who are not a part of the workforce. The new Oppenheim advocates rather that even the workforce should be immune from attack, except when it is actually at the plant.

It is obviously absurd to expect airmen to make such discriminations under intolerable ground-flack, and fighter and guided missile attack. But, even this apart, the thesis lacks reality. In the first place, it can scarcely come to a test at all. Up to the present, the "target areas" have included workmen's dwellings in terms of physical proximity within an urban concentration; and in future wars, when munitions production units move underground, attack on the work-force away from the plant may be the most effective way of reaching either the workforce or the war industry itself. Professor Lauterpacht's distinction will thus not sustain itself, even on paper. It will not have aided anyone to survive; and it may have prevented more promising approaches to the protection of civilians who are neither combatants nor members of the "quasi-combatant" workforce. Here, as elsewhere, the facing of the cruel realities is necessary before energies can be released for the practical tasks of devising such *temperamenta belli* as may command a degree of belligerent conformity.[43]

VI

Despite the great virtues stressed at the beginning of the review, this second volume of Oppenheim must thus remain a frustrating book for the student, publicist and chancellery of 1953. Our troubled times may, indeed, have turned its very virtues into vices. Its clarity of statement too often conceals the real difficulties and complexities by circuity or ambiguity and simplification. Its wide bibliographical reference tends to become an indiscriminate piling up of symbols, leaving the reader destitute of guidance as to the issues at stake and the precise principles involved. Its comprehensiveness and cosmopolitanism are too often achieved by raising (or reducing) problems to a level of abstraction and formalism quite barren for our dynamic period of transition.

Both its virtues, and the vices of its virtues, will determine the value of this new Oppenheim. In the present view, they render it, on balance, an inadequate and even misleading book on most topics which are of contemporary, as distinct from mere historical, importance. They address themselves to the last war and the Millenium, rather than to the next war and the World-As-It-Is.

JULIUS STONE *

The Australian Constitution: *An Analysis*, 2nd ed. 1952, by H. S. Nicholas, Law Book Company of Australasia, xxxvii and 458 pp., £3/10/0 in Australia.

Four hundred odd pages of constitutional law read through as a book rather than fumbled in as a wardrobe or work-table drawer inevitably prompt reflection on the nature of this so-called "law". One begins with reflections upon the rules set out in page upon page of sober accumulation. Then in the background the insistent query reverberates — "Not, what are the rules, but how come they?" As the total accumulation rounds itself off and one endeavours to perceive the whole, the Devil whispers between the leaves — "It's clever, but is it Law?"

To the work-a-day practitioner to whom Palmer's *Precedents* and the loose-leaf supplement to Gunn represent reasonable stability in a fluctuant world, the

[43] *Cf.* the general aspect of this matter examined in the Introduction to Stone, *Conflict.*

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answer is fairly clear. This constitutional stuff is *not* law. In a sense this is true enough. But like most non-specialist comment upon the esoteric it has the defect of its virtues. It is strong in what it affirms and weak in what it denies. The affirmation, barely disclosed and perhaps largely unconscious, springs from a belief that there are no rigidities but merely judicial opinions, often greatly in conflict and personal in conclusion. "The Constitution", says the "realist",—"It's just what the High Court says,—or the prevailing majority!!! Now where is that precedent providing that a solicitor executor may have both his costs *and* commission?" The weakness lies in an implicit denial that these same elements which are perceived and condemned are not also to be found in, say, the judicial attempts to define "profits" or fix the rights of preference shareholders. The differences are matters of degree and of atmosphere — the climate of conviction in which the work is done. For what is judicial law-making but the fitting of a technique of expression upon selected convictions of the community? The task is, in one sense, a process of pious deceit, — like the myth-making of (ancient) priests and ultra-modern scientist. The data of social experience must be taken and clothed in the recognised terms of a specialised body of knowledge. This "body" gains intellectual allegiance from its systematic nature, for man yearns for frameworks to stabilise a world of embarrassing variety. In larger part the creation of the system depends upon language in its most creative aspect, — the formulation of verbal conceptions as suitable reflections of experience and the organisation of these conceptions by logical and linguistic processes. The final achievement lies, often, in the skill with which actual experience is caught and held in the appropriate "word" suitably embodied in the system. Law cannot be confined to the "word" since it regulates life, — but by its nature it depends upon it. "The Word is the Law" a simpler age believed. Today we are a little readier to believe that the Law is the Word; — but not entirely so. And to the Masters of Constitutional Law the facts, — the life of the community being crystallised and regularised — have always been dominant. The task of fitting the word to the facts has never really been automatic or uncreative. But the "facts" in this field are peculiarly elusive and debatable. The process is not actually different in other parts of the law. It is seen in a slightly different and more respectable aspect. Corporate business enterprise and limited shareholder liability seem naturally to point to the conclusion that dividends may not be declared out of profits and such "perceptions" ultimately help to attach the word "profits" to the appropriate facts. It is not so easy perhaps to feel sure to what facts "arbitration for the settlement of industrial disputes" should or should not relate, or when the attachment of the words to facts denies the experience of the community.[1]

