

BOOK REVIEW

THE SUPREME COURT IN CRISIS: A HISTORY OF CONFLICT. By Robert J. Steamer.¹ The University of Massachusetts Press, 1971. Pp. viii, 330. \$9.50.

This book is based on the not altogether imaginative idea that the role of the United States Supreme Court in the American political system can be understood in terms of a history of the periods of antagonism and political ferment between the non-elected Court and the popular branches of the federal government, particularly Congress. One is very tempted to yawn and say *deja vue* about the approach Professor Steamer takes, but to the student of constitutional history the book provides a succinct account of the "leading cases" of the various periods and their political consequences.

The first chapter deals with the pre-constitutional period and British influences which shaped the structure of the American judiciary and provided the genesis of judicial review. The succeeding seven chapters all use the same structure and format. The first step is to introduce biographically the Chief Justice and the men who served during the particular Chief's tenure while assessing the contributions of the various justices. Next comes a summary recital and sometimes discussion of the leading cases during the Chief's tenure followed by an analysis of the political repercussions from Congress and the President. Marshall and Taney each get separate treatment while Chase and Waite, Fuller and White, Taft and Hughes, and Stone and Vinson have to share chapters. Chief Justice Warren's court from 1953-58 is handled in the treatment of Stone and Vinson, and the concluding chapter covers the balance of the Warren tenure which followed the judicial crisis of 1958.

Professor Steamer does not hesitate to offer his opinions and explanations of judicial conduct—this is no Charles Warren history of the Court. The underlying theme expressed early in the book and woven throughout the text is that (a) public controversy provoked by Court

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decisions results from a misconception of the judicial-political role of the Court and (b) there is a lack of consensus within the political branches of government over what the proper role of the Court should be. The Warren Court, nonetheless, fashioned a new role:

In the main the justices collectively and individually must act as the nation's conscience when they sit in judgment of the entire governmental process from the popular will to the actions of legislatures, presidents, governors, and a host of law-making and law-administering bodies.²

We all know the proper role of the Supreme Court has been debated in dozens of studies going back at least to the Progressive era, but Steamer provides something different by discussing the Court-curbing proposals in each historical period. The author does not attempt to discuss reactions within the states during Court-curbing periods but limits his discussion to Congress and the President. This is a serious shortcoming since the role of the Court as umpire of the federal system is a crucial one and has been responsible for much of the antagonism to specific Court decisions. Steamer attempts to save himself from criticism on this score by pointing out that congressmen do, in fact, reflect state and local viewpoints and prejudices.

The introductory chapter suggests that the vice-admiralty courts in the colonial period were the forerunners of the federal courts and that judicial review is rooted in British imperial practice stemming from Privy Council disallowance of colonial laws. The development of standardized admiralty procedure was an antecedent of the national court system even though there was no independent federal judicial system under the Articles of Confederation. At no time did the state courts command final word on all justiciable matters.

Like other sections of the U.S. Constitution, there was initial disagreement about key provisions of the judicial article. Judicial selection, for example, was a compromise between election by the legislature and appointment by the executive. The creation of inferior courts was left to congressional discretion. While tenure and independence of the judiciary was a matter of general agreement, several major topics were left indeterminate, *e.g.*, appellate jurisdiction, judicial review, the number and qualifications of judges, and the nature and extent of lower federal courts.

2. R. STEAMER, *THE SUPREME COURT IN CRISIS: A HISTORY OF CONFLICT* 287 (1971).

Next Professor Steamer moves on to the Marshall era which, along with the Civil War period and the 1937 judicial "revolution," constitutes the period of most intense and serious political opposition to judicial power. Marshall had a much harder time than his successors, and Steamer maintains that because article III left some important questions *re* judicial structure and power up to legislative discretion, "[T]he stage was set for frequent legislative-judicial altercations which at times have almost reached an irreparable constitutional crisis."³

Early in Marshall's tenure, two provisions of the Judiciary Act of 1789 caused problems: (a) the requirement of circuit-riding by Justices and (b) the section which permitted an appeal to the Supreme Court when a state court denied a claimed federal right. Federalists relieved the justices from the onerous duty of circuit-riding by an Act of 1801, but the Jeffersonians promptly repealed the legislation on the grounds that the additional judgeships created by the Act were an unnecessary burden and expense. Clearly, Congress was acting within its powers, but the restoration of circuit-riding was a poor decision in terms of judicial efficiency.

