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BOOK REVIEWS

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BOOK REVIEWS

LIONS UNDER THE THRONE, by Charles P. Curtis, Jr., Houghton Mifflin Co., Boston, Mass., 1947. 368 pp. \$3.50.

It is natural that in a period where the personnel of the United States Supreme Court undergoes a sudden change and where new constitutional questions are presented, there will be numerous efforts by authors to explain, criticize, and commend the decisions of this Court. This is true because the Court is not only a judicial body, but it is also an important political factor in our government. Mr. Curtis' book does not purport to be a history of the Court, nor of the Constitution, yet it touches on most of the important constitutional problems that have come to the Court during the period of our national existence. Its emphasis, however, is on the 1930's and the 1940's, during which time the Supreme Court was called on to consider much of the so-called New Deal legislation. In this brief review it is possible to touch only a few of the author's comments.

Lions Under the Throne reminds us that in the Constitution there is no power expressly given to the Court to declare Acts of Congress or State Legislatures invalid. The fact, however, that the powers of government are divided between the states and the Federal Government, and that many powers are reserved to the citizens by the Bill of Rights requires that there be an arbiter that can delineate these lines of power. This arbiter might have been the Congress, but it became the Court through the statesmanship of John Marshall, who saw an opportunity in *Marbury v. Madison* to claim the power for the Supreme Court to declare an act unconstitutional, though that holding was unnecessary for a determination of the issues in that case.

The Court has maintained its judicial supremacy by exercising restraint and by building up in the people the idea of the stability of the judicial branch of the government. As Mr. Curtis points out, the Court's powers are subject to the will of Congress. The great bulk of the Court's jurisdiction is appellate, and this appellate jurisdiction can be withdrawn or modified by Congress at will. Congress has exercised this power

only once, when in 1869 it withdrew the Court's jurisdiction to hear the appeal of McCardle, a Mississippi editor, who had been tried before a military commission under one of the Reconstruction Acts.

The Congress may also change the number of judges. It has complete power over the enforcement of the decisions of the Court, and it can initiate constitutional amendments to override the decisions of the Court as it did with reference to slavery and Federal income taxes.

It is interesting to note that the American Bar Association is considering the initiation of a proposal to amend the Constitution to prohibit Congress from withdrawing or extensively modifying the appellate jurisdiction of the Court. The current issue of the American Bar Journal indicates that the House of Delegates is almost evenly divided on the desirability of this change.

Mr. Curtis' comparison of the views of the old and the new Court on state and Federal regulation and taxation of business is particularly interesting. The old Court of VanDevanter, McReynolds, Sutherland, Butler, and justices of a similar bent of mind, who dominated the Court during the fifty-year period preceding 1935, grew up in an expanding country where success was achieved in an economy of free competition. These justices felt that interference by state legislatures in the free operation of business was so contrary to sound economics that it was arbitrary, so arbitrary, that it was unconstitutional as a deprivation of due process or as an interference with Congress' power under the commerce clause. At a later date when Congress attempted to regulate under the commerce clause and to tax for the general welfare, it was this same devotion to a pioneer economy that led these justices to find the New Deal legislation invalid under the Fifth and Tenth Amendments.

In this field there has been a marked change incident to the changed personnel of the Court. Today, state legislatures are free to enact almost any regulatory or tax legislation which does not discriminate against commerce. For all practical purposes the Court has relegated due process to procedural matters. Policy making in the Federal field is left to Congress.

An apparent contradiction to this tendency, however, is found in the field of civil rights. A presumption of the validity of the state or federal regulation, running counter to the

guarantees of the first eight amendments, does not exist. The present Court seems to feel that where there is an express provision in the Constitution guaranteeing people against legislative invasion of a particular field, that the statute must be closely scrutinized to be sure that it does not violate one of these reserved rights. By interpreting the Fourteenth Amendment as incorporating the provisions of the Federal Bill of Rights, and therefore guaranteeing these rights against state invasion, there is today practically no difference between the individual's protection against Federal encroachment and his protection against state encroachment.