In the United States the processes by which this law is formulated have, in much discussion upon constitutional law, tended to be seen in an unduly simplified form. It is assumed that the judicial process involved in selecting and subsuming facts under their appropriate linguistic categories is more conscious than is in truth the case. From time to time in legal growth words tend to attain to a life of their own, to kick their heels free of the facts to which they relate, to detach themselves from the experience which they conserve and develop. But this is not due to deliberate blindness by Courts. It is the result of the character of the material with which they work. It is from such features that the systematising of the law results, — so long as words remain servants and become not masters. The relation between the "facts", — social experience and purposes — and the law which seeks to give formal and regular expression to the repeated occurrences of these facts is vastly more subtle than traditional jurisprudence has admitted. As semantics and social analysis develop we shall probably come to a more real perception of the judicial process. Like other social sciences jurisprudence has suffered enormously from the inadequate

[1] *Cf. Ex parte Whybrow & Co.* (1910) 11 C.L.R. 1, and *The King* v. *Kelly; ex parte Victoria* (1950) 81 C.L.R. 64.

synthesis of detached studies. And traditional legal scholars will be amongst the last to throw open their territory to strangers who not only speak a different language but dare to question the adequacy of the patois of the natives. A more sophisticated analysis of the relation of law to the facts of social activity will, upon one plane, tend to disabuse those who think of constitutional law as a masquerader because it will reveal the relation of law to social activity outside the constitutional sphere and will demonstrate that the differences between different parts of the law are differences of degree and not of kind. From all this point of view the work-a-day practitioner's criticism is seen in one sense to be valid enough and in another to be totally unreal. It wrongly asserts about other parts of the law a character of logical absoluteness which is a myth—partly the product of traditional learning which itself is part of the pious deceit previously mentioned. When it denies to constitutional law this mythical purity, this denial may be valid, but all things considered the significance is much overrated. The lack of purity is vastly more general than is commonly supposed.

Thus the first question any treatise on constitutional law should suggest, even if it does not explicitly enunciate, is some view upon the nature of the law itself, some answer to the question — "What is Constitutional Law"? The foregoing is an attempt to suggest, not an answer to this question, but merely the limits within which the question should be posed and answered. For the answer must be found firstly in the nature and form of the facts to which the relevant "words" must be fitted and secondly in the peculiar characteristics of language in relation to those facts. Consider for example the expression "immunity of instrumentalities" with its obvious tendency to gain a life of its own in the *Deakin* v. *Webb*[2] era, — the facts being still vague hopes and fears — and contrast the significance of "discriminatory treatment" and the context in which this is relevant as disclosed by *West's Case*[3] and the *Melbourne Corporation Case*.[4] Does not the drama of s. 92 derive its tragic note from the persistence with which "absolutely free" tends to maintain life in a secluded asylum remote from the currents of community actions?

To questions of this character Nicholas provides no express answer. The nature of law in general and the differences of Constitutional law in particular were beyond doubt matters upon which the author, in a lifetime of working and thinking both about law and politics, had found his own answers. But they were not matters upon which he felt the necessity of public disclosure. Like the modern man's attitude to religious dogma this reticence may have sprung from an ineradicable dubiety or innate delicacy or merely from a desire to let sleeping dogs lie until they sleep for ever after too much and too long a waste of fighting.

