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# Book Reviews

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# BOOK REVIEWS

THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES. By C. Herman Pritchett. New York: The Macmillan Company, 1948, Pp. 314, $5.00.

LIONS UNDER THE THRONE. By Charles P. Curtis, Jr. Boston: Houghton, Mifflin Company, 1947. Pp. 361. $3.50.

THE NINE YOUNG MEN. By Wesley McCune. New York: Harper & Bros., 1947. Pp. 293. $3.50.

The Supreme Court of the United States performs essentially a political, governmental function. This was not entirely true prior to the Act of 1925,[1] but after that date the Court could choose the cases it would hear. That choice has rightly been directly toward matters of broad public concern, such as civil liberties, the extent and exercise of state and federal powers in the regulation of business, and social and economic services to the people.

The idea that the Court is only a court of law, interpreting absolutes as constitutional and legal principles, is one of the great popular myths of our time. I say "popular," because those who have been studying the Court's work, past and present, have, perforce, long since been disabused of that idea.

And, in fairness, the Court does not generally act on that myth. The difficulty is that, as Charles Curtis says, this popular fiction "heads the court in the wrong direction. It backs into the questions it ought to face."

But what inquiry do we face? It is the accommodation of the Court to the needs and wishes of our representative democracy. No such adjustment existed at the time of the *Dred Scott*[2] and *Hoosac Mills*[3] cases. The people wanted slavery abolished and federal aid to agriculture granted. They got it in each instance a few years later.

This needed accommodation must be the result of an enlightened legal tradition and of a general understanding by the citizenry of the history and functions of the Court. With either absent, both the Court and the people suffer. These books undertake in variant degrees to study the Court in the perspective of these factors. They are worth while to the extent that they develop them.

Pritchett studies the personal and political influences and the voting behavior of the justices appointed since 1937. An associate professor of political science at the University of Chicago, he is concerned with "the social and psychological origins of judicial attitudes and the influence of individual

1. 43 STAT. 938 (1925), 28 U. S. C. A. § 347 (1928).
2. Dred Scott v. Sanford, 19 How. 393, 15 L. Ed. 691 (U. S. 1857).
3. United States v. Butler, 297 U. S. 1, 56 Sup. Ct. 312, 80 L. Ed. 477 (1936).

predilections on the development of law." This ambitious purpose is not achieved in this book. Much of the material is an historical narrative of decisions in the past two decades. Perhaps the most interesting items are the novel tables and charts which Pritchett uses to indicate his estimates of the positions of the justices in important cases where dissents were registered. He traces what he considers to be the formation and disintegration of judicial blocs in the Court, as well as changes in individual attitudes. His analysis indicates that the closest alignment into left- and right-wing blocs existed during the years of greatest pressure, 1938-1940. After that, as pressure relaxed, agreement-relationships within the left-wing began to diminish, and extremes of agreement and disagreement among the justices began progressively to disappear. The bloc on the left has varied, but now includes Black, Douglas, Murphy and Rutledge. On the right in most cases are Vinson, Jackson, Frankfurter and Burton, with Reed being closer to them than to the left.

But Pritchett aims further. He undertakes by charts to indicate some judicial motivations and values in terms of which the justices have been making their decisions. He graphs judicial alignments in terms of five general subject-matter areas: economic regulation, civil liberties, crime and punishment, administrative agencies and labor. From these charts he draws several conclusions. He thinks that Douglas and Black, for example, are more positive libertarians in state than federal cases. Murphy "stresses individual rights more than economic issues." The fundamental division is "between conflicting systems of preference on matters of social and economic policies." And so on.

But none of these are new. Anyone who has been reading the Court's decisions in the past decade would probably give similar opinions without the aid of charts and graphs. The validity of such opinions is another matter; it is impossible to categorize individual justices. And the author implicitly admits this when he notes the disintegration of voting blocs after 1941. Moreover, such a mechanistic approach as a basis of opinion is simply a dissertation on an opinion. Yet in fairness Pritchett says these devices only "offer some clues" and are "relatively crude tools." We may all agree that, after the recent national elections, public-opinion polls, as well as judicial polls, are poor devices for predictions.

Chapter 10 is an interesting essay on "the plight of a liberal court." Admittedly, American liberalism has failed to produce a "consistent" social and economic philosophy. But consistency may not be the virtue. The liberal judicial tradition inherited by the Roosevelt Court was a divided one. Holmes believed in judicial self-restraint to effectuate the popular will, but Brandeis was more of an activist. He believed in using liberalism to motivate progressive goals of public policy. Both were realists. But both always considered consistency in pragmatic analysis more important than in the doctrinaire sense.

