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Supreme Court and Supreme Court Law: A Symposium (Ed. Edmond Cahn, 1954)

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BOOK REVIEWS


From the statement by Professor Cahn (p. 1), "Unless our philosophy of government is to be controlled by the rules of a patent office, novelty can hardly be accepted as the sole or decisive test of merit," through the observation by Professor Hurst (p. 84), "I think there is a tendency in the Court, an unfortunate one from my point of view, to write for the anthologies too much and for the litigants too little," to the concluding sentence by Mr. Curtis, "What we owe to [John] Marshall is the opportunity he gave us of combining a reign of conscience with a republic," this urbane volume reflects brilliance and learning. It is not monolithic, but the participants reach closer fundamental agreement than the members of the judicial body under their scrutiny.

This is a symposium, arranged at New York University School of Law by Edmond Cahn, to commemorate the sesquicentennial of Marbury v. Madison. It explores the influence of judicial review on the history and progress of the United States and examines the manner in which the Supreme Court has exercised its power and in what direction the Constitution is being turned. Unquestionably it will be a rare person who can agree with all of the ideas expounded.

Thus, in the introductory essay, Professor Cahn seems to deny the possibility of there being any immutable standards, quoting Brandeis via a secondary reference as remarking in his old age that "a code of law that makes no provision for its amendment provides for its ultimate rejection." Have the Ten Commandments — albeit violated — been amended lately? Have they ever been fully rejected by all men? Cahn observes that he has known quite a register of trial and appellate judges but never one who doubted that the solemn assumption of office had somewhat fettered his will. Should freedom be license? He goes on to note that the official oath "is now only a solemn type of promise." It would seem that if the oath means nothing it can hardly be required, and if it means anything the phrase "so help me God!" is what has meaning. Cahn would apparently quarrel with Professor Charles H. McIlwain, to whom the essence of constitutional

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1 Cranch 137 (U.S. 1808).

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government is the recognition of the existence of “a law that puts bounds to arbitrary will.”” Cahn might also have given us better quotations from Jefferson. But none of this can detract from the worth of the introductory essay; and very few students of logic would disagree when he says: “It may appear to you as somewhat peculiar that, in a country which contains such a high proportion of individuals who do not share Anglo-Saxon origins, the only history regarded as relevant, not merely for the purpose of defining specific terms like ‘jury’ but likewise for the purpose of defining basic national traditions, should be Anglo-Saxon history. It is assumed that the Volksgeist the Supreme Court is supposed to consult is Anglo-Saxon.”

Assistant Dean Ralph Bischoff of New York University School of Law establishes himself as a phrase-maker with his contribution. He inquires: “Do the members of the Court have any common conception of its function in our democratic way of life?” He notes: “... much of this overruling of precedents or of previously established concepts has only been necessary because the Court has transposed the policy of an era into constitutional dogma. Because laissez faire was constitutionalized it had to be deconstitutionalized.” It is strange that Dean Bischoff did not join in the discussion following his opening address.

Professor John Frank, from Yale Law School, contributes items on political questions and on review and basic liberties. His address on political questions concludes with the thought that the Supreme Court’s expanding of the doctrine of political question—the origin and scope of which, he concedes, are unclear—may well exclude important claims of individual liberty from any judicial review, and thus be contrary to the spirit of our institutions. We sympathize with him in theory, but it seems to us that “any judicial review” is going a bit too far. “Any appellate review” might conceivably be precluded, but are unreviewable decisions of courts necessarily wrong? And has it not been the rule for many years that the right of appeal is not essential to due process? And were there not many lawsuits on the

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2The Fundamental Law Behind The Constitution of the United States in The Constitution Reconsidered 3 (Read ed. 1938). He would appear to disagree also with the declaration of Miller, J., speaking for the Court in Citizens Savings & Loan Association v. Topeka, 20 Wall. 655, 663 (U.S. 1874): “The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. . . . There are limitations on such power which grow out of the essential nature of all free governments.”

3See McKane v. Durston, 153 U.S. 684, 687 (1894), to the effect that, in criminal
double indemnity clauses in insurance policies carried by the victims of the Pearl Harbor attack that turned on the existence or nonexistence of a state of war between the United States and Japan? And is not the existence or nonexistence of a state of war a political question? His formal article on review and basic liberties is more satisfactory. Here he gives us a fine tale of how the McCarran Internal Security Act of 1950 was pushed through the Senate, not omitting the now famous comment of Senator Ferguson (R., Mich.) that “never in the history either of American jurisprudence or of the British common law was it ever [until this act] contended that a man could be tried for his mere capacity to commit a crime.” He goes on to point out that constitutionality has come to be equated with merit, and makes a stirring plea to return the Supreme Court to the point of deciding, not avoiding, constitutional questions. This is legal writing at its best.

