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Scholarly Reflections on The Court and the Constitution

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SCHOLARLY REFLECTIONS

THE COURT AND THE CONSTITUTION. By Archibald Cox.[1] Boston: Houghton Mifflin. 1987. Pp. 378. $19.95.

In the prologue to *The Court and the Constitution*, Professor Archibald Cox recalls a conversation he had in 1963 with Attorney General Robert Kennedy. Governor George Wallace had just informed Kennedy that Alabama teachers intended to defy the Supreme Court's recent decision that prohibited public schools from opening the day with prayer,[2] and he demanded to know whether the federal government would send in the army to enforce the decision as it planned to do to for *Brown v. Board of Education*.[3] Cox reports that his advice to Kennedy — that there was no actual decree against any Alabama officials that could be enforced — was technically correct, but lame. Cox wishes today that he had answered that our Constitution "works, our liberties are protected, and our society is free because officials, individuals, and the people as a whole realize that liberty for the weak depends upon the rule of law and the rule of law depends upon voluntary compliance" (p. 15). Professor Cox need no longer harbor any regrets; his most recent work on "constitutional adjudication" (p. 343) — as he refers to judicial review — eloquently states this point.

The Court and the Constitution reiterates the message that "[t]he roots of constitutionalism lie in the hearts of the people" (p. 15). The legitimacy of any decision is determined by how responsive the Supreme Court is to what the nation, given distance and a cooler temperament, would assent to (p. 377). Professor Cox illustrates this point by chronicling many of the Court's weighty constitutional decisions over the past two centuries. His coverage is sweeping, from the establishment of judicial supremacy and economic liberty to affirmative action and abortion.

The bulk of the book is historical in nature. In each doctrinal area, Cox explains the evolution of the law. He breathes life into dusty cases by vividly describing the actors and issues at stake in their historical context. His approach is best seen in his discussion of the evolving relationship between free speech and national security. The question of what "relationship between words of political or social advocacy and unlawful acts will deprive the speaker of the protection

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[1] Visiting Professor of Law, Boston University; Carl M. Loeb University Professor of Law Emeritus, Harvard University. Professor Cox became the first Watergate Special Prosecutor in May 1973.

[2] *See* School District of Abington Township v. Schempp, 374 U.S. 203 (1963).

[3] 347 U.S. 483 (1954).

of the First Amendment" (p. 215) arises in many situations. The pressures, however, "are most intense and the stakes are highest when the criticism is of the Administration's conduct of a war" (p. 215), when nationalist sentiment runs deepest and tolerance is often in short supply. It is in this context that Cox locates the foundations of the first amendment, for "it is speech of a political nature that government most often seeks to restrict, and therefore the courts most often have occasion to defend" (p. 211).

Professor Cox traces the development of first amendment jurisprudence and its governing "clear and present danger" test from World War I to the present against the backdrop of changing national sentiment and priorities. The clear and present danger standard was first formulated in 1919 by Justice Holmes in his opinions upholding the conviction of Eugene Debs and two others[4] for violating section 3 of the Espionage Act, which prohibited wartime attempts to incite insubordination or obstruct military recruitment (pp. 218–19). Debs had given a speech — transcribed by a government stenographer who had been sent to record it — that encouraged his followers not to worry about charges of treason. "Be true to yourself," he told the gathering, "and you cannot be a traitor to any cause on earth" (p. 218). Although the statement fell short of actual incitement of unlawful acts, the Court held that it was unprotected speech because of its probable effect of inciting a violation of the law. The result of this holding was that "[l]ittle constitutional protection was left for wartime critics of government policies" (p. 219).

The Court's holdings in these three cases are best understood in their historical context. The World War I era was one of "feverish demand for '100 percent Americanism,'" a time "[w]hen an enraged sailor shot a spectator who refused to rise for the national anthem" and "the crowd cheered and applauded" (p. 216). Later periods, however, displayed greater tolerance. "The atmosphere of the New Deal," according to Cox, "encouraged the expansion of civil liberties. Opponents of World War II were fewer and fared better than Eugene Debs and the critics of World War I" (p. 221). The Supreme Court came to adopt a new understanding of the clear and present danger test,[5] one that was first enunciated by Justices Brandeis and Holmes in dissents to earlier decisions:[6] "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion."[7]

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[4] *See* Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47, 52 (1919).

[5] *See* Bridges v. California, 314 U.S. 252 (1941); Thornhill v. Alabama, 310 U.S. 88 (1940).

[6] *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes & Brandeis, JJ., dissenting).

[7] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis & Holmes, JJ., concurring).

