

What of the future? Our nation has never had a comprehensive, consistent power policy. For a brief period the National Power Policy Committee, which had been established by the President in 1934, performed the function of coordinating federal power policy and advising on power questions. Since the war the committee has lapsed into inactivity, and there is now no official agency exercising responsibility for developing a federal power policy.²³ "An industrial nation needs a coordinated power system during war and peace." The Twentieth Century study, if it does no more than awaken us to the void and provide a basis upon which to begin to fill it, will have performed a public service; and perhaps that is reason enough for publishing the material, outdated as some of it may be, at this time.

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The Roosevelt Court. By C. Herman Pritchett. New York: The Macmillan Co., 1948. Pp. xvi, 314. \$5.00.

If the Roosevelt Court does not go down in history as the most self-conscious group of men ever to occupy the Supreme Bench, it will not be the fault of the commentators. Born out of a constitutional crisis, nurtured in an atmosphere of unprecedented social change, the present Court grew up to face problems with which its chosen mentors Holmes and Brandeis had never been troubled. Then, too, the education of the Roosevelt Court has paralleled a growing concern, particularly among legal educators, with the state of formal legal education and the nature of legal processes. And as the Court's education has become an increasingly popular topic for public discussion, the debate has too often degenerated into an exchange of verbal brickbats. It is particularly refreshing, therefore, to find the subject taken up by a political scientist, who, though he has familiarized himself with the apparatus of Supreme Court scholarship, comes to a study of "the social and psychological origins of judicial attitudes" unencumbered by any legal *idées fixes* about the inherent wisdom of adherence to *stare decisis* as an overriding principle, or the inherent wickedness of one or another of the Justices.

Mr. Pritchett has focussed his attention on the non-unanimous opinions of the Court, as the best source for intimations of differing judicial attitudes toward society and the Court's function in society. Fortunately for his approach, division is rife among the Justices, and the percentage of non-unanimous decisions, in cases reported with opinion, has increased, as he notes, from 27 in the 1937 term to 64 in the 1946 term. So high a rate of disagreement encouraged Mr. Pritchett to venture even further into the realm of statistics, coming out with a series of charts which demonstrate, numerically and graphically, the shifting alignments and changing alliances among the members of the Court. He traces the route of his protagonists from their first stand against the Four Horsemen, through the early choosing of sides in the almost completed roster of Roosevelt appointees at the turn of the decade, to the present blurred alignments,

²³ The National Securities Resources Board, established by the National Security Act of 1947, 61 Stat. 496 (1947), 50 U.S.C.A. § 401 (Supp., 1947), is a limited exception to this statement. Its function is to advise the President concerning the coordination of military, industrial, and civilian mobilization, and is, in this context, concerned with electric power questions. The Board has recently published its "Second National Electric Power Survey—December, 1948" reviewing the capacity and requirements of the industry and the status of production of heavy power equipment.

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when for the first time at the 1946 term every Justice dissented at least once with every other Justice.

The alignments persist, however, and Mr. Pritchett can separate the Court roughly into two wings, and a wavering center. He can even label the two wings, with some justification, "right" and "left," as their attitudes toward the preservation of civil liberties, the rights of labor, the autonomy of the administrative process, and the regulatory powers of national and local government suggest competing complexes of political and economic ideas. But when he attempts to spell out the details of the various substantive elements, in a series of chapters which make up the body of the book and which deal with the bulk of the case material the Court has handed down in the last decade, his ultimate conclusions are strangely disappointing. That they are largely statistical is scarcely a valid criticism, but that they do not go much beyond summarization suggests that the classification on which the statistics themselves are based may not be the most meaningful one. At the outset, the selection of topics and the considerable disproportion in their treatment may be questioned. Two chapters, comprising almost half the substantive discussion, are devoted to civil liberties and the related subject of criminal procedure. The recent group of anti-trust cases, involving the affirmative power of the Court to make its decisions effective by molding the decree, and the related line of patent monopoly decisions, are nowhere considered, although their immediate impact on the economy and their future significance have been the subject of considerable informed discussion.¹ There is perhaps too much emphasis on the declaration of unconstitutionality as a weapon against state legislatures, and too little awareness of such alternative techniques as extension of the "federal field" doctrine.² The intricate but revealing technicalities of federal jurisdiction are for the most part neglected, and *Angel v. Bullington*³ is mentioned only in an appendix.

