

increase food production under these circumstances. And it is in this sense that America's enormous generosity in food aid (\$25 billion since World War II) has been counterproductive, for recipient governments have had no incentive to develop local incentives for agriculture. (Incidentally, American food giveaways were as much a function of our domestic farm price support system as of our humanitarian and tactical policies.) There are usually good short-run arguments against letting farmers raise their prices in LDC's: namely, thousands of the poorest citizens would no longer be able to afford a bare subsistence. But without suitable incentives, LDC's will in the long run be unable to stimulate the local production of which they are capable. It is an unpleasant tradeoff.

The ironic thing about the recent shortages is that they took everyone by surprise and that they confounded the expert wisdom. For by the late sixties, as the introduction of high-yield wheat achieved spectacular successes in the Punjab, the

pessimism of the middle sixties had given way to an unbridled optimism about food. In its 1969 report on the *State of Food and Agriculture*, the FAO declared that the food problems of the future would be how to dispose of surpluses rather than how to alleviate shortages. Lester Brown, who these past few years has been one of our leading pessimists, was at that time a great herald of the Green Revolution; in 1968 he hailed our "new agricultural era." And fearing overproduction, governments and farmers in the United States, Canada, and Australia—which together account for 90% of world grain exports—took steps to restrict grain acreage, lest "excess stocks" accumulate.

With reserve stocks low and acreage limited in the major grain-exporting nations, and with informed opinion overly optimistic about food supplies, the world was wholly unprepared when, in 1972, because of some unfortunate weather coincidences, world food production declined by 3%—the first decline in twenty years—while demand kept rising. Acre-

age is now replanted, stocks are slowly being replenished, and according to *Science* and Johnson, the difficulties of the last few years are not a prelude to coming disaster, but a temporary aberration caused by some accidents in the weather and by a lack of foresight. World resources are not so limited that the rich must kick the poor out of the lifeboat. America can be very helpful, not by curtailing her own consumption but by continuing generous technical assistance—improving grains and grain markets in the developing countries.

Is there a long-term food crisis? Probably not. Long-term problems persist, as always, and prices are still climbing, though Johnson predicts that after a few years real grain prices will return to their long-term pattern of decline. Predictions are always risky, especially with food supply, but I predict that with occasional setbacks, some luck, and a lot of hard work, people all over the world will continue to eat more and better. In the meantime, let us pray for rain. □

Book Review/Terry O'Rourke

Overloading the Scales of Justice

Justice Macklin Fleming of the California Court of Appeal has written perhaps the most perceptive and acute criticism of judicial activism yet to appear in print. Those readers accustomed to viewing critics of judicial activism primarily as yahoos whose malignant and narrow pursuits have been thwarted by the courts will be confounded by this book. For Justice Fleming is a stern legal scholar and craftsman dismayed by other judges' substitution of slogans for reasoning and personal predilection for the dictates of text and precedent.

The paramount theory that Fleming addresses is the idea of perfectibility—"the concept that with the expenditure of sufficient time, patience, energy, and money it is possible eventually to achieve perfect justice in all legal process." According to Fleming, the quest for perfect justice and legal procedure has dominated legal thought for the past twenty years, and has spawned an ever increasing scope and pace of judicial action: courts are no longer concerned simply with the adjudication of private controversies and the interpretation of traditional legal rights, but also with the resolution of almost all public issues which can be brought to life as legal causes because of alleged shortcomings in legal procedure. As a result, partisans of particular causes, unable to convince a majority of voters or legislators of the verity of their positions, routinely seek to invoke the power of the courts by accusations of imperfect procedure, thereby hoping to direct the course of subsequent

events by imposing impossible procedural demands. And as the courts, in striving to achieve perfect justice, have been ready to apply increasingly rigorous standards of legal procedure, this strategy has become a powerful weapon to shape policy and effect change in society: construction of new power plants can be indefinitely delayed, issuance of licenses

The Price of Perfect Justice

by Macklin Fleming
Basic Books \$10.95

postponed, construction of highways halted, and military service avoided.

