system of force exist side by side in such a State. As Professor Berman has put it, "There are certain areas into which law penetrates only slightly. For example, a person who is suspected of antagonism to the regime may be picked up by the secret police, held incommunicado for a long period of time, tried secretly by an administrative board, and sentenced to hard labor—without benefit of defense counsel and without any possibility of appeal. On the other hand, there are other areas which are on the whole governed by well-defined legal standards." The Soviet Union is thus what has aptly been characterized as a dual State—one in which acts of the administration are placed in a privileged position of immunity from control by law. And this, it should be noted, is the central feature of all totalitarian States, whether they be of the Soviet or Nazi variety. Indeed, the very term "dual State" is one which was first used to describe the authoritarian National Socialist State. But it is certainly accurate as well to describe the State set up in post-revolutionary Russia. The Soviet, like the Nazi, State may well be described as being under a more or less permanent system of martial law, which, following Blackstone's famous definition, is "in truth and reality no law," for it "is built upon no settled principles, but is entirely arbitrary in its decisions."  

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* Berman, Justice in Russia vii–viii (1950).  
10 Fraenkel, The Dual State (1941).  
11 1 Bl. Comm. 413 (Cooley's ed., 1866).  
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Roughly since the late 'teens of the present century, when Albert J. Beveridge published his monumental four-volume biography of John Marshall, lawyers, historians and political scientists have been analyzing and criticizing the Supreme Court as an institution of American government and the performances of individual justices. There have been histories of the Court, biographies of individual justices, studies of groups of justices, analyses of constitutional doctrines and of behavior in particular fields, and various other types of appraisal. The reasons for so many and such varied studies have included the following: In our American emphasis on the bigness and betterness of the present and the future, we have lost something of the halo that once betokened our constitutional system and its institutions, and particularly the Supreme Court. We have dissipated some of our reverence for the past and institutions hoary with tradition, with the result that each institution must be continually proving its case and in terms of prestige can draw but a minimum of sustenance from the past. The prolonged rift in Court decisions marked by relatively consistent
"liberal" deviation by Justices Holmes and Brandeis, differing as it did in its continuity and consistency from the diverse and multiple divisions of earlier years, revealed to the people the extent to which personalities and personal philosophies determined the course of decisions and led to unprecedented analytical criticism. The clash between the Court and the New Deal, with the justices unanimously opposed in some cases and in others divided in seeming mutual hostility, brought further popular intolerance of the exercise of restrictive judicial power and further disillusionment about a once hallowed institution. Thereafter, often with unconcealed antagonism among the justices, the Roosevelt-Truman Court split not along consistent lines but rather fragmented in all directions and provided encouragement and even leadership for popular criticism.

In the light of these developments it is clearly time for reappraisal of the past work of the Court and of criticism directed toward it, and for re-delineation of the position which the Court of today and tomorrow ought to occupy. Professor Rodell's book, characterized in its sub-title as "A Political History of the Supreme Court of the United States," should be appraised in the light of the need for such delineation.

The book is a popularized study in which the author has avoided the use of technical language or other verbal ponderosity, resorting to the restrictive editorship, he tells us, of his non-lawyer wife and his fourteen-year-old son. He notes that "If people cannot understand this book, it will be because Janet and Mike are too bright for her skirts and his breeches." He admits a bias on behalf of liberals and "an almost fanatical devotion to that kind of personal integrity that combines intellectual honesty with courage."

The author's assumptions and his strategy have given us a vigorously written book with great splotches of primary colors and with a minimum of finer shadings.

The author believes in the inevitability and seemingly also in the desirability of personal government. He has no tolerance for the ideal of a "government of laws and not of men." Like the late Justice Jackson in his posthumously published little book on the Court, he regards that body merely as an aggregation of individuals and punctuates his attitude by the choice of his major title, *Nine Men.* As he sees it these nine men, having no positive responsibility for the making of public policy, and free from political restraint, exercise vast power merely by saying yes or no to the policy made by the people's representatives and, where the saying of yes or no might embarrass the nine men or otherwise make them uncomfortable, they protect themselves by refusing to hear arguments in such cases.