Whatever be the explanation the volume which resulted is the less fit food for students, for it fails to provide guidance at the point where it is most required. The full-fledged practitioner will have acquired, vaguely or precisely, his pattern of dogma which will render the law comprehensible. But the student needs to be led to this, without forcible feeding of any predigested myth. Only when he has acquired the general perceptions will he be able to appreciate and evaluate the particular rules. Indeed by the time he comes to handle such matters in practice the rules may themselves have changd. In any case their detailed contents can be checked from the digests and text books. But the equipment by which they may be related to the problems of the practice of current life — if this is not acquired during the formative periods of study it may never be acquired at all. Nicholas must not be criticised for having failed to write a student's text, since his object may have been otherwise. It is to be hoped that teachers will not be led away into thinking their task, like his, is to concentrate on product and forget production.

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[2] (1904) 1 C.L.R. 585.
[3] *West* v. *Commissioner of Taxation (N.S.W.)* (1937) 56 C.L.R. 657.
[4] *Melbourne Corporation* v. *The Commonwealth* (1947) 74 C.L.R. 31.

After the question of "What?" comes the question of "How?" Of this perhaps too much has already been said — at all events too much that is crude and so "realistic" as to be unconvincing. For the most part this is the result of one aspect of American constitutional law. The existence of Bills of Rights provision in that country has inevitably forced American Courts, and particularly the Supreme Court, into a sphere of political evaluation. This is no secret intrusion of the judiciary into a forbidden sphere. Nor is it the enforcement of political assertions under guise of documentary interpretation as an exercise in the field of logic and language. To determine whether a legislative novelty is "due process", not procedural but substantive, compels the Court to political evaluation. To decide whether the relative conception of freedom of speech has been unconstitutionally denied cannot be performed by the impersonal application of some linguistic slide rule, some analogical micrometer. The task inevitably requires an adjustment, not interpretation, of the Word to the Facts. And the task necessarily attracts scrutiny and ultimately criticism.

The facts, so-called, like all such, are not capable of complete objective determination. They partly reflect the observer. Maybe there are no objective facts as the materialist scientist of the 19th century understood such data, even in the realms of science itself. In the political sphere at all events they are the reflections on the wall of the cave of the events passing outside, and the reflections as seen by some observer. The judge has no magic to protect him in this observation, however inerrant be, by tradition and doctrine, his enunciation of the law. If he errs according to the ultimate community judgment, the majesty of the ermine will not long render him immune from criticism for this very error. And this, it would appear, has taken its toll upon the complete immunity of the Court in Washington — as must necessarily be the case. So long as intellectual prestige does not unduly suffer, no great harm is done. Indeed a continual examination of the "how" of Constitutional law is, in a modern sceptical world, inevitable.

The interpretation of the shadows on the wall — the "facts" to which the word is adjusted — is difficult enough when unaffected by special limitations. For the constitutional court there are two complications. Firstly the judge must attempt the interpretation as he believes the community sees the shadows. But his view both of the shadows and of the community perception of them will be his, — the reflection of his personality, his predelictions, his scale of values. So long as he sits alone this may not be conspicuously apparent. As one of six or seven judges it will become unmistakable. Then, having fixed the outlines of the shadows for the time being, the judge must relate his valuation to a set of ideas expressed in a language which will have little or no referenec to that he has perceived. This convention is peculiar, almost like thinking in one language and then writing or speaking in another. It has traditional rules and compulsions which cannot be denied without professional criticism and condemnation. The symbols are complicated variables, like "the intention of the legislature", — "the object and purpose (but not the motive) of the legislation", — "expanding denotation but constant connotation". Let us then survey the task. Firstly the judges must individually observe the phenomena of social life and purpose brought before them, make a judgment of the broad community evaluation of this complicated though artifically abstracted sector, seek to correct the judgment if possible by eradication of personal preconceptions and predelictions, and thereafter apply an extreme professional skill to the process of expression, the translation of the conclusion into the technical symbols approved by tradition and practice and demanded by logic and "elegance". The social psychologist may eventually reveal to us why the translation is compulsive. The constitutional analyst will be content to observe how this is brought about.