The upshot of a number of Marshall's opinions was that, when dealing with the question of the limits of judicial and legislative power, economic conservatism and nationalism became the competitors of radicalism and states' rights. Beginning in 1821 and continuing until his death, Marshall had to contend with recurring challenges to judicial power. These took the form of state non-compliance with Court orders, proposals limiting the jurisdiction of federal courts, repeal of Section XXV of the Judiciary Act of 1789, and limited tenure of federal judges. Professor Steamer rightly points out that Georgia's refusal to abide by Supreme Court orders was the most serious threat to judicial authority and concludes that these efforts to limit judicial power were really a reflection of a struggle for power between the states and the national government. By the 1830's, a national consensus—somewhat precarious—had been nurtured which acknowledged that Supreme Court pronouncements on the fundamental law must be binding on private parties, the states, and branches of the federal government. While one could argue that President Jackson was no firm supporter of this consensus, Steamer points out that Jackson did sup-

3. *Id.* at 24.

port judicial review, asked for the Force Bill which enlarged the jurisdiction of federal courts, and refused to support any measure which would have weakened the judiciary. At no time during the Marshall era could a majority be produced to reduce the power of the Supreme Court—the forces of nationalism clearly dominated the interests favoring localism and particularism.

It was during the Taney period, however, that even the Supreme Court could not preserve the political, let alone legal, consensus that national unity was paramount. Before Taney stumbled over the issue of slavery, his court had to deal with political issues which were produced by the clash between the propertied and propertyless segments of the nation. Professor Steamer gives Taney high marks as Chief Justice and accounts for his lack of judicial innovation in constitutional doctrine in comparison to the pre-eminent Marshall as the result of his unwavering commitment to democratic majorities. The three most significant areas for judicial construction concerned the inevitable conflicts between economic classes, questions of federalism, and the issue of slavery. Steamer rightly argues that the vested rights of property doctrines attributed to Marshall remained intact at the end of the Taney tenure. Questions dealing with the relationship between the nation and the states were resolved with what Steamer calls “a balance between contradiction and consistency. . . .”⁴ He singles out as most important the doctrine of *Swift v. Tyson* which certainly expanded judicial power, the *Cooley* doctrine which espoused the “selective exclusiveness” version of the commerce power, and the “political questions” doctrine of *Luther v. Borden*.

It is the analysis of the slavery controversy, however, to which Steamer devotes his most detailed and searching attention. This constitutes one of the best sections of the book. We are told that whichever way it had decided the *Dred Scott* issue, the Court could not have altered the social and political forces leading toward civil war. At most, it could have delayed the outcome a few years. Taney had initially not planned on writing an opinion, and it is difficult to account for the fact that rather than acquiesce in the judicial pronouncements of Justice Nelson, Taney produced a long and complex opinion which grappled with every issue raised by the case. Taney concluded that Negroes were considered inferior beings at the time the Constitution was adopted and were not intended to be included in the term “citi-

4. *Id.* at 64.

zens." Next he ruled that Dred Scott could not become free as a result of living in Missouri because the Missouri Compromise was unconstitutional. Finally, having returned to Missouri from Illinois, Scott's legal status was determined by the law of Missouri where he was considered a slave and not entitled to sue in the federal courts.

Steamer attempts to rehabilitate the tarnished image of that wicked apologist for the slavocracy by stating:

To attack Taney as ideologically motivated and evil in his intent seems grossly unjust. He had opposed slavery for many years and had freed the slaves he had inherited except for two who could not support themselves⁵

This reviewer is not persuaded that the Taney effort to defuse the issue of slavery was simply an error in judgment because he was not personally committed to the perpetuation of slavery.

