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Book Reviews

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the trade-in, and not from the admittedly ridiculous undervaluation. The next step, one which must be taken by the several legislatures, not only in Michigan but everywhere, is a legal deterrent to the present popularity of undervaluation to protect the consumer. It is very well to pay tribute to Caesar, but not in the coin of bribery and extortion.

Joseph V. Wilcox

BOOK REVIEWS

PUBLIC UTILITY REGULATION. By Herman H. Trachsel.[1] Chicago: Richard D. Irwin, Inc., 1947. 538 pages. $6.00.—In the preface the author of this book notes that it is designed primarily for use as a college textbook, and that it may also be helpful to legislators, city officials, regulatory agencies, utility executives and other interested groups and persons. A careful perusal of the work indicates that Professor Trachsel at least attained his main objective.

As a college text the book is percise and lucid in its presentation of the principles of public utility regulation. Further, the volume follows a logical sequence in the exposition of the materials. Part I discusses the nature and characteristics of a public utility. Part II is concerned with the agencies of regulation, and Part III provides an evaluation of important administrative regulatory problems. Part IV deals with special problems such as rural electrification, federal power projects, the Tennessee Valley Authority and municipal ownership. Emphasis on the administrative aspects of regulation are in keeping with modern trends of public utility regulation. Frequent references to court and commission decisions, which are cited in the footnotes throughout the book, together with an interspersing of summaries of leading cases, make the book particularly valuable to the fledgling student.

Another notable feature of the work as a useful textbook is the fact that it builds up the regulatory agency structure from its local beginnings in the form of municipal regulation to its national culmination as federal regulation. Thus the student is able to follow the development of regulation from a local to the national scale. Chapters devoted to rural electrification, federal projects and the Tennessee Valley Authority furnish for the intelligent student a basis for the study of the great experiments in the field of public utilities.

The secondary aim of the book, that is as an aid to experts and workers in the utility field, is not achieved in such a satisfactory manner. Other recent books[2] have done a much better job. To be useful as a reference book, the volume should contain a more definitive analysis of the administrative problems involved in the regulation of public utilities. These must be amply annotated with citations from court and commission cases. Professor Trachsel's book does not furnish such a study. To be sure, certain chapters are quite helpful, as for example, those two[3] devoted to the discussion of franchises. The study of franchises is particularly important in the understanding of the use of certificates of public convenience and necessity. Even Barnes in his rather complete work on utility regulation devotes only a major part of one chapter to this subject.[4]

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1 Associate Professor of Political Science, University of Iowa.

2 Barnes, THE ECONOMICS OF PUBLIC UTILITY REGULATION; Troxel, ECONOMICS OF PUBLIC UTILITIES.

3 Chapters IV and V.

4 *Op. cit.*, note 2, *supra*, Chapter VII.

The inclusion of chapters on the Federal Power Commission, the Federal Communications Commission and the Securities and Exchange Commission are commendable. The discussion of these important federal regulatory agencies is sparse, but it may be a starting point for further readings on the organization and activities of these independent quasi-judicial bodies. [5]

The preoccupation by college professors in the writing of books on public utilities is an indication that this field of activity has become a matter of general interest. And any new book is a welcome addition to the growing literature on the subject.

*Louis Charles Kaplan.**

THE FIRST FREEDOM. By Wilfrid Parsons, S.J.[1] New York: The Declan X. McMullen Company, Inc., 1948. 178 pages. $2.25.—THE FIRST FREEDOM is the work of an American jurist-theologian, outstanding in his own field. Its author, Wilfrid Parsons, a Jesuit priest, is possibly less a secular-jurist than a Catholic theologian, and probably less a canonist than a theologian. As dogmatic theologian Father Parsons has restated the doctrine that the State and the Church are both perfect societies, both sovereigns in their respective fields, the State having exclusive jurisdiction over temporal matters and the Church having exclusive jurisdiction over spiritual matters. As priest, Father Parsons very adequately establishes this thesis which has been the traditional doctrine of the Catholic Church. Historically, he begins with the promulgation of this doctrine by Christ, Himself. He sets forth its acknowledgment and treatment by Pope Gelasius I in the fifth century, and the similar pronouncements of Pius IX, Pius XI, and Pius XII. He notes, at length, its advocacy by Pope Leo XIII.

