1947

REVIEWS
I wonder if a scholar can become a gentleman without ceasing to be a scholar. For, in their association, propriety intrudes to compromise the search for truth. These two authors, with a common subject, differ in the crafts they practice; but they are alike in allowing gentility to civilize objective analysis. Neither states that the nine young men as a Court are more unresponsive to the demands of justice—I pass up the word reactionary—than the nine old men who occupied the same chairs ten years ago. And I am far too much a creature of the amenities to make such a statement myself. But, if the scalpel had won a victory over good manners, I, for the defense, would be hard put to it for facts with which to answer back.

For the last few terms have been marked by a lapse from law to legalism. The current bench seems to have lost its feel for "the jugular." It seems, in the usual proceeding, unable to escape the irrelevant, to cut through lawyer-created issues, to find the real question which alone is of concern to the human men and women, natural and corporate, whose quarrels got the judicial process going. Instead it carries on as if it had been decreed that the actual issue, waiting patiently on the sidelines, had to abide the outcome of a bout at dialectic. Only two or three times in its history, and never for so long a period, has the Court elevated logomachy above human reason.

This attitude of living in a world of legal mores rather than of human conflict is too evident to require detailed example. By a few none too clever phrases, a man’s home ceases to be his castle in spite of a direct prohibition in the Constitution against searches and seizures without proper warrant. Even the law must yield to the belief, established in the newspapers, that John L. Lewis is Public Enemy No. 1; and to that end Mr. Chief Justice Vinson presents arguments to his colleagues for approval. If the arguments lack support in law, his brethren have a choice between them. A government employee, however long, efficient and faithful his service, can be dismissed upon an allegation, responsible or irresponsible, that he is disloyal. The Bill of Rights is too sacred to be put to so secular a use as his protection. The Congress, by fitting the anti-trust acts with an enlarging number of remedies, has sought the protection alike of small business, the system of free enterprise and the public. But, where the legislature has given, Mr. Jackson by

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a play on words, a bit of fudging, and a disregard for precedents, has taken
away a defense which was ancient when the Statute of Monopolies was
written.  

It is a matter of common knowledge that the way of the Court with a case
has changed. The way of a serpent on a rock or a man with a maid may be
as eternal as it is wonderful; but, as Mr. Justice Frankfurter has told us,
"fashions" in judicial rhetoric belong to the times. The very feel of the op-
inions distinguishes the New Court from the old. The Four Horsemen plus
Roberts and/or Hughes were honest and bold in their attempt to turn the
hands of the clock back. If they did not like coal control, the minimum wage,
or relief for dirt farmers, they said so by directly reading their prejudices
into the constitution. On the present Court, Vinson, C. J., and Frankfurter,
Jackson and Burton, JJ., often joined by Reed, J. arrive at a kindred result
by finding—or devising—ways to prevent the substantive question from being
reached. Thus, a patent may be invalid; but Frankfurter, relying upon a
precedent which is irrelevant, insists that the litigant is estopped from rais-
ing the issue. Bruce may be the victim of an unlawful price-system, but
he must pay the penalty for having selected the wrong cause of action. A
perplexed litigant should have persevered with his original suit; when, anxious
to do the right thing, he started all over, he lost his legal rights. Such instances
—and they are legion—indicate a state of mind so esoterically judicial that a
slight deviation from correct procedure—often existing only in the mind of the
justice—is a mortal sin, while a serious miscarriage of justice is only a venal one.

A mythology has been created in defense of the lapse of the Court from
the great tradition of the law. It is that the two wings of the present Court
represent an "activist" and a "legal" attack upon the cases. Thus Black,
Douglas, Murphy and Rutledge, JJ., play their economic preferences, while
Vinson, Frankfurter, Jackson and Burton, JJ., are content to sit back and
refer the cases to "the law." The author from Washington gets around too
much to swallow this fiction; the author from Boston, for all his critical
gifts, is too much attached to Cambridge completely to escape it. It does have
a bit of oblique truth; for Douglas, Black, et al. have competence in the dis-
cussion of substantive questions, while Frankfurter chooses to operate in the

820 (1946) (on first hearing).
(joint dissent. Frankfurter spoke for a minority of four, not for the Court.)
820 (1946) (on first hearing).
procedural field where he has confidence in his own footing. But rarely does Jackson, who of all the members of the court is most fertile in his leads, fail to adorn an opinion with an amateur's excursion in economics. And Burton's occasional discussion of industrial situations are alike indications of painstaking work and quite devoid of understanding. If a shift is made from the rhetoric in which they are cast to the rationale of decision, the difference in motivation between the two groups fades. Frankfurter affects a lack of concern for the "end product"; yet his votes are to be predicted in terms of the end product. You can almost always tell where he is coming out; yet not even the faithful can tell in advance how his stand is to be legalized. Frankfurter spurns "policy" and professes to lay the law down on the line. Yet he usually gets to the same place as Jackson whose law is not unspotted by the world. The work of the current term is marked by numerous instances of the search for a decent way of doing an indecent thing.

