

## Steamer: The Supreme Court in Crisis: A History of Conflict

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## BOOK REVIEW

*The Supreme Court in Crisis: A History of Conflict.* BY ROBERT J. STEAMER. Boston: University of Massachusetts Press. 1971. Pp. 289.

In light of conflicts which Supreme Court decisions have provoked between the judiciary and legislative branches of the national government in the past two decades, Professor Steamer's book is indeed a timely one. Sensitive to anti-Court sentiment and attacks of the 1950's, Steamer undertook a history of the Court with the intent of examining the crises its decisions provoked, and studying the recurring conflicts between the Court and the other two branches of government. It is his contention "that given the popular nature of the elective branches of government as opposed to the oligarchical character of the appointive branch, periodic constitutional crises are inevitable."<sup>1</sup>

Stating his thesis in these terms, there are three conceptual themes which tie his analysis together: (1) The notion of conflict between the judicial and the other governing branches; (2) the role of an oligarchy in a democratic polity; and (3) the dual nature of the judiciary. The Court has a duality of functions, he notes, since some of its rulings are "political" decisions as much as "legal" decisions. Without a doubt his major theme is the notion of conflict; the dual nature of the Court receives secondary consideration and the Court's oligarchical feature is but a minor theme.

The book is full of promise; reading it proved to be both a rewarding, enlightening experience and an exasperating, irritating undertaking. The first two and a half chapters of his book are solid pieces of work; the promise is delivered. The intervening three and a half chapters are bewildering and annoying; the promise is aborted.

In an engaging analysis of the Court's prehistory Steamer demonstrates that the conflict between the judiciary and executive or legislative branch did not emerge solely with the adoption of the Constitution; it was present in the colonial period, almost from the outset. He notes that a fundamental reason the Court has been controversial is its imperfectly defined role in the Constitution. That inadequate definition, he contends persuasively, was a legacy from the colonial past. Thus, rather than creating the basis for conflict between the judiciary and the other branches, the Constitution simply reflected ambiguous judicial understandings of British-Americans who had broken their ties to the Empire while retaining English legal-constitutional perceptions and procedures.

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1. STEAMER, SUPREME COURT IN CRISIS vii (1971).

Steamer found three reasons for the judicial ambiguities in the 1787 document. First, the general legal milieu prior to 1787 was one of confusion and disorder. The colonists adopted English judicial practices that were in a chaotic transitional state, prior to being systematized by the English judiciary. Colonial courts developed with a good measure of independence of the English system. New courts and procedures were added as new demands arose, without conscious efforts to copy from the home land. This disorderly growth of colonial courts was compounded by the lack of clearly differentiated governmental powers, meaning, in reality, that colonial legislatures fulfilled judicial roles. Second, after the creation of the vice-admiralty courts in 1696, two judicial systems existed in the colonies. Since the jurisdiction of vice-admiralty courts was never precisely defined, this dual court structure resulted in conflicts between Empire and colony somewhat analogous to those subsequently emerging in the American federal system.

The third and perhaps most important ambiguity of the evolving colonial judicial structure, Steamer found, was the appeals system. The Privy Council through its own volition might disallow laws for any reason, or it could nullify colonial enactments through exercising its judicial function as an appellate court by reviewing cases coming on appeal from colonial courts. To be acceptable to the Council colonial laws had to be free of provisions contrary or repugnant to the laws of England. Although the standards of "repugnancy" or "contrariety" were not clearly defined, they were nonetheless used to annul colonial legislation. Ill-defined as they were, these standards were superior law. By way of contrast, colonial enactments were inferior law and had to give way to the law of the Empire.

Given this thoroughly developed analysis Professor Steamer concludes that "modern American judicial review is not an entirely different kind of power, but is, in fact, rooted in British imperial practice."<sup>2</sup> By adopting a modified version of the "British imperial practice," Americans retained the fuzzy boundaries between judicial authority and that of the other governing branches. These obscure boundaries which perpetuated through the Revolutionary-Confederation period, were "written" into the Constitution.

The Court, he continues, was relatively free from controversy the first twelve years of its existence. However, with the emergence of political parties in the 1790's, the Court and its role in American public life became a matter of intense partisan debate. The first opposition to it came from Jeffersonians who suspected that the Court, under Federalist domination, might abuse judicial power. Consequently, early congressional debates about the judiciary centered on the "theoretically possible misuse of judicial power."<sup>3</sup>

Outright attacks on the Court came later, Steamer states. Opposition to the Court in the first decade of the nineteenth century dealt with ab-

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2. *Id.* at 14.