A canonist might also have cited that part of canon 1553 of the Codex Iuris Canonici, which provides:

"Ecclesia iure proprio et exclusivo cognoscit:

1. *De causis quae respiciunt res spirituales et spiritualibus adnexas; . . ."*

In compliance with Canon Law, Father Parsons has submitted his book to the proper authorities for ecclesiastical approval. His major superior gave permission for publication. John Courtney Murray, S.J., one of the foremost scholars in the Church on the subject, as *Censor Deputatus,* rendered the *"nihil obstat."* The present Archbishop of Washington gave the *"imprimatur."* The present Archbishop of Baltimore wrote a commendatory "Foreword." Full and unqualified concurrence is given in this review to Father Parson's thesis that the traditional teaching of the Catholic Church is that the Church and State are two independent sovereigns, with jurisdiction over the same subjects, but *not over the same subject-matters,* the Church having exclusive jurisdiction over spiritual matters, and the State having exclusive jurisdiction over temporal matters.

Aware of pertinent provisions of the *Codex Iuris Canonici,* this reviewer does not treat herein of theological or canonical matters which might require previous ecclesiastical approval. He confines all remarks exclusively to the field of *secular* law.

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[5] For example, *The Federal Power Commission, Silver Anniversary Issue,* 14 GEORGE WASHINGTON L. J. 1.

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[1] Contributing Editor, America, Catholic Review of the Week.

It is submitted that the book leaves a feeling of inadequacy to the secular lawyer practicing before the United States Supreme Court and state courts of last resort through the complete omission of the historical development of the comparative Anglo-American *Common Law* principle of Separation of Church and State, based on their respective jurisdictions. This development is briefly set forth herein.

Chapter One of the Magna Carta of King John (1215) provided: *"in primis," "that the English Church shall be free":*

> "In the first place we have granted to God, and by this our present charter confirmed for us and our heirs for ever that the English church shall be free, and shall have her rights entire, and her liberties inviolate; . . . "

By the term "English church" was meant the *English* branch of the Roman Catholic Church. There was in England at the time no other religiously organized society for the exercise of religion than the Catholic Church. Magna Carta did not purport to grant or guarantee the free exercise of any religion other than the Roman Catholic religion. Such a grant or guarantee would have been unthinkable in England in 1215. King John conceded that there existed in England, within the same territorial limits over the same subjects, two sovereigns, the Catholic Church and the King of England. The Catholic Church had jurisdiction, legislative, judicial and executive, *over its members.* The King had jurisdiction, legislative, judicial and executive, *over his subjects.* In the past the King had encroached upon the jurisdiction of the Church. By the Magna Carta he agreed that the King, in the future, would not encroach upon the jurisdiction of the Catholic Church over its members in spiritual matters. There we have, it is submitted, the beginning of *the Common Law principle of Separation of Church and State,* a principle, not the creation of State legislation or of State *constitutional* provisions, but deriving, according to Catholic theologians, from Christ, Himself, when He established His Church.

There is no more authoritative source for the discovery of the true meaning of the phrase "Freedom of Religion" and of the phrase "Separation of Church and State," under the Magna Carta than Bracton's *De Legibus & Consuetudinibus Angliae Libri.*

King John, by the Magna Carta, had *granted no rights* in spiritual matters to the Catholic Church. It is submitted that the First and Fourteenth Amendments to the Federal Constitution grant *no rights* to the Catholic Church in the United States and no rights to the nearly 300 other churches in this country to freely exercise religion. Both the Magna Carta and the Federal Constitution are *negative* in this respect. They have to be. Neither England, as a State, nor the United States of America, as a State, was competent to grant such rights. These rights to exercise religion existed independent of the Magna Carta and the Federal Constitution in the English kingdom and in the United States. The First Amendment *guaranteed* that Congress would not encroach on the exclusive jurisdiction of the Church (Protestant, Catholic, Jewish, and all other denominations then in existence or subsequently to come into being in the United States), in respect to the exercise of *legislative* jurisdiction over the subject-matter of religion. The English king, by the Magna Carta, likewise *guaranteed* that his *regnum* would not encroach on the exercise of legislative, judicial, or executive jurisdiction of the Catholic Church.

