governmental measures (tariffs, administrative regulations, commercial treaties, commodity agreements, and so on). Such power may be directed against competitors, suppliers, customers, distributors, labor organizations, economic liberals in government, universities, and so forth, *i.e.*, against all who may be suspected by precept or program adversely to tend to affect the profits, honor or security of the businessman or his interests. Such business activities are both totalitarian (embracing the entire industry) and collectivistic (requiring group action and adherence).

When industrial and economic power groups capture the government as they did in Fascist Italy, Nazi Germany, Spain and Japan, there emerges the terrifying monolithic totalitarianism of international fascism. When the government eliminates big business, the result in a mild form is the nationalization program of British socialism and in virulent form is communism.

Whether the twentieth century can peacefully find a *modus vivendi* between gigantic business and the State, or whether it will witness a succession of wars such as characterized the sixteenth century struggle between Church and State, is the crucial problem of this generation. World War II—precisely such an international Civil War with its fifth columnists and partisans—may be but a prelude to atomic holocausts unless this big business-democratic government dichotomy is speedily resolved.

Needless to say, the solution does not lie in further bipolarization—mass against class, or East vs. West—but in some *via media* such as Erasmus, Roger Williams, William Penn and other advocates of tolerance, reason, compromise, and brotherhood worked out for peaceful relationships between Church and State three centuries ago.

Theodore J. Kreps†

THE ROOSEVELT COURT: A Study in Judicial Politics and Values, 1937-1947. By C. Herman Pritchett.* New York: The Macmillan Company, 1948. Pages xvi, 314. $5.00.

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Mr. Pritchett has written a book about the Supreme Court of the United States that can be read with understanding and profit by both laymen and lawyers. Its chief value derives from the fact that it gives clearly and concisely the rulings of the Roosevelt Court in the many great cases in which it has construed the Constitution. Few laymen and not all lawyers realize to what extent this Court has changed—in many instances reversed—the interpretation of the Constitution. This lack of knowledge is not surprising.

Laymen necessarily rely upon the newspapers for their information. Accurate, readable and understandable reporting of court proceedings is not one of the excellencies of the American press. From October to June on three Tuesday mornings each month every daily newspaper carries a story purporting to tell what was decided and something of what was said the day before by the nine black-robed men who, in the ornate building that defiantly faces the Capitol, sit with their backs to the rich dark red velour curtains. Presumably both the stories that are compiled by the wire services and those that are written by the special correspondents of the metropolitan journals are widely read. I doubt, however, whether any one after reading them is better informed, for unfortunately, no reporter has yet acquired the ability of briefly and accurately digesting the opinions. Nor has any reporter felt himself competent even to attempt to set them in their context. Perhaps this is a task for editorial writers; if so, they have differed from the reporters only in the audacity of their attempts, not in the merit of their performances.

Most lawyers are in a not much better plight. The common view that every lawyer is well informed on constitutional law is a myth. True, probably all members of the bar have at one time had a course in constitutional law, but unless they are recent law school graduates, most of what they learned is of historical interest only. On few lawyers is there professional compulsion to read any current Supreme Court opinions; fewer still need to read many. Some do read all, but their interest is avocational, not vocational. Rare, indeed, is the lawyer who frames the opinions with their historic background or who even writes down his digest of them.

Mr. Pritchett is not a lawyer; his approach is that of

a "political scientist." It is his view that the "Supreme Court inevitably acts in a political context, and that the greatest danger to the Court and from the Court comes when that fact is inadequately realized." He is concerned with an institution that is less a court of law than an organ of government. Indeed, it is not too much to say that he is interested in the justices rather than in the Court—"in the social and psychological origins of judicial attitudes and the influence of individual predilections on the development of law." This interest of Mr. Pritchett has resulted in one of the best features of his book—twenty-five tables showing the alignment of the judges in all types of cases. His tables are a demonstration of the truth of the saying—stripped of all sinister connotation—that it is better to know the judge than to know the law.