The quest for perfect procedure has had its greatest impact on criminal law, where the modern doctrine has almost completely displaced the concept of effective procedure; and it is this impact which is Justice Fleming's major concern. Under standards of perfect legal procedure, the parties must be free to present their contentions to the fullest extent to a jury "which must have never heard of the cause, the parties, the witnesses, and the issues, and must be wholly free from opinions or preconceptions about any proposition of law or fact likely to arise in the trial." In addition, every legal or factual argument of any possible relevance must be considered in depth, exhaustively and repetitively, in order to eliminate the possibility of error from the

proceeding. And if the trial does not meet all of these requirements, then the cause must be tried again. Fleming documents numerous instances of the pursuit of perfect procedure by the courts: five months spent in the selection of a jury, the same murder charge tried five different times, prosecutions pending a decade or more, and the same issue of search and seizure being reviewed over and over again, as many as 26 times. In short, under the reigning standards of perfect procedure the guilt or innocence of the accused has become almost irrelevant because the emphasis in criminal proceedings has shifted to the determination of the correctness of the procedure used in the prosecution; the target is no longer the accused's own conduct, but the legal machinery used against him.

Justice Fleming persuasively argues that the attempt to achieve perfect legal procedure has seriously impaired the capacity of the legal system to achieve the basic goals for which it was created: namely, "to settle disputes promptly and peacefully, to restrain the strong, to protect the weak, and to conform the conduct of all to settled rules of law." By pursuing the will-o'-the-wisp of perfection, Fleming contends, the courts have neglected the key elements demanded of effective procedure: "the resolution of controversies within a reasonable time, at a reasonable cost, with reasonable uniformity." Perfect procedure is unable to convict the guilty promptly or to acquit the innocent in a manner that retains public confidence in

its accuracy, and Fleming concludes that "the deterrent effect of swift and certain punishment is lost, the feeling of just retribution disappears, and belief in the efficacy of the system of justice declines."

Justice Fleming believes that the idea of judicial perfectibility has carried with it the related concept that "judges are the chosen instruments for the achievement of perfectibility by means of the constitutional doctrines of due process and equal protection." The concept, Fleming argues, has given judges a theoretical mandate to boldly rewrite laws of every description—from criminal procedure to rights of inheritance, to regulation of personal conduct, to parole revocation, to abortion. Fleming is skeptical, for two reasons. Judges often enact their own personal predilections into law, under the guise of applying the requirements of due process or equal protection to a particular case. And, second, when they rewrite laws this way, the courts act as legislatures, a role that they are poorly equipped to perform. There is nothing new or astounding about either of Fleming's contentions. Since the heyday of economic due process, many students of the courts have similarly warned of judicial usurpation of the legislative role, even though informed opinion is frequently willing today to overlook the manner of a judicial determination and the indignities inflicted upon the separation of powers, when it approves of the outcome.

Nonetheless, in an age when the courts are creating, determining, and applying policy, choosing among alternative theories of equality, and weighing benefits for and burdens upon particular groups, Justice Fleming's analysis of the shortcomings of judicial legislation deserves serious consideration. According to Fleming, the major reason for the poor quality of most judicial solutions to legislative

problems is that the "courts are extraordinarily inept instruments for political brokerage." Courts have limited access to information and pressures essential to the solution of general problems; instead, the courts' information usually comes from two partisans—each armed with an axe to grind—who appear before the

Great American Series

The great service of Mr. Harding was to give the nation a quiet period of thought. He was not a noisy President. He did not regard himself as a national entertainer. He did not divert the public mind from its own thoughts to his thoughts. He refused to break the spell of public thoughtfulness by calling a special session of Congress. He had a horror of what he called "undeveloped idealism," by which he meant fine words that were never realized in fine actions. He did not feel called to do great acts but to prevent small wrong acts from being accomplished. In this he showed one of the qualities of a great executive—When there was nothing to do, he did nothing. When the value of that kind of wisdom is recognized, Warren G. Harding will have the credit which is his due.

—Henry Ford
in the *Dearborn Independent*,
August 18, 1923, on the occasion
of the death of Warren Harding.

court making frequently outrageous and exaggerated claims on behalf of their causes. Often, a court is shown only a small part of a general problem and solemnly assured that the part comprises the whole. Lacking access to accurate and unbiased information, provided with a

limited staff and almost no money, the courts frequently pronounce general laws based upon narrow and distorted perceptions of the issues. In short, Fleming concludes that "Judicial legislation is all wrong because it is ineffectual. Experience has shown... that legislatures are better equipped, better informed, possess greater sensitivity, and exercise a broader vision in making new law than do the courts."

Although Justice Fleming offers the reader a great deal of keen, and often witty, criticism of the errancies of contemporary judicial action, he suggests little to improve the situation. Perhaps Fleming should not be faulted for this omission, for if his analysis of the roots of judicial activism is correct, there is scant hope for improvement. By pinpointing the quest for unattainable perfection as the motivating spirit of modern judicial activity, Fleming links contemporary legal theory to the dominant utopian strain of modern thought, for which prudence and moderation are outmoded concepts, and the best idea is the most recent.

