

Volume 23 | Issue 1

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1971

# The Supreme Court in Crisis: A History of Conflict, by Robert J. Steamer

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## Recommended Citation

Gregory G. Binford, *The Supreme Court in Crisis: A History of Conflict*, by Robert J. Steamer, 23 Case W. Res. L. Rev. 241 (1971)  
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol23/iss1/10>

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## BOOK REVIEWS

THE SUPREME COURT IN CRISIS: A HISTORY OF CONFLICT. By Robert J. Steamer. Amherst, Mass.: The University of Massachusetts Press. 1971. Pp. viii, 333. \$9.50.

"The Supreme Court should be abolished. We have no youth on the court, no Southerners, no women — just nine old men . . . nine old men should not overturn the tradition of America."<sup>1</sup> So exclaimed the familiar contemporary critic, Martha Mitchell, wife of the U.S. Attorney General, after the Supreme Court had rejected U.S. Justice Department arguments against desegregation by busing. While some segments of society are shocked, if not irate over such scathing criticism — criticism which to many is wanton — a seemingly growing number of disturbed citizens in America 1971 hail that plangent Southern voice with a resounding "Right On!"

It is rare to pick up a newspaper or magazine, turn on the television or radio, or even glance through the index to any legal periodical without being confronted with a myriad of criticisms of the Supreme Court. Criticism abounds from the barroom to the classroom.

The critics range from the downright dullards to the sophisticated.<sup>2</sup> The arguments propounded vary from that of "kill the umpire," as exemplified by Mrs. Mitchell's assault, to calls for "genuine reform," as neatly summarized by President Richard M. Nixon: "[T]he kind of change that requires imagination and daring, that demands a focus on ultimate goals."<sup>3</sup>

From out of this wilderness of despair has come a soft-spoken, albeit persuasive, plea for the status quo by Robert Steamer in his recently published book, *The Supreme Court in Crisis: A History of Conflict*. At first blush one might query, perhaps justifiably, how any author could be so unthinking, unoriginal, and blasé, if not downright vulgar, as to even suggest maintaining the status quo of the Supreme Court. But after digesting this book, the thoughtful reader might begin to ask himself if perhaps the more active critics are not

<sup>1</sup> TIME, May 3, 1971, at 36.

<sup>2</sup> A notable collection of critical essays by some of the most eminent contemporary lawyers and social critics — Lon L. Fuller, Daniel Boorstin, Howard Zinn, Stanley Diamond, Anthony Wallace, Richard Barnett, Ronald Dworkin, and Edgar Z. Friedenberg — may be found in THE RULE OF LAW (P. Wolff ed. 1971).

<sup>3</sup> On March 12, 1971, President Nixon addressed the National Conference on the Judiciary. Excerpts of that address can be found in 60 CURRENT HISTORY 365, 366 (1971).

the ones suffering from at least a partial blindness, which could possibly result from isolation in the dense jungle of today's socio-political milieu.

For Professor Steamer, Chairman of the Department of Government at Lake Forest College, the Supreme Court must be examined within the context of its history — "a history of conflict" — which begins for this author long before 1776. The author's thesis, as the book's introduction describes, is that given the popular nature of the elective branch of the Government, as opposed to the exclusive character of the appointive judiciary, intermittent constitutional crises are inevitable. The popular opinion of the Constitution, often at odds with its judicial interpretation, causes the American system to enter periods of instability as judges are pitted against Congressmen and Presidents in public debates. Such a thesis may not be all that original, but it does seem to have been overlooked too often by many of the Court's more vocal contemporary critics. This book serves as the perfect vehicle to remind everyone, legal practitioner and layman alike, of the unique and sometimes disagreeable role the Supreme Court has and will continue to play in the American arena. As Professor Steamer concludes, quoting Alexis de Tocqueville: "'[T]he power vested in American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies.'"<sup>4</sup>

The author develops his thesis by analyzing the Supreme Court as a contradiction in American theory, an oligarchy in a democratic polity. But the contradiction is an essential one to the history of the Supreme Court, for it has enabled the Court to fulfill its unique and crucial role as ultimate arbiter and authority.

The book is divided into eight segments, each painstakingly footnoted, which serve Professor Steamer and the reader as a practical tool with which to grasp the Court's complex development. The author begins with a concise analysis of the legal and political genesis of the Supreme Court. The background presented is thorough despite its brevity of twenty-one pages. With this background serving as a foundation the author lays on the brick and mortar of his thesis, which is built upon the framework of the chapters of the book corresponding to the chapters of the Court's history: Congress and the Supreme Court During the Marshall Era; The Taney Court: Consolidation of Power; Chase and Waite: The Period

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<sup>4</sup> R. STEAMER, *THE SUPREME COURT IN CRISIS* 289 (1971).

of Relative Calm; Fuller and White: Conservatism and the Revival of Judicial Activism; Taft and Hughes: The Road to a Major Crisis; Stone, Vinson and Warren: Retreat, Rejuvenation and a New Crisis; Aftermath: 1958-1969. All of this is accomplished in slightly over 300 pages, yet with thoroughness and readability.