Mr. Pritchett had no intention, however, of merely doing the work of a synoptic court reporter or of an ingenious statistician. For him the tables are but prologue or, to put it differently, one of the premises from which he draws his conclusions. This factual basis is important, however, not only to understand Mr. Pritchett's views but also to enable the reader to formulate his own judgment. However much one may disagree with Mr. Pritchett's deductions, one must admit that he is not a dogmatist who pontificates but a scientist who accurately presents the data from which he distills his analyses. This fairness greatly enhances the interest of a reader who avails himself of the opportunity of comparing his own views with those of Mr. Pritchett, different as in many instances they are.

For most readers there will not be a large zone of disagreement. There will be practically none about *what* the justices did and but little more as to *why* the justices did it. Many, however, will dissent from Mr. Pritchett's appraisal of the result. It was, of course, far easier for Mr. Pritchett to be precise in stating how the justices voted and the extent of their disagreement, evidenced by dissents, than to fathom the reasons for those dissents.

All of the justices of the Roosevelt Court but one were appointed by Roosevelt or by his successor, whose recent success emphasizes his underlining of Roosevelt's policies. The one exception, Stone, received a commission as Chief Justice which was signed by Roosevelt. In view of

Roosevelt's political adroitness it may be safely assumed that he was not unaware of his appointees' predilections. The Court has never functioned in a vacuum from which political considerations have been excluded. Only the most naive could fail to see that "judicial decisions," as Max Lerner put it, "are not babies brought by constitutional storks, but are born out of the travail of economic circumstance."

Why then did the Roosevelt Court prove to be, in Mr. Pritchett's words, "the most ununanimous court in American history" from which "dissenting opinions have been turned out on a mass production basis"? Why did not the Court follow the leadership of Roosevelt and accept the philosophy of the New Deal? The answer is that it did. The purpose of the "court-packing" bill was to insure the validation of congressional legislation enacted under the Roosevelt leadership. The Roosevelt Court has shown almost unprecedented unanimity in acknowledging the supremacy of Congress. The sources of dissent arise otherwhere: the constitutionality of state legislation when challenged under the "due process" clause of the Fourteenth Amendment or as an impingement upon interstate commerce; the extent to which civil liberties are protected against state and federal action by the Bill of Rights; judicial review of administrative tribunals; the question of how long and unclouded is labor's day.

In probing for the reasons for dissents in these areas Mr. Pritchett rejects political ambitions on the part of the justices although he does not deny that they at one time existed. He admits that there has been a clash of personalities, such as transpired in the Black-Jackson feud, but depreciates its effect. Motivation he finds in the nature of the questions posed and in the background from which the justices have been appointed to the Court.

Generally the Court is confronted with only hard cases. Moreover, the Roosevelt Court has had brought to its attention more than its quota of hard cases. The New Deal legislation not only extended the frontiers of federal power,[1] but much of it was hastily drafted, vague, and thus effective only when judicially interpreted.

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1. It will be recalled that in July, 1935, with reference to the Guffey Coal Bill, President Franklin D. Roosevelt wrote Representative Samuel B. Hill: "I hope that your committee will not permit doubt as to constitutionality, however reasonable, to block the suggested legislation."

These factors, however, do not fully explain why dissents at one time reached the record-breaking high of 64 per cent. Nor is the answer supplied by the fact that Chief Justice Stone was less desirous of and less competent to achieve agreement than had been Chief Justice Hughes.

While Mr. Pritchett mentions other possible reasons he does not seem to me sufficiently to emphasize them. One is the heterogeneous constitution of the New Deal group—united as to certain goals but seeking various roads to a common destination. This factor is reflected not only in dissents but in many concurring opinions which agree only as to a result. Six members of the present Court, before they went on the bench, were in government service, while another, Justice Frankfurter, had been an influential New Deal adviser. Mr. Pritchett insists that politics has always played its part in appointments to the Court; however, he cites no era during which in rapid succession any president has appointed to the Court so many justices who were at the time of appointment his active coadjutors.