3. *Id.* at 32.

tract judicial power. The first judicial crisis came during the decade from 1821 to 1832 when the Court became the target of a sustained congressional attack. The issue was no longer what the Court *might* do but what it had *actually* done. During the period after 1809 the Marshall Court used the doctrine of implied powers, the contract clause and the necessary and proper clause to restrict state power. By 1820 it had invalidated laws in seven states and by 1825 in ten.

Congressmen and senators responded to the Court's rulings with a series of hostile and anti-Court speeches and legislative proposals designed to limit judicial power by restricting the Court's appellate jurisdiction, subjecting federal judges to removal, limiting judicial tenure, requiring a two-thirds majority in cases involving state laws, and finally in 1831 by the attempted repeal of Section 25 of the 1789 Judiciary Act, which permitted appeal to the high Court when a state court ruled against a right or privilege claimed under the Constitution or national law.

The controversy which the Court's decisions provoked, in Steamer's view, was at its base a political question—a contentious dispute about the nature of the federal system, a clash which pitted the values and interests of the nationalists against the particularists. The Court's rulings, related as they were to pressing social, political and economic issues brought federal-state antagonisms to a head. It was thus a fight for political power between the states and the national government, not a conflict between Congress and the Court, Steamer maintains. However, to avoid what might have become a deadlock between the national government and the states, and in the absence of other obvious institutional arrangements for solving political struggles of this nature, the resolution of the fight devolved upon the Court.

The decisions leading to the crisis of the 1820's, Steamer notes, vigorously sustained expansive national powers at the expense of restricting state powers. This meant that congressmen and senators, with their local and state constituencies were the offended parties. Consequently, the Senate and House were natural forums for them to voice their opposition to Court rulings. Collectively these congressional spokesmen were convinced that the Court had exercised powers beyond those expressly granted to it in the Constitution. It appeared to them that an irresponsible judicial oligarchy had used ambiguous constitutional clauses and doctrines to frustrate the majority will. Thus, it was natural that they responded with a rash of measures intended to stipulate accurately the Court's powers. These first attempts to curb judicial power failed, Steamer contends, primarily because there was little agreement on the method to use.

By the 1830's, Steamer observes, Americans had reached a consensus about the role of the Court in their government system and about the nature of the federal system. Although it was a shifting, precarious consensus, it was generally acknowledged that the United States was a single nation with state powers subordinate to national authority and power. For the next generation, then, the Court served as an adjunct to a growing nationalism. The Taney Court avoided conflicts between itself and Con-

gress to the middle of the 1850's by its cautious use of judicial power and by ingratiating itself to diverse elements in the nation. And in spite of the Court's repeated assertions of national dominance in the federal system, its decisions up to the 1857 Dred Scott case avoided areas of intense emotion.

The nature of the union apparently had been solved; the issue of slavery in the territories now wanted resolution. The Court, Steamer argues, could not avoid the issue. There was no good reason, he contends, for it simply to dismiss the Scott case for lack of jurisdiction. However, strong pressures, both from justices on the Court and the American public demanded judicial intervention in the matter. And since the Court was held in high esteem by the 1850's, Americans naturally looked to it to help resolve what had become the dominant political issue since the Mexican War. On the slavery issue, however, the precarious consensus prevailing since the 1830's splintered in the late 1850's; Dred Scott's case was an indicator of the tenuousness of that consensus. Steamer's conclusion that "[t]he Court failed, as Congress had failed. The American people had failed . . ."<sup>4</sup> seems well justified.

Again, as a generation earlier, critical political questions put to the Court triggered intense, heated reactions. On the emotional level the ensuing attack on the Court was unmatched by any previous attacks. The Dred Scott decision had touched a depth of feeling which earlier decisions had not. The nature of the union was again called into question, but now it was compounded by the volatile slavery issue. But, the attack of the late 1850's, as compared to the crisis of the 1820's, was an attempt to discredit the Court's decision, not to constrict its jurisdiction.