Along such lines a job of significance needs to be done. So I regret that in both books downright analysis has come off second-best in its battle with gentility. It was the law journals, reversing the decisions of the Supreme Court, which led the fight on the Old Court. The nine young men have been subjected to no such critical and disinterested bombardment. A host of truths, quite ugly truths, need to be spoken. It does no good to impute personal blame. Mr. Justice Frankfurter has no feel for the dominant issues; he operates best when weaving crochet patches of legalism on the fingers of the case. He does the best he can, often very well indeed, with the techniques in which he is proficient; it is a calamity that his skills happen to be petty skills. He is the victim of a bad legal education; but the Court has no business allowing him to select, from all the issues the case holds, the question upon which it must turn. The Old Court may have been any bad thing you wish to call it; but in backwardness it was bold and did not hide its naughtiness behind a curtain. The new Court is a lion in condemning iniquity, and a lamb in putting an effective stop to it; compare the roar of the Yellow Cab case,13 with the please-won't-you-be-good of National Lead.14 But, in a retreat from old ways, a respect for the province of the legislature does not carry an immunity to judicial responsibility. Mr. Justice Jackson, in his dissent in Southeastern Underwriters,15 created the doctrine that wrong once vested becomes too sacred to be disturbed. And the current Court has shown no avidity to discover exactly what the law says when the result would be to dispossess the interest which is established.16

It is the glory of our law that it was born of, and does not stray far from

16. See, e.g., U.S. v. The Pullman Co., Mem., 67 Sup. Ct. 1078 (1947). Here a three-judge Court denounced iniquity in no uncertain terms; but, as for relief which was effective, it decided that the powers of equity did not extend to a business judgment. Its decl-
the facts of life. The craft of the common-law judge, who worked in the
great tradition, was to apply the law to the actual case. The mark of great
judges from Hale and Holt and Mansfield to Holmes and Cardozo has been
the quality of judgment. Long ago it was remarked that the letter kills and
the spirit gives life. As procedure is the instrument, not the master of the
law; so that law is the instrument, not the master, of justice.

Walton Hamilton†

Both these books are recent studies of the workings of the Supreme Court
as the third branch of our government. McCune's is lively, entertaining and
amusing. Rarely does a book live up to the blurb on the jacket; his is an
exception. It deals mainly with the court since 1937 when Roosevelt trans-
formed it after the collapse of his ill-advised plan to get rid of the old Court by
packing the new. The story is told in biographical form, dealing with each
justice in a separate chapter, alternating with chapters on civil liberties, the
war decisions, and other recent decisions of the Court as a whole. Consider-
able space is given to the Supreme Court plan of 1937 and its vicissitudes and
to the feud between Justices Jackson and Black. The biographical material
is not of a muck-raking character but, in an impartial way, seeks to do justice
to the propensities and characteristics of the various judges.

It is a pity that so meritorious a book is marred by signs of hasty proof-
reading, though the errors that have crept into the story will not materially
affect its reading. Many of the anecdotes are new and the style, while racy
and colorful, is never vulgar. To many it is a misfortune that the Supreme
Court ever assumed the power to declare federal legislation unconstitutional
for it has thrown the Court into politics. But since it occupies that position,
the informative, light method of treatment adopted by this book is preferable
to the ponderous analysis to be found in most law books. The author pre-
serves the human element in the court's composition while yet analyzing with
sympathetic pen their New Deal decisions.

The book by Curtis, while resembling McCune's in the pithiness of its
sentences, deals with the Supreme Court from a somewhat different angle.
Instead of the journalist addressing lawyers, as was McCune, we find in
Curtis a sophisticated and learned lawyer addressing laymen. Valuable as
this book is in analyzing the judicial process, I am inclined to think that lay-
men will be baffled by his analyses and that lawyers are likely to derive more
profit than laymen. Curtis examines the work of the Court as an exemplifica-
sion was affirmed on appeal by "an evenly divided Court." The vote is not of record;
but it can be set down with certainty that the votes for reversal were by Black, Douglas,
Murphy and Rutledge, JJ. In reaching the conclusion that Vinson, C. J., Frankfurter,
Jackson and Burton, JJ. voted to affirm, no legalistic criteria have been employed.
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tion of the judicial process. What he has to say about particular cases will prove of value to lawyers, statesmen and philosophers—a combination he demands of every Supreme Court justice. Where McCune is amusing, Curtis is serious. He is concerned with a serious theme and cannot help the result. He deals adequately with the New Deal and especially with the growth of civil liberty. There is a temptation to read his book over again for even to an experienced man it is none too easy to follow. It is almost certain that the book will be accepted as a valuable contribution to constitutional law and that the judges of the Court will find it profitable to read.