Mr. Pritchett also seems to me to minimize the effect of the fact that a preponderance of the justices were without previous experience on the bench and had no great experience at the bar. Justice Rutledge and Chief Justice Vinson are the only members of the Court who before their appointments were judges of appellate courts.[2] Four members of the Court were experienced and successful practitioners: Justices Reed, Jackson, Burton and Chief Justice Vinson. Three of the justices, Rutledge, Douglas and Frankfurter, may be classed as law school men. True, Justice Rutledge went on the Supreme Court from a Circuit Court of Appeals, but he was appointed to the lower court not from the active bar but from a law school deanship. Mr. Pritchett seems not to give full weight to the law school influence when he merely remarks that it is not unprecedented since both Justice Holmes and Chief Justice Stone were law teachers. (He might have added Justice Story's name.) But the citation of these precedents does not meet the issue. Justice Holmes was, when appointed, an experienced judge and a law teacher only by avocation; moreover, the law school point of view

2. The Circuit Court of Appeals of the District of Columbia. Justice Murphy served as judge of the recorders' court in Detroit, and Justice Black of the police court in Birmingham.

has greatly changed since Holmes taught at the Harvard Law School. Indeed, it is not the same as it was when Stone was dean of the Columbia Law School, although Stone never entirely lost that tendency to explore the law which is characteristic of many school men. A glance at the law reviews will demonstrate how widely the school men differ from the bar in discarding absolutes for the "functional" approach and in questioning and often jettisoning precedents.

Justice Black belongs neither to the bar nor to the schools. He is by temperament and experience a crusading legislator who seeks judicial enforcement of his views—patient with legislation he deems desirable, impatient with that he regards as obstructive—utterly unlike the tolerant Holmes and even more of a judicial activist than was Justice Brandeis. Equally infused with crusading zeal and unrestrained by long experience at the bar is Justice Murphy.

Thus there is on the Court no controlling group saturated with the bar and bench tradition that the law should slowly broaden down from precedent to precedent. Such an attitude in normal times usually means merely the reiteration, the application, or the distinguishing of earlier cases. Even when problems are new the tendency is to project the old line—not to divert it—and even less to draw a new one. The lack of this centripetal force of a common tradition in dealing with novel problems would seem to be the most likely explanation of the frequent differences among members of the Court.[3]

The absence of a compelling tradition is especially evident in the Court's attitude toward stare decisis. Here again the Roosevelt Court has attained a new high. During the ten terms from 1937 through 1946 it has overruled some thirty-two previous decisions.[4] Perhaps no one of the jus-

3. For an interesting account of the rise, fall and resurgence of the practice of writing individual opinions see Palmer, *Supreme Court of the United States: Analysis of Alleged and Real Causes of Dissents*, 34 A. B. A. J. 677 (1948). See also *Causes of Dissents: Judicial Self-Restraint or Abdication?* and *Dissension in the Court: Stare Decisis or 'Flexible Logic'?* by Mr. Palmer. *Id.* at 761, 887. This is a series of articles which constitutes a penetrating criticism of the Court by a practicing lawyer.

4. The figures are Mr. Pritchett's, who adds: "This revoking includes only decisions which the Court flatly stated that it was overruling, plus a few where the intimation was so clear that it could not be misunderstood." (P. 57) There are various ways of giving the *coup de grace* to a precedent: (1) it may be overruled *eo nomine*, (2) it may be distinguished or qualified, (3) it may be iguored. The first is the only satisfactory method; otherwise the precedent may live to fight another day.

tices would formally dissent from Justice Brandeis' declaration that while stare decisis is not "a universal, inexorable command" but simply a rule of policy, it is usually "the wise policy, because in most cases it is more important that the applicable rule of law be settled than that it be settled right." However, most of the justices in practice probably limit the application of this dictum to cases not involving the construction of the Constitution; for in constitutional cases legislative change is impossible and alteration by amendment extremely difficult.