An interesting phase of the book is the credit given Mr. Justice Roberts in changing the economic balance of the Court in favor of the validity of Federal and State regulation during the 1936-1937 term and its effect in President Roosevelt's proposal to increase the number of justices. Mr. Curtis points to the fact that Justice Roberts in 1934 had joined with Hughes, Brandeis, Stone and Cardozo to sustain New York's right to control milk. However, he voted with the VanDevanter wing of the Court, in deciding that railroad pensions were beyond the scope of the commerce clause and contrary to due process. In early 1936, Justice Roberts voted with the majority in striking down the Agricultural Adjustment Act as an invasion of the field reserved to the states, joined in holding that the regulation of coal production and wages was beyond the reach of the commerce clause, and finally, in June, 1936, joined in holding that New York's minimum wage statute deprived employees of due process.

In November, 1936, shortly after the re-election of President Roosevelt, when the New York Unemployment Compensation Act was sustained by an evenly divided court, with Justice Stone absent, the surmise was that Justice Roberts was swinging away from the conservative block. Later in the term this was confirmed when Justice Roberts voted with the majority to sustain state minimum wage legislation, the National Labor Relations Act and Social Security.

The point is that the changed viewpoint of the Court was affected before a single Roosevelt appointee had reached the Bench, simply because Mr. Justice Roberts became convinced that this regulatory and tax legislation involved policy, and not constitutional questions.

This book contains numerous other phases of the Supreme Court which not only the lawyer but also the laymen will enjoy.

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COMMENTS, CASES AND OTHER MATERIALS ON LEGISLATION, by Arthur Lenhoff,* Dennis & Co., Inc., Buffalo, N. Y., 1949. 1,046 pp. \$8.00.

The publication of this textbook adds another important work to the United States Case Book Series, and represents a contribution to a field which is gaining greater prominence in the law school curriculum—the study of legislation, its genesis, formative processes, manner of expression and publication and substantive clarity and effect.

To the extent possible, Professor Lenhoff has adapted the book to two general classifications: (1) The Legislative Process as Part I, and (2) Statutory Interpretation as Part II. An added appendix contains valuable excerpts from such sources as the United States Code, the report of the New York State Joint Legislative Committee and the guide used by Arizona in drafting statutes.

The text may be generally described as an analysis and appraisal of the judicial responsibility in an age when statutory law is blazing new trails unknown to the common law. Indicative of this fact is the comment of Professor Lenhoff:

“Nowaday, when statutory law in the common law countries has gradually penetrated fields which formerly constituted the undisputed domain of case law, the question of a dividing line between the province of legislation and the province which still is left to the creative development of law in the form of judicial adjudication call for an examination. How far statutory law has evolved and taken the place of common law can be seen from the fact that while in 1875, still more than 40% of the controversies which reach the Federal Supreme Court were

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common law cases. In 1947 'cases not resting on statutes are reduced almost to zero!'¹

The text is very comprehensive; many decisions on recent legislation of interest not only as the product of the legislative process, but also from the substantive standpoint as well, are included. Such far-reaching statutes as the Wagner Act, the Fair Labor Standards Act, the Labor Management Relations Act, commonly known as the Taft-Hartley Act, are treated in many of the opinions. Other important problems such as conflict of laws, state and federal, concurrent jurisdiction, mistakes of law, and the impact of such cases as *Erie R. R. v. Tompkins*, 304 U. S. 64, are found in the decisions.

Professor Lenhoff uses a system of analyzing through notes and comments effectively, and many of these comments are very penetrating, and will be found useful both to the student and practitioner.

Of particular interest is the emphasis placed upon the actual process of lawmaking—how a bill takes form, the introduction, passage, enrollment, ratification and publication. The matter of expression, simplification and phraseology is amply treated, and the trend now present in many states toward code revision and progress in simplifying statutes is well known.

Among the interesting notes is a note on page 73, entitled "A Note on Private Acts, Local Acts, Lobbyism and Related Legislative Matter." Another is found on page 128, entitled "A Note on the Various Phases of Legislative Procedure." The decision of *Field v. Clark*, 143 U. S. 649 (1892), involved the question of the impeachment of an enrolled bill by the legislative journal or other extrinsic evidence. The note following this case shows the two rules which prevail on this subject, namely, the "enrolled-bill rule" which accepts the enrolled bill as conclusive evidence of its regularity and correctness, and the "journal-entry rule" which permits the bill only as presumptive evidence, thereby allowing impeachment from the legislative journal.

