is always somewhat difficult to evaluate because of the want of any other existing work in the field to compare it with. This is because the first available volume is apt to be either uncritically praised as a monumental effort, the best in its field (a safe statement when there is no other), or hypercritically taken to task for an inability to solve or suggest viable solutions for all of the complex problems and questions which the authors profess to see. On balance this reviewer will go on record as recommending the volume to practitioners engaged in the field of condominium. It adequately covers the basic concepts and furnishes reference material not otherwise readily available. It does at the very least encourage one to think positively about the workability of the condominium concept (as the authors obviously do) and it will provide in its text discussion, its copious footnotes, and the compendium of forms, enough suggestions, comments, and examples to furnish real inspiration and assistance to the practitioner called upon to represent the developer, the buyer or the association of owners of a condominium project.

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THIS HONORABLE COURT: A HISTORY OF THE SUPREME COURT OF THE UNITED STATES. By Leo Pfeffer.† Boston: Beacon Press, 1965. Pp. 470. $10.95.

Leo Pfeffer, constitutional lawyer and legal scholar, professor of political science and would-be historian, has written a history of the Supreme Court which will annoy the specialist, regardless of the mantle he wears. In the splinterized academia no one could hope to satisfy all of the specialists all of the time, but one would expect that Pfeffer could satisfy some of them some of the time. To the criticism that the author was writing for the general reader and not for an academic audience,[1] this reviewer can only respond that with Pfeffer's impressive credentials the general reader deserves a better book. What the reader did receive is essentially a rehash of Supreme Court decisions, mixed with some uneven history and biography spiced with a sprinkling of personal judgment.[2]

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[1] See Cherrington, Book Review, 79 HARV. L. REV. 227 (1965), in which the volume is appraised as useful and interesting for the lay reader.

[2] The book contains an index of cases cited, but no footnotes and only a highly selective, briefly annotated bibliography.

In evaluating this volume, four considerations suggest themselves: the author's treatment of the Court as a political body; his use and abuse of history; Pfeffer's analysis of the relationship between public opinion and decisions of the Court; and his evaluation of the more prominent justices.

Though the Court is the highest American judicial tribunal and though it seems to operate with legal instruments within a legal context, in reality Pfeffer contends, it has become "a third branch of the political government, exercising vast powers and influencing our political, social and economic society."[3] In this characterization Pfeffer the political scientist predominates over Pfeffer the lawyer, as he blithely disposes of the essential legal and constitutional questions at the threshold of a legal study. The author acknowledges that his approach leads to a seeming paradox: a Supreme Court, without self-sufficient enforcement power, making significant political and legislative decisions, but then escaping effective political attack. Perhaps there is some value in a political approach to the subject, but if it is to be determined one must probe beneath the level of the superficial and the obvious. An investigation of the political considerations surrounding the appointment of various justices and an analysis of their political views and predispositions would be in order. But Pfeffer has done this only to a limited degree; his treatment tending to highlight the unevenness of the available secondary material. From an analytical standpoint if the justices are to be viewed as political beings, should they not be evaluated in terms of the politician? At the core of political success is a flexibility of mind and a willingness to compromise personal beliefs in order to secure the support of a majority. Using this standard, it would seem that the greatest justices should be those who were willing to trim their views in an effort to produce judicial harmony. Should the dissenter be the hero Supreme Court historians have made of the first Harlan, Holmes, Brandeis, Black and Douglas, or should the hero be a Taft who desperately sought unanimity?

Though this politically-oriented approach runs through the book, the story is presented chronologically and is intended to be a history of the Court. To throw light upon the paradox posed at the outset, Pfeffer seeks to develop what he calls a "life history" of

[3] PFEFFER, THIS HONORABLE COURT 20 (1965).

the Court, an examination of the decisions of the Court "against the political, social and economic background which gave rise to its major decisions and which in turn was vitally affected by these decisions."[4] This is a worthy aim, for even with the recent spate of volumes dealing with the Supreme Court, much fundamental work in placing the Court in a more generalized historical setting remains to be done. This leads to our second consideration, the author's use and abuse of history.