Paul Freund, professor at Harvard Law School, gives us an address on review of facts in constitutional cases and an article on review and federalism. In his short address he observes that the Supreme Court has actually made findings of fact that are contrary to findings of the trial court, citing the Scottsboro case, and poses some basic questions which set off a lively discussion with the other panel members. In his article on review and federalism, he comments on everything from the effects of legal education to the possibility of a federal statute concerning divorce. This is not to say that he rambles: his examples and similes are chosen with care. His essay is well rounded, and points up serious problems existent under present case law. One of his quotations from the late Chief Justice Edward D. White indicates that White was aware that development in economics was not the death knell of our system. This we were glad to see, for thus does a modern Harvard man “update” Mr. Justice Holmes, who once commented that, while White was an unusually powerful man, he was hardly as well fitted for the bench, where Cleveland put him, as for the Senate, whence he was appointed. Now White was from Louisiana, the first

cases at least, “A citation of authorities upon the point is unnecessary,” and Standard Oil Co. v. Missouri, 224 U.S. 270, 287 (1912), a civil case holding that “right of appeal is not essential to due process of law,” but citing a criminal case as authority.

81 Holmes-Laski Letters 797 (1953).
Southerner to head the Supreme Court since Taney. Although he was a conservative, he wrote the majority opinion upholding the constitutionality of an act of Congress passed at President Wilson's behest to avoid a general railroad strike, establishing an eight-hour day for railroad workers. To see any recognition of the true judicial temperament in White, whose definitive biography remains to be written and who is altogether too little known, is pleasant.

Professor Willard Hurst, from the University of Wisconsin Law School, has a slight note on the role of history in the process of constitutional construction and a formal article on review and the distribution of national powers. In his statement on the role of history, Hurst concludes that for the safe conduct of any high policy-making through the courts we must depend upon a challenging standard of advocacy at the bar. This brings to mind the complaint of Judge Charles E. Clark at the Institute on Legal Ethics at the University of Florida last winter that attorneys are seldom properly prepared for argument, to their clients' detriment and their own shame. While Professor Hurst gives us a truism, Judge Clark's sad reality indicates the task of the law schools and bar associations. The formal article by Hurst bears rereading. It is not casual; it might have used a little sparkle. Law reviews need not be dull merely because they treat of abstruse subjects. Hurst's first footnote, observing in effect that American legal history since 1790 is practically terra incognita and then listing precisely the classifications of which we have no history, should prove valuable to law review article and note editors seeking subjects. Professor Hurst can turn a phrase. Note this: "Perhaps cause and effect work no more intricately now than in the nineteenth or eighteenth century; perhaps it only seems so, because we feel pressed to make more conscious efforts to order events and, hence, are more conscious of their intricacy." When he gets to the problem of congressional committees and investigations, he suggests, with remarkable restraint, that the Supreme Court, while it has shown considerable readiness to curb administrative investigations, even in regard to

9White saw Confederate army service and was from a totally different milieu than the New Engander Holmes, who never forgot his Union army service. This difference might well account for Holmes' almost grudging admission of White's ability. That White was pompous, everyone knows; that he was not so great a mind as Holmes, all are ready to concede; but he was a gentleman and a good justice.


subject matter, has shown no inclination to use its opportunities to enforce minimum standards of decent procedure.

Finally, we come to Charles P. Curtis. Curtis' mother was an intimate friend of Mr. Justice Holmes. Curtis, a Boston lawyer who aroused the ire of Henry S. Drinker by an article in which he said he did not see why we should not come out roundly and say that one of the functions of a lawyer is to lie for his client, and who was a big-game hunter in his earlier days, once moved Holmes to remark to Laski that Curtis would not achieve great things, because he was "too surrounded by popularity and praise." Curtis' contributions to this volume show him at his brilliant, widely-read best. He is not a person with whom anyone can disagree for long; he never stays in one place. Freund, for example, in the discussion following Curtis' address on the role of the constitutional text in the process of constitutional construction, credited Curtis with delivering a "really profound discourse on the meaning of meaning"; but he added that he was reminded of Robert Browning's famous reply when queried as to whether he had meant thus-and-so in a poem. Browning is reported to have shot back: "I may not have meant it when it was written, but I mean it now." Curtis' reply to this was, simply: "I will adopt anything you say." More than any of the other speakers, Curtis joined in the discussion of his remarks. His topic sentence in the discussion might well be: "Only present and current meanings of the text of the constitution are pertinent in determining what the constitution means." His concluding sentence was: "The justices are at their best when they measure their respect for the opinions of their fellows and co-workers in our government against the meanings of the words instead of