Rather than tracing a multitude of constitutional issues through their complex evolution, the author wisely focuses on but a few key issues as they developed and related to the Court's crises and the author's theme. Professor Steamer sticks to his theme religiously, with a frequent emphasis on historical events and variables which are all too often omitted from constitutional law courses.

On the one hand, therefore, the harried first year law student may find this book disappointing when it comes to an analysis of the "guts" he might be looking for, but he can find a wealth of such material elsewhere. This book is, after all, neither intended as a casebook (although over 400 cases may be found within the text) nor as a treatise on constitutional law. On the other hand, the student or practitioner of law would be ill-advised to dismiss this book as irrelevant. Few, if any, books of such brevity will be found to furnish such useful background information on the High Court, especially in such an interesting and palatable presentation. The book is worth \$9.50 in entertainment alone. Where else could one find the sleeping habits of Chief Justice Taft reported alongside a scholarly discussion of economic due process?

A notable feature of this book is that it should provide appealing reading to most any audience. The layman will have no trouble understanding this chronicle. Cases are examined with ease yet with subtle sophistication.

Of utmost importance is that the reader will come away armed with an added perspective and understanding of the Supreme Court. As Professor Steamer notes in his discussion of the Warren Era:

The decisions setting forth new rules in criminal procedure came at a time when the nation was witnessing a shocking increase in the crime rate, and it became a political expedient — often a euphemism for demagoguery — to lay the blame for America's unsafe streets at the doorstep of the Supreme Court. Although little, if any, evidence can be adduced to show that careful judicial protection of the rights of accused persons has any connection with an increasing crime rate, the popular mind seemed to believe otherwise and politicians were only too willing to feed the misconception and hysteria.<sup>5</sup>

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<sup>5</sup> *Id.* at 272.

The result, of course, was the ominous Omnibus Crime Control and Safe Streets Act of 1968.<sup>6</sup> Steamer's clear perspective of that period of "misconception" centering on the Court and the resultant unfortunate political ramifications may all be obvious to the legal mind in 1971, but similar incidents can be traced throughout the history of this nation. Perhaps the highest expectation one could have for this book is that it revitalize the legal mind and awaken the "popular" mind (however thin the distinction may be). Professor Steamer has done his best; the burden rests upon his audience.

The author has sacrificed little quality in attempting to reach the widest possible audience, a feat in itself. However, the book is not without deficiencies. In a discussion of Chief Justice Warren, the author glosses over one of Warren's greatest faults — the lack of judicial craftsmanship in his opinions. The subject of judicial craftsmanship is never again mentioned by the author. On more than one occasion other critics have asserted that Chief Justice Warren was not alone in a lack of craftsmanship.<sup>7</sup> In fact, it has been contended that lack of judicial craftsmanship by the High Court on the whole has historically been and continues to be one of its greatest faults undermining public confidence in the Court.<sup>8</sup> The criticism of Professor Steamer is not that he fails to agree with these scholars, but that he fails to discuss so serious a matter at all. The issue of judicial craftsmanship is glaringly omitted from the author's plea for the status quo, whereas he confronts other criticisms of the Court with expertise.

The author also fails to include what is at least interesting data in his discussion of the selection of judges — data which would help support his plea for the status quo. With the growing weight accorded American Bar Association ratings at that time, it is surprising that after his discussion of the star-crossed nominations of G. Harold Carswell and Clement Haynesworth the author fails to make mention of the fact that both men had received favorable ratings from the American Bar Association.<sup>9</sup>

It is also regrettable that in a book so recently published no mention is made of the significant steps already taken by the Burger Court. While unfortunate, this omission is not a serious flaw. The

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<sup>6</sup> 18 U.S.C. § 3501 (1968).

<sup>7</sup> See, e.g., Lewis, *The High Court: Final . . . But Fallible*, 19 CASE W. RES. L. REV. 528, 530 (1968).

<sup>8</sup> *Id.* at 533.

<sup>9</sup> Goldman, *American Judges: Their Selection, Tenure, Variety and Quality*, 61 CURRENT HISTORY 1, 4 (1971).

book is by no means outdated. With over 300 years of history already included in the book, Professor Steamer's thesis has a solid foundation.

Finally, the author seems to have a penchant for overusing the rather misleading "conservative" and "liberal" labels, especially misleading in any examination of history. As the author warns: "In [Taft's] day, as in John Marshall's, judicial activism went hand in hand with conservatism."<sup>10</sup> Unfortunately, this is the only instance in which the author clearly defines those illusive labels, inviting frustration to beset the most captive of his readers.