Steamer thus rejects the contention that the Scott case weakened the Court as an institution in the American governing system. Attacking the Court's decision rather than its jurisdiction was less severe and much less fundamental than the criticism of the 1820's. Judicial review of congressional enactments, he notes, became a vital principle after the Scott case, not after the *Marbury* decision. If many more years had passed before the Court asserted its power of review, he argues, it would have become a "constitutional dead letter." Fortunately for the Court, the fact that its review "was exercised on an issue over which the nation was divided so bitterly meant that Congress, in its disunited state, could not muster the kind of support needed to curtail the power of the Court."<sup>5</sup>

The other solid portions of Steamer's work are the last two chapters. By the end of the depression decade, Steamer observes, the Court no longer served as an economic umpire as it had done since the post-Civil War period. It became imperative that the Court redefine its purpose. That redefinition started under the Stone and Vinson Courts. Steamer views their Courts as a transitional period away from the preoccupation with economic issues to the new meaning the Court would receive under Warren's leadership.

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4. *Id.* at 72.

5. *Id.* at 94.

By the mid-1950's, Steamer argues, two new themes of judicial activity had emerged offering new understandings of the Court's role in American life—its concern for fairness and equality. The Court's commitment to equality, he found, was exemplified in cases dealing with race relations; criminal procedures, prayer in the schools, reapportionment and freedom of speech and press. In its decisions in these cases the Court reasserted that persons, regardless of race, had the right to equal treatment by their government, national, state and local; that procedures for judging accused individuals should be fair and applied equally in the states; that the believer and non-believer alike had equal rights in public schools; that there should be equality of voting power; and that the privileges of free expression should extend to opponents of the status quo as well as to its advocates. Court decisions insisting that proper procedures be followed by Congressional loyalty investigators and decisions invalidating state anti-Communist programs, demonstrate, in Steamer's view, the Court's concern for fairness.

Collectively, Steamer maintains, the decisions of the 1950's and 1960's, like those of the 1820's, limited powers of the popularly elected branches of government. And like both the crises of the 1820's and 1850's, the political nature of the cases brought to the Court for resolution the past two decades created anti-Court maneuverings. The initial attacks of the 1950's came from congressmen interested in protecting the "southern way of life"; these detractors were soon joined by those who felt the Court interfered with the nation's loyalty program, and finally the anti-Court coalition was bolstered by a swelling contingent who were certain that Court opinions frustrated the nation's police. In short, "the entire South, and many senators, congressmen and state legislators had been offended by the new judicial activism."<sup>6</sup>

Since so many interests had been offended by the recent Court, the crisis of the late 1950's overshadowed those of the 1820's and 1850's. Anti-Court forces combined attempts to discredit specific decisions with proposals to restrict the Court's jurisdiction. In addition, Court opponents were more vociferous and better organized than in the earlier crises. Nevertheless, Steamer concluded, none of the proposed measures to "curb the Court" was aimed at altering its functions or interfering with its institutional integrity.

The Warren Court, Steamer contends, had little opportunity to avoid the crisis of the late 1950's. Judicial activism was the only legitimate response the Court could make to the lethargic indifference of legislatures, governors and presidents who abdicated their responsibility for preserving constitutional rights. The political branches of popular government failed; the Supreme Court was thus "drawn into a vacuum created by irresponsible politics, and it did not shirk its duty. . . . The irony of the crisis is that for the first time in American history the Supreme Court was in trouble for insisting that the *substance* of democracy

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6. *Id.* at 250.

must be fulfilled as well as the form."<sup>7</sup> The judicial oligarchy proved worthy of tackling the problems bequeathed to it.

Placed on a balance, the strong portions of Steamer's book would outweigh its weaker sections. Nonetheless two major difficulties mar his work. There is a lack of conceptual clarity and an extremely thin use of relevant secondary studies.

Steamer's major interpretive concept—the notion of conflict and crisis—is not adequately developed. He never defines what he means by conflict or crisis. In reading the book it becomes clear that both words have shifting meanings depending on the time period the author discusses. It is obvious that from Steamer's perspective, the first judicial crisis came in the 1820's; the second a generation later with the Dred Scott decision. The third crisis came in the 1860's during reconstruction, but ironically his analysis of the reconstruction *crisis* is placed in a chapter with the subtitle, "The Period of Relative Calm." It is difficult to put "calmness" and "crisis" together. Then in his discussion of the Fuller and White Courts, one of his longest chapters, he alludes to "clashes with Congress," to which he promises "we shall return shortly," but by the end of the chapter he notes that reaction to these Courts was "merely a feeble thrust here and there." And later, in discussing the Taft and Hughes Courts the author refers back to the "crisis of 1896," to which he had given only passing reference.<sup>8</sup> Thus, it is not clear what a "crisis" or a "conflict" is in the sense that the author uses these terms.

