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Professor Leuchtenburg is a Professor of History who has spent much of his professional life studying, and writing about, Franklin Roosevelt and the New Deal. He is also one of a handful of scholars in the United States who spends his life studying and teaching about the work of the Supreme Court in earlier ages. His specialty is the age of Holmes and Brandeis. His dual interests have now attracted his attention to the rocky relationship between the Court and President Franklin Delano Roosevelt.

This book represents a collection of his papers, some of which are actually chapters in a forthcoming two volume history of the constitutional crisis in the United States in the 1930s. As one reviewer correctly puts it, Leuchtenburg writes like a novelist. Yet his notes are fastidious and his attention to legal detail is superb. Some aspects of his discussion of United States

affairs may strike contemporary Australian readers as having a certain relevance to our own scene.

The book begins with a chapter which takes its title from Justice Oliver Wendell-Holmes Jr's remark in the majority opinion in *Buck v Bell* 274 US 200 (1927). Titled "Mr Justice Holmes and Three Generations of Imbeciles", it recounts the way in which the then contemporary ideas of eugenics obtained a constitutional blessing in the United States. Astonishing though it seems to most eyes today, Holmes' opinion was regarded at the time as the "herald of a new day". Holmes himself was hailed as "the new Prometheus". The result of the Court's upholding Virginia's sterilisation law was the enactment of many similar laws in the United States and Canada. Over the next generation some 70,000 persons in the United States were sterilised by State court orders. The Supreme Court comes in for sharp criticism as being locked into an already outmoded and discredited mentality and ignorant of the repudiation of eugenics by the majority of life and behavioural scientists in the United States, even at the time when the Court's opinion was written. The consequences of similar legislative and administrative acts in other countries are now being unravelled. Carey Buck, found in her later years, was described as an "alert and pleasant lady". The author asserts that she was no imbecile. It was not her genes but society's prejudices at the time which determined her destiny.

The book also contains the story of the nomination of Hugo L. Black, a Senator from Alabama, as a Justice of the Supreme Court. The denunciation heaped upon the President for this appointment was in part because of Black's earlier reputed association with the Klu Klux Klan. One commentator observed:

"There have been worse appointments to high judicial offices, but with Rogers and Hart, I can't remember where or when."

Nobody doubted Black's ability. But it was his lack of lawyerly experience and knowledge of the Constitution which attracted the critics. Senate deference ultimately secured Black's confirmation by 63-16. A commentator suggested that he would not have to buy a black robe, "He can dye his white one black".

Shortly after the confirmation, news reports clearly linked Black to the KKK from which, it seems, he had resigned in 1925. Many Senators were reported as saying that they would not have confirmed Black had they known the details. Roman Catholic politicians of Irish stock began a campaign to get rid of Black on the ground that the KKK's targets were not only American blacks but also Catholics. Under a great deal of pressure, Black finally decided to accept an invitation to speak on national radio. He admitted his previous association with the Klan. He disdained "any organisation or group which, anywhere or at any time, arrogates to itself the un-American power to interfere in the slightest degree with complete religious

freedom". He went on to affirm that some of his best friends were Jews and Catholics. So he took his Seat on the Court, the Justices looking "unusually and unnecessarily solemn". Petitions were immediately filed to challenge his right to be on the Bench. However, he weathered the storm. And he quickly became best known as a dissenter, urging the Court to break new ground on civil liberties. In particular, he was an advocate of uninhibited application of First Amendment rights to free speech. He served on the Court for 34 years and ultimately left a legacy on the First Amendment and on civil liberties which has few equals. This is a fascinating tale. It is, as Leuchtenburg says, "rich in paradox and irony". The author puts Black's "inspired" appointment down as a "testament to FDR's perspicacity".

The last chapter in the book is on "The Birth of America's Second Bill of Rights". This tells the tale of the way in which the 14th Amendment came to be interpreted by the Supreme Court as the means to extend First Amendment and other rights to the States. The course of the interpretation is agonising - and it is painstakingly traced. It is only of interest to Australian readers as it throws light on the way rights can be enlarged in the hands of successive generations of a Court which sees the same text but in a different light.