The Supreme Court, at any rate, had enjoyed high respect and prestige from the death of Marshall to the *Dred Scott* decision. There were only isolated congressional speeches attacking Court opinions. There was no genuine interference with judicial independence. But *Dred Scott* provoked the most extended legislative attack upon the Court. The ensuing debates in Congress amounted to a reconsideration of the proper role of the Supreme Court as well as debate over the nature of the Union and status of slavery. Steamer surveys the anti- and pro-Court forces and the substance of their arguments; he points out that even on as emotional an issue as slavery, on which advocates held the most impassioned views, there were a few middle-of-the-roads who supported the Court. Senator Stephen A. Douglas of Illinois said that "he would abide by the decision of the Supreme Court, not only as a matter of policy, but from considerations of duty."⁶ Steamer reaches the doubtful conclusion that the Taney Court exercised judicial review at a propitious moment. If many more years had passed without invoking this power, it would have become a constitutional dead letter. That it was exercised over the issue of slavery meant that Congress, because of its internal disunity, could not muster enough support to curb the power of the Court.

Chapter IV covers the tenure of Chief Justices Chase and Waite and is subtitled "The Period of Relative Calm." Steamer tends to minimize the decline in the stature of the Court in the post-Civil War

5. *Id.* at 77.

6. *Id.* at 92.

period and argues that the retreat of the Court in that period has been exaggerated. He marshalls such evidence as the fact that the Supreme Court declared ten federal and forty-six state laws unconstitutional during the Chase tenure from 1864-73. This is revisionist judicial history which downgrades the importance of the alteration of the Court's size three times in ten years, the removal of appellate jurisdiction over the Reconstruction statutes, and the packing of the Court as a result of the legal tender decisions. These were genuine threats to judicial independence. Steamer argues, on the contrary, that judicial review had truly become a force to reckon with.

He devotes several pages to congressional reaction to *Ex parte Milligan* and *Ex parte McCordle*. His conclusion about *McCordle* is that it illustrates the weakness of judicial power—had Article III been more explicit in defining the appellate jurisdiction of the Court, it could not later have been contracted. But the radicals were on strong constitutional ground in repealing a jurisdiction which they had granted. Steamer concludes: "To snatch away a case already docketed is still another question. The spirit of the American constitutional heritage was certainly violated, and the Supreme Court might have said so."⁷ Judicial review is a political as well as a judicial power, and perhaps it was wise for the Court to collapse on this issue rather than risk the retaliation of radicals in Congress against the continuation of judicial review.

The tenure of Chief Justice Waite is sympathetically reviewed as a contest for judges' minds between the intellectually superior and mildly anti-democratic Justice Field and the humanitarian and democratic Chief Justice. On economic issues, the record of the Waite Court permitted some regulation of growing corporate enterprise and rejected the Spencerian doctrines of Social Darwinism. The *Slaughterhouse Cases* interpreted the fourteenth amendment cautiously in order not to create a radical alteration between state and federal power. It was in the area of civil rights that the Waite Court was disappointing because it narrowed the meaning and scope of the Civil War Amendments. Steamer makes the significant point that de-racializing the fourteenth amendment and interpreting it to protect economic freedom but not eradicate racial discrimination was our greatest national catastrophe.⁸ Steamer's explanation for this draws upon the work of

7. *Id.* at 111.

8. *Id.* at 119.

several historians:

At bottom the new attitude was based on economic and political motives of expediency, profits and power. A South beset by racial strife would not attract capital, and since the quest for Negro equality stood in the way of economic expansion and profit-making, stability soon took precedence over the Negro cause.⁹

The next chapter covers the periods of Chief Justices Fuller and White and is characterized as the era of conservatism and revival of judicial activism. The case which marks the change in judicial orientation is the *Minnesota Rate Case* decided in 1890 which announced that rate making was a matter for judicial consideration requiring due process of law. This opinion practically overruled *Munn v. Illinois*. It opened the door to the expansion of judicial supervision of legislatures which we call substantive due process.

