inc. v. Louisville & Nashville R.R., 392 U.S.
571 (1968).
\(^{24}\) 2 A. KAHN, supra note 2, at 162-66.
\(^{25}\) 392 U.S. at 586 n.16.
utility company to take the business away from its rivals by reducing rates on competitive services to marginal costs, there may be some dynamic loss if the result is the elimination of those competitors. . . . [P]reserving the competitor and the stimulus . . . of its continued presence might in the long run contribute sufficiently to a greater and more varied innovation, to continual improvements in the industry's service and efficiency to outweigh the static welfare loss involved in keeping it alive. This assessment could only be made in each particular instance . . . .

One has only to consider the discouraging effect, upon entry of new competitors, or upon the inauguration of a price-cutting campaign by existing competitors, of a rule of law that leaves open to a massive utility the option to respond with selective incremental pricing.

It would be misleading to leave the impression that I favor the protectionism involved in the "inherent advantage" formula. For me, inherent advantage is best determined by free competition. But until Congress manifests a genuine commitment to free competition wherever feasible, notably by removing all restraints upon entry and pricing in motor vehicle transportation—a course that would really test the viability of railroads and their crazy rate structures—Ingots Molds remains, for me, another minor skirmish between competing monopolists for administrative favors.

One would wish for time and space to extend these reflections, to point down one vista after another opened by these fascinating chapters: the paradoxes of "peak responsibility pricing" (should commuters, whose concentrated morning-and-evening train travel requires a capital investment that lies idle most of the day, have to pay higher fares than the mid-day rider?); the riddles of "cream skimming" (competitive operation in profitable segments of a utility's operation without obliging the competitor to serve the unprofitable segments); national coordination of utility investment (e.g., by requiring neighboring power producers to take turns in expanding plants, so that each builds to adequate scale in the light of regional rather than single firm demand forecasts). But it is time to return to a question posed at the beginning of this review, the relationship between law and economics. No novel or earth-shaking conclusions on so abstract (or pompous?) a topic can, after all, arise from reading Kahn's urbane and pragmatic work.

The disciplines are obviously complementary. Economics—even at its most speculative and abstract—is perpetually exposing old errors and new considerations relevant to decisionmaking in government. Law is perpetually reformulating the equations by which governmental decisions are reached. Those equations contain many variables that

26 1 A. Kahn, supra note 2, at 176-77; cf. 2 A. Kahn, supra note 2, at 246-50.
are non-economic: notions of fairness and national priority, administrative feasibility, political feasibility, the desirability of disposing of complex questions under rubrics simple enough to be appraised by legislature and public. If the equation occasionally seems to deprecate the economic variable, that is more likely accounted for by the counter-weight of other factors than by legal resistance to economic enlightenment. If the equation seems at times stubbornly resistant to change, it is because stability is itself a value in the equation. Economists too "temper principle with practicality" by accepting, for the sake of stability in utility rates, long range marginal costs rather than theoretically superior short range costs as the standard.

In relation to the legal order, other social sciences are in much the same position as economics. The psychiatrist makes an essential contribution to criminal proceedings when he throws light on the emotional organization of the accused, the extent of his power to choose between desirable and undesirable courses of conduct. But the personality of the accused is only one of many variables in the legal equation; and a psychiatrist who fails to perceive this is likely to feel acute frustration when a man whom he regards as "ill" is nevertheless held "responsible." He may even see such a judgment in terms of lawyers or jurors presuming to negate professional diagnosis. He will regard the statutory formula separating the punishable from the exculpatingly ill, whether McNaughten's Rules, Durham, or American Law Institute, contemptuously as a "legal" definition of a medical concept. Any such formulation is, on the contrary, only an administrable rule-of-thumb that takes account—well or poorly—of such non-medical considerations as: the pervasiveness and incalculable diversity of human "abnormality"; the inherence of social and philosophic elements in the concept of mental illness; the dearth of techniques and physical resources for the "cure" of many forms of psychic deviation; and certainly the need (at the guilt-determining stage of trial, although not perhaps at the sentencing stage) to have rules disposing of categories of cases, so that the law will at least appear to operate with a degree of consistency in similar cases.

An historian too, applying the criteria of his speciality to the criminal trial, would be likely to come away with scorn for this perverted way of "searching for the truth." Who ever heard of rejecting a conclusion merely because it is not "established beyond a reasonable doubt"? What even-handed searcher for truth would categorically exclude from consideration hearsay, testimony of a spouse against his mate, a confession obtained by pressure, incriminating evidence illegally obtained by the police? What historian would withhold an adverse judgment on a figure of the past until he could provide a lawyer for the defense? Shall journalists and good citizens—amateur historians, all—

27 See 1 A. KAHN, supra note 2, at 83-86; cf. id. 182.
really doubt the guilt of Oswald, "alleged" assassin of President Kennedy, because the "presumption of innocence" has never been accorded to him in a legal proceeding? The answer to these rhetorical questions lies, of course, in the fact that a criminal trial is not an abstract search for historic verity. The trial lies primarily in the realm of action, not cognition. A man's fate is to be disposed of, and in a procedure that calls into question the tactics of government as much as the behavior of the accused. We are committed to the proposition that it is better for ten guilty to go free rather than one innocent be condemned. We know and intend that a verdict of "not guilty" means only "not sufficiently proved" or even "proved but the law is silly." Painfully aware of the frailties of the trial process even at its best, and perhaps in anxious dubiety about the utility of the entire system of prosecution and punishment, we erect "arbitrary" barriers against conviction like the statute of limitations and the rule against double jeopardy. In sum, the range of considerations is enormously broader and different for lawyers than for historians.

The X-ray chooses not to see skin, fat, any tissue extraneous to the target of its probe. Intellectual specialists must similarly blind themselves to much that is ultimately relevant, in order to see more deeply. The economist necessarily excludes from the range of his inquiry much that the lawyer cannot ignore. The mathematical economist excludes much that the institutional economist regards as vital. Agricultural engineers, social psychologists, demographers, philosophers, and public relations wizards, whose sciences feed into economics, presumably reproach economists for a certain imperviousness to their respective illuminations.

For me, the moral of all this is the necessity for professional modesty. The X-ray must not suffer the illusion that it sees all. The general practitioner must not imagine that he has X-ray eyes, but must be ever ready to examine those shadowy transparencies submitted to him by the radiologist, and to listen comprehendingly to the specialist's interpretation. The boundaries between the professions must remain permeable, and we must honor the border-raid ers.