Though it rejected old absolutes, the irony was that the Roosevelt Court

adopted its own absolutes in the field of civil liberties. Save these, basic decisions on most policy questions have been entrusted to the institution directly responsive to popular control, the Congress. Pritchett fears that the "heady brew" of the Bill of Rights is leading the Court into an "explosive mixture which may get out of control of the court, as in the picketing cases." Perhaps a more pertinent criticism would be that the Court mistook its governmental function for that of a spiritual guide under the First Amendment to all of our governments. The assumption of the *Gitlow* case [4] should never have been developed into the cliché of the Los Angeles Times case.[5] For better or worse, the Court is now father confessor to all communities in the Nation.

Wesley McCune, of Time Magazine, in his "The Nine Young Men," is more interested in what one radio commentator calls "the human side of the news." He narrates a number of delightful anecdotes about members of the Court. And he writes of the past ten years with the verve and perspective of a good newspaper man. This book will be of special interest to the lay reader, because of its sprightly style and the brief histories of significant events.

The real atomic effect of Roosevelt's 1937 plan to reorganize the Court was to change its attitude on federal powers. Chapter 3 of this book is the only place where I have seen a complete account of that memorable battle in Congress and out of it.

Judge Black is one of the most maligned men on the Court, and one of the ablest. It is a pleasure to see an objective and fair estimate of the great value of his work. He is an affirmative justice, never neutral in his impacts, comparatively unincumbered by professional abacadabra. Charles Beard has said in "The Republic" that Black's opinion in *Chambers v. Florida*[6] "will ring with power as long as liberty and justice are cherished in our country." And of equal value are his contributions to the definition of Congressional power as to property interests under the Fourteenth Amendment.

Equally good are perceptive biographical sketches of the other justices, and of the "feud" between Jackson and Black. McCune thinks Jackson is the one primarily at fault, for reasons he discusses at some length. McCune has an interesting list of the times the present Court has reversed itself in the past ten years, which supplements Brandeis' list in his dissent in *Burnet v. Coronado Oil & Gas Company*.[7] The verve and enthusiasm with which this book is written make it unquestionably the most interesting of the three for the non-professional reader.

Curtis is basically a constitutional philosopher, with an informal, clear style and a gift for irony. All of these he uses with effect in his "Lions Under

4. Gitlow v. New York, 268 U. S. 652, 45 Sup. Ct. 625, 69 L. Ed. 1138 (1925).
5. Times-Mirror Co. v. Superior Court of Calif., 314 U. S. 252, 62 Sup. Ct. 190, 86 L. Ed. 192 (1941).
6. 309 U. S. 227, 60 Sup. Ct. 472, 84 L. Ed. 716 (1940).
7. 285 U. S. 393, 52 Sup. Ct. 443, 76 L. Ed. 815 (1932).

the Throne." His book is on a higher intellectual and literary level than the two preceding volumes. It is not a history of the Supreme Court or of the Constitution, except incidentally. It is a group of interrelated informal essays on the functions of the Court and the Constitution in our system of government. Although his ideas are not new, they are stated here more felicitously than anywhere else I know. And they should be restated whenever possible. Conceptualism and the Constitution have too often drifted off into the dream world of the now defunct Hays Office, or, more locally, into the censorious animadversions of Memphis' Mr. Binford.

Curtis urges a pragmatic interpretation of the Constitution. Its authors meant no more than what they said, and "what they left unsaid, they left open for us to decide." Within its broad framework, the Constitution should permit a continuing expression of the popular will. The Court may be the guardian of the Constitution, but the question in the old song is here apropos: "Who's taking care of the caretaker's daughter when the caretaker's busy taking care?"

> "The Court is operating with mirrors. As it approaches the image of this reasonable being, the Justices find that they are approaching themselves, and that the doubts they ascribe or impute to him are really no more than their own. In that case, outside of a purely conventional discipline, the phrase 'beyond rational doubt' comes to mean only a degree of the intolerable, beyond what Holmes once referred to as our Can't Helps, across the no man's land of indifference, and on until they are up against the blind wall of We Can't Stand It." [8]

Curtis points out that the Court is "a tenant in sufferance." Its appellate jurisdiction is controlled by Congress, and the number of its members is fixed by Congress, which can also control enforcement of its judgments. The value of the Supreme Court lies in the wisdom and self-restraint of its justices. And these latter attributes must be exercised in two main fields.