Bracton, in the first half of the thirteenth century, a few years after the Magna Carta, set the common boundary which separated the Church and State, *in the field of jurisdiction,* in the following terms:

> *Ad papam et ad sacerdotium quidem pertinent ea quae spiritualia sunt, ad regem et ad regnum ea quae temporalia . . .*

Dean Pound has written authoritatively and extensively on this phase of our subject. He traces the beginning of these separated jurisdictions of the Church and State back to the Magna Carta. He says:

> In the politics and law of the Middle Ages the distinction between the spiritual and the temporal, between the jurisdiction of religiously organized Christendom and the jurisdiction of the temporal sovereign, that is, of a politically organized society, was fundamental.[2]

The Year Books contain many cases wherein the early English courts observed the principle of Separation of Church and State, based on separate jurisdictions, the different jurisdictions of two separate sovereigns.

Henry VIII began his contest with the Pope for the supremacy of the English branch of the Catholic Church towards the end of his reign. This was the contest which was ultimately to result in the complete annihilation of the Common Law principle of Separation of Church and State *in England*. The Theory of the Royal Supremacy was to triumph, bringing with its victory *the union* of the church and state, with the Church of England, now cut off from the Holy See, as the Established Church. This union of Church and State was to be accomplished by the usurpation by the State of the jurisdiction of the Catholic Church, legislative jurisdiction, executive jurisdiction, and judicial jurisdiction, as King John had attempted before the Magna Carta.

Coke, commenting on Chapter One of the Magna Carta, said:

> . . . this charter is declaratory of the ancient law and liberty of England, and therefore no new freedom is hereby granted . . . but a restitution of such as lawfully they (all ecclesiastical persons) had before, and to free them of that which had been usurped and encroached upon by any power whatsoever; . . .
>
> That is, that all ecclesiastical persons shall enjoy all their lawful jurisdictions, and other their rights, wholly without any diminution or subtraction whatsoever; and *jura sua* prove plainly, that no new rights were given unto them, but such as they had before, hereby are confirmed; . . .

Seeking religious freedom from the pressure exerted in England under the union of Church and State, Roger Williams had come to Massachusetts in 1631 as a Separatist. He was established as pastor of the church at Salem, but the Puritans of that town ran him out after clashing with him on the dogmatic theological principle that the State had no jurisdiction over spiritual matters. In June, 1636, he founded a settlement, the beginning of the State of Rhode Island. Here Williams insisted that the principle of Separation of Church and State should be preserved, the new settlers to sign the following agreement:

> We whose names are hereunder, desirous to inhabit the town of Providence, do promise to subject ourselves in obedience to all such orders as shall be made for the public good by the major consent of the present inhabitants and others whom they shall admit unto them, *only in civil things*.

Commenting on this compact, S. E. Forman in *Advanced American History*, at page 41, says:

> In this compact we see the great idea for which Williams stood, namely, the separation of church matters from state matters . . .

Before the Federal Constitution had been drawn, it was a well accepted principle of government that a politically organized society is separated from religiously organized societies by distinct jurisdictional metes and bounds. That

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2 47 HARV. L. REV. 1, at 6.

this principle was incorporated in the political philosophy of the Founding Fathers is maintained by an examination of their writings and speeches.

Separation of Church and State is primarily a principle of *Common Law*, not a constitutional law principle. It has well been termed a principle of *Inter-Church-And-State Common Law*. It means nothing more than that the State has exclusive jurisdiction over temporal matters and the Church has exclusive jurisdiction over spiritual matters. The Common Law is specific and concrete and proceeds from case to case.

Two state cases, a not all-inclusive list, by any means, illustrate the point. The Massachusetts case of *Carter v. Papineau et al.*, 222 Mass. 464, 111 N.E. 358 (1916), definitely stands for the proposition that a secular court has no jurisdiction over a spiritual matter. In this case a member of the Protestant Episcopal Church brought suit, in 1913, for failure to give her communion, against the rector of her church and her bishop. The Supreme Judicial Court of Massachusetts decided against her on the ground that the secular court had no jurisdiction inasmuch as the subject-matter of the litigation was spiritual and not temporal.

