

misreading of the old language offers no guarantee whatever against more misreading. The practical course is to await change in the Court's mind or in its membership, or both, with the latter quite possibly contributing to the former; and in the meantime to push a many-faceted testing of the present rule, so that by the classic process of judicial inclusion and exclusion it may be refined toward the vanishing point. There was, after all, in the prayer decisions powerful dissent by Mr. Justice Stewart. His activist brethren who proclaim the elasticity of the Constitution would be—at least, *should* be—the last to argue that dissent from them is less sure of ultimate triumph than the older dissents which they have so often converted into the law of the Court.

If Professor Rice's recommendations are thus questionable, his narrative account of the prayer controversies is solid topical history. Moreover, his Appendix A presents a sequence of godly invocations in pre-Independence documents, from *Magna Carta*, 1215, to the Mecklenburg Declaration, 1775. Appendix B quotes divine references in the several State constitutions (Hawaii and Alaska not excepted) and Appendix C those in the inaugural addresses of Presidents of the United States. Appendix D is the text of Lincoln's proclamation of a day of prayer in 1863. This sampling of the mountainous evidence from which the Court now turns its face is followed by a full index to the whole book.

Reviewed by C. P. I V E S

Case Against the Court

The Supreme Court on Trial, by Charles S. Hyneman. *New York: Atherton Press, 1963. ix & 309 pp. \$6.95.*

DID THE UNITED STATES Supreme Court, by "deciding" as it did in the Segregation cases, exceed the traditional limitations on its powers? What about the "judicial activists," who not only defend the Court's findings in these cases but urge it to adopt even a more aggressive role in the future? Both these questions, today the crucial questions in the field of constitutional law, re-

ceive answers to which all American conservatives must give careful attention.

With regard to the Segregation cases, Professor Hyneman argues that the Court did indeed lift itself "to a new peak of judicial power." "The nonsegregation orders," he writes, "are without precedent for comprehensive and deep-cutting social consequences and for application of judicial method to issues of obligation arising directly out of constitutional language." The Court, he agrees, already had a long record of nullifying national and state legislative enactments (the Dred Scott Case, *Lochner v. New York*, the New Deal cases, for example), but it had before the Brown case confined itself to "reinstating the regime of law that existed prior to [the] particular enactment [in question]." The Segregation decisions went far beyond this: They not only invalidated statutes; they commanded people in the affected states "to fashion legislation of a kind they had never had on their statute books and to institute some social relationship that had never prevailed in those places." Let no one suppose, Hyneman insists, that *that* was not something new under the constitutional sun.

As for the "judicial activists" and their argument that the Court must never hesitate to help the American people achieve certain values and goals which, it is alleged, are embodied in the Constitution, Hyneman calls them to a long overdue accounting. There is, he insists in a chapter entitled "A Question of Democracy," a demonstrable incompatibility between what the activists urge and our commitment to government by the people. What is needed, he argues, is a complete rethinking of the criteria by which to determine which of our governmental branches, the political (that is, Congress and the President) or the judicial, ought to be entrusted with the function of making far reaching political decisions: and no theorist of the Constitution since Corwin has thrown so much light on the relevant problems.

One section of Hyneman's book is a memorable treatise in and of itself: In it he notes the Court's interpretation of those provisions of the Constitution that have, over the decades, been prime topics of controversy—the "elastic" clauses (the "necessary and proper" clause, the "general welfare" clause and the Tenth Amendment), the "commerce" clause, and the "due process" clause. Unlike previous scholars who have written in this area, Hyneman does not attempt a case-by-case analysis of the Court's interpretation of these

provisions. Rather he seeks to show, by imposing his own order on the discussion, that the Court historically has been reluctant "to settle important issues about constitutional authority, to restate constitutional language in ways that will clarify the limits of governmental authority, to formulate supplementary rules that will instruct lawmakers as to what they may and may not do, and to inform the governed as to when they can count on the courts to rescue them from unlawful exercise of governmental power." Defenders of the Court's present ways will not find it easy to answer these charges.

Before we answer the question whether the Court should, in its decisions, go beyond the letter of the law and strive "for a finer vision of the good life," Hyneman believes we should learn to distinguish between two "levels" of "morality;" the morality of "distant contemplation" and the morality of "immediate confrontation." The procedures of our political branches, particularly Congress, assure to them an understanding, impossible to the Court, of the sacrifices necessary for realizing or achieving given ideals: theirs, therefore, is the "morality of confrontation." and it is that morality that makes them reluctant to push too hard too soon for what the activists urge upon the Court, namely, the immediate achievement of an ideal or goal derived from the "morality of distant contemplation." The Court, on the other hand, is not in position to see the sacrifices called for by its ideals, or to estimate probable resistance by the general population to given measures; its morality, therefore, is that of "distant contemplation." The dangers of following this latter morality are, he believes, very great, and we must for that reason think twice before conceding to the Court sweeping policy-making powers.

This is beyond any doubt a profound and significant work. Hyneman's critique of the activists is so devastating that, upon laying his book down, I felt in my heart a sentiment I had never expected to feel, namely, compassion for Charles L. Black, E.V. Rostow, and Fred Rodell, all of whom look somewhat different when stretched out full-length on the ground.

Reviewed by GEORGE W. CAREY