The "federal problem" is to reconcile national government with local participation, and political result with the economic power of business and labor.

But we also recognize under the Constitution certain fundamental, natural rights in man as an individual, which no government may abridge or infringe upon. And we expect the Court to see to this. This task "calls for something more than statesmanship, almost priestcraft." Since the justices deal with such absolutes, Curtis says we are inclined to impute "something ultimate and absolute to their opinion." And he may be absolutely correct, if conventional legal thought is any criterion. As lawyers, we may expect a particular principle in torts or contracts, for example, to be predictable, but we should not expect that to be true in constitutional law. The large mass of cases before the Court in the past decade "have had no reference whatever to ordinary lawsuits between individuals."

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8. CURTIS, p. 31.

It is perhaps regrettable that we do not criticize the Court enough. Curtis has an extremely interesting suggestion in this respect:

> "The function of the bar on these public questions is sometimes not fully understood. The bar not only aids the Court by arguing the issue before it. The bar is a special set of experts retained by the public at large to read the Court's opinions and expound them to the people. The people not only have a right to criticize the Court. They have professionals to help them do it. It is a double pity when the bar is so eager to defend the Court's prestige that it goes back on its public clients." [9]

Constitutional doctrines may be fact or fancy, but most often they are the latter. As Judge Learned Hand once said, "it always gives an appearance of greater authority to a conclusion to deduce it dialectically from conceded premises than to confess that it involves the appraisal of conflicting interests." [10] Abstractions are instruments with which to find one's way about the world, being popular signposts. But Curtis believes that they are no more than this.

With these premises, the author briefly examines the personal, biographical background of each of the justices of the past fifteen years, and then makes an analytical study of the facts, in an informal manner, with reference to the decisions in a number of fields, such as railroad pensions, the N. R. A. and government regnlation of business, the A. A. A. and regulation of agriculture, the Guffey Coal Control Act and the coal industry, and minimum wages. All of these have reference to the "old court and new deal."

He then discusses with considerable verve the "new court." In place of the substantial modifications made by the present Court upon the principle of inter-governmental tax immunity, and the admittedly inconsistent stands taken by the majority, Curtis thinks, for example, that the proper solution would be that recommended by Justice Black in the *Northwest Airlines* case.[11] The Constitution gives to Congress the power to regnlate commerce among the states, and, until Congress does that the Court should not try to formulate rules to meet national problems arising from state taxation which affects interstate commerce. He recommends that we adopt John Dewey's philosophy in this respect: "If it won't work, call in Congress."

Other illustrations used by the author to indicate the difficulty in an opposite approach are narrated under chapters entitled "Delegated Judicial Legislation" and "Personal Liberties." He is one of the few who have seen the irony in the position of Justice Black with reference to the due process clause of the Fourteenth Amendment. Certainly its extension to state legislation in the field of civil liberties under the First Amendment is just as unwarranted as was its extension to the protection of property rights. Nor is

9. CURTIS, p. 67.
10. Spector Motor Service, Inc. v. Walsh, 139 F. 2d 809, 823 (C. C. A. 2d 1943).
11. Northwest Airlines, Inc. v. Minnesota, 322 U. S. 292, 301-02, 64 Sup. Ct. 950, 88 L. Ed. 1283 (1944).

it justified by Black's explanation that the First Amendment is more specific than the Fourteenth." [12]

But what is the scope and extent of the Court's power? Here a pragmatic approach demonstrates the strength and weakness of the author's rationale. Of course it is limited by what Judge Stone once referred to as the Court's own self-restraint. It must remember, not forget, that it is a part of our government, whose job is to cooperate with the Congress and the Executive. And everything it does must be done from inside the legal tradition; this despite the fact that for most purposes it is not a court of law. Then, in order to operate democratically, the Court must not only be wise but be prudent. The justices "must keep what is called their personal predilections as far from them as they can." They must have "respect for the country's desire to have its own way, and that is an act of faith, not of will."

The system demands too much of any judge. The Court's success is in proportion to the degree to which the Court meets these standards. Certainly Curtis is correct in saying that the Court must never forget that it is dealing with our convictions and our major premises.

WILLIAM N. ETHRIDGE, JR.*

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A DECLARATION OF LEGAL FAITH. By Wiley Rutledge. Lawrence, Kansas: University of Kansas Press, 1947. Pp. 82. $2.00.

