Vanderbilt Law Review

Volume 23
Issue 1 *Issue 1 - December 1969*

Article 7

12-1969

Book Reviews

Law Review Staff

BOOK REVIEWS

THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM. By Archibald Cox. Cambridge: Harvard University Press, 1968. Pp. 144.

This is a deceptive book. It appears to be one more friendly appraisal of the work of the Warren Court—this time from the recent Solicitor General—surveying in giant steps and broad strokes its decisions in six major areas within the short space of 135 pages. On close reading it turns out to be a tough-minded essay written with notable lucidity, analytical density, and high professional competence. Moreover, it confronts directly and steadily the well-worn paradox or dilemma of the Supreme Court of the United States which must be both court and political institution, and it seriously attempts to appraise the Court's performance in both roles. Although Professor Cox writes of the Court with deep empathy and admiration, this is no unbroken paean of praise; he is at numerous points critical of the Court's performance. Indeed he is at times so critical that it brings to mind that old adage about a man's mother being "his best friend and severest critic." Finally, he leaves the reader with a picture of the Court's liberal momentum which is strikingly different from that sketched by many of its critics, especially those critics in the popular press or in the United States Congress.

Two quotes taken from consecutive pages are suggestive of the ambivalence he shows, an ambivalence I suspect no full view of the Court can escape. In his discussion of criminal procedure, after noting that Churchill once observed that the methods used in the enforcement of its criminal law were a chief measure of the quality of a nation's civilization, Professor Cox goes on to say that, if so, "then the activism of the Warren Court has enabled our civilization to give a vastly better account of itself" (p. 88). In assessing the institutional costs of the Court's reforms of state criminal procedure, he comments: "[T]he rapidity of the doctrinal changes and the readiness of a bare numerical majority of the justices to overturn recent precedents immediately upon a change in the membership of the Court do no service to the ideal of law as something distinct from the arbitrary preferences of individuals" (p. 89).

Because of the care and clarity with which Professor Cox writes, it is exceptionally easy to describe the structure and content of the book. It falls evenly into six parts. A first chapter states the theme—the paradox of the Court's role—and the remaining five chapters illustrate

it. Contemporary problems of the Negro and the Constitution occupy two chapters, one centering on direct judicial intervention and the other on the Court's ratification of sources of federal legislative power. After a fourth chapter reviewing the developments in criminal procedure, the focus for the final two chapters turns to the Court's "intensely conscious sense of judicial responsibility for the open and democratic operation of the political system." One concluding chapter deals with freedom of speech and association, the other with reapportionment and voting.

The book escapes several pitfalls of such ventures. Professor Cox avoids the blandness of the even-handed survey which can do little more than digest reeent developments. He does this by being selective about what he treats, letting some topics such as obscenity and school desegregation go virtually without comment; and he is emphatic about the topics he does treat such as *Reitman v. Mulkey*,[1] *Katzenbach v. Morgan*,[2] *Time Inc. v. Hill*,[3] *Berger v. New York*,[4] *Harper v. Virginia Board of Elections*.[5] Within the brief compass of the book he thus manages to take the time and space to express his own personal reactions in some depth, making his survey singularly flavorsome. Second, he maintains his "big" theme about the basic dilemma of the Court so as to give the essay as a whole a fair degree of unity. Finally, so far as I can judge, he manages the very difficult task of keeping his text intelligible to the layman while holding it to high professional competence for the lawyer. There is no bowdlerizing of the complexities. Recent events such as the Fortas fiasco show how important it is to have a serious public opinion about the role of the Supreme Court in American life; this would seem pre-eminently the aspect of law on which the understanding of the layman should be cultivated. Yet the complexity of our constitutional inheritance has been such as to make the enterprise seem impossible except perhaps for the unique felicity of a book like Anthony Lewis's *Gideon's Trumpet*. A chief importance of Professor Cox's book is to show that writing in the large about the work and role of the Court at one and the same time for the lawyer, who is forced thereby to look up, and for the layman, who is forced thereby to look down, is possible.

Professor Cox is gallant in confronting directly and simply these

1. 387 U.S. 369 (1967).
2. 384 U.S. 641 (1966).
3. 385 U.S. 374 (1967).
4. 388 U.S. 41 (1967).
5. 383 U.S. 663 (1966).

questions: What is the role of the Supreme Court today? How can we judge whether it is performing well or badly? At the outset he states his thesis (pp. 4-5):

> In my view, constitutional adjudication presents an insoluble dilemma. The extraordinary character of the questions put before the Court means that the Court cannot ignore the political aspects of its task—the public consequences of its decisions—yet the answer to the question "what substantive result is best for the country?" is often inconsistent with the responses obtained by asking "what is the decision according to law?" The Court may incline to one direction or the other, but no one could wisely and permanently grasp either horn of the dilemma.

The remarkable compression of Professor Cox's presentation poses a pretty fair dilemma of its own for a reviewer. His rich treatment of his thesis invites comment, yet unless the review is to be more discursive than the book, prudence and self-restraint are required. The following are ten observations about the book.