The book really stirs a profound interest. A mere cursory glance will re-emphasize to the student the enormous expan-

1. Quotation from Professor Lenhoff from Felix Frankfurter, "Some Reflections on the Reading of Statutes" (1947), 47 Col. L. R. 527. (See text, page 15)

sion of statutory law, and its influence on the life of the everyday citizen in such matters as insured deposits, insured savings, price supports, subsidization of private enterprise and of education through such institutions as the Federal Deposit Insurance Corporation, the Reconstruction Finance Corporation, the Federal Communications Commission, the Interstate Commerce Commission, the Tennessee Valley Authority and others—all creatures of the legislative department of government. It is a challenge to the professional lawyer of America to appreciate the significance of this fact.

Considerable emphasis is placed on the big job of drafting statutes. Many of the cases included show that the litigation developed as a result of ambiguity or lack of clarity in the statute and that courts often have to interpolate to give substance to a statute. The inference of the text appears to be that America generally has suffered from poor draftsmanship. An example is the following comment of Professor Lenhoff:

“The draftsman of the Wagner Act, 1935, had failed to insert a provision expressly mentioning which of the statutory norms may or may not be subject to a bargain between the parties. The omission has troubled the parties all along. As an example, one may mention the question whether the terms of valid individual employment contracts prevailed over those of collective bargaining contracts. It was not until 1944 that the Supreme Court pronounced that Section 9 (a) of the National Labor Relations Act must be construed as being of the inflexible type of statutory norms, therefore exclusive of individual bargaining. It is almost a matter of common knowledge that analogous legislative omissions in the drafting of the Fair Labor Standards Act have occasioned numerous litigations centering around the problem how far private agreements which set up their own standards for the payment of ‘work week’ or ‘hourly rate’ are a valid basis for overtime payments.

“Thus one is amazed that the new act remains entirely silent on the problem. It would be very easy in drafting regulatory laws to indicate in plain language whether or not their terms are subject to the control of the parties.” (Page 47-48 of the text.)

Another graphic example pointed to by Professor Lenhoff is that of the Federal Employees’ Liability Act and the Fair

Labor Standards Act. In both of these acts, federal and state courts are given concurrent jurisdiction. In the former, however, the statute expressly provided that the removal principle would not apply, and in the latter this provision was omitted, thereby occasioning much litigation.

There are an infinite number of questions found in the text which it would be interesting to point to here, such as the importance of a title in a statute, and the renewed use of the old preamble as a "statement of policy". But the scope of a review is necessarily limited. The student, however, in a program of organized study centered around this fine text will derive both value and fascination. Subjects such as acts *in pari materia*, correction of legislative errors, statutory interpretation with its problems of literal interpretation and administrative interpretation, the matters of findings by boards, and rulings of such agencies as the Treasury Department and the Commissioner of Internal Revenue, the use of Legislative history as a guide to interpretation, the question of obsolete and superannuated statutes and many others are timely considered in the text. The student will find knowledge of these matters of permanent worth.

An enormous amount of work has gone into this casebook. It merits a place in the curriculum of the student of law.

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MR. JUSTICE BLACK. THE MAN AND HIS OPINIONS, by John P. Frank, * Alfred A. Knopf, New York, 1949. 357 pp. \$4.00.

"My God, what's the country coming to?" was the query seriously posed by South Carolina's late redoubtable United States Senator, Ellison D. Smith, when he was informed that his colleague, Senator Hugo L. Black, had been nominated to be an Associate Justice of the United States Supreme Court. The news of the nomination was whispered to Senator Smith by an aide while the Senator was presiding over an executive session of the Senate Committee on Agriculture and Forestry. He could no more restrain the impartation to his colleagues

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of this bombshell than he could stem the flood tides of the sea.