IN persuading Mr. Justice Wiley Rutledge to inaugurate the Stephens Lectures and in setting the time for those lectures in December, 1946, the University of Kansas School of Law gained for us an invaluable footnote to the decision of the Supreme Court in *Prudential Insurance Co. v. Benjamin*,[1] as well as inspiring a moving exhortation to faith in democracy and in the ultimate achievement of justice between man and man. The lectures, using the commerce clause as exemplifying the strength and adaptability of the federal principle, give us the benefit of an analysis and synthesis of ideas governing great court personalities in their interpretation of the clause which might otherwise have perished in discarded notes remaining after the final draft of the opinion in the *Prudential* case had been prepared.

This is not to say that the opinion itself is not a lucid and persuasive exposition of the principles applied in settlement of that controversy. Some important fruits of painstaking research and rigorous analysis of decisions could be subsumed in the opinion, however, under the cryptic phrase, "the

12. Federal Power Comm. v. Natural Gas Pipe Line Co., 315 U. S. 575, 600-01, n. 4, 62 Sup. Ct. 736, 86 L. Ed. 1037 (1942).

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1. 328 U. S. 408, 66 Sup. Ct. 1142, 90 L. Ed. 1342 (1946).

decisions are not in point." It was unnecessary, for example, in rejecting arguments of counsel for Prudential utilizing the line of cases stemming from *Gibbons v. Ogden*[2] and running down through *Welton v. Missouri*[3] and its sequels, to synthesize the cases which construed the "silence of Congress" as outlawing state action with those which rested such action on the commerce clause operating independently.

Unofficially but nonetheless usefully, Justice Rutledge here has given us this important synthesis. He has also said here, explicitly rather than by implication, that the decisions are expressly repudiated which have seemed to further the assumption that Congressional power was of the same proportions in the sustaining or forbidding of state action whether it consisted of a judicial interpretation of Congress' dormant power or an express legislative act.

Perhaps the further exposition of the *Prudential* case and its implications, of which we are the beneficiaries through these lectures, was prompted to no little extent by a deeply urgent desire to deal a body blow to the "versatility [of] argument [which] inverts state and national power, each in alternation to ward off the other's incidence . . ."[4] and which would "outlaw all power in the Federal system." (P. 65.)

In this respect the *Prudential* case is so classic in the gamut of contentions which counsel run in attacking both the state tax involved and the Congressional act which validated it as to warrant noting them again here.

The state of South Carolina, so counsel argued, was powerless to impose a tax on foreign insurance companies because the commerce clause "of its own force" precluded taxes discriminatory against interstate commerce; furthermore, the McCarran Act,[5] which authorized the states to tax insurance, had no force or effect to accomplish this result since Congress was powerless to extend state power beyond the limits set by the commerce clause operating "of its own force." Counsel went further, in hedging against possible loss of the argument as to the effect of the commerce clause, to contend that the McCarran Act was also violative of due process, of the requirement of uniformity in federal taxes, of the limitation on Congress to draft its own legislation, and of the exclusive power of the states, anchored in the 10th Amendment, to tax for purposes of raising revenue for their own use (the latter two contentions on the theory that Congress had adopted the tax as its own).

The juxtaposition of the argument that the tax was beyond the power of the states to enact because discriminatory against interstate commerce, with the argument that the McCarran Act was a Congressional attempt to tax for a purpose reserved to the states, thus bringing the Federal-State cooperative

2. 9 Wheat, 1. 6 L. Ed. 23 (U. S. 1824).
3. 91 U. S. 275, 23 L. Ed. 347 (1876).
4. Prudential Ins. Co. v. Benjamin, 328 U. S. 408, 412, 66 Sup. Ct. 1142, 90 L. Ed. 1342 (1946).
5. 59 STAT. 33, 15 U. S. C. A. § § 1011-15.

effort to a neat "fall between the stools," obviously aroused Justice Rutledge. So also must have been the effect of the bland non-recognition of that line of cases which encompasses the second *Wheeling* case[6] and In re *Rahrer*.[7]