Because the authors fail to analyze all questions of international law and all questions of procedure, they omit discussion of the dubious opinion in United States v. Pink—sustaining a Russian confiscation of a debt from a New York bank to a Russian creditor, and Tileston v. Ullman—in which the doctor, a victim and the target of an anti-contraceptive statute, was not allowed to challenge the statute because forsooth he had not joined as parties plaintiff the three women who would have profited by his advice.

It is my personal opinion that the present court is much the best that we have had. Both the content and the literary form of its decisions seem superior to the clichés of the past. Inevitably, there will be differences of opinion among such men. It is a misfortune that practically none of the judges has the necessary background in international law. At least, Chief Justice Stone had a chance to submit troublesome questions to John Bassett Moore. None of the others appear to have availed themselves of that opportunity.

EDWIN BORCHARD†

It has become a commonplace to say, or assume, of the current Supreme Court that the big conservative-liberal battle lies behind it; that the nine new Justices are all of them liberals of varying degrees of persuasion; that their doctrinal differences—by contrast to the old Court’s split over progressive legislation—are quite minor matters as government by judiciary goes. I wonder. For there are more ways than one to skin a cat or a statute, and the stiletto of “interpretation” will serve as well as the old battle-axe of “unconstitutionality” in the hands of a Justice resistant to social reform.

Is it really any more conservative to oppose, on whatever legal pretext, federal regulation of the coal industry than to oppose, on whatever legal pretext, federal regulation of the insurance industry under the anti-trust laws? Is it really any more conservative to vote against a national plan for financial aid to farmers than to vote against a national plan for financial aid to railroad-shippers, including farmers? Is it really any more conservative to defend the right of employers to pay low wages than to defend the right of utilities to

1. 315 U.S. 203 (1942).
2. 318 U.S. 44 (1943).
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charge high rates? Or is it perhaps true, despite the current commonplace about an essentially liberal Court from stem to stern, that the same basic battle between the privileges of property and the control of those privileges is still being waged, but on a different legal level—with the “interpretation” of patent laws, tax laws, labor laws, anti-trust laws, utility laws, and all the rest subtly substituted for the old Court’s more forthright fight over the constitutionality of new legislation?

Because Mr. McCune is aware of this last question and Mr. Curtis either is unaware of it or does not care to face it, The Nine Young Men, for all its journalistic disjointedness, is a far more perceptive and useful book than the superficially scholarly Lions Under the Throne. Mr. McCune, though he pretends to no deep erudition and essays no philosophic furbelows in his review of the Court’s past ten terms, does appreciate the essentiality of the economic decisions in which the Court has acted as overseer of government regulation of business. He rates his nine young men according to their stands on the economic issues as well as on the popularly publicized issues of civil liberties. By so doing, he manages to rate them rather more accurately than has any other recent writer of book or article, although Justice Jackson’s verbal brilliance seems to have blinded him a little in dealing with one of the Court’s two most obstructive members. These ratings are implicit in nine chapters (interspersed among more general decision-discussing chapters) each devoted to the life, personality, and judicial views of one of the Justices. As one who recognized several phrases from his own past articles, borrowed without quotes or credit, I think it fair for me to say that the life-and-personality stuff is largely second-hand rehash of published material. Inevitably, too, I caught a few errors (though none so egregious as some of the nine boners listed by Henry Steele Commager in his Herald-Tribune review of Lions Under the Throne). But these minor gripes in no way detract from my admiration for a competent, clear-headed, and amazingly complete reporting job. Not in itself any great or startling contribution to Supreme Court literature, The Nine Young Men could well serve as a starting-point and a handy warehouse for anyone anxious to take on a more ambitious task.

Mr. Curtis, for instance, might have profited by digesting it whole before he wrote his own book on the Court. Or he might not. (Forgive me for falling momentarily into the chopped-sentence chit-chat style which Mr. Curtis affects and which some have admired. Not I. Like this. See?) In contrast to his conversational cosiness, Mr. Curtis’s ideas are on a rather more ambitious intellectual level. He is concerned with such matters as federalism and dual sovereignty and tri-partite central government and the role of judicial review in relation to these. There is nothing much wrong with all this political theorizing except that it goes on in something akin to an economic vacuum. Though Mr. Curtis starts back with the Founding Fathers, he might never have read Charles Beard or, for that matter, James Madison. As he works up to date through the Court’s history, Louis Boudin is con-
spicuously not one of his references; he prefers Warren. Even in his tediously discursive chapter on "Old Court and New Deal," which adds nothing to what has been better said, before and often; Mr. Curtis sticks to the abstract convolutions of political and legal theory, with only a passing nod to the protection of Big Business (his caps.) in the old Court's abuse of the "due process" clauses.

