

## *The Thickening Thicket*

**The Political Thicket: Reapportionment and Constitutional Democracy**, by Royce Hanson; foreword by Hubert H. Humphrey, *New York: Prentice-Hall, 1966. 143 pp. \$4.95*

**The Courts, the Public, and the Law Explosion**; edited by Harry W. Jones, *New York: Prentice-Hall, 1965. 177 pp. \$3.95. (paper \$1.95)*

IN A CURIOUS, yet all too significant manner, the study by Prof. Hanson and the symposium edited by Prof. Jones combine to vivify the contrast between the ebullient optimism characterizing the liberal mind and the more sophisticated skepticism of the non-ideological intellect. Since the former's bias toward the "egalitarian-majoritarian approach to legislative representation" is openly acknowledged, it is little wonder that the assumptions and prejudices surrounding this preference should manifest themselves, despite a serious and commendable effort to mute them.

*The Political Thicket* is a study of state legislative reapportionment (or lack of it) in all its numerous aspects—loosely grouped under theory, law, and politics—by a participant in the fray. Professor Hanson has put his theory to practice by serving as Secretary-Treasurer of the National Committee for Fair Representation and President of the Maryland Committee for the same. To his credit, he has written a book replete with valuable and diverse insights and done so in a pleasant, non-ponderous style characterized by phraseology that is compact and meaningful. For an example of Prof. Hanson's combination of wit and cryptic commentary one may note his conclusion that "a constitution and constitutional law are an exercise in the goring

of oxen." Like it or not, the point is cleverly made!

Though all this makes the book enjoyable to read and quite informative, it does not, of course, make its prescription more palatable. In spite of the lip service paid to theory and law, to institutional integrity and structure, the book is, not unexpectedly, preoccupied instead with the concrete problem. State legislatures were malapportioned, and in spite of the big push started in the late forties to alter their composition, many remained grossly malapportioned in the early sixties. In most cases this meant under-represented cities and suburbs and resulted in legislatures that were not responsive to the pressing difficulties facing these areas. This Prof. Hanson aptly demonstrates. Yet, one suspects, had they been so, those of Dr. Hanson's persuasion would have attacked them anyway because their decisions, though "right," would have been reached by representatives of a minority of the people.

To the liberal, failure to solve a "problem" becomes intolerable since all problems are deemed to have solutions; thus, when all else had seemingly failed (or the knights had grown weary of their crusade) the Supreme Court—removed as it was from the elective structure that had frustrated change—had no choice but to act. Theories of federalism, of proper judicial performance, of community values and consensus to one side—the "problem" had to be "solved," the "old order" cast away and the path opened to the inevitable improvement change must bring. Prof. Hanson never doubts that this improvement will come.

As optimism is the keynote of Prof. Hanson's study, an enlightened skepticism pervades the essays in Dr. Jones' collection. They focus on the increasing difficulties raised by the enormous amount of litigation our courts must now dispose of and discuss it on both the trial and appellate level, from the perspective of the judge, the attorney, and the public. But there is an obvious lack of certainty that

things will improve, that there exists a "solution" as such. No utopia awaits the morrow's sun. They seem reconciled to the fact that the pace of improvement, if and when it comes, will be slow and—most importantly—not without its liabilities. Inevitably, one concludes, humanity must live with its own imperfections.

Given these conditions, contributor Geoffrey Hazard of the University of Chicago, laments the tendency by appellate courts, and especially the Supreme Court, "to assume wider and wider-ranging responsibility for questions of general social and political interest." As this volume of cases increases, he continues, "the character of the judicial organization changes subtly but unmistakably, and the character of the judicial establishment thereby changes also."

If, as Hanson opines, "the national judiciary—especially the Supreme Court—has become the principal protector of the Constitution and of the concepts of constitutionalism," one wonders how his concern for problem-solving could so blind him to the institutional implications of his position. It was this concern for the integrity of judicial performance and the propriety of judicial function that characterized Frankfurter's dissent in *Baker v. Carr* and has characterized Harlan's continuous battle in this "political thicket."

As the final essay, "Judicial Selection and Tenure in the United States," in the Jones' collection argues, a judiciary in order to fulfill its assigned tasks must remain independent of the "political" branches of government. It is a paradox of modern liberals that they seek at one and the same time egalitarian democracy with uncompromising majority rule and a national judiciary—*independent, non-elective, and oligarchic*—to protect those values they, and in most cases we, hold dear.

But their attitude is schizophrenic, and Prof. Hanson's book is a typical example of this rigidly ideological view: a curious faith in egalitarian democracy combined with the conviction that non-democratic in-

stitutions can best preserve—and moreover ought to preserve—democratic values. Of this Learned Hand once wrote:

. . . that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where such spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

It is this spirit of moderation and compromise that is essential to a liberal society and without which liberty cannot survive. This spirit is obviously absent from both the extreme left and the extreme right—from the doctrine of "Black Power" as well as from unreasoning crusades for the impeachment of Chief Justice Warren in order to "Save our Republic." If this spirit of liberty is to be preserved, it must be through the lives, actions and efforts of millions of individual Americans and not through any authority—court or legislative chamber—seeking to impose a preconceived blueprint for perfection upon us.

To the understanding of this both books contribute, albeit in different ways. By illustrating the confluence and conflict of values and interests involved in such a problem as reapportionment. Prof. Hanson—regardless of his conclusions—demonstrates the complex and sensitive institutional structure that houses our governmental system. Prof. Jones and his symposiasts dramatize the strain imposed on the system from excessive use. This understanding of the system in operation and the dangers facing it *should* lead to some caution on the part of those who seek from the State—especially the courts—the solutions to the great problems of our time, but, alas, it will not.

Prof. Jones and his collaborators have shown clearly that the answers do not lie there; yet Prof. Hanson's book has shown that many will continue to seek them there anyway.

Reviewed by WYATT B. DURRETTE, JR.