First, I am inclined to agree with the basic formulation. The Supreme Court is, like the jury, an institution which defies a cool blueprint. Its contemporary functions come not from some organization chart but from that slow accretion of functions over time which characterizes institutions which survive.[6]

Second, one is tempted to use his formula to account for the division of labor and the difference in perspective between the law-man and the political scientist, and to suggest that both sides miss part of the data.

Third, the problem of role can arise only when policy and law are seen as inconsistent. Because of the generous ambiguity of constitutional law as law, the antimony will not be easy to detect in any given case however attractive it is to assert in the large. How is one to assess, for example, what the Court did in *Gideon v. Wainwright*?[7] Moreover, there is no reason why the inconsistency should be frequent; one should at least guard against the impulse to treat any result which is wholly desirable as a matter of substantive policy as being somehow thereby suspect and impeached as a matter of continuity of legal principle. Finally, we are warned that the only time we can get a clear test of the Court's obedience to legal values is when, wearing a judicial hair shirt, it refuses on behalf of such values to endorse the better policy.

Fourth, although he is sensitive to the social needs to which the Court was responding, Professor Cox is helpfully explicit about what

6. *See, e.g.*, P. BLAU, THE DYNAMICS OF BUREAUCRACY (1963).
7. 372 U.S. 335 (1963).

he calls the "institutional costs," the counter-values on the law side. There are four things to say quickly about the counter-values. One, they are peculiarly within the province of professional law training. Two, they are inevitably long-term values, while the social values they compete against are likely to be short-term and urgent; indeed, given the anemia of the institutional counter-values in contrast to the glamour of the competing social needs, it is surprising that they ever win. Three, the perception of them as values, in Cox's account, rests on a proposition that is surprisingly behavioral. The public will accept and obey mandates from the Court so long as they think of it as a court speaking, as Learned Hand once put it, "with the mouth of others" and not, to borrow a figure from Cox, as a bevy of Platonic guardians. Presumably the argument is that if the Court were to abandon altogether the "law" horn of Cox's dilemma, it would become a very different institution. Possibly the public could be educated to regard it as "a third house," but certainly this would require radical changes in its non-democratic structure. And we would be the poorer for having acquired an additional legislature that we did not need at the price of eliminating a remarkable institution for law-making as a last resort. Four, one might well wonder how much the craftsmanship of the Court's performance ever affects the public's view of it, which must in the nature of things be gross—as though we were talking of the public image of the work of the brain surgeon. Professor Cox manfully meets this challenge by asserting that craftsmanship in the first instance affects the opinion of the bar and that "a large segment of public opinion looks to lawyers" to appraise the Court's performance. One can only brood about what would happen if these very fundamental propositions about the legal order were subjected to any sort of empirical inquiry. It would be fun and important to try.

Fifth, it emerges as perhaps the cardinal sin for the Court to reach a result which is both politic and within the law without, as Cox puts it, regard "for how it integrates the decision into the general body of the law." Quite possibly a good deal of the current criticism of the Court is criticism of results that could have been rationalized so as to be decently integrated into the general body of the law.

Sixth, the institutional costs of judicial activism involve not only long-term public respect but also basic changes in our constitutional distribution of governmental powers, particularly as they affect the equilibrium between national and state power. It is an essential Cox theme that if there have been any victims of the Warren Court, they have been the states and not the Congress.

Seventh, one clue as to how the Court is handling its insoluble dilemma falls peculiarly within the technical competence of the lawyer. It concerns the Court's control of the occasions on which it will adjudicate constitutional issues. The point Cox elaborates goes not to the withering away of the doctrine of political questions or to the administration of petitions for certiorari. It goes rather to a shift in doctrines of judicial economy, affecting such topics as ripeness, standing, avoidance of constitutional adjudication if alternative grounds are available, and adjudication of the constitutionality of legislation on its face. Quite apart from how it has decided constitutional questions, the Warren Court has been characterized by a greater appetite for taking them on.

Eighth, there are, of course, costs to be reckoned with if the Court steadily refuses to intervene and stands frozen in its legal role. There are, Cox argues, instances where if the Court will not act, no branch of government will. Moreover, Cox suggests that when the Court declines to interfere with an injustice because it is beyond its province, there is a risk that it will appear to the public to be ratifying or legitimating the injustice. There is also the waste of the moral force the Court can exercise far beyond its decree. Surely, the *Brown v. Board of Education*[8] decision did more to affect national opinion on the legitimacy of the Negro grievance in general than it did directly to change school segregation. Finally, with an eye on the problems of race relations Cox urgently reminds us that the law must *deserve* respect.

Ninth, there is the interesting matter of the tempo of change in constitutional law. Although Professor Cox is emphatic about the obligation to preserve continuity of legal principle and to avoid "great leaps forward" in doctrine, he does not fully address himself to the puzzle of whether the Court can do anything it wishes so long as it does it in small steps over time. Perhaps it can solve its insoluble dilemma by generating constitutional law by the common law process; perhaps its mission in American life is to make revolution slowly.