When he gets around to today's Supreme Court in the last near-half of his book, Mr. Curtis begins to omit not merely the economic issues behind cases but even the economic cases themselves. No rate or patent or anti-trust cases, no cases involving supervision of regulatory bodies, only a smattering of minor tax and labor cases (with the emphasis always on non-economic factors) contribute to Mr. Curtis' analysis of the present Court and its members. Instead, he runs through a few small conflicts between state and national power and then, like a layman unable to comprehend the vast and disparate business-vs.-government issues the Court has coped with, he stakes his almost all on the civil liberties decisions. This strange selectivity, plus some strained argumentation, lets Mr. Curtis come up with a clearly implied personal choice as the new Court's hero.

Now the choosing of judicial heroes—or for that matter, of judicial villains—does not in itself vitiate or even taint a study of the Supreme Court. On the contrary, since the Court is composed of nine distinct and intensely human beings, such preferential judgments are inevitable on the part of any observer and it is better that they be consciously made and honestly communicated than that they be unconscious, unrecognized and so condescendingly unconceded. Law professors and others who would keep their Supreme Court scholarship uncontaminated by personalities, uncomplicated by intellectual and emotional differences which in fact exist, are all too likely to find the Court's decisions and divisions incomprehensible, unpredictable, paradoxical and mysterious. As Prof. Hamilton long ago perceived and Prof. Lasswell currently makes clear, what we need in order to adequately analyze or understand the court is more, not less, concentration on the separate justices as individuals. I have no quarrel with Mr. Curtis' choosing of a hero for the Court; my quarrel is with his choice of a hero. For his choice is Justice Felix Frankfurter.

To anyone who knows about Mr. Curtis, this should be no surprise. Mr. Curtis is a Bostonian and a Harvard Law graduate who rates Prof. Thomas Reed Powell, Justice Frankfurter's official apologist in the law reviews, as "our great expert now" on constitutional law. In a book of quotations that Mr. Curtis coedited a couple of years back, called The Practical Cogitator or The Thinker's Anthology, there were four lengthy quotes and a short one from Felix Frankfurter and none at all from Justices Black, Douglas, Murphy, or even Stone. (Franklin Roosevelt got one and Abraham Lincoln three.) So, in Lions Under the Throne, there are nineteen quotations from, or references to, Justice Frankfurter—more than are allotted to Justices Black, Douglas, Murphy, and Rutledge combined.
Even beyond his case selectivity and his quantitative loading of the record, Mr. Curtis works hard at touting his hero. He blandly quotes with apparent admiration Frankfurter's loose talk (in a concurrence) of "discrimination" as the basis of *McCulloch v. Maryland*—barely two pages after he himself has said: "There was no discrimination . . ." He cites with obvious approval Frankfurter's participation in the joint dissent in *McCarroll v. Dixie Greyhound Lines*—and nowhere adds that Frankfurter repudiated this stand well before Mr. Curtis' book was written. He beams at Frankfurter's "State as a State" formula for dual-immunities tax cases, out of *New York v. U.S.*—without ever noting that the four separately concurring Justices, headed by Stone, devoted much of their opinion to ridiculing the formula as utterly meaningless. Most significantly, he pounces on two or three stray opinions by Black and Douglas, worries and twists them until he can conclude that "the mentality of these Justices" is ruled by "conceptual thinking" ("in the same grooves which held the Old Court so fast") and triumphantly crowns Justice Frankfurter, by contrast, as the Court's great "latitudinarian."

Leaving entirely aside the big economic cases, in which Mr. Curtis might have found his so neat classification a touch difficult to apply, I should like to pose Mr. Curtis a question or two, right on his own home grounds. Mr. Curtis treats in his book of judicial limitations on the states' taxing power under the commerce clause; Mr. Curtis also spends quite some time in his book making fun of the old Court's rigid distinction, on an abstract level, between the "direct" and "indirect" affecting of interstate commerce. On Dec. 16, 1946, Justice Frankfurter spoke the opinion of the Court in *Freeman v. Hewit*, a case declaring a certain Indiana tax, as applied, an unconstitutional violation of the commerce clause (with Justices Black, Douglas, and Murphy, dissenting). Perhaps this decision came down after Mr. Curtis' book was at the printer's; but surely a blanket classification of judicial "mentalities" should hold as well for the future as the past—so no matter. In *Freeman v. Hewit*, Justice Frankfurter said the tax was bad because it was a "direct" tax on interstate commerce. He did not explain why it was "direct"; he simply said it was "direct" and said it ten times. How now, Mr. Curtis? How about the absurd conceptualism of deciding cases by drawing lines between "direct" and "indirect," and how about the "latitudinarianism" of your favorite Justice? Or do you still applaud Justice Frankfurter when he goes the Bellman in Lewis Carroll’s "The Hunting of the Snark" seven better? It was the Bellman, you will recall, who remarked: "What I tell you three times is true."