Recognizing the oligarchic and trend-setting nature of the Supreme Court's role, Fleming's recommendations are almost entirely limited to the suggestion that tenure for members of that body be limited to 16 years. Firmly convinced that absolute power is corrupting, Fleming argues that a limited tenure will to some degree limit the proclivities of justices to decide cases on the basis of personal predilection. Although Justice Fleming's suggestions would have had the meritorious consequence of removing justices such as McReynolds and Douglas, it would also have sacrificed the services of justices such as John Marshall and Frankfurter. Apparently Fleming believes that the bad justices so outnumber the good, that he is willing to make such sacrifices. □

HARRY JOHNSON
(continued from page 27)

have been completely misleading to talk about the impending exhaustion of all "viable" sources of coal just because the surface coal could last only a few years.

For resources with high discovery costs, such as petroleum, the number of years' supply known to exist is a function of the number of years' supply it pays to explore for, given the price of the product, the cost of the exploration, and the rate of return on a similar investment somewhere else in the economy. Therefore, a fifteen years' supply of petroleum does *not* mean that we are going to have no more petroleum in sixteen years: There was only a fifteen years' supply of petroleum thirty years ago, and there will probably be only a fifteen years' supply of petroleum a hundred years from now. Johnson does not go into this in the detail he might, probably because—as in the case of income distribution—the shrill voices are saying such utter nonsense.

Yet to treat this nonsense as beneath discussion is only to allow it to continue to flourish.

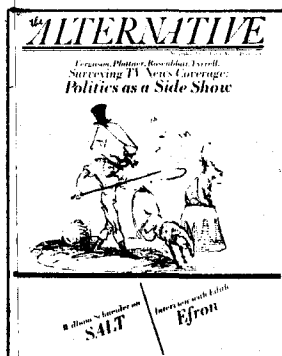
It is certainly true—and important—to say, as Johnson does, that history has shown a "consistent falsification of the prophecies of successive schools of doom predictors," but perhaps also we need to know *why* they have been so wrong so often. Why these doom-and-gloom predictions have persisted or recurred is another good question. There may be something in the human psyche that creates a demand for disaster—or at least for predictions of disaster. Disaster and doom have been thriving industries for centuries, with religious, political, and environmental subsidiaries—and this long before Hollywood began making movies that allow them to share in the profits of doom.

Professor Johnson brings out the point that many environmental complaints are made "from an extremely egocentric view of society"—objections to others having life-styles different from one's

own (they want more bowling alleys while we want more trees) or laments for the loss of differential gains, such as wooded seclusion in national forests to which others had little access before the rise of more general affluence. The trick the environmentalists use is to attack, not the other groups who want to live differently, but the intermediaries who represent those other groups' demands—i.e., "developers," "commercial interests," and others who lack the aura of sanctity surrounding the Sierra Club.

There are points on which a reviewer could disagree with Professor Johnson—his use of "society" where this anthropomorphic metaphor confuses crucial aspects of the actual decision-making process, his willingness to see the government tinkering in some areas where the prospects seem dim ("incomes policies," for example), and his refusal to consider the longer-run effects of certain short-run "humanitarian" policies. But these are surface blemishes on a basically very good and valuable book. □

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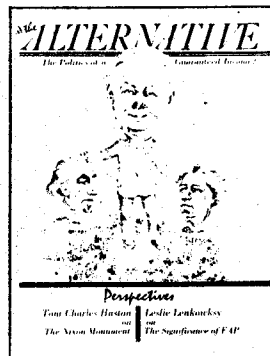
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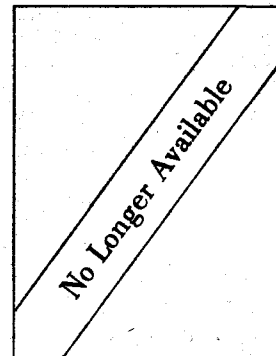
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on W.C. Fields.