Tenth, and finally, it is the special virtue of the Cox book that he does not accept the easy invitation—having posed the Court's task as an insoluble dilemma—to retreat into a mystique about its performance. He believes there are better and worse ways of handling an insoluble dilemma, and the book is really an appraisal of how the Warren Court has handled its insoluble dilemma.

While perhaps none of this by itself is new, the pulling of it

8. 349 U.S. 294 (1955).

together so openly and compactly is. The Cox approach is thus a step toward developing a systematic legal-political theory of the Supreme Court. His discussion of the familiar problems of racial discrimination and the sit-in provides a good example of his approach at work and indicates the kinds of points it permits the critic of the Court to make. First, he expresses a deep personal sense of the gravity and urgency of the Negro grievance in America and ranks it as the primary social pressure bearing down on the Court. Second, he is not hesitant about the substantive policy; racial discrimination in places of public accommodation ought to be abolished. Third, in an extended passage he examines various theories for expanding state action so as to enable the Court of its own motion to find segregation of public accommodations unconstitutional. He finds each of them lacking and unsuitable. He argues further that what is required is essentially a legislative judgment which has the virtue that it can be arbitrary and establish the necessary cut-off. He, therefore, concludes that the Court played its double role properly in its repeated refusal to go this far. It was better to leave the question to Congress, especially since there were signs that Congress was stirring. It was a fairly routine legal step for the Court to uphold the constitutionality of the Civil Rights Act of 1964 under the commerce power. Moreover, Cox opines that the 1964 Act, "because of the participation of all three branches of government, commanded far wider and deeper acceptance in all parts of the country than would have been accorded to a Supreme Court decision abolishing segregated public accommodations" (p. 39).

There are two further points about the matter. Cox applauds the Court's ingenuity in upsetting each of the sit-in convictions while nevertheless refusing to resolve the underlying issue of the legality of segregated accommodations. The legal restraints on the Court made it difficult for it to abolish the state action limitation and resolve the social issue before it even though the substantive merits were very clear. The political function of the Court, on the other hand, made it urgent that it not legitimate the discrimination by convicting the sitters-in and that it keep pressure on Congress. Its role was to keep the momentum for racial justice alive while it bought time awaiting action by Congress, the proper agency of government for correcting the injustice. Thus, in retrospect, the role of the Court was arguably modest and politically astute.

The final point—a point about which Professor Cox evinces considerable excitement—is the possibility that the Court will now be creative in finding new sources of federal legislative power beyond the

commerce clause. This is essentially the theme of his third chapter which explores in detail the implications of *South Carolina v. Katzenbach*,[9] *Katzenbach v. Morgan*,[10] and *United States v. Guest*.[11] In the end, the role of the Court will have been to defer to Congress while providing leadership and stimulus for the mitigation through law of the Negro grievance.

The example seems instructive on several counts. It suggests—and this is a basic Cox theme—that the Court has often been highly deferential to Congress and, in that sense, a conservative influence. It suggests also, and this is the Cox hope, the possibility of appraising the work of the Court by placing it in a larger political context and paying attention to its interaction with the other branches of government. Additionally, it places the series of sit-in cases, with their often thin rationalizations for upsetting the convictions, in a new light. The Court was not going all out for Negro rights.[12] It was playing a modest role as a partner in the governmental enterprise.

The success of the endeavor at criticism, of course, cannot rest on a single example, however complex. The canons of criticism need to be applied to the work of the Court in other areas and in other periods of its history. The technique proved less productive in Cox's effort to appraise the decisions on criminal procedure or the decisions on free speech and association. The reapportionment cases, however, do afford the obvious example complementary to the sit-in cases. Here Cox makes the familiar points that the value at stake was the high one of the integrity of popular government itself; that if the Court did not intervene there was no hope of any agency of government ever correcting the problem; and that the intrusion insofar as there was one was at the state level. He adds what appears to be an additional criterion: it worked. The Court's action proved a catalyst. "The power of the ruling in the reapportionment cases—their claim to be law—rests upon the accuracy of the Court's perception and upon its ability, by expressing the ideal, to command a national consensus" (p. 119).

The Supreme Court of the United States is our most interesting legal institution. It is of high importance that we seek to understand its role in American life and seek to supply rational criticism of its

9. 383 U.S. 301 (1966).

10. 384 U.S. 641 (1966).

11. 383 U.S. 745 (1966).

12. The most challenging case on which to test these considerations must be Hamm v. City of Rock Hill, 379 U.S. 306 (1964), in which the Court found it necessary and possible to use the Civil Rights Act as the basis for protecting conduct which had occurred prior to the passage of the Act.

performance in that role. To these tasks the Cox essay, by its professional competence, its clarity, and its gallantry, makes a most welcome contribution.

HARRY KALVEN, JR.*

---

* Professor, Law School, University of Chicago.