It is the central part of Leuchtenburg's book which explores the most fascinating story warranting the description of "constitutional crisis". This crisis concerned the string of

decisions in which a majority of the Justices of the Supreme Court in the 1930s struck down as invalid FDR's New Deal legislation. The average age of the nine men on the Court was 72. One of them, the irascible Justice McRoberts, seemed determined to outlast FDR (but he did not).

Fresh from his overwhelming victory in the Presidential election of 1936, Roosevelt conceived the "Court packing" plan. This was the only way that he could conceive of getting his legislation through the Supreme Court. He could appoint as many as six new Justices to swamp the conservative majority and thereby change the composition of the Court. Several ways of accomplishing this end were explored by the President. They included (amazingly enough) one proposition which envisaged that he would present a Bill to provide for retirement of the Justices at age 70. If, as expected, the Supreme Court struck it down, he would return to the Congress with a request for instruction to obey Congressional wishes rather than the orders of the Court! Other more modest proposals included the enactment, in the case of Justices remaining on a Court beyond the age of 70, of a power of appointment of additional Justices. The object was the same. It was expressed beguilingly in terms of bringing "new blood" to the Supreme Court.

The Court packing plan was eventually presented to the Senate in the form of a Bill. All reports showed that the Senators were very closely divided on the measure despite the

large Democrat's majority. However, pretty soon there were a number of defections from the Party. The legislation was shepherded through the Senate by Senator Joe Robinson, one-time Vice-Presidential nominee of the Democrats (in 1928). He was rumoured to be the first likely appointee if the legislation were adopted. Robinson was a towering figure who intimidated all who came in his path. The weather in Washington during the debates was as hot as the tempers became in the Senate Chamber. Leuchtenburg describes it as it was: a major Parliamentary drama. Having made his stirring speech to the Senators, Robinson went home. The following morning he was found by his maid sprawled face forward on the floor, dead. The critics suggested that God had intervened. One Senator beseeched the President to drop the fight "lest he appear to fight against God". But the President pressed on. And eventually the Bill lapsed.

Leuchtenburg's assessment is that FDR's combat with the Supreme Court did much more damage to him than the Court. It seriously divided the Democratic Party. It thereby slowed the drive for social and legislative reform and left "spasms of bitterness" in the Congress which lasted for a decade. It resulted in the "stormiest and least productive [session] in recent years". It built up a head of resistance to the President and eroded his claim on middle-class backing which "ebbed away" from the high point it had reached in the 1936 election. The middle-class saw it as an attack on the independence of the

judiciary in the United States. Even when the Second World War came, the President never won back the popular following he had previously commanded. The battle also proved extremely distracting to Roosevelt's conduct of foreign affairs. The reports of the British Ambassador (quoted liberally in these chapters) show the dismay in Britain. It was described as "unpleasantly reminiscent of the battle Mr Wilson waged 18 years ago over the Treaty of Versailles".

In the result, no legislative change to modify Supreme Court appointments was enacted. Judge Learned Hand's aphorism about "the Final Five of the August Nine" was to remain true - and it is still true today in the United States. Yet soon after the crisis began the decisive swinging vote of Justice Roberts began to shift solidly against the challenges to the New Deal laws. Within 2½ years after the defeat of the legislative proposal President Roosevelt had chosen five of the nine Justices. In less than four years after the end of the legislative struggle he had named more Justices to the Supreme Court than any President since George Washington. Before the end of his exceptionally long term as President, he had filled eight of the nine vacancies and had elevated Harlan Fiske Stone to be Chief Justice. This drew Robert Harrison's comment "Roosevelt succeeded more than any other President in packing the Court". Patience, and not revolution, were rewarded.

This interesting and readable history of that far-away "constitutional crisis" in the United States carries many lessons. The story is told in a highly readable and even exciting way by a legal historian who has a clear grasp of the institutional relationship which must exist in a federal democracy between the political and the judicial branches of government. Most interesting of all is Leuchtenburg's description of the way that slowly, but resolutely and then angrily, the mass of citizens deserted the most popular President in the history of republic when he sought to undermine the nation's highest Court. Citizens in a democracy, it seems, have a sense of constitutional institutions and a realisation of the distance and balance that must be kept between them.

M D KIRBY