The limitations of the statistical approach can be pointed up by two excerpts. In the section headed "Anti-Okie and Jim Crow" of the chapter entitled "Civil Liberties and Judicial Supremacy," Mr. Pritchett describes the *Bob-Lo* case,⁴ where the Court upheld the application of the Michigan Civil Rights Act "against racial discrimination by a Detroit boat company on excursions to a nearby island on the Canadian side of the boundary . . .," and goes on:

Justice Jackson, with Vinson concurring, alleged the inconsistency of considering that a state Jim Crow law was a burden on commerce (*Morgan v. Virginia*, 328 U.S. 373 [1946]) while a state civil rights act was not. But two months later the Court was unanimous in denying judicial enforcement to racial restrictive covenants covering sale of real estate, with Vinson writing the opinion in *Shelley v. Kraemer*.⁵

To read the U.S. Reports as a box-score for democracy is to overlook much that may be instructive about the technique of the game and the conduct of the players. Mr. Pritchett would not imply that by striking a blow for freedom in the restrictive covenants cases the Chief Justice cancelled out the effect of his *Bob-Lo* dissent, but those are the implications of his method, unless consciously avoided.

¹ See Levi, *The Antitrust Laws and Monopoly*, 14 *Univ. Chi. L. Rev.* 153 (1947); Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 *Univ. Chi. L. Rev.* 567 (1947); Compulsory Patent Licensing by Anti-trust Decree, 56 *Yale L.J.* 77 (1946).

² See Braden, *Umpire to the Federal System*, 10 *Univ. Chi. L. Rev.* 27 (1942).

³ 330 U.S. 183 (1947).

⁴ *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948).

⁵ P. 129.

On the other hand, when he attempts to extrapolate, he is apt to come out with a conclusion like the final sentence in his chapter on judicial review of administrative proceedings:

Left and right may disagree as to the public purposes in behalf of which the courts should intervene, but both agree that judicial powers must be maintained adequate to protect their respective values against administrative attack.⁶

Such a conclusion ignores all the vital issues of the next decade in administrative law, wrapped up in the question of how much is "adequate."

A statistician must work with categories, and the presently accepted categories are rapidly becoming meaningless. Mr. Pritchett reads the opinions, both the majority and the dissent, in *New York v. United States*,⁷ as reactions to ICC policy in increasing class rates throughout the East, and decreasing them correspondingly in the South and West. His analysis of judicial motivation may well be correct; but it neglects the fascinating and perplexing problems—only hinted at by the opinion writers—in the scope of judicial review of sweeping administrative orders.⁸ In another area, review of state legislation affecting interstate commerce, there is more concern with the old issue of legislative supremacy, than with the emergent, practical issue of the Court's role in maintaining a national economy.⁹ The primacy of "human rights" over "property rights" in the Court's hierarchy of values is acknowledged.¹⁰ But in the search and seizure cases¹¹ too jealous a concern for the protection of human rights from direct governmental evasion may fatally weaken governmental controls over large aggregations of property, which are in turn a threat to other human rights. The problem is dismissed, however, under the heading "The Search and Seizure Mystery,"¹² on which Mr. Pritchett's statistics shed no light.¹³

If this study of the Roosevelt Court were merely a further demonstration that "the fundamental division . . . appears still to be between conflicting systems of preferences on matters of social and economic policy,"¹⁴ it could be accepted as useful

⁶ P. 197.