The Court is most nearly unanimous when clearing the path for congressional legislation in the economic field. When the Court departs from this field marked divergence begins —perhaps proof of the contention that the Roosevelt appointees were elevated to the Court primarily because of their common belief in the economic and social goals of the New Deal.

While the theorists of the New Deal, believing in legislative supremacy, awarded their accolade to state legislation so long as it coincided with their views, the practicalists were unconcerned with state power provided congressional power was expanded to its outer limits. It was to the practicalists a matter of indifference whether the states could legislate in a field which Congress had not entered because Congress at will could assert its potential superiority. Thus the Court, without breaking ranks in its progress toward the chief New Deal objectives, was free to pause for forays by the individual justices.

The fact that the Fourteenth Amendment required of the states "due process" in the same words that the Fifth imposed this obligation upon the Federal Government presented no difficulty. However, there was one troublesome road block: the interstate commerce clause. Quickly the Court rejected the test that state legislation should be voided or upheld depending upon whether it *directly* or *indirectly* affected interstate commerce. Instead the Court adopted a pragmatic approach, left the realm of absolutes, and consistently decided that the question was one of degree—did state legislation put a real burden on interstate commerce. All the justices agree that when Congress pre-empts the field the states are excluded. But when Congress is silent disagreement arises. Are the states free to act, or is the

grant of power to Congress exclusive? Justice Black is the protagonist of the view that the protection of interstate commerce is for Congress, not for the Court. The Court itself still vacillates.

More obvious and more fundamental are the justices' differences in civil rights cases. Mr. Pritchett refers to but does not elaborate upon the basic cleavage of the Court in this zone. The disparity arises from a disagreement as to which provisions of the Bill of Rights are made effective against the states by the "due process" clause of the Fourteenth Amendment. It was first assumed by the Court that certain rights, especially those specified in the First Amendment, are so fundamental that they had been incorporated into the Fourteenth Amendment. Other rights, indictment by grand jury for example, have been held to be merely procedural and, therefore, guaranteed only against the Federal Government. Justice Black, however, would have the Court hold that all the provisions of the first eight amendments—substantive and procedural—are effective against state action.[5] When confronted with his own insistence that "due process" is only procedural he makes the distinction that this is true as to property but not as to personal rights. But he does not point out the difference. Perhaps his best answer would be that "a foolish consistency is the hobgoblin of little minds."

The Court itself has not been immune to the charge of inconsistency in its pronouncements on the application of the Bill of Rights. As to legislation—state and federal—it has fortified itself with a strong presumption of constitu-

5. Adamson v. California, 332 U. S. 46 (1947). Justice Douglas concurred; Justices Murphy and Rutledge agreed but thought that the Fourteenth Amendment protected other fundamental rights not mentioned in the first eight amendments.

CHARLES P. CURTIS, JR., in his LIONS UNDER THE THRONE, [reviewed by Armstrong in 33 VA. L. REV. 814 (1947)] and EDWARD S. CORWIN in his LIBERTY AGAINST GOVERNMENT, [reviewed by Armstrong in WILLIAM AND MARY QUARTERLY, (January, 1949), and by Frank, 24 IND. L. J. 139 (1948)] discuss this subject at length. Professor Corwin believes that the Court is leaning to Justice Black's view. If this is correct it may result in the overruling of such cases as Hurtado v. California, 110 U. S. 516 (1884), Maxwell v. Dow, 176 U. S. 581 (1900), Twining v. New Jersey, 211 U. S. 78 (1908) and Palko v. Connecticut, 302 U. S. 319 (1937), which held that indictment by grand jury, trial by jury, protection against double jeopardy and self-incrimination are not necessary attributes of a fair trial.

tionality; it has, however, placed the burden upon those who for any reason would restrict the fundamental liberties.[6]

One of the most interesting of Mr. Pritchett's tables is that which demonstrates the extent to which the Court has given sanctuary to those who have insisted that their civil rights have been violated. The table also gives the alignments of the justices in these cases.[7] The most ardent champions of civil rights have been Justices Murphy, Black, Douglas and Rutledge in that order. Low in the list has been Justice Frankfurter, whose conservatism has been exceeded only by that of Justice Burton and Chief Justice Vinson. Many were surprised at Justice Frankfurter's attitude because, before his appointment, he had been a notable advocate of civil rights. Mr. Pritchett furnishes the explanation: Justice Frankfurter consciously or unconsciously assumes that the mantle of Holmes has fallen upon his shoulders; Holmes believed that legislatures, state or federal, had the right to legislate unwisely as well as wisely.