Pfeffer's inclusion of history is little beyond the minimum required to make the Court's decisions themselves comprehensible. His use of historical data is cursory and oversimplified, and at times inaccurate. On the first page of the text, seeking to dramatize the widespread effect of Supreme Court decisions, the author states that the millions of Americans who filed income tax returns for 1894 were relieved of this burden by the *Pollock* decision in 1895.[5] Pfeffer's search for drama has led him into careless error, for only those with income in excess of $3500 were required to file, and in the depression year of 1894 it is unlikely that any more than a quarter of a million Americans were so affected. This is the author's most egregious error, though his implication that Cuba was annexed following the Spanish-American War runs a close second. Certain of his other historical judgments are highly questionable, such as his view that the *Dred Scott* decision[6] made the Civil War inevitable, or that Thaddeus Stevens has been subject to more vilification than any American since Benedict Arnold, or that William Randolph Hearst's yellow journalism was almost single-handedly responsible for the declaration of war upon Spain, or that a *modus vivendi* could have been worked out between Russia and the United States if Mr. Chief Justice Vinson's planned trip to the Soviet Union had not been frustrated.

Beyond these particular problems involving the use of historical data, Pfeffer's research into the available material is too limited to produce valuable results. We want to know why justices were appointed, what forces operated upon their decision-making, what effect these decisions had upon the public, and finally what effect such public reaction in turn had upon the justices. The book

[4] *Ibid.*
[5] Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).
[6] Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

does make some assertions in these areas, but it is largely devoid of evidence upon which to evaluate them.

Pfeffer attempts to explain the paradox he poses by stating that the Court has survived, and even increased its stature, by its consistent ability to reflect the popular will—the collective conscience of the community. This gives rise to the third consideration. The author empathizes with the Court in its task of reflecting the attitudes and expectations of the American people. He contends that in the Supreme Court as on the baseball field there is no practical difference between the score of 5 to 4 and 9 to 0. Apparently entrapped by this superficial analogy, Pfeffer too often accepts the final result without concern for the score.

The successful, though not always popular Court, argues Pfeffer, has been the one which has mirrored successfully the demands of the times. Of Marshall's many important decisions, only *Gibbons v. Ogden*[7] engendered substantial popular support, but the author sees Marshall's reputation resting upon his recognition of the tide of American economic evolution. He views the decisions in the *Slaughter-House Cases*[8] and *Munn v. Illinois*[9] as attempts to inhibit business, attempts which were doomed to failure in an environment of industrial growth and business dominance. But even in this tendency to read the Court's decisions with vagne references to the economic, social and political environment the author is not consistent. Error is inevitable when one works too little with historical facts and too much with historical generalities. For example, if one seeks to rationalize the Court's decisions by a reference to prevailing conditions and attitudes, such a technique should be applicable to decisions restricting the effectiveness of Reconstruction legislation, but clearly, except for a decided minority, the American people have been, until recently, apathetic to Negro equality.

Pfeffer, often speculative and unconvincing, sees the Warren Court in the period from 1958 to 1959 backing away from the rationale and implications of its early liberalism in areas of communism and individual rights. Because the results of the 1955-56 decisions seem different from those of the later period, the author concludes that the justices reacted to the public criticism their

[7] 22 U.S. (9 Wheat.) 1 (1824).
[8] 83 U.S. (16 Wall.) 36 (1873).
[9] 94 U.S. 113 (1876).

earlier decisions engendered.[10] He does not analyze divisions on the Court, nor particular votes, nor the nature and substance of the public criticism directed toward the Court.

In time of fear and stress when critics ask much of the Court, Pfeffer argues that the Court alone cannot stem the tide of an excited and emotionally-charged popular will. His admonition seems to be: ask not from the Court what you cannot expect to get from a popular majority. With such an understanding Pfeffer excuses the Court for its decisions against civil liberties in the World War II and McCarthy eras. "For the Court to attempt to speak reason to an irrational people," he writes, "would not have been merely quixotic, it would probably have been suicidal."[11] Only within the author's emotional treatment of the early 1950's and his inclination to apologize for the decisions of the Court can such a judgment be understood.

In considering the fourth factor in our review—Pfeffer's evaluation of the justices—we reach an area in which Pfeffer has met with some success. He has given the reader an understanding of the office as well as an insight into some of the one hundred men who have donned the robes of a Supreme Court justice. Their sensitivity has had to endure the public attacks that began as early as 1794 when the first cries of impeachment were heard. Absence of political reprisals has not meant the absence of bitter criticism for justices. Pfeffer gives the reader some understanding of the human dimension of these men: their physical infirmities and, at times, their mental deficiencies, which caused difficulties both within and without the Court; their background and, at times, their personal prejudices; and finally their ability, in most cases, to grow and develop in meeting the responsibilities of their high office.