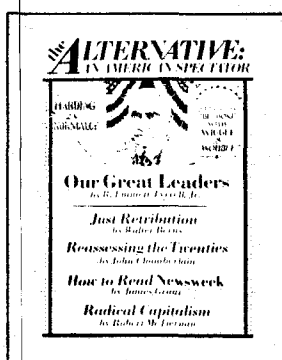
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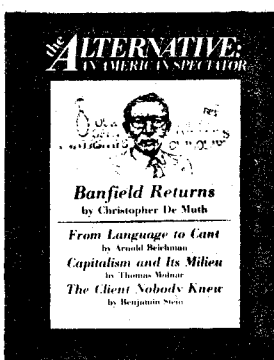
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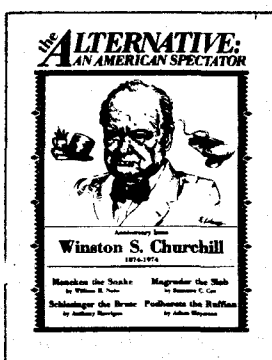
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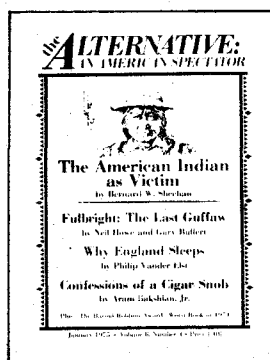
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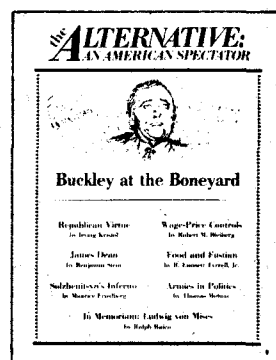
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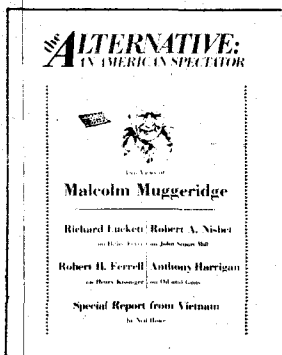
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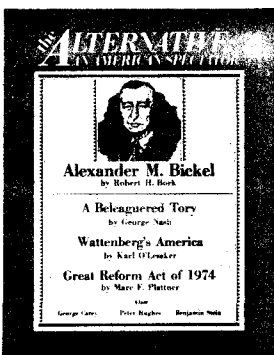
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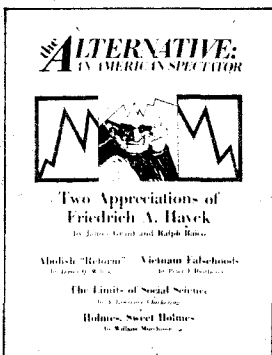
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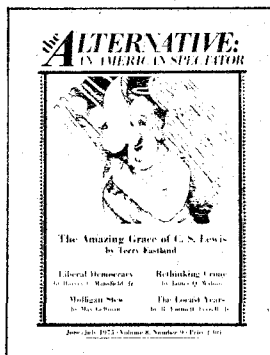
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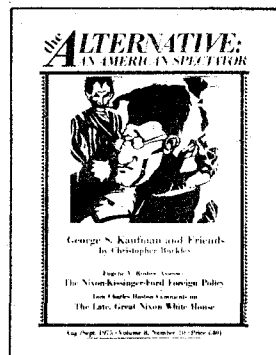
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Current Wisdom

PORTRAIT OF THE ARTIST: Author Clifford Irving, the American Proust, enunciates the elements of his afflatus in a rare interview granted to Jurate Kazickas:

Asked if he saw any parallels between his own futile attempts at a cover-up and Watergate, Irving answered: "None at all. My motives were adventure, literature and money, not necessarily in that order. Their motives were based on the extension of a corrupt government."

—*International Herald Tribune*
July 7, 1975

AUTOINTOXICATION: In reviewing another heart-warming tome about our glorious radical movement that sparkled with thousands of bombings, hundreds of maimings, many murders, and many more broken lives, sage Elinor Langer displays that exquisitely honed critical sense that is at once the triumph of the ritualistic liberal and the scourge of American hypocrisy:

"More Power Than We Know" is neither manifesto nor autobiography. It is personal without being egotistical. Perhaps it reflects less sophistication than faith. Dellinger, born in 1915, is old enough not to have been discouraged by the movement's errors and not to confuse a decade with a life. He sees a "people's movement toward democracy," internally alive, renewing itself, sloughing off tyrants, breathing free. For others the vision may be less vivid. But his book is a reminder that, even if it is not an adequate counterforce against the rising manipulation in American life, still it was a force in ending the war. To that force "More Power Than We Know" is not a benediction; it is an invocation.

—*New York Times Book Review*
June 15, 1975

INTELLECTUALOIDS IN ACTION: During one of CBS-TV's more cerebral moments, TV profundicator Shana Alexander reveals her exquisite sense of justice and statecraft to an astonished James Jackson Kilpatrick:

The Mayaguez rescue is being hailed now as a great victory. But I hope, Jack, that it can soon be seen for the shameful episode it really was. I do not complain of the clumsy risky way the rescue was done—the invasion of the wrong island, the loss of so many Marines—because such things happen in a remote crisis. No, Jack, it's the crowing afterwards I object to. Not the doing, but the cockadoodle-doing as the President and his men congratulated one another. We didn't let l'il ol' Cambodia push us around. No sirree!