In his discussion of the Court from the 1870's to the mid-thirties, there are two clues to his conceptual problem. First, his organizational method hampers his conceptual development. His book is organized around the Chief Justices and the Courts they guided. And whether or not any particular Court experienced conflict, Steamer has a discussion of each Chief Justice and his Court. This is certainly an unfortunate organizational pattern since the Chief Justices were at best Steamer's minor interest and quite obviously there is no correlation between conflicts and crises and the tenure of the Chief Justices. He penalized himself and his readers by subordinating his major thrust to secondary concerns. There is no doubt that his analysis would have been stronger, more sharply focused if he had organized his work around periods of conflict or crisis.

Second, his theme needs broadening. Conflicts between the Court and other branches of government may be inevitable, but that does not mean they are ever present. If Steamer had redefined his concept to include absence of conflict, the extensive coverage he gave to the period from the 1870's to the early 1930's would not have been so annoying. As those sections stand the reader encounters pages of material in which conflict is absent. The reader was promised conflict, expects it, but instead finds suggestions of why conflict was absent or failed to develop. For example, in his analysis of the White Court the author notes its "judicial permissiveness of congressional power," and is forced to con-

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7. *Id.* at 260.

8. *Id.* at 150, 152, 169, 212.

clude that except for the child labor case, "the vast majority of Congress [had] only meager grounds for complaint."<sup>9</sup>

Conflict may have existed between Congress and the Court during the two generations after 1870, but if it did, it was in an attenuated, almost meaningless form, so far as it is discernible in Steamer's book. If he had refined his conceptual theme to include the lack of conflict, the large middle portion of his book would not seem so irrelevant to the thesis he sought to develop. As that section of his work now stands, Steamer is open to charges of present-mindedness—of projecting the conflict he knew the Court experienced in the 1950's back into the Court's history whether conflict was present or not.

The other major difficulty marring this work besides the lack of conceptual clarity is Steamer's unbelievable inattention to relevant secondary studies. For his understanding of the New Deal Court Steamer only used accounts contemporary to the court-packing era—materials published between 1937 and 1941—to the exclusion of recent studies of that period. It is not that he should have overlooked these studies; it is as though New Deal historiography stopped at the outbreak of World War II. This inattention to pertinent monographic literature helps explain why Steamer's analysis of the judicial-executive conflict of the late 1930's fails to advance our understanding of the controversy beyond what is available in standard constitutional history texts.

This same disregard for secondary materials is present in his consideration of the evolution of the party system and the impact which party struggles might have had on opposition to the judiciary. None of the recent analyses of party formation and growth is included in the sources used for understanding the early national period. The nearest Steamer comes to this is his use of John Miller's 1960 study, *The Federalist Era*, which has a couple of chapters on political parties in the 1790's. It might be argued that an examination of recent literature on the party system would not have altered Steamer's analysis of Jeffersonian opposition to the judiciary or of his understanding of the 1820's. Nonetheless, there is no question but that his reluctance to consult recent scholarship completely undermines the credibility of his analysis of the legislative-judicial relationship during the reconstruction period.

Evidently Steamer was unimpressed by the excellent monographic studies which might have helped him understand constitutional aspects of the Civil War and Reconstruction periods. With the exception of David Silver's 1956 study on Lincoln's Court *all* other scholarly literature on the war and reconstruction are either overlooked or ignored. In addition to Silver's book, he used two other secondary sources: Fred Rodell's *Nine Men* and Charles Warren's constitutional history texts—incredibly thin in light of alternative works he needed to use.<sup>10</sup>

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9. *Id.* at 163, 164.

10. For the best review of relevant literature on this period see Harol M. Hyman's introductory essay in *THE RADICAL REPUBLICANS AND RECONSTRUCTION: 1861-1870* xvii-lxviii (1967).



Overall Steamer's account of the 1860's illustrates how shallow his analysis is. He explains how an "arrogant and self-righteous Congress," refused to be restrained by constitutional limitations. Consequently, Congress forced the Court to "cave in"; to acquiesce to its dictates.<sup>11</sup> The radicals first moved against the Court in December 1861, Steamer argues, when Senator Hale "introduced a resolution requesting the Committee on the Judiciary to inquire into the expediency and propriety of abolishing the Supreme Court." Hale's resolution was "indicative of the intensity of feeling among the Republican radicals," he continues. Later Congress passed a Court reorganization bill, in large part to ensure a majority of justices "to uphold those congressional and presidential actions which even those who believed wholeheartedly in the war might consider constitutionally marginal."