Just at the time that judicial conservatism in economic matters was becoming entrenched, agrarian discontent expressed by the Populist Party and labor violence at Homestead, Pennsylvania shocked most Americans of that time. Supreme Court hostility to state economic regulation was one matter, but there were three opinions in 1895 which helped solidify and mobilize congressional criticism of the Court—they were, of course, the *Sugar Trust Case* which made the Sherman Act ineffective against manufacturing monopolies, the *Income Tax Case* which invalidated the 1894 federal income tax of 2% on personal and corporate incomes over \$4,000, and the *Debs Case* which upheld a federal court injunction halting the Pullman strike on the grounds that the strike was an interference with interstate commerce. Social Darwinism began more and more to permeate the Court pronouncements which bolstered property rights against public regulation. The result was Progressivism which not only opposed individual decisions but judicial power in general. In the U.S. Senate, the names of Robert M. LaFollette of Wisconsin, Hiram Johnson of California, Albert J. Beveridge of Indiana, and William E. Borah of Idaho among others were closely associated with attacks upon the Court as the defender of the vested interests and opponent of valid national regulation of the economy.

Upon Fuller's death in 1910, Justice White moved from Associate Justice to the center chair. The ensuing period was one of less pronounced hostility to governmental regulation of economic matters. The

9. *Id.* at 120.

White Court approved national regulatory measures (with the exception of the *Child Labor Case*), but disallowed state regulations of interstate commerce thus giving Congress little grounds for complaint. Three cases involving racial discrimination showed that the Court was willing to interpret equal protection in a more comprehensive way. Professor Steamer summarizes the Fuller-White years this way:

The period from 1882-1921 is not one in which the Court can be said to have maintained a consistent posture on constitutional questions. . . . But it is interesting to note that even at the height of the Court's 'carnival of unconstitutionality,' even after *Pollock*, *Debs*, and *Knight*, there was no sustained attack on the Court in Congress, but merely a feeble thrust here and there.¹⁰

True, but does one not have to look beyond Congress for criticism of the Court in this period? It was after 1895 that Progressives, Populists, and members of the Bar spoke of the Court in the most bitter and stinging critical terms. In each session of Congress for a number of years, income tax bills were introduced as a taunt to the Court's decision in *Pollock*.

The Taft and Hughes years paved the way for the most important crisis between the Court and popular branches of government since the Civil War. During the tenure of Chief Justice Taft (1921-30), all three branches of the federal government espoused the same conservative viewpoint, and there was a marked decline in regulatory legislation. Steamer's evaluation of Taft is most generous: "his innate ability combined with a love of judicial power and a real learning in the law surely place him close to Marshall and Taney. . . ."¹¹ This inflated judgment about Taft reminds me of the quip of Justice Brandeis who described Taft as "first rate second rate." Be that as it may, Steamer summarizes the major Taft opinions on economic due process, the national commerce power, and civil liberties.

Moving on to Chief Justice Hughes, Steamer justifiably emphasizes that great judge's accomplishments in civil liberties and equal protection of the laws. He does not stress the opportunist and shifting voting pattern of Hughes in the crisis years of 1935-37.

The 1934 term provided a false hope that the Hughes Court would be hospitable to the Roosevelt New Deal Legislation. Between January, 1935 and June, 1936, on the contrary, the Court delivered twelve

10. *Id.* at 169.

11. *Id.* at 175.

major decisions unfavorable to the President. Collectively, they convinced him that the remaining major elements of the New Deal, *e.g.*, Social Security Act, National Labor Relations Act, and the Public Utility Holding Company Act, would also fail to pass muster in the Court. Our author discusses the twelve cases in chronological order and effectively builds up to the Court reorganization plan of February, 1937.

The President's proposal initially had the support of only one hundred congressman and thirty senators, but Roosevelt thought that a majority could be produced eventually. Presidential advisors divided over the proper strategy to obtain congressional approval and those who favored a no compromise stance on the Court packing plan won since they had the President on their side. Chief Justice Hughes' letter to the Senate Judiciary Committee absolutely discredited the President's claims that the Supreme Court was unable to keep abreast of its docket. It provided timely ammunition to the opponents of the bill and, of course, the *West Coast Hotel Co. v. Parrish* opinion of March 29, 1937 provided "the switch in time that saved nine." In June, 1937, the Judiciary Committee issued an unfavorable report calling the Court bill "needless," "futile," and an "utterly dangerous abandonment of constitutional principle."¹² This crisis, Steamer believes, was "perhaps the only time in our history that a congressional majority might have been mustered which would have seriously altered the Supreme Court's role in the American system."¹³ In politics, the Justices won the contest, but in law the President triumphed.