In *Watson v. Garvin*, 54 Mo. 353 (1873), the court said:

> The true ground why civil courts do not interfere with the decrees of ecclesiastical courts, where no property rights are involved, is not because such decrees are final and conclusive, but because they have no jurisdiction whatever in such matters, and cannot take cognizance of them at all, whether they have been adjudicated or not by those tribunals. This principle forms the foundation of religious liberty in republican governments.

The United States Supreme Court case of *Watson v. Jones*, 13 Wall. 679 (U.S. 1871), is, of course, a landmark on the subject.

This reviewer believes that Father Parsons is in error when, in speaking of the meaning of "separation of church and state," he says, at page 8:

> Its original meaning in this country (is) — liberty and equality of all religions before the state . . .

and, at page 49:

> The so-called "American principle of separation of church and state" simply did not exist at the time of the adoption of the First Amendment . . . ;

and, at pages 80 and 81:

> It obviously does not mean what it says: . . .
>
> To bring about a true separation of these two societies is obviously impossible, unless you are going to tear each of the members physically into two pieces . . .
>
> On the face of it, therefore, the phrase does not mean anything at all . . .

This reviewer agrees with Father Parsons when he says, at page 85:

> St. Gelasius set forth in unmistakable terms the historic doctrine of the Church. . . . He (Christ) did not wish that the two powers should remain in the hands of one man, and so He separated them.

But Father Parsons was logically on firm foundation when he construed the "no establishment" clause of the First Amendment to mean that Congress was prohibited from setting up in the United States a State Church similar to that of the Church of England in England; and not to mean that the federal and state governments were absolutely prohibited from exercising legislative jurisdic-

tion *over temporal matters* that would aid or benefit citizens who happened to be members of some particular religiously organized society.

In the New Jersey school-bus case, all nine justices of the United States Supreme Court were in agreement as to the principle of law involved, namely: A state cannot enact a law imposing *a tax for the support of any religious activity or institution.*

All nine justices were in agreement that this principle of law flowed from the "establishment of religion" clause of the First Amendment. After coming to agreement on the principle of law involved, all the justices were in agreement as to this issue of the case, *a question of fact: Did the New Jersey Act impose a tax for the support of any religious activity or institution?* The majority decided that it did not. The minority insisted that it did. It is agreed that the nine justices were right in their declaration of the principle of law that a state cannot enact a law imposing a tax for the support of any religious activity or institution. It is submitted that the decision of the United States Supreme Court was correct and that the majority opinion was sound in finding as a fact that the transportation of school children *to the doors of a parochial school* was not a *religious activity* but a temporal matter over which the state had jurisdiction. It is also submitted that all the justices were in error in reasoning that the source of the principle of law upon which it proceeded basically was the "establishment of religion" clause of the First Amendment.

As to the *McCollum* case, it is submitted that the decision and the *rationes decidendi* in this case were both wrong. This case, and the *Everson* case, should not have gone off on *constitutional* law grounds. The McCollum case involves fundamental principles of Common Law, the Law of Real Property, and the Law of Taxation. The nine justices were again right, as in the *Everson* case, in declaring, as a principle of law, that a State cannot enact a law imposing a tax for the support of any religious activity or institution. But they were again wrong in reasoning that this principle of law flowed from the "establishment of religion" clause of the First Amendment. It is a fundamental principle of *Common Law* that taxes cannot be raised for any but *public* purposes.

Father Parsons objects (at page 123) to "the assumption that no money collected by the State in taxes may go to any activity connected with religion." He says: "Apart from the fact that this assumption has no basis in American tradition, it is also inconsistent with present American practice and American law." Father Parsons cites no secular court cases, constitutional provisions, or statutes, to support the last two words of this last statement. All states, except Maine and North Carolina, directly or indirectly prohibit by wide constitutional provisions the use of tax revenues for sectarian purposes; the provisions in the constitutions of Arkansas, Iowa and New Jersey are limited.