In this connection it is interesting to observe Justice Frankfurter's consistency. He is a stalwart defender of civil liberties in federal cases where he has the obligation of interpreting both constitutional and statutory provisions which protect them. As a result he has voted for the defendant in 55 per cent of the cases. He believes, however, in the Holmesian tradition of granting the utmost latitude to state legislatures and feels bound by the construction given state statutes by state courts, provided only that when so construed they do not run counter to the Federal Constitution. Consequently he has voted for the accused in only 11 per cent of state criminal cases.[8]

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6. Mr. Pritchett writes: "The truth is that the Roosevelt Court has developed a double standard for guiding judicial review." (P. 92)

7. The percentages of majority decisions in favor of civil rights are: freedom of religion, 67%; free press, 50%; radicals, 100%; wartime freedom, 57%; political rights, 33%; total, 62%. (P. 131)

Mr. Pritchett, though by no means a reactionary, seems troubled by the Court's lack of restraint in the civil rights area:

> "The protections of the first ten amendments must be interpreted with sanity, with judgment, with extraordinary pains to understand the rationale of the legislative or administrative or judicial action which it is proposed to invalidate.
>
> "There is no doubt that the Roosevelt Court has sometimes failed to achieve the balance required for this task. The philosophy of human freedom is a heady brew, which tends to dissolve judicial inhibitions and turns judges into crusaders, unable to apply the standards that should guide them as 'reasonable men.'" (P. 285)

8. The figures are from Mr. Pritchett's tables which here again demonstrate their value.

The outstanding fact remains that the present Court has gone further than any of its predecessors in protecting civil liberties. The stone which the builders refused[9] has been placed by the keepers as the headstone of the corner.

Mr. Pritchett's tables are equally illuminating in disclosing the Court's attitude toward administrative tribunals. Here is one of the most effective implementations of the New Deal. In the main the Court, as was to be expected, has cleared the way to New Deal objectives—chiefly by its tendency to give finality to the fact-findings of the tribunals. Here again, however, the justices have been influenced by their individual views as to the correctness of the policies of the agencies. The left wing has been more inclined to accept the decisions of agencies other than the ICC while the right wing has been more in accord with the conservative ICC.[10] Perhaps implicit in this is some recognition of the fact, well known to practicing lawyers but ignored by the Court, that the agencies, in their fact-finding, have been frequently influenced by their efforts to support desired conclusions.[11]

As a preface to his discussion of the Court's attitude toward labor, Mr. Pritchett quotes Professor Edward S. Corwin: "Constitutional law has always a central interest to guard. Today it appears to be that of organized labor." Here the statistical table reveals that the Court, in 68 per cent of its non-unanimous decisions, has supported labor and that Justices Murphy, Black, Rutledge and Douglas have constituted the labor bloc.[12]

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9. The Constitutional Convention accepted Hamilton's argument that a Bill of Rights was unnecessary because the Federal Government would possess only delegated powers. The first ten amendments as proposed in Congress by Madison, at the suggestion of Jefferson, would have been effective against the states. This provision was stricken out by the Senate. An interesting current development is the movement in Canada for a specific written Bill of Rights. *Cf.* How, *The Case for a Canadian Bill of Rights*, 26 CAN. B. REV. 759 (1948).

10. In each instance the Court supports its conclusion by its reliance upon the theoretical expertise of the agencies.

11. Another reason for adopting the factual conclusions of the agencies is the physical impossibility of reading and weighing the evidence. It is readily determinable that it is impossible for the justices to read all the records and briefs in the cases they are required to decide.