Pfeffer's treatment of the more prominent justices is quite interesting. In evaluating John Marshall, Pfeffer tries the approach that many historians have tried with Lincoln, *i.e.*, emphasizing the man's professional shortcomings and his personal limitations, but meeting with the same result—that no matter what the criticism, the man's influence and stature remain great. As an interpretative

[10] Pfeffer reaches his conclusion by comparing Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) with Lerner v. Casey, 357 U.S. 468 (1958) and Beilan v. Board of Educ., 357 U.S. 399 (1958); Watkins v. United States, 354 U.S. 178 (1957) with Barenblatt v. United States, 360 U.S. 109 (1959); and Pennsylvania v. Nelson, 350 U.S. 497 (1956) with Uphaus v. Wyman, 360 U.S. 72 (1959).

[11] PFEFFER, *op. cit. supra* note 3, at 377.

device the author defines Marshall's implied aim as one of making the Supreme Court a strong and independent force within the government which could withstand popular pressure, concluding that just such a Court has evolved. This attenuated attempt to bring some unity to his story distorts the material, for Pfeffer himself hints that Marshall, because of his eloquent defense of private property, would see such a result as more of a nightmare than the achievement of his true dream.

On the subject of Roger Taney, Pfeffer subscribes to the now prevalent historical tendency to rehabilitate the justice tainted by the *Dred Scott* decision by calling attention to his aid in developing the police power concept. Pfeffer laments Hughes' decision to leave the Court for a presidential bid in 1916, feeling that a long, uninterrupted tenure would have made Hughes a greater justice. Though noting the shortcomings of the Taft Court, the author praises Taft for charting a new course in the protection of individual liberties. Though treating both kindly, the author clearly distinguishes the work of Holmes and Brandeis. He speculates that perhaps the traditional evaulation of each man's significant contribution should be reversed—with Holmes being primarily recognized for economic jurisprudence and Brandeis for his defense of civil liberties. While recognizing that a different Vinson might have had a profound impact upon the Court's decisions in the early 1950's, Pfeffer excuses decisions restricting the political rights of the individual by a reference to a "great sickness" of the American people, which he defines as a loss of rationality in the face of an assumed communist menace.[12] With *Shelley v. Kraemer*[13] Pfeffer discerns a trend in the Vinson Court toward protection of the Negro in his search for equality, but which was an honor the Warren Court was to reap. Discussing the Warren Court, the author becomes cautious in his judgments, and he is more reportorial than analytical.

In conclusion, two points of criticism require further discussion. First, Pfeffer fails to deliver what his introduction promises, for his limited analytical tools quickly become dull and unproductive. The paradox which he states in his first chapter grows rather than diminishes with his presentation. Just how has the Court been able to escape effective attack while making significant political

[12] *Id.* at 363-64.
[13] 334 U.S. 1 (1948).

and economic decisions? Or to rephrase the question, why have Americans given their continued support to this least democratic branch of the Federal government? Is it simply tradition, or an inherent suspicion of majority power, or even a desire to maintain a whipping boy upon which to vent aggressions in a changing world? Pfeffer's only answer seems to be that the Court has succeeded because it has reflected popular will. We are, however, confronted with gaps between the judicial decisions and the majority will. For instance, the attack on the Court as a protector of vested property interests was launched in earnest some thirty years before the famous 1937 revolution. To explain this frustration which a pragmatic people endure, we must recognize the American's reverence for, and his search for security in, the Constitution. The Supreme Court has sustained and strengthened its role because its welfare is inseparably linked to the Constitution itself. Whether we choose to call this myth or not, the Court's invulnerability rests upon the popularly-held belief that it is interpreting a Constitution freed from the common political pressures. How else can we explain the public apathy to Franklin D. Roosevelt's court-packing plan in 1937?

Second, Pfeffer's defense of the Court and his apology for its decisions leads him to criticize his own liberal position. Actually Pfeffer fails to meet the liberal contention that a democracy true to itself must allow the expression of unpopular opinions, even when the demand for conformity and unanimity is greatest. Certainly it is a truism to state that neither a court nor a constitution can save a people bent on destruction, but is it not the Court's duty to speak reason and caution even to an aroused people? The author sees the Warren Court doing just this in the middle 1950's, but at that time Pfeffer concludes such a course was feasible, while during the prior McCarthy era it was not. But why not? Pfeffer seems mired in a view of historical inevitability, leading him to conclude that such leadership was not assumed earlier because it could not have been assumed earlier. We have advanced beyond the early definition of democracy as the rule of the majority to the position that democracy now must also include the protection of certain basic rights which even a concerted majority may not infringe. Without direct involvement by the courts a minority, whatever its character, is often without effective protection. It is not surprising that the author has ignored this argument, for his thesis leads to the

conclusion that we cannot expect any more from the Supreme Court than we can from any other political branch of the government. Even as a most practical matter, one must still ask if this conclusion is sound?

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