The Mayaguez affair exposed certain top level attitudes which had remained blurred while the war was on. Then you

never knew quite what they were up to. Security considerations clouded everything. But last week their motives were quite clear and quite ugly. They were out to punish the insolent Cambodians, to show the Gooks and the world that the mighty U.S. of A. is still in charge, to vent their own rage and frustration, and—worse—to give their own people something to cheer about. And anything would do, even a rinky-dink rerun of Terry and the Pirates.

It was cynical politics of the lowest order: leaders trying to recover popularity by appealing to the most primitive instincts of the crowd. During the war, Jack, your side used to talk about "bombing them back into the Stone Age!" Well, in this vindictive, vainglorious handling of the Mayaguez Mr. Ford and Mr. Kissinger acted like Stone Age bullies themselves. So this war ends with neither a bang nor a whimper, just the hollow sound from the Oval Office of King Kong beating on his hairy chest.

—Point Counter Point,
CBS-TV's "60 Minutes"

RETURN OF A ROSSBACH: *The Bulletin*, lively journal of the National Railway Historical Society, reveals an encouraging capacity for self-correction:

Erratum: In No. 5, 1974, there was included a list of members who had passed away during the preceding year. One of the staff has now received word from Arthur L. Rossbach, Jr. that he is still alive. Our apologies to Mr. Rossbach for this unfortunate mistake.

—*The Bulletin*
Vol. 40, No. 1, 1975

THE HIGH BROW: What kind of person gorges himself on the cerebral viands of the *New York Review of Books*? We quote randomly from its gorgeous classified ads. Happy Days!

Handsome white male, foot fetishist, in late 20s, seeks female foot fetishist. Fat women welcome. Ray M., c/o Downstairs, 167 W. 21st St., New York, NY 10011. Also into erotic tickling....

Retired, professional man wants to employ young male aid who looks like clothes model. NYR, Box 10706....

Writer, widower, late 50s, good shape, wants middle-age woman in Bergen County, NJ for mutually enjoyable and financially advantageous romance and open marriage possibility. NYR, Box 10878....

Volatile, winsome, aesthetic divorcee seeking attractive, successful businessman for meaningful, fun-filled relationship. NYR, Box 10874....

Chic, warm, witty Cape Cod courtesan, 36, own luxury apartment, offers confidential diversion to well-to-do gentlemen vacationers. NYR, Box 10771....

Oversexed male with vasectomy would like to make it at Madison Square Garden during the Star Spangled Banner at the first hockey game of the 75-76 season. NYR, Box 10904....

INSPIRATIONAL READINGS: The illustrious Governor of Vermont, Thomas P. Salmon, gives birth to a worthy candidate for the next edition of *Bartlett's*:

"...Courage is the price that life exacts for granting peace of mind."

—*Burlington Free Press*
April 21, 1975

SUBSIDIZING THE ARTS: Proof that the modern federal government is serving human needs and encouraging man's finer instincts:

Jubal Hale admits he's a bureaucrat with little to do. So he spends his working hours reading and listening to Beethoven records at his office.

Hale says it's not that he doesn't try to earn his \$19,693-a-year salary as executive secretary of the Federal Metal and Non-Metallic Safety Board of Review. It's just that the board has never had anything to review in its four years, Hale said in an interview.

—*The Washington Star*
May 13, 1975

THE SOAP OPERA INTELLECTUALOID: *New York Times* reporter Lucinda Franks displays her reportorial talents:

We cannot seem to alter the disturbing reality that our American leaders have destroyed nearly an entire generation of young men for no reason.

—*New York Times Book Review*
June 15, 1975

THE WHOOP OF A LOON: The distinguished G. William Domhoff confects a conspiracy theory curiously flavored with sour grapes:

The owners and managers of large banks and corporations, with a little bit of help from their hired academics, lawyers, and public relations people, dominate everything in this country that is worth dominating—foreign policy through such organizations as the Council on Foreign Relations, Council of the Americas, and Trilateral Commission; economic policy through the likes of the Conference Board, Committee for Economic Development, and Brookings Institution; population policy through such groups as the Population Council, Population Reference Bureau, and Planned Parenthood; environmental policy.... Every one of these organizations is financed and directed by the same few thousand men who run the major banks and corporations, and every one of them is pivotal on governmental policy in its area of specialization.

—*New York Review of Books*
July 17, 1975