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BOOK REVIEW

THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT. By Archibald Cox. New York: Oxford University Press. 1976. Pp. vii, 118. $6.95

*Reviewed By Marc I. Steinberg**

Based upon the four Chichele Lectures he delivered in early 1975 at All Souls College, Oxford University, Professor Cox succinctly examines the proper role which the Supreme Court should play in the American democratic process. In particular, Cox discusses the widespread usage of constitutional adjudication as an instrument to achieve social reform. Placing great emphasis upon the landmark rulings of the Warren Court, Cox inquires whether the Supreme Court should assume such a large political role.

Beginning his analysis with Chief Justice Marshall's historical opinion in *Marbury v. Madison*,[1] Cox traces many of the significant cases concerning constitutional issues decided by the Court. The subject matter of these holdings vary greatly, ranging from the Court's overruling of 175 years of settled legal precedent in *New York Times Co. v. Sullivan*,[2] to *Baker v. Carr*[3] and its implementa-

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1. 5 U.S. (1 Cranch) 137 (1803). Although not discussed by Cox, Chief Justice Marshall's opinion in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), is helpful to show that the Federal Constitution is not a static document but should be flexibly interpreted to meet the various exigencies which are distinctly contemporary in nature:

> This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.

Id. at 415 (emphasis in original).

2. 376 U.S. 254 (1964). In *New York Times*, the Supreme Court held that "the First and Fourteenth Amendments bar a state from awarding a public official damages for a defamatory falsehood relating to his official conduct unless the falsehood is published with knowledge of its falsity or with reckless disregard for whether it be true or false." A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT at 38-39 (1976) [hereinafter cited as Cox].

3. 369 U.S. 186 (1962); *see* Reynolds v. Sims, 377 U.S. 533 (1964). Referring to these decisions, Cox observes that "[b]y these 'one man, one vote' decisions the Court removed the chief remaining source of political inequality in the United States and gave impetus to other correctives." Cox at 69.

tion of the "one man, one vote" principle. Although providing detailed examination of the major Burger Court holdings, such as *Roe v. Wade*[4] and *United States v. Nixon*,[5] Cox places primary emphasis on the activist approach of the Warren Court. According to Cox, "[t]he most striking aspect of constitutional adjudication under the Warren Court was its vigorous use as an instrument of reform."[6] Indeed, the *New York Times* case greatly enlarged the freedom of the press, and, in so doing, overruled 175 years of settled law. Likewise, the "one man, one vote" holding invalidated long-settled political practices. And, of course, *Brown v. Board of Education*[7] not only overturned *Plessy v. Ferguson*,[8] decided over half a century prior to *Brown*, but also the culture and tradition of an entire region.[9] In all, "the Chief Justiceship of Earl Warren brought a period of extraordinary creativity in constitutional law which has greatly enlarged the role of the Supreme Court in American government and further politicized the process of constitutional adjudication."[10] But in so doing, Cox inquires whether such an approach was a proper one for the Court to adopt. Thus, the theme prevailing throughout Cox's work evolves around one basic question: "Has the Judicial Branch over-expanded its role in American government and over-politicized the process of constitutional adjudication?"[11]

The question is surely not a novel one but Cox's analysis, interspersed with illustrative examples, offers a refreshing approach. Upon confronting this question, Cox finds two institutional concerns which have arisen from recent activism in constitutional adjudication. First, by continuing to base its decisions primarily on social policy rather than conventional legal criteria, he fears that the Court may become unduly result oriented and thus sacrifice its

4. 410 U.S. 113 (1973); *see* Cox at 51-52, 113-14.

5. 418 U.S. 683 (1974); *see* Cox at 26-27, 104.

6. Cox at 100. In reference to this judicial activism, Cox submits that some of the Court's landmark constitutional decisions resulted "from reading into the generalities of the Due Process and Equal Protection Clauses notions of wise and fundamental policy which are not even faintly suggested by the words of the Constitution, and which lack substantial support in other conventional sources of law." *Id.*

7. 347 U.S. 483 (1954).

8. 163 U.S. 537 (1896).

9. *See* Cox, at 78-80, 100, 109.

10. *Id.* at 100. In so doing, "the Justices have rejected other precepts of judicial deference to the legislative process by making their own findings upon underlying questions of fact and by appraising and balancing opposing interests." *Id.* at 101.

11. *Id.* at 102.

power of legitimacy. Second, Cox claims that excessive reliance upon courts to shape public policy rather than upon the legislative and executive branches might very well stunt the growth of the democratic process.[12]

These concerns are of prime importance, Cox believes, for "[t]he Judicial Branch is uniquely dependent upon the power of legitimacy when engaged in constitutional adjudication."[13] In order to command acceptance and support, the judiciary must convince the populace, the press, the legal profession, and the executive and legislative branches that it is performing only those functions assigned to it. For without this power of legitimacy, the courts would be exceedingly vulnerable to attacks from the other branches of government.[14]

But what are these proper functions that the Court is to perform? Which abuses would leave the Court subject to loss of its power of legitimacy? Cox never seems to squarely confront these questions. Instead, he acknowledges that the Warren Court, more so than any other Court in American history, made new law in overturning long settled precedents. Rather than rebuking this approach, Cox concludes that, due to this activism, "the prestige of the Supreme Court is surely greater than that of other branches of government today, and I am inclined to think that it has never been higher."[15]

Judicial activism in constitutional adjudication, however, must not be premised solely on pragmatic political considerations. Rather, the creation of constitutional rights must be based upon principles sufficiently embedded within the community so as to assure their endurance through significant periods of time.[16] But how is the Court to perceive which principles are sufficiently engrained within the nation? Cox attempts to answer this inquiry by replying:

> Constitutional adjudication depends . . . upon a delicate, symbiotic relation. The Court must know us better than we know ourselves. Its opinions may . . . sometimes be the voice of the spirit, reminding us of our better selves. . . . But while the opin-

12. *Id.* at 103.