During the Cold War period, greater intolerance and the fear that a Communist conspiracy would infiltrate the government again led to more stringent restraints on speech. In 1947, Eugene Dennis, a Communist Party member, was convicted of violating the Smith Act by advocating the violent overthrow of the government. In *Dennis v. United States*,[8] the Court upheld the conviction and returned to a less protective definition of the clear and present danger standard: "In each case, [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[9] Professor Cox believes that this formulation was "manifestly inconsistent with the views of Justices Holmes and Brandeis as expressed in *Whitney*" (p. 224). In addition, he claims that the Court failed to justify the factual foundations for its holding, never explaining why Dennis' particular speech was denied protection (p. 224). Professor Cox concludes that "differences of temperament, broad impressions concerning the forces at work in the country and the world, and inarticulate hopes and fears played larger parts in these conflicting judgments than hard-headed factual analysis" (p. 224). Although judges strive for impartiality and reasoned principles, they "sometimes render decisions under pressures of war that they may come to doubt in calmer years" (p. 225).

Despite the shortcomings of cases like *Dennis*, Professor Cox asserts that judicial review provides the best protection for rights that may be threatened by the emotional pressures of national conflict. Although the judicial pendulum may swing, it does so "less wildly and in a shorter arc than public or legislative opinion" (p. 226). Moreover, the scope of judicial review is not unlimited. To be legitimate, the "aspirations voiced by the Court must be those that the community is willing not only to avow but in the end to live by" (p. 377). This standard requires much tolerance and cooperation, for the Court cannot physically force every citizen to obey its edicts (p. 374). Compliance with the Court's decisions derives from a quality inherent and unique to our citizens, for "[d]evotion to the Constitution and the rule of law go hand in hand among the American people" (p. 26).

Cox's thesis can be evaluated in the context of the school desegregation cases. Professor Cox notes that despite the importance of *Brown v. Board of Education*,[10] the Court's practical ability to enforce a decision not accepted by portions of the populace was limited and required time and effort. "The process was slow; the local authorities often dragged their feet; protracted litigation was often necessary to secure full relief" (pp. 265–66). After *Brown*, fourteen years elapsed before the Court in *Green v. County School Board*[11] ruled that school

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[8] 341 U.S. 494 (1951).

[9] *Id.* at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).

[10] 347 U.S. 483 (1954).

[11] 391 U.S. 430 (1968).

boards were under a duty to take "whatever steps might be necessary" to eliminate racial segregation "root and branch" from the school systems (p. 263).[12] Another three years passed before the Court in *Swann v. Charlotte-Mecklenburg Board of Education*[13] explained how far those steps could go, upholding a remedy that included the use of "zoning, pairing, and grouping techniques"[14] as part of a mandate to "eliminate from the public schools all vestiges of state-imposed segregation"[15] (pp. 264–65). Cox's theory would explain the delay in achieving meaningful results in the desegregation context by emphasizing the need to attain popular consensus before working such fundamental change in the social fabric of the country. "To go further — to impose the Court's own wiser choice — is illegitimate" (p. 377).

But this approach is paradoxical. On the one hand, Cox envisions a countermajoritarian role for the Court. He concludes that because questions involving fundamental rights should be resolved not by force or popular pressure but by reason and a sense of justice, the Court is the proper institution to protect these rights from governmental oppression (p. 25). On the other hand, the legitimacy of any decision depends on majoritarian principles — whether a particular decision would strike a responsive chord in the public "equivalent to the consent of the governed" (p. 377). Cox attempts to resolve this paradox by directing the Court to look beyond present standards of acceptability and to envision what Americans, in an atmosphere of greater tolerance, would accept. "[W]hile the opinions of the Court can sometimes be the voice of the spirit reminding us of our better selves, the roots of such decisions must be already in the people" (p. 377). This standard is remarkably subjective. Under it, the legitimacy of any decision can be assessed only retrospectively — after the people have had a chance to determine whether they can live by it. Cox's solution, however, is no more unworkable than pure noninterpretivism; ultimately, as Cox admits, it requires faith in the "delicate symbiotic relationship" between the Supreme Court and the people (p. 377).

The Court and the Constitution is an illuminating book, but it is better suited for the layperson than for the student of constitutional theory. Its appeal lies in Professor Cox's ability to interweave political, historical, and legal descriptions with rich personal insights garnered during a distinguished career. Regrettably, Professor Cox does not elaborate his theory of constitutional adjudication in detail. Perhaps ultimately scholars suffer from the same shortcomings as the justices and must find consolation in the fact that "reaching for ideals is part of reality, even though our reach exceeds our grasp" (p. 26).

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[12] *Id.* at 437–38.

[13] 402 U.S. 1 (1971).

[14] *Id.* at 9.

[15] *Id.* at 15.