The credits far surpass the debits of this book. The reader should profit handsomely from an investment of a few hours reading time. Professor Steamer's plea for the status quo is persuasive, refreshing and certainly reassuring. Critics who contend that the framers of the Constitution never intended for the Supreme Court to assume the position of an oligarch amidst a democratic polity should mull over the author's contention that, while met with recurring and often awesome resistance, the Court has used its oligarchic muscle only when the elective branches of government have failed to perform their role of guaranteeing the most basic human and democratic rights. As the author muses in his discussion of the reapportionment decisions of the 1960's: "How ironical that the judicial oligarchy should be the vehicle for attaining majority rule!"<sup>11</sup>

The reader comes away from this book with a full awareness that today's criticism of the Court is in no way a new phenomenon. With few exceptions it is apparent that today's critics are but echoes of the past. Proposals have been offered in Congress to curtail federal judicial power from 1800 onward. And Mrs. Mitchell's charge takes on the gentle qualities of an ode to love when compared to the words written by Thomas Jefferson: "The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederate fabric."<sup>12</sup>

Professor Steamer leaves his audience free to conclude that abounding contemporary criticism is but a good sign that the Supreme Court is quite healthy and very much alive.

GREGORY G. BINFORD

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<sup>10</sup> R. STEAMER, *supra* note 4, at 173.

<sup>11</sup> *Id.* at 268.

<sup>12</sup> *Id.* at 80.

LOW-INCOME HOUSING: A CRITIQUE OF FEDERAL AID. By Robert Taggart III.<sup>1</sup> Baltimore: Johns Hopkins Press. 1970. (Paperback Edition) Pp. x, 146. \$2.25.

By common observation and periodic declaration of Congress, housing is one of the most serious and persistent problems of the American people.<sup>2</sup> Seven Presidents, 19 Congresses, and uncounted public officials and experts have done their bit to confront the housing problem. Their efforts have been variously hailed as the means to realize "a decent home and suitable environment for every American family,"<sup>3</sup> and "a Magna Carta to liberate our cities."<sup>4</sup> Yet despite these self-gratifying words and noble intentions, the results have been meager. The National Commission on Urban Problems put the matter this way:

Over the years, accomplishments in subsidized housing are extremely inadequate. The Nation in 30 years of public housing built fewer units than Congress, back in 1949, said were needed in the immediate next 6 years . . . . One might suppose after years of talk and controversy . . . that by now the Nation would have managed to produce a sizeable quantity of housing units for low-income families. The record is to the contrary.<sup>5</sup>

Will the record in the 1970's be better? In the Housing and Urban Development Act of 1968, Congress reiterated its determination to meet the national goal of a decent home for every American family by setting an explicit 10-year production target of 6 million subsidized units to be provided by 1978.<sup>6</sup> Unfortunately, history seems to be repeating itself, for at present rates of production we should be lucky to reach half of this total.<sup>7</sup> If the goal of a de-

<sup>1</sup> Research associate with the George Washington University's Center for Manpower Policy Studies.

<sup>2</sup> According to the 1960 census, 18 percent of all occupied homes were substandard. R. TAGGART III, *LOW INCOME-HOUSING: A CRITIQUE OF FEDERAL AID* 2 (1970) [hereinafter cited as TAGGART]. The figure is based on a definition that would include as "standard housing units," many living quarters that lack: (1) kitchen facilities; (2) plumbing within the unit itself; (3) adequate space for dwelling and sleeping; and (4) decent light and ventilation. F. KRISTOFF, *URBAN HOUSING NEEDS THROUGH THE 1980'S: AN ANALYSIS AND PROJECTION* iv (1968). An additional eight percent were described as "deteriorating" and 12 percent had more than one person per room and hence were overcrowded. TAGGART 2.

<sup>3</sup> TAGGART 5. The discussion refers to the Housing Act of July 15, 1949, Pub. L. No. 89-171, 63 Stat. 413.

<sup>4</sup> President Johnson's description of the Housing and Urban Development Act of 1968 in *N.Y. Times*, Aug. 2, 1968, at 12, col. 4.

<sup>5</sup> REPORT OF THE NAT'L COMM. ON URBAN PROBLEMS iii (1968).

<sup>6</sup> See 42 U.S.C. § 1441a (1968 Supp.).

<sup>7</sup> TAGGART 5.

cent home is ever to be achieved, not only will more money be needed, but the performance of the plethora of federal subsidy programs — the Department of Housing and Urban Development now has an arsenal of over 70 of them — must be improved by rationally redefining their application, coordinating their use and, in some cases, by changing their priorities.