Such an approach is calculated to produce a "shocker." It is not intended to produce a pretty or a discriminating picture of the Supreme Court. John Marshall is characterized as a "great Chief Justice" not primarily because of his

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1 P. x.  
2 P. xii.  
3 The Supreme Court in the American System of Government (1955), reviewed at p. 352.
BOOK REVIEWS

legal performance but because he was a superb politician. In his appraisal of judicial performance Professor Rodell is concerned not primarily with legally correct interpretation of constitutional phrases, but with whether the justices have used those phrases in such a way as to give maximum protection to liberty. He says in one instance, for example, that "the justices gave a green light for the future to the brutality and terrorism of the Ku Klux Klan, by overthrowing a federal statute deliberately meant to curb the Klan—on the ground that the protections and guarantees of the Fourteenth Amendment could be enforced (if at all) only against official state acts, not against the acts of private persons."4

Guided largely by his criteria of liberalism and courage, the author traces the history of the Supreme Court down through the New Deal period in sparkingly colorful and dogmatic language. He idealizes Justice Holmes, noting that "It was rather as a critic than as an actor, as a prophet than as present leader, that he made an indelible mark on the political law of his own time."5 Plunging into the story of the New Deal conflict, he asserts that "the constitutional theories of all politicians, including Supreme Court justices, are no more than high-faluting ways of arguing for the political ends they are really after."6

The most valuable chapter in the book, dealing with the post-New Deal Court and entitled "A Court Attuned to a Liberal Key Develops Its Own Discordance," retains the characteristics of the earlier chapters but goes into more detail with respect to issues and personalities and presents more material that is new to the general reader. It is more discriminating than the earlier historical treatment, even though the discrimination still functions in terms of the author's bias. The author's explanation of the splintering of the liberal Court once the conservative opposition has been removed is summarized as follows:7

They splintered because "liberalism" is so fuzzy—meaning a political concept, and "liberal" so inexact a political definition of a man, that neither prediction nor unanimity is possible when a group of liberals get together to decide a mass of many-faceted and mostly new political problems; in short, one reason why the liberal New Deal Court splintered was that different men thought differently on different issues. The other, and overlapping, reason for the splintering was more complex; it was the accept-or-fight-or-compromise reaction of each separate liberal Justice to the views of his fellow liberal Justices when their idea of legal liberalism differed from his. In short, it was the different response of different personalities to intra-liberal differences on the issues. And both the issues and the personalities of the men who met—or failed to meet—those issues ranged (as those who would put "liberalism" or "Supreme Court" into a neatly patterned pigeonhole are so loath to recognize) over the whole of a colorful spectrum in which only black and white, the colorless colors, were missing.

The book closes with lamentation over the weakness of the Truman appointees, regret that a liberal Court has proved less liberal than it might have been, and an optimistic suggestion that the new Chief Justice may be able to

4 Pp. 166-67. 6 P. 184. 6 P. 217. 7 P. 258.
use the Court for protection of the people against their strong nation, as John Marshall used it to protect a weak nation against the people. The effect of the over-all approach is to needle sharply any sanctimonious or reverent approach to the Court and its work, to puncture confident assumptions concerning it, and to portray the Court as a highly individualized and political aggregation of nine men seeking from their entrenched positions to ensure perpetuation of their own political ideas, often in competition with those of the people and their representatives. It is a stimulating and effective debunking study if by this time members of the Supreme Court and other critics have left enough "bunk" to make additional debunking worth while.

It is worth suggesting, however, that at this stage more needs to be done than continued debunking and deflation of one of the three major branches of our government. It is of course true that nine men remain nine men after appointment to the Court, and that nobody expects them to develop Siamese linkages. But if for national purposes we may expect even 160,000,000 people to achieve a kind of unity and subordination of individuality to common aims, we ought to be able to expect nine professionally trained, intellectually disciplined, and well paid and well protected government employees to adhere to an ideal of individual self-effacement to achieve common statement of high purpose in the realm of constitutional law. While assuming that the ideal will not always be attained, we may well insist on the maintenance of its idealized status with awareness that goals have their directional value whether or not we have fully arrived. Every institution needs from time to time the catharsis of caustic cleansing. The judiciary is no exception, but having reached in recent years the stage wherein even members of the Supreme Court provide verbal sand for the rougher scrubbing of their fellows, it seems time to turn back to the basic problem of the nature of appropriate judicial performance. It is here submitted that it is not enough to say that individual judges should be liberal and that they should have the courage of their individual convictions. It is submitted, as indicated above, that the justices are obligated to do for the American people a task of synthesizing political ideals at the constitutional level, which calls for the subordination of individuality and the merging of individual wisdom and capacities in institutionalized performance.

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The decade since the opening of the trial before the International Military Tribunal in Nuremberg has produced a voluminous literature in the United