Consideration of agricultural matters terminated immediately and the members assembled gave expression to their reaction to the new nomination. The more conservative members considered the nomination the worst in the long and colorful history of the United States Supreme Court and fraught with direst implications. They believed the nominee totally unfit, mentally, professionally, temperamentally and otherwise to serve on the Supreme Court. They stated the appointment was an insult to the United States Senate as well as to the entire nation. It was the pay-off, so they explained, for Black's support of the recent infamous court-packing plan which had split the Senate into warring camps as no other measure within a decade, and other liberal legislation such as the Wage and Hour Bill, various WPA and PWA appropriations, Social Security legislation, the Wagner Labor Relations' Bill and other proposals, which were anathema to the conservative members of the Committee, Democrats and Republicans alike. No mention was then made of his Klan membership, the revelation of which later precipitated a crisis of such portentousness that Mr. Justice Black, who had already been confirmed when the news leaked out, felt constrained to make a nation-wide radio address of explanation, which it is stated was heard by the largest audience in history, with the exception of King Edward VIII's abdication message.

The liberals in the Committee were equally stunned by the nomination as they had never considered Senator Black as being possessed of a judicial temperament, but thought of him as being of the fighting, crusading type, whose leadership in the Senate was invaluable in bringing about the adoption of the New Deal program. Later they, with the other liberals of the Senate, prepared their case in behalf of the nomination and were successful in obtaining confirmation by a vote of 63 to 16, with 10 Republicans and 6 conservative Democrats voting against the nominee and 17 abstaining from voting.

A forthright answer to Senator Smith's query as to what would become of the country with Mr. Justice Black on the Supreme Court may be found in Professor John P. Frank's biographical sketch: *Mr. Justice Black. The Man and His Opinions*. The author, a professor at the Indiana School of Law, is particularly well qualified to write this book, for he was at one time law clerk for Justice Black, thus having an

opportunity to know him well, and has devoted a considerable part of his time to studying the personalities who have composed the Supreme Court. While it would not be unnatural to expect that Frank's account would be biased because of his relationship with Justice Black, his presentation of Justice Black's life and his impact upon the Court is forthright, fair and unprejudiced. The author simply presents the salient facts in the life of Justice Black, together with a collection of his most important opinions, leaving to each reader the task of evaluating his significance in the political and judicial history of America.

"The biographical sketch", it is stated in the author's preface, "makes very little attempt to estimate the validity of the hatred or the praise (for Justice Black). It is far too early to attempt Black's critical biography, and this sketch makes no such pretense. It is offered as a short account of salient events in a full life."

This book is divided into two parts, the first of which is designated "The Man" and the other "His Opinions". The first part describes the life of Justice Black from his birth in Clay County, Alabama, in 1886, up through the first ten years on the Supreme Court. Emphasis is placed on his modest background which influenced his early adoption of the general objectives of the Populists and of the liberal Democrats of the Nineties. This political philosophy has been steadfastly adhered to by Justice Black throughout his life and was applied with especial force and vigor when the various New Deal measures were under consideration in the Senate. This part of the book gives an interesting and full account of Black's Alabama home life, his education, his law practice, his endeavors to improve the administration of justice while he was serving as a police judge in Alabama, his colorful political campaigns, his record in the Senate, where he was one of the most effective and vocal proponents of the Wage and Hour Bill and other liberal measures, and his part in the spectacular investigation of the public utility holding companies. An interesting account is given of Black's appointment to the Supreme Court, with the ensuing storm which followed, including the controversy over his Klan membership, and his much publicized "feud" with Justice Jackson, which involved the propriety of Black's hearing a case presented by an ex-partner of many years before.

The second part of the book contains excerpts from 34 of the more than 300 written opinions filed by Justice Black during his first ten years on the Supreme Court. These opinions are prefaced by illuminating comments setting forth the circumstances of each case, pointing out the social or political implications and the votes of each Justice. A consideration of these excerpts gives the reader the best insight into Black's political, economic and judicial philosophy.

The opinions are grouped under the following classifications: I. Control of the Economy: (a) Extent of Federal Power; (b) Extent of State Power; (c) Problems of Regulation. II. Civil Rights: (a) Basic Theory; (b) Speech, Press, Religion; (c) Fair Trial; (d) Marriage and Divorce; and (e) Aliens.

I heartily concur with the opinion expressed in the introduction by Charles A. Beard that "Mr. Frank's volume should be judicially received and thoughtfully examined by each citizen concerned with the fortunes and fate of the Republic."

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