13. *Id.*

14. *Id.* at 103-04. "Although the courts control neither the purse nor the sword, their decrees often run against the Executive, set aside the will of Congress, and dictate to a State." *Id.* at 103.

15. *Id.* at 110.

16. *Id.* at 114.

> ions of the Court can help to shape our national understanding of ourselves, the roots of its decisions must be already in the nation. The aspirations voiced by the Court must be those the community is willing not only to avow but in the end to live by. For the power of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will and upon the Court's ability, by expressing its perception, ultimately to command a consensus.[17]

Does Cox really answer the inquiry or does he merely assume that the Court has the ability to perceive these embedded values? Further, Cox's approach assigns to the Court a large political role in our democratic system. Is this proper? Should the Court, which is not politically accountable, be entitled to create substantive constitutional rights in the name of "due process" or "equal protection"? Certain eminent legal scholars surely would conclude that Cox is incorrect, for although he agrees that the Court's decisions must be supported by enduring legal principles, Cox also contends that the enlarged role of the Court into the political arena is commendable. Commenting on this situation, Dean Griswold acknowledged that the Court must, at times, "make law." This function, however, must be "an understanding process, not an emotional one, a self-effacing process, not a means of vindicating 'absolute convictions.' "[18]

> [I]t is one thing to act according to one's personal predilections or choice, and a wholly different thing to come to one's own best conclusion in the light of his understanding of the law as it has been established by statute, decision, tradition, received ideals and standards, and all the other elements that go to make up our legal system. . . . The question is how far and how hard he [the judge] seeks to be guided by an outside frame of reference, called for convenience "the law," in arriving at his conclusion, rather than focusing his intellectual effort, perhaps unawares, on justifying his conclusion arrived at somehow or other in some other way.[19]

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17. *Id.* at 117-18.

18. Griswold, *Forward: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 94 (1960). For other works advocating judicial restraint, see R. KEETON, VENTURING TO DO JUSTICE (1969); Hart, *Forward: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

19. Griswold, *supra* note 18, at 92. Regarding the role of the Supreme Court in the

Thus, according to those authorities in favor of judicial restraint, the Court has become too much result oriented. Rather, the Court should reach its decisions "through the painful intellectual effort of judgment in the light of the law. . . ."[20]

But other scholarly experts believe that Cox's view is correct. In rebutting the Griswold-Hart approach, Judge Arnold asserted that the only type of court which could fulfill their prescription

> would be a court composed of men without deep-seated convictions about current national problems, a court whose members have not had enough previous experience with the controversial ideas which the Court must eventually express as law to have ever taken sides in the struggle; such a court might be found in a Trappist monastery.[21]

Elaborating, Judge Arnold concluded: "To suggest that judges who hold differing views with absolute convictions . . . are going to surrender those views, moved solely by logic and debate, is to betray a lack of knowledge of the history of the Court."[22] Even more emphatically, Chief Justice Traynor, a zealous advocate for judicial activism, commented:

> [T]he real concern is not the remote possibility of too many creative opinions but their continuing scarcity. The growth of the law, far from being unduly accelerated by judicial boldness, is unduly hampered by a judicial lethargy that masks itself as judicial dignity. . . .[23]

American democratic process, Professor Hart's philosophy is in agreement with that advanced by Dean Griswold:

> Only opinions which are grounded in reason and not on mere fiat or precedent can do the job which the Supreme Court of the United States has to do. . . . Only opinions of this kind can carry the weight which has to be carried by the opinions of a tribunal which, after all, does not have the power either in theory or in practice to ram its own personal preferences down other people's throats.

Hart, *supra* note 18, at 99.

20. Griswold, *supra* note 18, at 93.

21. Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1313 (1960).

22. *Id.*; *see* O.W. HOLMES, THE COMMON LAW 35 (1881), where Justice Holmes observed:

> The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.

23. R. Traynor, *Comment on Courts and Lawmaking*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 48, 52 (M. Paulsen ed. 1959). Justifying the need for judicial activism in the legislative sphere, Chief Justice Traynor contended:

> Legislators are under no compulsion to disclose the reasons for a rule, let alone to keep a chronicle of its origins. Sometimes a statute is enveloped in a history so

Which view—judicial restraint or activism—is correct? The issue is by no means a novel one. Cox, however, approaches this question in a refreshing and interesting manner. Although his conclusions are certainly debatable, Cox's work provides useful insights into a troublesome area.

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voluminous or ambiguous as to be more confusing than revealing. A statute may be dubious because those who sponsored it were not motivated to do so in the public interest or because those who enacted it did so without adequate knowledge or consideration of its objectives or implications. For all the vaunted responsiveness of legislatures to the will of the people, it is no secret that legislative committees, particularly those dominated by the elder statesmen of a seniority system, tend to dilute the reliability of statutes as expression of public policy.

Traynor, *Statutes Revolving in Common Law Orbits*, 17 CATH. U.L. REV. 401, 424 (1968).