Finally when the whole process has been completed it is sometimes necessary, or at all events not unnatural, for the Court to round the whole matter off with a sturdy re-assertion of the myth of "interpretation of the Constitution"

as if this were an abstract and automatic process exclusively linguistic in character.

Thus the task may fall to the Court of assessing the broad degree of readiness of the community for some political, economic and social proposal embodied in legislation and challenged by strongly entrenched interests. The assessment by the Court may never take the form of determining even implicitly, as it certainly never does explicitly, the wisdom of a particular proposal. On the other hand, it would deny unmistakable experience if we accepted the myth at face value and rejected any actual consideration of the inner consistency between the plan contained in the proposal before the Court and what are thought to be the accepted patterns of the community. Every important change will involve some modification of the existing patterns. Is the instant case a vital, a fundamental, modification, uninspired by community acceptance? The task is a delicate assessment of degrees. It calls for and has been matched, in the overwhelming majority of cases, with wisdom. Once the appraisal is made, the translation takes place. The "facts" have to be related to an existing logical and linguistic apparatus. The whole must be asserted in terms of a formal problem — the "interpretation" of an organic statutory instrument. Finally the loose end may be tidied away.

> Now it cannot be too clearly understood that this Court is not in the smallest degree concerned to consider whether such a project is politically, economically or socially desirable or undesirable. It is concerned only with the question . . . whether the Act or the regulation is in whole or in part a valid exercise of power.[5]

The quotation is noted and indeed recorded in full by Nicholas. As the paragraph consists wholly of quotation without comment it is not possible to attribute irony to the author.

It is somewhat superficial to assume that the individual answers to these problems are dictated, however indirectly, by personal "value judgments" translated into technical terms. Such value judgments are elements in the result, though they do play only a part in the ultimate assessment of acceptability. If a proposal seems monstrously unwise to the individual judge it will be the easier for him to feel that this is a general community assessment. Let us put the matter in reverse. If the proposal seems not merely wise and desirable but of vital importance to the individual, it will not unnaturally also seem to him as, at one level, within the accepted community pattern, and, at the next level, "logically acceptable" within the required technique.

And this brings out one final complication. The reason for the maintenance of the myth of isolation is partly historical and partly inherent in the nature of judicial review in democratic countries. But the necessity for that maintenance itself, infects the process of adjudication from time to time. Let us say that the process of translation into the technical language sometimes compels a modification of the sense — as all translation does — to preserve the artistry of the exchange. For, it is to be noted, the judges are to be seen at all costs as detached artists aloof from the actual facts. But this metaphor reveals the difficulty in this conception. "Artists" and "facts" are not independent of each other. The artist is the product of the "facts" he observes and the "facts" are those he is apt to perceive. But somehow we are to assume that the judicial artist can make a picture not only abstract in its form but painted by one who has neither seen nor been influenced by the facts.

A legal text book may be wholly written in the technical tongue or may desert the limitations of technique for a more expansive view. Both attitudes have their value — the former in the maintenance of community myths and the latter in assessment for practice or prognostication. Nicholas chose the former

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[5] *Per* Rich, J. in *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (1945) 71 C.L.R. 29, 70.

and adhered to his self-imposed limitations. Indeed the extreme severity with which he observed the limitations makes it beyond doubt that he recognised the myth for what it was and chose to work within it. It may be human to be disappointed not to have his views upon matters he elected to eliminate, but it is not criticism to condemn a mediaeval gargoyle as an unsuccessful attempt at a classical angel. It remains to add some modest comments upon the gargoyle itself.

To the reviewer it would appear that insufficient attention was paid to the task of accommodating modern decisions into the accepted framework of the pre-existing rules. Sometimes indeed the new material is distorted in order to fit preconceptions.