We have as a result, crypically in the opinion and more at length in the lectures, a dissertation on the limitations of the principle that the commerce clause has operative effect "of its own force" and an instructive dissection of the cases about which Thomas Reed Powell wrote a biting little piece he called "The Still Small Voice of the Commerce Clause."[8] Justice Rutledge finds more than humor in the distinction which Powell has described as Congress being "silently silent" and "silently vocal." While characterizing the distinction between the implied constitutional prohibition, the "of-its-own-force" principle, and a prohibitory inference drawn from the silence of Congress as largely verbal, he nonetheless finds the latter has often served us better than the less flexible implied constitutional prohibition. Coupling it with the ideas contributed by Mr. Justice Curtis and his majority in *Cooley v. Board of Wardens*[9] as to some matters of commerce requiring national uniformity and some for which local regulation will suffice until Congress shall have moved into the field, Mr. Justice Rutledge finds it eminently more useful as a working hypothesis than the pervasive exclusiveness of Marshall's implied constitutional prohibition. Each, however, is accorded its role; Marshall's where state action is identifiably discriminatory and constitutes a real and threatening danger to interstate commerce; Taney's and Curtis' where there is good faith local regulation of a matter on which Congress has not yet taken pervasive action.

That these useful hypotheses, in Congress' silence, should continue as limitations when that silence is broken by legislative act, either to vest power in the states to discriminate tax-wise against interstate commerce or to provide for its regulation in other ways, is of course a frontal attack on the existence of power in the federal system to work out amicable solutions to the present-day complexities of interstate commerce control. It is so recognized by Mr Justice Rutledge.

In these lectures Mr. Justice Rutledge is declaring his faith in the intelligence of the Court to piece out hypotheses which will adequately provide such solutions and will preserve unity as well. He notes that Marshall's sweeping generalizations worked well at a time when we were emerging as a new empire, with compelling need for the strength which pervasive federal control

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6. Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421, 15 L. Ed. 435 (U. S. 1856).
7. 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572 (1891).
8. 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 931 (Ass'n Am. Law Sch. 1938), reprinted from NAT. TAX ASS'N PROC. 1937, 337, 338-39.
9. 12 How. 299, 13 L. Ed. 996 (U. S. 1851).

internally could give us.[10] But Taney's later willingness to accept hypotheses which would weaken to some degree that internal strength was equally needful in a period of phenomenal industrial expansion fraught also with intersectional tensions.[11] The adaptability which permits changing hypotheses as to the meaning of the commerce clause as new elements in our federal system have become relevant and others have faded in significance is to Rutledge of the warp and woof of the American dream. John Dewey would no doubt admit such characterization of Marshall and Taney's conceptions to his definition of ideas as "anticipated consequences" . . . of what will happen when certain operations are executed under and with respect to observed conditions." [12] Today's Court is of course quite candid about the fact that it is doing just this. As Mr. Justice Rutledge expresses it, "Larger emphasis is put on scrutiny of particular facts and concrete consequences, with an eye on their practical bearing for creating the evils the commerce clause was designated to outlaw. . . . [L]ess stress is placed upon large generalizations and dogmatisms inherited from levels of debate time has lowered. More and more the controlling considerations of policy implicit in thinking, judgment, and decision are brought into the open." (P. 70.)

This is a declaration which some no doubt will find most disturbing. We treasure too highly a daguerreotype of the Court unerringly applying immutable principles not to view with a somewhat jaundiced eye a Court which explicitly takes into account "concrete consequences" in its decisions. Faith in the Federal principle as Mr. Justice Rutledge sees it being judicially administered is not easy of attainment.

M. G. DAKIN *

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10. De Tocqueville has expressed what Marshall no doubt anticipated in the way of consequences. "[A]11 commodities and ideas circulate throughout the Union as freely as in a country inhabited by one people. Nothing checks the spirit of enterprise. Government avails itself of the assistance of all who have talents or knowledge to serve it. Within the frontiers of the Union the profoundest peace prevails, as within the heart of some great empire; abroad it ranks with the most powerful nations of the earth; two thousand miles of coast are open to the commerce of the world; and as it possesses the keys of the globe, its flag is respected in the most remote seas. The Union is as happy and as free as a small people, and as glorious and as strong as a great nation." DEMOCRACY IN AMERICA 163 (1899).

11. De Tocqueville envisioned the possibility of events which in Taney's time loomed on the horizon and appraised thus their centrifugal power: "[I]f the Federal law were to clash with the interests and prejudices of a State, . . . and all the citizens of State were aggrieved at the same time . . . they would instinctively unite in a common defense, and they would derive a ready-prepared organization from the share of sovereignty which the institution of their State allows them to enjoy. Fiction would give way to reality, and an organized portion of the territory might then contest the central authority." *Id.* at 167.