⁷ 326 U.S. 572 (1946).

⁸ See Pekelis, *The Case for a Jurisprudence of Welfare*, 6 *Lawyers Guild Rev.* 611, 616 (1946).

⁹ See Rostow, *The Price of Federalism*, 38 *Fortune* 161 (December, 1948).

¹⁰ The proposition is qualified, however, on pp. 276-77. For a recent discussion and appraisal, see Clark, *The Dilemma of American Judges: Is Too Great "Trust for Salvation" Placed in Them?*, 35 *A.B.A.J.* 8 (1949).

¹¹ *Harris v. United States*, 331 U.S. 145 (1947); *Zap v. United States*, 328 U.S. 624 (1946); *Davis v. United States*, 328 U.S. 582 (1946).

¹² Pp. 152-55.

¹³ Mr. Pritchett recognizes conflicts in other fields, as in his discussion on p. 81, of *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947), and on p. 238 of *Hunt v. Crumboch*, 325 U.S. 821 (1945), but he expresses no need for redefinition of the issues. His figure for the Court's labor policy is the pendulum, rather than the spiral.

¹⁴ P. 263.

documentation of an established proposition.¹⁵ Its inadequacies as a guide to the future of the Court must be ascribed to the inappropriateness of its method for dealing with the predicament so brilliantly sketched in its final chapter, "The Plight of a Liberal Court." Mr. Pritchett points to three prime factors in the Court's predicament: the habit that has grown on American liberalism since the first World War, of living off its capital of political ideas; the paradox in a double tradition of Holmesian self-restraint and Brandeis judicial statesmanship; and the fact of being in power. He finds that the downfall of conceptualism has not made life easier for the Justices, and that current economic and political problems have outgrown the New Deal framework for their solution. But in his final formulation he seems to accept the old dichotomy of activism versus self-restraint, although rejecting Schlesinger's pat characterizations of the Justices.¹⁶ The members of any group that does not always occupy the entire field of its potential authority may be arranged on a scale of relative willingness or hesitation to participate in the process of decision. They may further be characterized in terms of the values, expressed or inarticulate, that have most frequently led them to participate. But the job for students examining the work of the Court, in its present plight, is to ask the questions which the Justices are just beginning to ask, in order to establish new values and standards by which measurement can be more meaningful. In the meanwhile, "The Roosevelt Court" remains a careful and considered documentation of the Court's stand on yesterday's issues in the problems of today.

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The Conflict of Laws: A Comparative Study, Vol. II. By Ernst Rabel. Ann Arbor: University of Michigan Press, 1947. Pp. xli, 705. \$8.00.

This is the second volume of a prodigious enterprise which was undertaken some years ago by a leading European scholar, teacher, and judge. The objective is to present not merely a panoramic outline of the general theses of Conflict of Laws as entertained by legal writers in the leading nations of the world, but, more important, to afford the legal profession of this and other countries a comparative study of conflict of laws in action in jurisdictions whose legal systems have their roots in Anglo-American and Roman traditions. The first volume published in 1945 dealt primarily with such family legal relations as arise out of marriage, divorce, and affiliation. This, the second volume, is devoted to Foreign Corporations, Torts, and Contracts.

Expanding international business activity may on occasion bring to the office of even a provincial lawyer a problem arising out of facts which cross territorial and so legal boundaries. One objective that might have been served by an undertaking such as that of Dr. Rabel would have been to furnish the novice as well as the expert, whatever his own country might be, a working tool through which he could ascertain probable re-

¹⁵ See Powell, *The Logic and Rhetoric of Constitutional Law*, 15 *J. Phil. Psych. and Sci. Method* 645 (1918); Braden, *The Search for Objectivity in Constitutional Law*, 57 *Yale L.J.* 571 (1948).

¹⁶ Schlesinger, *The Supreme Court: 1947*, 35 *Fortune* 73 (January, 1947).

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