12The Ethics of Advocacy, 4 STAN. L. REV. 3 (1951); Drinker's reply appears at 4 STAN. L. REV. 349 (1952).
13Producing, with his brother Richard, the fine volume HUNTING IN AFRICA, EAST AND WEST (Houghton-Mifflin, Boston, 1925).
14 HOLMES-LASKI LETTERS 793 (1953).
15Logically, then, he concluded that he would hold whipping unconstitutional as a cruel and unusual punishment today, despite the fact that at the time the Constitution was adopted whipping was common practice. The two monumental volumes by Crosskey, POLITICS AND THE CONSTITUTION (1953) are devoted to the contrary thesis. Curtis would doubtless not apply for admission to "that lawyer's Paradise" described in THAYER: A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 428-9 (1898) as a place "where all words have a fixed, precisely ascertained meaning; where men may express their purposes, not only with accuracy, but with fullness; and where, if the writer has been careful, a lawyer, having a document referred to him, may sit in his chair, inspect the text, and answer all questions without raising his eyes."
against a reverence for the past."\(^{16}\)

In his formal essay *Review and Majority Rule* Curtis reduces *Marbury v. Madison* to a statement that Marshall wrote twenty pages of decision in the case and then spent seven pages in determining that the Court had no jurisdiction to decide the issue. He points out that certain phrases, such as "due process of law," had fixed meanings when put into the Constitution. "We turned the legal phrase into common speech," he says, "and raised its meaning into the similitude of justice itself." He goes on to suggest that it is we, not our ancestors, who have made "due process" a large generality, making for ourselves even more opportunities than they provided for us. He then gives another example, from *McCollum v. Board of Education*.\(^{17}\) He notes that the Court "turned from the intentionally specific language of the First Amendment to the intentionally vague language of the Fourteenth, and then filled its vagueness with what they thought we thought, as expressed by Jefferson in a metaphor,\(^{18}\) by Grant in a speech following the Civil War,\(^{19}\) by the political wisdom of a Root,\(^{20}\) by the insight of a great contemporary poet,\(^{21}\) and by recent and

\(^{16}\)But, as Learned Hand, J., suggested in *Cabell v. Markham*, 148 F. 2d 737, 739 (2d Cir. 1945): "It is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary."

\(^{17}\)So titled throughout the volume, and popularly known as the *McCollum* case, the litigation is officially listed as *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948).

\(^{18}\)The metaphor, of course, was the "wall of separation between Church and State." In his separate concurring opinion in the case, id. at 238, Jackson, J., after indicating that it was "a matter on which we can find no law but our own prepossessions," pointed out that with no surer guide, the Court was "likely to make the legal 'wall of separation between Church and State' as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded."

\(^{19}\)Grant, it will be noted, called for "a good common school education, unmixed with sectarian, pagan, or atheistical dogmas." Many moderns seem to have lost sight of the "pagan or atheistical" portion of this remark.

\(^{20}\)Root was politically wise, of course. He appears to have been the earliest to have enunciated separation of Church and State (to which we wholeheartedly subscribe) as a "great American principle." It is strange, however, that this "great American principle" does not appear clearly spelled out in the Constitution. It is stranger still that in the constitutions of 47 of the 48 states there is silence on the point.

\(^{21}\)The poet was Robert Frost; the insight was the line "good fences make good neighbors," used by Frankfurter, J., to conclude his opinion in the case. See 333 U.S. at 232. Frost used the line in "Mending Wall," which first appeared in a volume entitled *North of Boston*, published in England in 1914. The thought was hardly original. Early in the seventeenth century George Herbert said: "Love your neighbour, yet pull not down your hedge."
current educational practice."22 One can let Curtis leave him cold or bring him to a boil. One can hardly review such a man, but he deserves the popularity and praise that Holmes conceded thirty years ago were his.

It is always with a feeling of inadequacy that a reviewer comes to such a volume as this. The method of attack is difficult to determine. One may write a general essay on the subject of the book and then modestly suggest that if the readers want something better they will purchase the volume for themselves. One may outline in broad strokes the background of the situation that gave rise to the preparation of the work. One may give a sample of the choice riches to be found between the covers. Or one may take the path chosen by this reviewer and then, in Housman’s words: “I will not say with Coleridge that I recentre my immortal mind in the deep sabbath of meek self-content; but I shall go back with relief and thankfulness to my proper job.”23

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22“Recent and current educational practice” would certainly include sending some children, for any reason, to a private or parochial school. Professor Paul G. Kauper, in 52 Mich. L. Rev. 829, 841 (1954), notes that ever since Pierce v. Society of Sisters, 268 U.S. 510 (1925), parents have had a constitutional right to send children to nonpublic schools. The Pierce case is of especial interest in non-segregated areas, in the present state of the law, for the Court specifically condemned a single school system, saying, at 535: “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”

23Housman, The Name and Nature of Poetry 50 (1933).