> Even when there is no express restriction in the constitution, there is an implied restriction under which the legislature cannot rightly impose taxes for the benefit of private persons or in aid of private uses or enterprises. This restriction grows out of the essential nature and purposes of all free governments, and is inherent in the subject itself, and implied in all definitions of "taxes" or "taxation." [3]

On the other hand, Father Parsons correctly sets forth numerous instances wherein Congress had so legislated on *temporal* matters that public funds raised by taxation have been distributed under the NYA Act, the so-called G. I. Bill of Rights, the Mead Housing Act, the Lanham Act, the School Lunch Act, and many more.

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[3] 61 C.J. 89.

Pursuing this advantage, Father Parsons tentatively advances the proposition that juridically there should be no objection to the support of parochial schools from public funds raised by taxation.

As such legal philosopher he is far in advance of the present state of American law. Nevertheless his arguments could meet with approval by the followers of the sociological school of jurisprudence, and one or more of the interests in this regard which he champions may well be secured by law in the future. But such claims, if seriously pressed at the present time, would undoubtedly provoke heated controversies. A more lawyer-like approach must be made in such controversies than has heretofore been made.

The reviewer submits an appendix of ten jural postulates as bases for *rationes decidendi* by federal and state courts in these and other controversies over spiritual and temporal matters, and for setting forth the metes and bounds of the field of jurisdiction for Congress and state legislatures.[4]

*Daniel E. O'Brien.**

APPENDIX

CHURCH AND STATE
JURAL POSTULATES

JURAL POSTULATE I. Churches, in the sense of religious societies, with legislative, executive and judicial departments, must be able to assume that their jurisdiction over their members, and over those who have consented or subjected themselves to the exercise of jurisdiction over them either before or after the exercise of jurisdiction, in purely spiritual matters and in temporal matters bound to spiritual matters, is exclusive of the jurisdiction of the States in which the Churches are located.

JURAL POSTULATE II. States must be able to assume that their jurisdiction over all persons within the territory of the State, all persons domiciled in the State not present there, all persons who have consented or subjected themselves to the exercise of jurisdiction over them, either before or after the exercise of jurisdiction, in temporal matters not bound to spiritual matters, is exclusive of the jurisdiction of Churches.

> A nation recognized as such by the law of nations has jurisdiction over its nationals, although not present within the territorial limits of the nation.
>
> A church has jurisdiction over members wherever present.

JURAL POSTULATE III. Churches organized with legislative, executive and judicial departments must be able to assume that their jurisdiction over immovable things, in spiritual matters, is exclusive of the jurisdiction of the State in which the Churches and said immovable things are located.

JURAL POSTULATE IV. States must be able to assume that their jurisdiction over immovable things within the State in temporal matters, not bound to spiritual matters, is exclusive of the jurisdiction of Churches.

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4 "I esteem it above all things necessary to distinguish exactly the business of government from that of religion, and to settle the just bounds that lie between the one and the other." Locke, *A Letter Concerning Tolerance* 39 (1689).

* Member of the California Bar.

JURAL POSTULATE V. Churches organized with legislative, executive and judicial departments must be able to assume that their jurisdiction over chattels, in spiritual matters, is exclusive of the jurisdiction of the State in which the Churches and said chattels are located.

JURAL POSTULATE VI. States must be able to assume that their jurisdiction over chattels within the States, in temporal matters not bound to spiritual matters, is exclusive of the jurisdiction of Churches over said chattels.

JURAL POSTULATE VII. Churches must be able to assume that they may control for the advancement of religion an adequate amount of property, which they have acquired under the existing social and economic order, without restriction by the State.

JURAL POSTULATE VIII. Ministers of Churches must be able to assume that they may acquire from the members of their Churches voluntary contributions for their decent support under the existing social and economic order, without restriction by the States.

JURAL POSTULATE IX. Ministers of Churches must be able to assume that they may advance their religion, by preaching their doctrines among their own members and *consenting* non-members, without restriction by the State, except in those cases where the acts or words of the ministers have a tendency to disturb the public peace, corrupt the public morals, damage the social welfare, or imperil the integrity of the State.

JURAL POSTULATE X. Members of Churches must be able to assume that they may exercise their religion within their own religious societies, without restriction by the State, except in those cases where their religious activities have a tendency to disturb the public peace, corrupt the public morals, damage the social welfare, or imperil the integrity of the State.