The treatment of the *Communist Party Case*[6] is a conspicuous example of a failure to perceive an important shift in emphasis. It is surely not true to say that a majority of the Court here decided that "the defence power referred only to external enemies". Indeed the phrase is either so self-evident as to be virtually valueless or definitely misleading. Again it is surely going much too far to say that the case decides that the defence power "could not be brought into operation . . . by evidence given at the hearing" ! In one sense it is nonsense to contemplate a legislative power being brought into operation by evidence. But, re-formulating the expression nearer to orthodox conceptions, the contention is not a true summation of varied and even conflicting judicial opinions. On the other hand there is a complete failure to appreciate the genuine significance of the decisions in relation to Commonwealth legislation made operative upon the opinion of the Governor-General. The views enunciated on this matter are of vital significance in relation to a legislature of specified and limited powers. They are not the less but the more important because they virtually overrule, by a process of filial imperception, ancestors of a different complexion. The text-books inform the students that precedents may be either followed, distinguished, or overruled. There is need for a footnote for "Honours" under the heading "Disregard". Was it an excess of family piety that led Nicholas to avoid any mention of the matter at all?

But even earlier cases seem to suffer harshly perhaps when conflicting with some subtle Freudian unconscious derived from "constitutional" infancy. It is asserted[7] that the Court decided in *Attorney-General (Victoria)* v. *The Commonwealth*[8] that the words of s. 81 "did not authorize the Parliament to make laws other than those included in the enumerated powers". It is difficult to fix a valuable meaning on this expression. It might easily suggest to the unwary, however, that the case determined that expenditure by the Commonwealth was limited to the enumerated subject matters of Commonwealth legislative competence. It may not be a strong authority to the contrary, but it certainly contains marked suggestions in that direction.

A good many minor suggestions could readily mislead students, if not checked from contemporary sources. Thus it is not true that Australia went off the Gold Standard in 1929[9] and the statement tends to obliterate an interesting year of politico-economic history. Equally an interesting aspect of Australia's intellectual sluggishness is suggested by the statement that at the time of the Commonwealth Financial Emergency (State Legislation) Act 1932[10] "Lord Keynes' Treatise on Money was not yet available".[11] The appropriate word is not "available" but "appreciated".

The curious tendency to overlook the niceties of the more recent developments of the Constitution is revealed in the description of the power of the Commonwealth Parliament to legislate "with respect to unemployment".[12] Is this

[6] *Australian Communist Party* v. *The Commonwealth* (1950-1951) 83 C.L.R. 1.
[7] P. 198.
[8] (1945) 71 C.L.R. 237.
[9] P. 188.
[10] No. 13, 1932.
[11] P. 168.
[12] P. 212.

another example of the unconscious at work? Similarly[13] there is a persistence of the idea that the Arbitration Court operates upon obtaining cognizance of a dispute. Surely the destruction of this conception is a significant recent development.

No author could be criticised for failing to have his current edition *en rapport* with the latest aspect of the problems relating to s. 92. It is ironical to find[14] that in relation to s. 51 and s. 92 it is stated that "the question is not whether the subject of legislation is inter-State but whether it is an element in trade and commerce." The more recent decisions have shown the vital importance not so much of the contact of the legislation with commerce but with "inter-stateness"[15]. It is disappointing in this connection to find no treatment of the intriguing problem of "commingling".

The long chapter on "Interpretation" contains useful material illustrating what has been described earlier as the "translation" into technical and remote terms of judicial perceptions. It is of course treated here in a different way. By a neat misprint Fullagar, J. is made to describe judicial review as deciding upon the validity of a statute "in a feudal system".[16] "Many a true word . . . " would add some, though not including this reviewer. One of the rare generalisations of opinion may be found[17] on the contrasted attitudes to interpretation of the American Supreme Court on the one hand and the Privy Council and the High Court on the other. A Gallup Poll among lawyers (and others) would, it is believed, produce a large percentage concurring in the opinion ventured. To venture upon an evaluation of this chapter would involve a recurrence to the matter dealt with earlier in this review. But two unsatisfactory details may be noted. The problem of inconsistency under s. 109 is not adequately summarised[18] and the student in search of understanding would be well advised to study *Forsyth's Case*[19] more intensively than the text would suggest.

Finally, to select yet another recent trend which seems to have been inadequately appreciated, there is the ever-recurring problem of severability and "reading down".[20] The writer may have an inclination to distort this particular matter under a minor sense of mild personal dissatisfaction, but surely the discussion by Latham, C.J., in *Pidoto* v. *Victoria*[21] noted by the author[22] is not the end point in development of this matter but actually a breathing space before a departure along a vital line of expansion.