12. If Mr. Pritchett were a practicing lawyer he probably would not have failed to point out how extremely far the Court has gone in sustaining the claims of railroad employees under the Federal Employers Liability Act.

While Mr. Pritchett is generally in sympathy with the Court's treatment of economic legislation, he is severely critical of its attitude toward labor: "In this field the Court has been responsible for a dramatic reversal of previously established doctrines, and has exhibited a degree of facility, not to say legerdemain, in statutory interpretation which has left some members of the legal profession gasping in astonishment."[13]

In concluding his chapter on "Labor's Day" Mr. Pritchett writes: "Now the pendulum is swinging back again, and the Roosevelt Court must reconsider its policy. . . . that it will be pulled along in the direction of the election returns has already been demonstrated by the *Lewis* and *Petrillo* cases." This, however, was written before the November election and Mr. Pritchett has had no opportunity to revise his language since Mr. Truman's unexpected victory.

> The threatened cloud has passed away,
> And brightly shines the dawning day;
> What though the night may come too soon,
> We've years and years of afternoon!

In conclusion, Mr. Pritchett's tabulations of the votes of the justices are definitive or nearly so; they are also revealing. His inferences are always suggestive, sometimes challenging. He is accurate in controverting Max Lerner's assertion that it is the brooding image of Holmes that guides the Court. Holmes was an exponent and practitioner of judicial restraint to a greater extent than any of the present justices.[14] The Court—especially its left wing—is more nearly in line with Brandeis' activism in its willingness to infuse its strongly held views with judicial vitality. It has, however, traveled beyond Brandeis in its disposition to make what appear to be legislative rather than judicial choices. The present justices are even less restrained than was Brandeis by any compulsion of tradition. Brandeis was a crusader; so are some of the present justices. But to a greater extent than he they were active participants in an

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13. P. 209.

14. "A statistical survey," as Mr. Pritchett writees, "is bound to be a relatively crude tool." It needs to be supplemented by a critical analysis of the opinions, by a scrutiny of the public careers of the justices and by an examination of such biographical data as are available. For brief biographical sketches of the justices see McCUNE, THE NINE YOUNG MEN (1947).

organized crusade, and more than he, they are willing to use the Court to promote the public policies in which they believe.

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THE CONFLICT OF LAWS: A COMPARATIVE STUDY. Volume II. Foreign Corporations: Torts: Contracts in General. By Ernst Rabel.* Ann Arbor: University of Michigan Press; Chicago: Callaghan & Company, 1947. (Michigan Legal Studies.) Pp. xli, 705. $8.00.

Sincere tribute must be paid to Ernst Rabel for his new book on Conflict of Laws.[1] Like his earlier volume on the sale of goods, this work again reveals the author's vast knowledge and wide experience, and it demonstrates both his unerring capacity for clear thought and his mastery over an immense wealth of material. The statutory and case law of all the countries of Europe and the Americas, as well as of all States belonging to the British Commonwealth of Nations, form the rich and variegated background of his work. In assembling his material he enjoyed the help afforded by incomparable law libraries and the invaluable assistance of many gifted lawyers. But it is his own energy, his own creative ideas, and his own sure touch that have woven the immense mass of raw material into the finished tapestry; that have transformed innumerable single "foreign" laws into a true "comparison of laws." The value of such comparison is much more evident in every chapter of his book than in all the numerous apologetic and methodological es-

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1. The first volume of Rabel's work, published in 1945, dealt in the Introduction not only with the historical background, the literature, the sources, and the "structure" of conflict rules (where Rabel's well-known views on classification were repeated) but also with what the author calls "Development of Conflicts Law." By this phrase he understands certain general principles and methods, such as "misuse of logic," *renvoi*, autonomy of the parties, the tendency to uniformity, "specialization" of conflict rules, and internationalization. Parts Two to Five of the first volume discuss the personal law of individuals (including determination of domicil and nationality); marriage; divorce and annulment; and parental relations.