In all candor (with due apologies to Mr. Curtis who opines, revealingly, that "candor can be very destructive") I confess to some small amusement at the recent rash of writings in defense of Justice Frankfurter. From Prof. Powell's involved and interminable concurring opinions in the *Harvard Law Review*—through Arthur Schlesinger, Jr.'s, convenient but cock-eyed dichotomy, in *Fortune*, between the "judicial self-denial" of Frankfurter *et al.*
and the wicked "activism" of the Black-Douglas wing—on to this latest tossing of a lopsided lance in *Lions Under the Throne*, they all try so desperately to make a convincing liberal out of the little Justice. This quixotic effort demands of its authors, a gallant if misguided crew, that they strain at legalistic gnats and swallow a caravan of economic camels. For anyone who reads the reporters whole can see, as did Mr. McCune, that the same old conservatism, poured into new containers, persists on the Court today—and that Felix Frankfurter is its major prophet.

**Fred Rodeell†**

In introducing courses on Constitutional Law and related subjects I tell my students that one of the reasons a lawyer should be familiar with the work of the Supreme Court is that much of its business makes the headlines, and the layman will always ask the lawyer to explain its latest decisions as inadequately reported in the newspapers. But even when they have become lawyers, I warn them, they will be no better equipped than the layman to explain a Supreme Court decision unless they follow the current work of the Court as news.

This seems to me just one of many ways to express the paradox of our unique institution of judicial review: the Supreme Court is a court of law, moving in the circle within which lawyers operate, but by and large it decides issues of immediate political importance. Evidence of this paradox is the recent appearance of two books for the layman about the Supreme Court. Both books demonstrate the paradox. Mr. McCune, in reportorial fashion, both by selected subjects and by analyses of individual justices, tries to cover the whole field of Supreme Court activity. The result is a confusion of law and politics. Mr. Curtis confines himself mostly to the Court and the Constitution but he sets up his discussion on a philosophical plane and brings the paradox out into the open.

No longer a layman, I cannot be sure how clear either of these books is to the uninitiated. I suspect that the details of McCune's book may be confusing but that the overall picture is lucid enough. It is full of errors, some factual, many the kind that comes from condensing a twenty-page opinion into three sentences, and a few that a student in the field would consider the result of faulty analysis. But such errors, except of course factual ones, seem to me inevitable in a popular book about the Court. The layman who reads McCune's book will get a somewhat blurred picture of the Court's work and of the people who do the work, but I think for all its blurred lines it is not so misleading that it should be put on an Index of books forbidden to the lay public.

Curtis has set his sights higher than McCune. He seeks to demonstrate to the layman the nature of this paradox of the Court. And he also seeks to

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work out a philosophy, satisfactory to him and presumably to the lay public, that will, if followed by the Court, justify its place in our constitutional system. The philosophy is, of course, one of "self-restraint." It is elaborated in superb prose, but it boils down to a plea not to use power unwisely. By this Curtis apparently means the Court should not stray far from what he calls "our creed for the era." As long as the present system is unchanged, I suppose that is the best philosophy one can express. The trouble is that it doesn't mean much. No justice presumably ever thinks he is using his power unwisely. In most cases part of the public thinks the Court is "right"—i.e., using its power "wisely"—and part thinks the Court is "wrong"—i.e., using its power "unwisely." Nor do I see that Curtis' conclusion satisfactorily gets around the dilemma of judicial review—that is, that the debatable issues of review are matters of opinion and if the nine young lions have the power, they are entitled to use it according to their opinions; if they are not entitled to exercise their power in this manner but are supposed to exercise it according to our opinions, then take away the power and give it to us.

Whatever one thinks of Curtis' conclusion, his book is well written and should be enlightening to the layman. In short, I think a layman would do well to read both books, one for its bird's-eye survey of the facts, the other for the philosophy of the institution. Likewise, a lawyer not specializing in the work of the Court could read both with profit. And even the expert in the field will find something in both: in McCune's a few new stories and in Curtis' some old ideas dressed up in new and sparkling language.

GEORGE D. BRADEN

In the present state of legal scholarship anyone who tries to describe the social and personal factors that "explain" the responses of the Court is thrown back on improvisation. He is in the same predicament as a writer setting out to summarize the economic history of the United States on the basis of the scholarship of 1900, when economic history was a catchall of haphazard statistics, dramatic anecdotes, and impressionistic remarks. There was no systematic picture of the fluctuating price level, or the changing structure of saving, investment, employment, and standard of living.