12. DEWEY, LOGIC, THE THEORY OF INQUIRY 109 (1939).

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THE PAPERS OF WALTER CLARK: 1857-1901. Vol. I. Edited by Aubrey Lee Brooks and Hugh T. Leffler. Chapel Hill, N. C.: University of North Carolina Press. 1948. Pp. xv, 607. $6.00.

THE Papers of Walter Clark, late Chief Justice of North Carolina, give the reader a clear insight to the fundamental principles which controlled his personal and official life. The book abounds in numerous personal letters addressed to him and from him to individuals in every walk of life, his father and mother and many distinguished men of North Carolina; his public addresses, and articles in various periodicals, wherein he gives expression to his conviction that victory in life is not to the indolent, but to those who fight for it with an abiding faith in the living God; that government is unjust and tyrannical when due regard is not given to the rights and privileges of the common man. To him there was no such thing as free government in which "life, liberty and the pursuit of happiness" was guaranteed, if the power to govern was under the domination of corporate wealth.

The letters are often disconnected and some of them have little meaning. But now and then there is revealed an attitude of mind and heart which commands great admiration. This is true even though one is not in agreement with the writer. From early youth it is clear that fate had mapped a great destiny for him. The foundation of his life could not be undermined by time-servers and opportunists. Life was great from the beginning. As a student in Hillsboro Military Institute, age 14, he was often admonished by his mother to be steadfast in prayer to God and be "respectful to your teachers." While due consideration was given to matters of faith and religion, and his scholastic standing was high, he received many "demerits." His mother writes, "I feel so troubled about your getting so many demerits (and that in so short a time)." He left school at the age of 17 to become a soldier in the Confederate Army as a First Lieutenant; joined Lee's Army to see the first battle of Manassas; participated in the capture of Harper's Ferry, and was "in the forefront of the battles of Sharpsburg and Fredericksburg." He graduated from the University of North Carolina before he was 20 years old and later returned to his regiment, leading his men with great courage at Bentonville, which was the last major battle of the Civil War. General Hoke writes of Major Walter Clark and his regiment as follows:

"At Bentonville they held a very important part of the battlefield in opposition to Sherman's old and tried soldiers, and repulsed every charge that was made upon them. When he returned home he found nothing but the land. Former slaves were wandering aimlessly about. The invading armies had burned the mansion, its beautiful gardens had disappeared."

But the great life was still before him, the law, the high Court of his native state which he was destined to occupy with distinction.

Every true Southerner in reading these letters will be impressed with the close relationship which existed between this young Confederate officer (age 17) and his body servant "Neverson." When the going was hard and many soldiers were hungry and barefooted, he was mindful of his faithful servant.

The career of Clark finds its counterpart in the late Justice Holmes, who was himself an aristocrat, a man of letters, a soldier in the Union Army, and later, like Clark, a great jurist, and like him also a great liberal. Neither was embittered by adversity; they were both impatient with wrong, especially with the grant of governmental privileges to special interests.

It is difficult for one to think that Clark was at all sympathetic with the institution of slavery. He fully realized that the question was settled once and for all in the great forum of war. This appears from the following expression: "This is an age of progressive ideas and mighty changes. The opinion of a life time must now vanish in a day. The times change and we must change with them." He refused to be overwhelmed by the numerous problems confronting the South. The conditions demanded a changed attitude on the part of the ruling classes. He insisted that the South must rid itself "of the dead body of slavery and with it dispose of the perplexing problem of negro suffrage and negro equality forever." In writing about the future of North Carolina, he says, "She is penniless but not poor," considering her great natural wealth. "The South needed laborers to build its future greatness, but the negro could not be made to subserve the grand purpose." There is not so much as an intimation, however, by him as to how the question of "negro suffrage and negro equality" is to be solved.

One interesting chapter in the book is his fight with President Kilgo of Trinity College, now Duke University. While the issue between them was of minor importance, Clark seized the opportunity (without success) to have Kilgo removed because he was morally unfit to be the head of a religious school. In his speech to the Board he accused Kilgo of being a "sycophant" and servant of the "cigarette trust," glorifying the late Washington Duke of the American Tobacco Company as being superior to anybody in North Carolina. The natural inference to be drawn is that this great church school (Methodist) should not be endowed with "tainted money." The secret of his grievance against Kilgo is found in the face that the latter was a gold standard advocate in 1896 and made speeches against Bryan, who was Clark's candidate for Presidency, and whose paramount issue was free and unlimited coinage of silver at 16 to 1. He quoted Kilgo as having said in a speech in Caswell County, North Carolina, "That the proper cure for free silver men was the application of 16 lashes on each back." This was evidently too much for Clark. Continuing his remarks before the Board, he quoted one of the "ablest ministers" in the church as saying:

"I believe every charge you make against Dr. Kilgo. The basis of his support is the recognition of the American Tobacco Company as a religious institution, and the canonization of the Dukes before they die—an advanced step as compared with the papacy."