THE JURISPRUDENCE OF INTERESTS. Selected Writings of Max Rümelin, Phillipp Heck, Paul Oertmann, Heinrich Stoll, Julius Binder, Hermann Isay. Translated and Edited by M. Magdalena Schoch. With an Introduction by Lon L. Fuller. Cambridge, Massachusetts: Harvard University Press, 1948. 330 pages. $5.00 (20th Century Legal Philosophy Series: Vol. II).—It is quite appropriate that this volume on *Interessenjurisprudenz* should follow that of Kelsen in this important philosophy of law series. Kelsen is not only a positivist but an idealist in his emphasis on the importance of concepts and norms. The school of jurists, which grew up, for the most part, around the University of Tübingen, and which holds that law is a product of interests and exists for their protection, is also idealist, in the philosophical sense, to the extent that it treats concepts as entities. It is critical of the Kelsen position, however, in that it rejects the Kelsen method of deducing legal rules from concepts postulated as norms. The Tübingen school is much more realistic in its emphasis on the practical application of judicial decisions as the significant ground for legal study.

In fact there is much in the writings of this Tübingen group which sounds very familiar to an American who is aware of Mr. Justice Cardozo's deliberations about the judicial process or Dean Pound's discussion of the ends of law. It is the basic thesis of these writers, especially of Heck, that law is a struggle for the protection of interests. The view that law is a product of interests is stressed in opposition to that of the school which prevailed in Germany during the formulation of the Code, which contended for the accurate definition of legal concepts and the derivation of legal rules from them. The thesis that legal rules precede legal concepts instead of being caused by legal concepts developed

largely as a result of Rudolph von Ihering's theory that the determining factor in law is its purpose or end rather than its origin or form. Since Ihering is looked to as the exponent of the basic ideas which were expanded by the Tübingen School into a teleological method, and since Ihering's influence on Roscoe Pound is well-known, it is not surprising to find that *Interessenjurisprudenz* in Germany has much in common with the so-called sociological school of jurisprudence in America.

The importance of this debate about theory becomes apparent whenever a judge is called upon to decide a case in which no precise rule is to be found in a code, statute, or sequence of decisions. In such cases the question is not only the power of judges to make law by filling in the gaps but also whether judges are limited in their interpretative function by current legislation only, by earlier legislation, or simply by their own self-restraint. The question also may lead into the whole theory of government since it asks whether the judiciary is subordinated to the legislature or vice versa in the authoritative determination of the law.

One of the striking things this book illustrates is the seriousness of the jurists in wrestling with their theoretical problems and their temerity in trying to solve, without any help from the philosophers, questions which have been the subject of philosophical speculation for centuries. In this book, for instance, Phillipp Heck considers concepts as entities, a view which has given rise to one of the most bitterly debated controversies in the history of philosophy, namely that between the conceptualists and the realists, particularly during the period when scholasticism was considered to be in decline. If it could only be brought home to the lawyers that the solution of some of their most practical problems could be aided by an adequate knowledge of philosophy, and if it could be made clear to contemporary philosophers that the law is deserving of their most careful attention, much could be gained in the advancement of judicial wisdom.

This book, bringing into focus as it does, some of the most pressing problems confronting German jurists in the period just preceding World War II, is a most valuable addition to legal philosophy in America. Its manner of presentation, by means of which short but well rounded-out articles expressing divergent views of representative exponents of the theory of *Interessenjurisprudenz* are presented as if in debate with one another, is most effective in making the various aspects of the theory known. It must have taken a careful as well as an extensive reading of much related juristic writing to have resulted in such a satisfactorily chosen sequence. The fact that the articles are all comparatively recent, having been published between 1930 and 1934, adds to their value for present day readers. The Committee was indeed fortunate to have the services of Dr. Magdalena Schoch, first woman professor on a German law faculty and afterwards a member of the District of Columbia Bar, to coordinate the ideas of both legal systems in this translation in such a way as to show that jurists under both civil and common law systems have common theoretical problems.