After fifty years the time is ripe for a study of Australian Constitutional Law. There is a real need for a treatise which will be more on the one hand than essays produced as leisure tasks by preoccupied craftsmen and more on the other hand than deliberately restricted summaries from which the critical spirit has been banished. What is wanted is a latter-day Harrison Moore, turning a richness of legal culture and a precision which is the outcome of vast learning and wide knowledge to the production of a half-century of Australian judges. Such a man might easily produce a great legal classic, — for the material to be examined, whatever criticisms may be expressed, when viewed as a whole can withstand comparison with the very highest products of Anglo-American judicial statesmanship.

If there is in the foregoing a note of disappointment, it is in part due to the reflection that Nicholas is no longer with us to complete in free and liberal reflection the survey which he undertook with such untiring industry and

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[13] P. 219.
[14] P. 239.
[15] *Cf.* Price fixing and s. 92.
[16] P. 311.
[17] P. 301.
[18] P. 303.
[19] *Stock Motor Ploughs* v. *Forsyth* (1932) 48 C.L.R. 128.
[20] P. 345 *et seq.*
[21] (1935) 68 C.L.R. 87.
[22] P. 346.

unflagging interest. He represented a type which is becoming too rare in both public life and the law, — a type in which culture and learning led to, rather than away from, public affairs and community interests. Since he was an active-minded man his convictions had colour and he may seem to some to have been too clearly marked with political affiliations for academic commentary. But he belonged to a broad-minded group who surveyed politics neither to satisfy a shallow and cynical aloofness nor to promote a chosen class or section. He had a genuine feeling for the Constitution as a part of a moral system and not as an opportunity for dialectical virtuosity. By his character and capacity he did much for his fellows — and he deserves to be well remembered by them.

P. D. PHILIPS *

Pollock's Law of Torts: Fifteenth Edition. 1951. By P. A. Landon, M.A., M.C., Fellow and Tutor, Trinity College, Oxford; pp. xliv and 446 and (index) 34. London, Stevens & Sons Ltd. Australasia, The Law Book Co. of Australasia Pty. Ltd. (£4/8/- in Australia.)

If the value of a text-book be assessed by reference to the criterion whether it conveys an up-to-date, dynamic impression of the law, this second posthumous edition of Pollock's treatise on Torts must be regarded as a failure. Almost a quarter of a century has now elapsed since the appearance of the last edition prepared by Sir Frederick himself, and the deficiencies of the present volume are inevitably measured by the extent to which this branch of law has developed since 1929. The law of torts is peculiarly sensitive to the 'social climate' of the environment in which it operates and, consequently, exposed to judicial experiments of an order which do not find a parallel except perhaps in the constitutional field. The editorial policy of preserving the text of the 13th (1929) edition intact without amendment (except by exclusion where the "treatment is *obviously* out-of-date") already lends the book an antiquarian flavour which in the Olympian atmosphere of Oxford might be regarded as a mark of commendation but could elsewhere be diagnosed as a symptom of sterility. No disrespect to Pollock is implied by doubting whether it is appropriate to throw a halo of sacrosanctity around a once-standard treatise which, throughout the author's lifetime, was intended as no more than a representation of contemporary, living law. In such a field as this, it is a misconception to regard any text as a 'classical' exposition of the subject capable of withstanding unscathed the passage of time.

The editor seeks to meet these objections to some extent by the use of footnotes and brief additions to the text which are prominently segregated from Pollock's *ipsissima verba* by resort to square brackets. The result is anything but happy. Much material has in the process been omitted and, perhaps more substantially, bare citation of a string of cases accompanied by sparse, if any, comment, is an inept device to acquaint the reader with significant changes in judicial orientation.[1] Mr. Landon's decision to reproduce verbatim the section on Contributory Negligence, in the teeth of the author's own admission that "some re-writing was required", is a questionable service to Pollock's memory.

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[1] See, e.g., the treatment of the nervous shock cases at 37-39 and, in particular, the editor's addition to n. 74.