The decade 1937-47, Steamer decides, can best be described as a revisionist period in which the Court assiduously avoided striking down acts of Congress but was willing to overturn a number of state laws in both the economic and civil liberties areas.

Chapter VII covers the Stone, Vinson, and first phase of the Warren Court (1953-58) and is called a period of retreat, rejuvenation, and a new crisis. Collectively, the men named by Roosevelt were the "most distinguished made by any president in American history." Dealing rather briefly with the cases which exemplified the return to the broad conception of national power, Steamer devotes more attention to the civil liberties cases of the Stone Court, especially those dealing with the free exercise of religion and separation of church and state.

12. *Id.* at 215.

13. *Id.* at 216-17.

The Stone period was a period of conflict *in* the Court rather than *between* Court and the Congress and President.

The Vinson Court (1947-53) was uncertain of its proper role although it began to spend more time considering civil liberties cases, in Steamer's view. In another revisionist mood, Steamer says it is unfair to call the Vinson Court unwilling to protect civil liberties because much of what it accomplished had begun under Stone or was the beginning of judicial doctrine that would be pursued more imaginatively under Warren. Generalization about civil liberties as a category is really unwise, according to the reviewer, because the Vinson Court made progressive strides in some areas, *e.g.*, racial discrimination and movie censorship, but clearly retreated or vacillated in others, *e.g.*, regulation of subversive activities and separation of church and state, while in cases dealing with freedom of assembly and free expression it equivocated, *e.g.*, compare *Feiner v. New York* with *Terminiello v. Chicago* or *Saia v. New York* with *Kovacs v. Cooper*. Steamer discusses no congressional response to the Vinson period either pro or con and eagerly moves on to analyse the Warren era.

Earl Warren, the fourteenth Chief Justice, was, after Marshall, the most influential judge to shape American constitutional jurisprudence. As an opinion writer, Steamer considers Warren unimpressive; his opinions "though competent, are somewhat loose and rambling, often devoid of even elementary legal reasoning, and to the judicial craftsman, they are shockingly without precedents. . . ." ¹⁴ This is being pretty hard on Warren, but Steamer adds that despite shortcomings as a legal scholar, Warren combined those qualities that gave him authority which was accepted both by his colleagues and the American people. If this is taken at face value, one must ignore the Resolution of the State Chief Justices in 1958, the chilliness of the American Bar Association toward Warren Court policy making as well as the Southern Manifesto!

The crisis of 1957-58, Steamer argues, was different from all those of the past with the possible exception of the Marshall era. It was precipitated by the fact that the Warren Court was redefining its judicial role. The Court moved ahead of the popular branches and the will of the majority of the people in its protection and expansion of civil rights and liberties.

Decisions involving the loyalty-security program, regulation of sub-

14. *Id.* at 242.

versive activities, congressional investigations, access to FBI files, and membership in state bar associations, among others, so antagonized many congressmen that a judicial crisis was provoked by 1958. The Eighty-fifth Congress spawned thirty proposals to alter the Court's work or its functions. Steamer sorts them into three principal categories: (1) those which would reverse the Court's interpretations of certain statutes, (2) those limiting the appellate jurisdiction of the Court, and (3) proposals fixing qualifications for judicial office. Seven of these measures were given serious attention by Congress, and only one, the Jencks bill, was made law. It permitted the defense in a prosecution by the government to request statements made by witnesses which were in the possession of the U.S. Government, and the trial judge would decide whether that request would be granted or strike the witness's testimony from the record. No devastating blow to the Court's authority, surely!

The Jenner-Butler bill, however, constituted the most serious and drastic assault upon the Supreme Court. It would have eliminated the appellate jurisdiction of the Court in five significant areas—contempt of Congress, federal loyalty-security programs, regulations of employment and subversive activity in public schools, state anti-sedition laws, and admission to law practice in any state. These areas were the principal areas in which the Court had begun to render important civil libertarian decisions! In diluted form, the Jenner proposal narrowly missed passage in the Senate.