As in every philosophy there is much in the Jurisprudence of Interests that is acceptable because of its approximation to truth. As in most philosophical systems, however, there are exaggerations or overemphases, such as considering legal rules as commands, which are unwarranted and lead to error. To say that this book is a valuable contribution to the literature of the philosophy of law in America does not imply acquiescence in all its tenets, nor even in its fundamental premises. On the contrary, in acclaiming the Association of American Law Schools for making available, through the scholarship of its Committee on the Philosophy of Law, this compilation and translation of the work of such an influential school of jurisprudence, there is intended to be conveyed nothing more

than an appreciation of the profundity of the problems presented in the hope that American jurists may be stimulated to offer solutions which will improve upon those reached by these serious-minded German professors.

*Miriam Theresa Rooney**

THE ROOSEVELT COURT. By C. Herman Pritchett.[1] New York: The Macmillan Company, 1948. 324 pages. $5.00.—Professor Pritchett contributes a book whose appearance is most propitious. At a time when a hue and cry for the scalp of the Supreme Court has been raised by extremely vocal members of the bar and by the grumbling dissenters of the more reactionary laity, the author has come forth with a brilliant, well documented, objective, and thoroughly absorbing analysis of the present Supreme Court. His work, which studies the present Court from the appointment of Justice Black in 1937 to the 1946-1947 term, is concerned with the plight of a liberal Court in a conservative day. Indeed, the liberal Court, having finally come into its own, has broken ranks. The Roosevelt appointees who were once derisively referred to as a "rubber stamp" Court have taken to intermural disagreement which at times assumes the noisy nature of the melee among the Kilkenny cats. The Roosevelt "puppets" have refused roles of judicial cats' paws and have become, instead, the most non-unanimous and independent minded Supreme Court in our history.

This lack of unanimity is the grist for Professor Pritchett's mill. It is through acute examination, dissection, and appraisal of the non-unanimous opinions of the present Court that the author endeavors to seek explanations for the voting behavior of the incumbent justices. This reviewer must agree with Professor Pritchett that the patterns of disagreement, which split decisions reveal, reflect not only individual judicial preferences as to public policy, but also the conflicts within our whole society as we wrestle with the tremendous problems of an integrated, industrial, atomic age.

The author has compartmentalized the broad range of problems with which the Court must cope into the general categories of economic regulation, including taxation and commerce; civil liberties; state and federal criminal procedure; administrative law; and labor law. These broader fields are further subdivided into appropriate smaller topics. Moreover, the author has supplemented his analysis by inserting interesting statistical data on the division of judicial opinion. This technique serves to canalize his scholarly appraisals within the legitimate and well marked boundaries of statistical objectivity. Through these techniques of inquiry we see a liberal Court with a left wing (Black, Douglas, Murphy and Rutledge) believing in a philosophy of judicial self-restraint in passing on questions of the constitutionality of legislative action, but believing in close judicial inquiry into attempted legislative regulation in the field of civil or political liberty. On the other hand, we can now clearly discern its right wing (or if you wish) the right side of the left wing (Frankfurter, Jackson, Reed, Vinson, and Burton) which, while also laying claim of heir to the Holmes tradition of judicial self-restraint, wishes to apply it not only when appraising legislative regulation of property rights, but also when reviewing alleged legislative deprivations of civil liberties.

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It is now the liberals who exert the judicial power, conceived by Marshall in *Marbury v. Madison* and sired by Taney in the *Dred Scott* case in an attempt to protect personal rights against legislative infringement, where conservatives of another day had used it to safeguard property interests from legislative regulation. We ask in unison with Professor Pritchett: is judicial self-restraint a means rather than an end? And we concur in what seems to be his answer. The Roosevelt Court has expanded its power "in the only direction where such expansion is compatible with a democratic constitutionalism—in the direction of safeguarding the right to believe, to speak, to assemble, to practice one's religion, to have a fair trial." The author has some fears that the Court left-wingers sometimes become unreasonable in their paternal efforts at protecting political liberty. He warns that the philosophy of human freedom is a heady brew. This reviewer feels, however, that those members of the Court who are called upon to imbibe its powerful ambrosia will continue to display the judicial moderation which allows the free play of the forces of political liberty without inventing the twin debilitations of anarchy or authoritarianism.

*Alfred Long Scanlan**