It must be admitted that beyond his personal grievance against President Kilgo, due in part to their economic views, Clark was a consistent foe of entrenched wealth. We find him advocating the election of Federal Judges because he thought many had been appointed at the behest of the "money power." It was for the same reason he favored the election of U. S. Senators by popular vote. Whether one agrees with Justice Clark's legal philosophy or rebels against it, all must have a profound respect for his intellectual integrity, his sincerity and his intense patriotism.

The Chief Justice was one of the great men of America, forward-looking and courageous, ever the champion of the rights of the underprivileged. As a jurist he had but one lofty ambition, which was to honor the cause of justice. No nobler attribute could be found as a motivating power in the life of any man. It was Ulpian who defined justice as "the constant and perpetual will to allot to every man his due." Dean Wigmore has said, "This is the noblest utterance that is to be found in any of the world's great legal systems."

A. B. NEIL *

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STATE LABOR RELATIONS ACTS. By Charles C. Killingsworth. Chicago: University of Chicago Press, 1948. Pp. 328. $4.00.

THE undertaking of the author to survey the labor laws of all the 48 states arouses immediate admiration and respect. It is no small undertaking to find, to read, to appraise, and draw generalizations concerning the numerous statutes, even though some aid may be had from compilations of state laws now found in various loose-leaf "labor services." Having undertaken the job, the author apparently initiated it by studying and appraising the "voluminous files" at the institution of learning where he was then a candidate for his doctorate degree. It was not the purpose of the author merely to classify and to catalog statutory rules and principles. His purpose was to complete a study of public policy. This he approached historically in his Chapter II, which briefly tells the story of unionism from the post-Civil-War period to our own times.

In summary of the various enactments stimulated by a protective policy, he notes that the statutes studied were intended to eliminate two conditions and their consequential harmful results. The first of these was the inequality

* Chief Justice of Tennessee

of bargaining power; the second was employer interference with efforts of working men to organize. Balanced against these, the author describes certain restrictive policies which developed to protect workers who do not desire to become members of unions, as well as other "primary rights of third parties" with restrictions on picketing, boycotting and similar union activities.

The author studies and compares the provisions of the Wagner Act concerning unfair labor practices of employers with corresponding provisions of the various state statutes, and points out parallels as well as variations and modifictions. In logical pursuance of this theme, he then considers unfair labor practices of employees and unions and compares the rceeintly passed Taft-Hartley Act with relevant state legislation. In this discussion, he weighs specifically prohibitions of violence and similar tactics, statutory treatment of strikes and peaceful picketing, boycotts and anti-coercion clauses, together with some statutes which more directly affect the regulation of internal affairs of the unions themselves.

The author gives much attention and unusually fine analysis to questions concerning "the appropriate unit" and particularly comments on the recent provisions concerning "craft units." Election procedures are studied, the forms of ballots, and the types of runoff elections are analyzed and discussed. In this connection, the much debated problem of court review of certification is fully treated.

Without doubt the meatiest chapter of the book is that entitled, "Conclusions and Interpretations." In this portion of the work, the author demonstrates himself to be a competent thinker on both abstract theories and practical applications of labor laws. Here are offered scholarly and practical comments on some of the most hotly discussed questions now debated in the labor field. For example, he states: "One of the most difficult and complex problems in the determination of employee representatives is that of the appropriate bargaining unit. The craft-unit proviso is a rather inept and illogical effort to solve some of the aspects of this problem. Strictly construed, it is not inconsistent with the encouragement of collective bargaining, but it results in little or no change in the policies of most labor relations boards. Liberally construed, the proviso tends to encourage interunion rivalry and in some cases has resulted in the disruption of long-established relations, to the detriment of stable labor relatons.

"When an election indicates that a majority of employees favor collective bargaining but that no union has majority support, it appears obvious that a runoff election must be held if collective bargaining is to be encouraged. It is difficult to decide which of the choices should be eliminated from the runoff ballot, but any of the possible solutions to this difficulty would be more

consistent with the policy of the protective acts than the indefinite postponement of collective bargaining." (Pp. 255-256.)