The literature now available on the Court and the American judicial process reads like the economic scholarship of the late Victorian era. There is no systematic survey of the structure of Court opinion that makes full use of the methods devised by modern research on semantics. There is no monumental survey of comparative biography in which the technical apparatus of

1. P. 334.
2. It seems worthwhile to note that partisans of various justices will hold strong views. Friends of Justice Frankfurter, for example, will like Curtis and not McCune. Friends of Justice Black vice versa. Thus, another demonstration of the paradox.

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sociology and psychiatry, for instance, are effectively applied. Systematic studies have yet to prepare the material on the basis of which the impact of single factors, or groups of factors, can be critically evaluated. (For instance: What indicators are there of the impact of party politics, elected office, administrative service, the army, business and different types of legal practice? What of the personality structure of the bench? What of the effect of presidential ambition and personal incompatibility upon the judicial process? What indicators are there of the impact of various modes of legal education? What evidences have there been of response of Courts to legal and professional criticism?)

No doubt the percolation of modern methods into legal scholarship will result, over the next fifty years, in some improvement in the calibre of material at hand for the McCunes and Curtises of 1997. In the meanwhile a steady trickle of inquiries into the legal process can exercise a certain impact upon the level of rationality achieved by the judges participating in the legal process itself, an impact curiously underemphasized, if not undervalued, in the McCune-Curtis volumes.

The rationality of the judicial process is largely a matter of insight, which depends upon awareness of predispositions of the self in relation to the environment. Since self-understanding is furthered by analysis of the self by others, self-knowledge among the judges can be intensified when they see themselves mirrored in the perspective furnished by the psychological and social sciences. It is an opportunity, if not an obligation, of legal scholarship to hold a mirror to the face of the Court.

It should not be imagined—as Mr. McCune erroneously imagines—that more knowledge on the part of judges improves the certainty with which decisions can be predicted. Rationality, on the contrary, may increase unpredictability. After remarking that the pattern of the votes of Mr. Justice Frankfurter in relation to his brethren is fairly clear, McCune continues: “However, this behavior pattern does not make Frankfurter’s vote predictable, not even against the background of volumes of his writing about the Court and the Constitution. Theoretically it should; but the best test—reactions of lawyers who have to follow the divisions closely—shows the professor to be unpredictable”.¹

Theoretically, knowledge improves flexibility of the mental process, emancipating the thinker from the simplifications of ignorance. Self-knowledge, in particular, is calculated to emancipate the thinker from the automatic compulsion of unrecognized bias, and in this way to enlarge the vision of details and relations pertinent to the self (as well as to the environment) which are taken into account in coming to a given result. It is not unlikely that Mr. Justice Murphy, were he more aware of the factors within himself that affect his “sensitivities”, would be less rather than more predictable. (Mc-

¹. P. 99.
Cune: "His vote can be more nearly predicted than can that of any other justice, which is another way of saying that one can predict which cases will offend Murphy's sensitivities." However, insight into sentiment and cliche does not invariably produce changes in behavior: you may know that you hate economic bigness and concentration partly on the basis of early identifications with "little" people, and you may nonetheless continue to oppose monopoly.

The point is that there is no necessary tie between rationality and the certainty with which decisions can be foreseen. Indeed, predictability will be welcomed by alert justices as an opportunity to raise within themselves a question about the degree to which they are acting upon an overly rigid set of predispositions when they are faced by the ever-unfolding semi-novelties of human life.

HAROLD D. LASSEWELL†

. SCHOLARSHIP about the Supreme Court is in danger of being confused by the divisions of the Justices. The New Court contains three or four strong-minded, colorful and assertive personalities, and some of them manifestly dislike each other. A good many of the law professors and other writers on these matters vicariously share the joy of the judicial feuds. For some, Mr. Justice Frankfurter is a King Charles' head, cropping up in every context, and always the target for a rock-filled snowball; others find their view of the Court and its work obscured by emotional attitudes towards other Justices, notably Jackson, Black or Douglas. The New Supreme Court is hard enough to understand and to predict, without forcing all analysis to choose between being pro- or anti-Mr. Justice Black. Any comparative survey of the work of the Court reveals a most paradoxical inconsistency in the position of individual Justices. The attitudes of the Justices are a problem in national policy, and the study of the Court's work is not advanced by the pressure of factionalism.

The program and policy of the New Supreme Court are in many ways a mystery.

On the negative side what the Court has done is clear. The main positions of the constitutional era which ended in 1937 have been reversed. The principal judicial limitations on economic regulation by Congress and by the states have been abolished or greatly relaxed. The generalization could be qualified a good deal in detail—particularly as to state taxes—but it is fair enough, for most purposes. Old problems have taken on new urgency as a result of some of these changes. The exercise by Congress of some of its new power over

2. P. 151.
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commerce, for example, has raised many questions as to the scope of state regulatory authority in the same area. But by and large, constitutional doubts are no longer a principal issue in the consideration and drafting of economic and social legislation. Attention can now be focused on the more fundamental problems of policy, rather than on the limited and sometimes inadequate target of constitutionality.

