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The Warren Court: Constitutional Decision as an Instrument of Reform by Archibald Cox

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accurately, it has done its job. This, Rights of Person has generally done.

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Archibald Cox begins this brief and incisive study of the Warren Court by recalling that “de Tocqueville wrote more than a century ago that hardly a political issue arose in the United States that was not converted into a legal question and taken to the courts for decision.”1 So it was then and so it is today. Americans, unlike any other people, are in the peculiar habit of committing their most critical social, economic, political, and philosophical questions to legal actions so that the judiciary may participate in their resolution. Over the decades, the judiciary has helped resolve these critical issues, while storms have arisen in the American polity over the direction in which the judiciary has led. Lawyers and political scientists, as well as members of the Supreme Court itself, have joined in the fray to attempt to answer the question: What is the proper role of the Supreme Court in the American governmental and political system? Should the Justices ignore the political aspects of their task—the public consequences of their decisions? Should they ask themselves the question “What substantive result is best for the country?” Or should they be content to answer the question “What is the decision according to law?” Different Courts have leaned in different directions, and the dilemma remains.

This book is an attempt by a former Solicitor General of the United States (1961-1965), who is presently a professor at Harvard Law School, to show that the Supreme Court under the Chief Justiceship of Earl Warren has met the dilemma head on and solved it in an acceptable manner. Professor Cox admits that his view may be prejudiced. One who sits in the Supreme Court almost daily awaiting oral argument or the delivery of opinions, he tells us,

... [a]cquires both admiration and affection for the Court and for all the justices. The problems with which they deal are so difficult, the number

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and variety of cases are so overwhelming, the implications are so far-reaching, that one sits humbled by the demands upon them. That the institution of constitutional adjudication works so well on the whole is testimony not only to the genius of the institution but to the wisdom and courage of the individual justices.\textsuperscript{2}

In fact, however, Professor Cox has produced a remarkably well balanced overview of the Warren Court, up to but not including the last term, in such a brief, well-written, and non-technical form that it will be valuable for the general reader as well as the student of constitutional law.

The thesis of \textit{The Warren Court} is that the seemingly insoluble antinomy lying at the heart of constitutional adjudication can be eased through legal reasoning that preserves "the power of judge-made law to command consent while at the same time changing it to serve the new and newly felt needs of the community and the demands of individual justice."\textsuperscript{3} In other words, the Supreme Court must preserve the respect and confidence of the people and, at the same time, permit and promote social progress. This is done by rationalizing constitutional judgements in terms of principles consistent with accepted sources of law. The author asks whether the Warren Court, which has rewritten, often with more profound social consequences than any other, major constitutional doctrines governing race relations, the administration of criminal justice, and the operation of the political process, has been able to attain an acceptable balance of progress as it is viewed by both the liberal and conservative elements of our society? The author believes so. He is confident, he tells us, "that historians will write that the trend of decisions during the 1950's and 1960's was in keeping with the mainstream of American history—a bit progressive but also moderate, a bit humane but not sentimental, a bit idealistic but seldom doctrinaire, and in the long run essentially pragmatic—in short, in keeping with the true genius of our institutions."\textsuperscript{4}

Cox points out that the Warren Court's difficulties were increased by the pressing and urgent nature of a number of forces existing in our society: the demand for racial justice, the movement toward equalitarianism, the concern for personal liberty and privacy, and finally the force of new knowledge in the fields of psychology and sociology that cast doubt upon such traditional notions as the efficacy of punishment and deterrence in criminal law.

Professor Cox supports his thesis, which he introduces along with a brief historical glance at the dilemma of the judiciary in his first

\textsuperscript{2} Id. at 134.
\textsuperscript{3} Id. at 23.
\textsuperscript{4} Id. at 133.
chapter, with five well-organized chapters arranged around the central themes of judicial and legislative power in civil rights, the reform of criminal procedure, and finally, political democracy with specific attention to freedom of speech and association, voting rights, and legislative reapportionment. The author cites, in developing these themes and supporting his thesis, specific cases and records personal observations drawn from his experiences as the government's advocate. He displays intimate and thorough familiarity with his subject and provides the reader with valuable insights. This reviewer's only complaint is that placing the footnotes at the end of the book caused minor inconvenience which should have been avoided by the publisher.

Professor Cox is not completely uncritical of the Court's work over the past fifteen years. He notes that the Court's majority has been particularly unsuccessful in rationalizing new departures under the equal protection clause of the fourteenth amendment. In addition, he feels that some of the innovations wrought in the area of criminal procedure have been too rapid. Cox seems especially concerned about the Court's apparent failure to deal with the questions raised by the radical revisions in the structure of government that will result from shifting ultimate judicial responsibility from the state to the federal level, as in the administration of criminal justice.

Overall, the author believes that while there are areas of virtually unprecedented creativity, the "Warren Court has recognized that there are limits to what can be accomplished by Constitutional adjudication without undue risk of undermining the rule of law." The true greatness of the Warren Court is that it has been able to pursue what it saw as the goals of society without impairing the long-run usefulness of judge-made law. In so doing it has made a significant contribution to the continuing progress of the American people.

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5 Id.