How does Steamer account for this crisis? It was the culmination of several long standing historical trends which produced pressure upon the Justices to act. The thrust for racial equality on the political and social levels was one such trend. The second historical force "was the rise of new ideological theories of social organization, the purposes of which were to free the oppressed worker from industrial serfdom under systems of unrestrained capitalism."¹⁵ What does this mean, anyway? Under this "historical trend," at any rate, Steamer places the subversion cases! The third historical trend he calls an "inexorable movement toward national unity," which also seems fearfully amorphous and vague. The result in terms of Court decision-making was that since both state and national governments had abdicated their responsibility for guarding constitutional rights, the Supreme Court stepped

15. *Id.* at 258.

into the breach. The Court did not seek this role, it was drawn into it. Why didn't the legislative retaliation succeed? Because the Court had enough determined supporters in the Senate.

The final chapter deals with the remaining Warren Court years, 1958-69. Steamer notes that most areas of judicial innovation in this period were at the expense of state discretion in such areas as the rights of persons accused of crime, legislative apportionment, regulation of obscene material, racial equality, and prayer in public schools. Congress reacted to these decisions largely as a body which reflects powerful state interests which viewed the decisions of the Court as the cause of a crisis in federalism. The underlying value in each of these significant areas of constitutional interpretation is equality.

Professor Steamer covers a wide range of the major decisions which need not be discussed in detail. He explores the genesis of congressional opposition to the criminal procedure opinions which culminated in the Omnibus Crime Control and Safe Streets Act of 1968, a statute of "dubious constitutionality" which was "the most serious and irresponsible meddling of all time with what traditionally have been judicially determined constitutional rights."¹⁶ Why did Congress enact this unwise measure? Steamer believes that the summer of 1968 was a calamitous time of national disunity over the Vietnamese War, and congressional leaders decided to divert their attention to the law and order issue and "do something" to restore peace to America's cities. The 1968-69 term of the Court which concluded Warren's tenure saw no retreat in the fields of racial discrimination and reapportionment. The Court made at least seven decisions overturning convictions involving freedom of speech.

Steamer concludes his book with a plea for the *status quo*, even though he admits that the principal theme of his study is that there is perpetual conflict and periodic crisis between Court and the other elements of the federal government. Our Supreme Court has become the means of accomodating rule by the people with the rule of law. In performing this high responsibility, there is bound to be antagonism. Sometimes the result is sloganeering about "judicial tyranny" and "judicial legislation."

On other occasions, however, there have been proposals to reduce future conflict. These proposals fall into two principal categories:

16. *Id.* at 272.

(1) those which would alter the makeup of the Court's membership and (2) those which would restrict judicial review. The former group includes those which would require prior judicial service for Supreme Court members, a fixed term for justices, a statutorily fixed retirement age, or an increase in the size of the Court. Professor Steamer dismisses all as without merit. Certainly, prior judicial service and greatness in a Supreme Court judge do not go hand in hand, and a fixed term would render judges less independent of popular opinion.

The second category of reforms would alter appellate jurisdiction or require an extraordinary majority or unanimity in order to declare a statute unconstitutional. To revise the appellate jurisdiction of the Court as the Jenner bill attempted is truly "kill the umpire" legislation. It would repudiate the role of the Court as the final arbiter of the federal system. To require an extraordinary majority in striking down state or federal laws, Steamer tells us, would cut down judicial review thus giving broader leeway to legislative policy. It would bolster popular majorities which have never been strong supporters of civil liberty. Although judges may not be detached and objective in their judgments, their discretion is canalized by the traditions, values, and methodology of the legal process. The judge's role is both conservative and innovative because he "performs a creative act not only by interpreting the social conscience, but by helping to 'form and modify the conscience he interprets.'¹⁷

Judicial review has survived, Steamer concludes, because it has been grounded in sound, logical reasons for placing limits on governmental power. If the Court's decisions are opposed by enough people, there are constitutional means to overturn the Court's judgment. That the court has been reversed so infrequently in nearly two centuries is a tribute to judicial responsibility and an indication that the American people endorse this mild check on popular government.

Professor Steamer's study of the periods of crisis in Supreme Court history is a useful summary treatment of the topic with some insightful observations. The biographical information about members of the Court is selected with care. The reviewer does not consider its theme as particularly original but as falling in the mainstream of that vast literature which has debated the pros and cons of judicial review.

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17. *Id.* at 288.

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