Once one gets past the New Court's nullification of the restrictive dogmas of the Old Court, however, fog closes in. Clearly the New Court is sometimes but not always in favor of civil liberties; it is sometimes but not always against what is called "judicial legislation"; it supports the work of administrative agencies, although it divides sometimes on how far courts should see to it that administrative bodies do what the courts think the legislatures have told them to do.

These, however, are examples. The ultimate question is what the Court's job is in American government, and how well it is doing it. This is the theme of *Lions Under The Throne*, an urbane and thoughtful essay on judicial supremacy—not path-breaking, but altogether worth reading. Perhaps as a consequence of his success as an anthologist, Mr. Curtis suffers from some archness of style, and his book is full of tag ends out of Rabelais, Montaigne, Bacon and Holmes, Holmes, Holmes. However, these are minor and personal reading difficulties. *Lions Under The Throne* is mature and not without wit. It is the comment of one of Holmes' good pupils on the paradox of the Supreme Court's function in a democratic society.

Mr. Curtis has not attempted a comprehensive report on the New Court, nor a full history of the whole Court. He has sketched the historical growth of the Supreme Court's special power in our system of government, through its principal changes. His historical illustrations are few, but they establish a realistic perspective. And he has attempted to formulate a conclusion of his own as to how the Court should behave in relation to the other arms of government.

For better or for worse, Mr. Curtis believes, the practice of judicial supremacy should remain. The origins of the power are obscure and probably illegitimate, but in his view the Court should keep its historic privilege of declaring statutes unconstitutional. The privilege should be exercised warily, prudently, and with a strong sense that the Court is only part of a complex government which cannot work unless there is reasonable harmony among its branches. Above all, the judicial power should be exercised for the great and dominant purpose of helping to make government and society democratic.

Thus his first rule of judicial etiquette is that the Court should give full faith and credit to the products of the democratic legislative process, just as they have traditionally accepted on faith the verdict of a jury trial conducted

REVIEWS

according to the proprieties of common law. Such a policy of democratic
deferece to the legislative and executive leaves considerable scope, however,
for the responsible exercise of judicial supremacy.

In the first place, personal liberties are the source of all things in democ-

cracy, and they should be beyond legislative control. Mr. Curtis quotes Justice
Jackson's vivid sentence: "One's right to life, liberty, and property, to free
speech, a free press, freedom of worship and assembly; and other fundamental
rights may not be submitted to vote; they depend on the outcome of no elec-
tions."3 In Mr. Curtis' view it is or should be one of the Court's basic
responsibilities to assert the inviolability of civil rights.

Then there is a considerable number of statutes, Mr. Curtis argues, which
do not merit full faith and credit before the Supreme Court. Here he builds
on a suggestion of Chief Justice Stone4 to define a class of situations in which
the Court should make up its mind without the exercise of self-restraint.
These are cases in which those who bear the burden of the legislation are not
adequately represented in the legislature which makes the decision. In such
cases, Mr. Curtis urges, the legislative vote is not entitled to acceptance on
faith as the outcome of full democratic deliberation. In that sense it lacks
what should be regarded in a democracy as a species of procedural due
process. Mr. Curtis gives as examples state legislation affecting interstate
commerce, California's attempt to bar the "Okies,"5 and action against minor-
ities feebly represented in the legislature. The list could easily be lengthened,
perhaps most notably by the problem of improper legislative districting pre-
sented in Colegrove v. Green.6 We have 150 years of experience in the in-
tensely difficult task of getting legislators from rotten boroughs to vote them-
selves out of power. Without judicial help, we can hardly succeed in giving
each citizen a vote of equal consequence, in legislative districts of equal size.
It is hard to imagine an issue of more importance to the entire process of
representative government, nor a case in which the Court failed more com-
pletely as an instrument of democratic purpose.

Judicial supremacy in these two areas, Mr. Curtis says, does not exhaust
the problem. "What is the Court's function and what are the limits of its
self-restraint when the democratic process is working, when it is not mutila-