However, it was not until after Lincoln's death, Steamer says, "that the Court became subject to serious and successful legislative intrusions into its customary domain." Following the *Milligan* ruling, there was intense "congressional shouting" about the Supreme Court. After the test oath cases there was concern for "punishing former supporters of the Confederate cause," when "once again the radicals in Congress reacted bitterly and moved to overrule the Court." These early responses to the test oath cases were "merely a warm-up for the major event to come." The major event was the Court's "cave in" over the McCardle controversy. Finally, "the Court suffered a further loss in prestige as a result of its decisions in the *Legal Tender Cases*." But fortunately, Steamer concludes, under Waite there was a "return to power and prestige."<sup>12</sup>

Perhaps Steamer is justified in not making *extensive* use of the recent literature on the Civil War and Reconstruction. The central thrust of much of it focuses on matters not concerning his work. Generally he should know that scholars have abandoned the notion that the radicals were a united, aggressive group; and if he wants to adhere to the notion of "punishment" he might have explained what that punishment was. However, by overlooking the work done by Stanley I. Kutler of the University of Wisconsin and William M. Wiecek of the University of Missouri, Steamer has written a presumptuous account of judicial-legislative relations during reconstruction. The work of both Kutler and Wiecek focus sharply on the very questions Steamer set out to examine.

In a thorough study of the reconstruction Court and Congress, Kutler stated explicitly that his work was an examination of "judicial power and legislative responses . . ." Kutler also noted that he initiated his study intending to focus on the post-reconstruction period after giving "perfunctory" attention to the Court's loss of prestige following Dred Scott and the "nadir of judicial power and influence" after reconstruction. However, he soon discovered that this traditional account "bore little relation to reality," and learned that congressional Republicans were not

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11. Steamer adopted the notion of a "cave in" from Rodell, but accepted Rodell's account of the Court in the reconstruction era.

12. All the quotes are from Steamer's book, at 102, 103, 103, 104, 105, 112, 113, 113.

united against the Court, "but, in fact, contributed significantly to the expansion of its power."<sup>13</sup> The Court during the war and reconstruction periods, Kutler concluded, "was characterized by forcefulness and not timidity, by boldness and defiance instead of cowardice and impotence, and by a creative and determinative role with no abdication of its rightful powers." Instead of the Court being nearly annihilated by Congress, congressional measures during the 1860's provided "a thrust which actually expanded judicial power in a significant manner."<sup>14</sup>

Wiecek, in a cogent analysis of judicial-legislative relations between 1863 and 1875 argued that "In no comparable period of our nation's history have the federal courts, lower and Supreme, enjoyed as great an expansion of their jurisdiction as they did in the years of Reconstruction. . . ." This "accretion of power to the Courts," Wiecek concluded, "lies primarily with Congress."<sup>15</sup>

Since Steamer consciously or unconsciously ignored one of the most fruitful areas of American historiography of the past generation, his analysis of the 1860's is reminiscent of historical accounts published in the late 1920's and 1930's. As early as 1940 Howard K. Beale cautioned that "further studies and changed points of view [were] necessary [for] a full understanding of Reconstruction." Until that happened, Beale contended, "we shall not have the facts from which to generalize with any assurance."<sup>16</sup> A lot of those "further studies" have been made; the "changed points of view" have occurred, and more of the "facts" are known. Yet Steamer dismissed it all. Consequently, in terms of endeavoring to advance historical understanding of that crucial decade, his work is retrogressive, a type of scholarly anachronism. In evaluating his analysis of the reconstruction Court the most charitable conclusion to draw is that he failed to do his homework as well as he could have. Presumably he knew his assignment.

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13. JUDICIAL POWER AND RECONSTRUCTION POLITICS vii (1968).

14. *Id.* at 6. Kutler has two articles examining judicial-legislative relations Steamer should have examined: *Reconstruction and the Supreme Court: The Numbers Game Reconsidered*, 32 JOURNAL OF SOUTHERN HISTORY 42-58 (1966); and *Ex parte McCordle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered*, 77 AMERICAN HISTORICAL REVIEW 835-51 (1967).

15. *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 JOURNAL OF AMERICAN LEGAL HISTORY 333, 334 (1969). Since this article appeared Wiecek has another relevant article which was published too late for Steamer's use: *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 JOURNAL OF SOUTHERN HISTORY 530-48 (1970).

16. *On Rewriting Reconstruction History*, 45 AMERICAN HISTORICAL REVIEW 810 (1940).

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