As a practical observation, he points out that the various states have been largely impotent to enforce restrictive laws to the present time. His words are:

"It is also possible that practical considerations may alter a decision made on a theoretical basis. The restrictive labor relations laws in operation have proved to be remarkably ineffective. There have been no cases at all under the restrictive clauses (except for test cases) in most of the states with such laws. Only in Wisconsin have the restrictions been applied to unions in a substantial number of cases, and even there unions have certainly not been crushed or, except in a few instances, impeded in their growth. It is obvious, moreover, that unions have not abandoned the tactics and objectives condemned by the restrictive laws." (P. 264.)

Despite the rather dismal picture drawn by the foregoing, he concludes, however, that whatever public policy prevails, state labor relations acts are indispensable. "Even with the broadest possible extension of federal jurisdiction under the constitution," he observes, "many millions of workers would remain outside that jurisdiction." Then he queries, "Why should the federal jurisdiction be stretched to its outermost limits, however, if state agencies can adequately handle the same subject matter?" (P. 265.)

In addition to the text previously described, the author furnishes a lengthy appendix which contains a summary of union regulatory laws other than labor relations passed by the states from 1937 to 1947. He also presents a tabular study of work stoppages due to labor-management disputes from 1934 to 1946. A lengthy bibliography is included, a table of cases cited is furnished, and the work is well indexed.

Much is being written today in the form of statutes and official decisions, books, periodical articles, and newspaper stories on the important currently active and fluid field of labor relations. The book here reviewed is one of the most useful and interesting which have recently come to the notice of the undersigned. It will no doubt be valuable to teachers and students, as well as to personnel managers, lawyers, arbitrators, judges, and legislators.

C. M. UPDEGRAFF *

## BOOK NOTES

DANGEROUS WORDS. By Philip Wittenberg. New York: Columbia University Press, 1947. Pp. 335. $5.00.

ESSENTIALS OF LIBEL. By Paul P. Ashley. Seattle: University of Washington Press, 1948. Pp. 71. $1.50.

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THESE two books were prepared primarily for the journalist (including the one engaged in radio broadcasting), rather than for the lawyer. Both books are concerned with the preventive aspect of the law and instructions on how to avoid the uttering of libel, instead of the problem of when redress can be obtained for a tort already committed. But the lawyer, too, is interested in the preventive aspect of the field. He frequently is called upon to advise the journalist in advance on specific problems and to give general instructions on avoidance of libel. For such purposes he will find these books helpful. They may suggest to him how to phrase his advice so as to make it most meaningful and effective for a layman, and he may find it desirable to prescribe their purchase and reading by his clients.

The Wittenberg book is the larger of the two. It is written in a free style for easy reading. It contains frequent references to holdings in cases, usually setting out the facts and often including quotations from opinions. Yet all this is done in popular style rather than in the form of a legal text. There are no footnotes; only the names of cases are given in the text and a table of cases in the back of the book gives citations to the official reports. There is a table of terms judged libelous, classified according to general nature and arranged chronologically. The index is very complete—perhaps too complete, since it lists every name, every newspaper and other trivia. The Ashley book is accurately described in size (7 by 5 inches) and context by its subtitle, "A Handbook for Journalists." Written in a brief, incisive fashion, it has short chapters and headings for paragraphs so as to make it easy to find any topic. The writing is always phrased in terms suggesting rules of conduct for the journalist. Short indented paragraphs giving illustrations or cautions are helpful. There are no references to cases or other authorities. The index is shorter than that of the other book but more usable for ready reference.

In a newspaper or radio station, the Wittenberg book is most appropriate for general reading to give a broad understanding and general background knowledge; the Ashley book is most appropriate as a constant reference book to be on the desks of the various people handling copy.

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LAW IN ACTION. Edited by Amicus Curiae, With an Introduction by Roscoe Pound. New York: Crown Publishers, 1947. Pp. xiv, 498. $3.00.

THE nature of this book is indicated by its subtitle, "An Anthology of the Law in Literature." Forty-three selections are collected. Accounts of actual trials (*e.g.*, The Trial of John Brown) and relations of historical events (*e.g.*, Judge Jeffreys and the Bloody Assizes), share space with famous trials of fiction (*e.g.*, Bardell v. Pickwick). Arthur Train's Mr. Tutt and Irvin