4. South Carolina State Highway Department v. Barnwell Bros., Inc., 303 U. S. 177,
185 (1938); McGoldrick v. Berwind-White Co., 309 U. S. 33, 46 (1940); Southern Pa-
cific Co. v. Arizona, 325 U. S. 761, 767-768 (1945). See also United States v. Caroline
(1947).
5. Edwards v. California, 314 U. S. 160, 174 (1941). Perhaps one should note the
view that in the field of interstate commerce the Congress can always overrule state legis-
lation if it wishes—a doctrine which ignores the realities of the legislative process, evades
judicial responsibility for the preservation of the national economy, and cannot be recon-
ciled with the Edwards case itself.
(1947).
ing itself. and when the legislation before the Court is the result? We must
look for an answer in a larger context than self-restraint or even faith in the
democratic process.\textsuperscript{7} The answer, Mr. Curtis says, is that the Court must
act for our society, with its other organs of decision, as proponent and pro-
tector of the values which are the unstated premises, goals, needs and pur-
poses of our culture. The inescapable ethical ideas which determine how the
men of any time think and react will give ultimate shape to the process of
decision in the Supreme Court. The Justices cannot help being products of
their generation. It is best, therefore, for judges to be conscious of what
would otherwise be their unconscious motivation; to examine their private
verities; to minimize personal predelictions; and to attempt as statesmen to
fulfill the underlying philosophic code of the society as a whole.

On this note, Mr. Curtis concludes. But it is a point of beginning, if the
conclusion, however correct, is to be more than platitude. What is the code
of our society, and what task does it set for Law in general, and the Supreme
Court in particular? Even if we wait for another Jefferson to write them
down for our time in general terms, what reflections of the unstated ultimates
can we find in the work of the present Court?

The weakest part of Mr. Curtis' book is its failure fully to meet the chal-
lenge of its own conclusion. He does not affirmatively attempt to formulate
a full program for the Court, nor adequately to evaluate its performance.
The bulk of his chapters, indeed, is devoted to the Court which died, and
was reborn, in 1937. It is a startling experience in many ways to review
the leading constitutional cases of the twenties and early thirties—monstrous
and fantastic they are now, both in reasoning and result. It is hard to believe that
it is little more than ten years since the first Wagner Act decision, for the
Constitution of the Old Court now seems a remote historical curiosity. Mr.
Curtis' spirited defense of President Roosevelt's court-packing plan, which
would have rocked the teacups in 1937, now sounds serene, philosophic and
inevitable.

The pressing issue for the New Court is altogether different: to help artic-
ulate the public law of a free society, competent to fulfill its democratic dream
in the turbulent second half of the twentieth century. If this is the Court's
function, then self-restraint, even as modified by Mr. Curtis' necessarily broad
exceptions, is a working rule of limited utility. On those aspects of American
life which fall within the jurisdiction of the Court, the question becomes:
What positive goal is served by the Supreme Court's decision—or refusal to
decide? The generalities of Mr. Curtis' analysis can be used in valuing the
work of the Court when they have been carefully tested by application to ur-
gent current controversies, no less urgent when viewed in the long-range per-
spective of constitutional structure. It is only after one has tried to formu-
late in detail the concrete purposes and problems of the Court for our time

\textsuperscript{7} \textit{Lions under the Throne} 328 (1947).
that one can hope to achieve insight into its energetic divisions, and its emerging pattern of decision. Admittedly the task will be difficult, for many of the ideas we have inherited from Holmes, Brandeis and the other great teachers of the last generation are no longer satisfactory. Yet surely it is a reviewer's privilege to call for a positive doctrine of constitutionalism without supplying one.

Mr. McCune's *Nine Young Men* is almost totally useless for the purpose. To be fair, it pretends to no such function. It is a relatively harmless and gossipy piece of journalism, designed to give the lay public some idea of who the justices are, and what they are doing. The portraits which emerge are two-dimensional and distorted. Mr. McCune seems to think that most of the cases before the Court represent a direct choice between the interests of Big Business and the Common Man, and he is trying to work out a scorecard dividing the justices into liberals and conservatives in this sense.

The Supreme Court is an institution which, despite its abdication of many powers, can still substantially influence the structure of American life. It is concerned with the way in which power and authority are distributed in our society—with the status of the military; the relative importance of the states, the regions, and the nation in a federal system; with the position of the individual as a member of the community, in his capacity as a voter, a defendant in criminal trials, a worker, trade union member, business man, farmer, inventor and bankrupt. It can help or hinder in some, but not all, or even the most important, of the economic processes of society. Thus it can settle disputes concerning the relations between labor and management, the organization of industrial markets, the administration of the tax laws, and the protection of patents. But it can do little or nothing to formulate fiscal policy, foreign policy or banking policy. It has inherited a strange and mystic prestige, and the power, when litigants present the opportunity, to strike an occasional blow for Liberty.

Neither of these books provides a critical assessment of the Court's performance, in the light of a philosophy of its function. Mr. Curtis has limited himself to broad and rather intangible aspects of the issue of judicial supremacy, and Mr. McCune is out of his depth. The task for scholarship in this field of constitutional law therefore remains to be done. It is the most pressing of all the responsibilities of legal scholarship. For the Court lacks an integrated and affirmative conception of its duty. It needs the benefit of sustained, disinterested and detailed criticism of its work. And certainly we need from the Court a much better brand of constitutionalism and public law than we are getting.

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