Robert Taggart's concise and simply written study attempts to lay the groundwork for such improvements. Not just another of the all too frequent expositions maligning the efforts of the Federal Government, Taggart's critique constructively focuses on solutions rather than problems. By analyzing the purposes and strategies of the principal federal subsidy programs and empirically measuring their accomplishments to date, the author formulates suggestions to improve their administration and execution.

Behind the cold facts and figures of program performance, lies Taggart's conviction that the misery caused by inadequate housing is intolerable, and that the severity of the low-income housing problem demands a higher priority on the national level. Mr. Taggart spells out this persuasion in an introductory "Overview." Housing, it is argued, is central to the much broader problem of poverty. In an environment created by substandard and deteriorating housing, education, health, and social development are bound to suffer. Further, in a production-oriented society housing is more amenable to solution than are the intangible and intergenerational problems of poverty. While these contentions are indisputable, the author's exhortation that housing be given a greater share of our national resources at the expense of other vital services for the poor, such as income maintenance, education, and improved health care, is not without considerable opposition. Noted authorities such as sociologist Nathan Glazer have asserted that a national policy of raising income levels, concurrent with efforts to improve education, develop new job skills, and create new jobs, would more efficaciously attack the slum environment than would a massive infusion of new housing.<sup>8</sup> Such a strategy would place the slum-dweller in the more socially desirable position of being able to opt for new homes in better neighborhoods or improving his present quarters and staying there.

This perception of the housing problem as gradually dissolving in the social alchemy of rising income and social mobility, while partially valid, is incomplete. Focusing primarily on the demand

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<sup>8</sup> 2 HEARINGS BEFORE THE NAT'L COMM. ON URBAN PROBLEMS 246 (1968) (statement by Nathan Glazer).

side, it assumes that decent homes and neighborhoods can be supplied automatically in the private market. This has never been true — even for the affluent the housing supply is immobile, long-lived, and unresponsive to short-run changes in demand. Decent living environments require large direct investments by government as well as deliberate public policies to channel resources into the production and maintenance of the housing stock.

The real point, which transcends the occasional petulance of academic polemics — Taggart *qua* economist, Glazer *qua* sociologist — is that no single grand solution to the housing problem exists, just as there is no such panacean answer to the broader poverty problem. Housing gains depend, on one hand, on the growth and distribution of the nation's income, and, on the other, upon changes not only in housing production methods and strategies, as Mr. Taggart suggests, but also in the institutions of local government, the land market, and race relations.

For example, while much can be done with existing production techniques and knowledge adaptable from other industries, we also must be prepared to reverse old American traditions and assume public responsibility for the acquisition of private, vacant land for new, large-scale developments. Mr. Taggart, generally speaking, does not deal with these more extrinsic, but nonetheless vital considerations. His failure to do so, however, should not be deemed a flaw in his work, but rather must be viewed as the result of the inherent limitations of a primarily economic analysis of existing federal subsidy programs.

In his second chapter Taggart reviews the legislative origins of housing assistance and its evolution into the present proliferation of alternative and complementary subsidy tools. From his brief outline of legislation, the author distills the changing thrusts and major developments in the federal housing effort, the most important of which are the broadening of program design to span a wider range of those in need of assistance, and the increasing reliance on the private sector. A summary, in table form, of the characteristics of the major housing assistance programs is provided to give an idea of their relative contribution to the housing assistance effort and as a reference for the more detailed analysis which follows.

In separate chapters, public housing, leased housing, rent supplements, the 236 rental housing program, the 235 home ownership plan, rehabilitation programs and rural housing are objectively explicated as to program design, costs, success or deficiency in achiev-

ing legislative goals, and impact on the total housing picture. Supplementing the analysis are 24 tables and charts which provide hitherto scarce data and information, indispensable for measuring the performance of the newer programs. While this type of analysis is necessarily detailed and will consequently be of greatest use to those directly concerned with the low-income housing effort, the interested layman can benefit greatly from the individual examinations of the divers federal programs. Since housing legislation and administration is so complex and broad, spanning the intricacies of the money market to the deepest of social problems, there is virtually no public understanding of how the various programs work. Congress has contributed to the problem by annually modifying and adding to the programs contained in the few basic pieces of legislation with little regard for the relationship of new or substantially altered programs to those already in existence. Further adding to the obscurantism surrounding federally subsidized housing is the cryptic alphabetic code of legislative subsections used by the initiated to identify the multifarious programs. Under these circumstances the special interests, who understand the legislative maze all too well, have an extraordinary impact on governmental programs.

Behind the facts and figures on program performance lie a number of highly controversial issues concerning subsidy techniques, strategies and program priorities which the author discusses in the last two chapters. Among the most important issues identified are the following: (1) the effectiveness of rehabilitation and the emphasis it should be given in relation to new construction; (2) the need for and relative cost of homeownership subsidies as opposed to the more traditional rental housing subsidies; (3) the feasibility of dispersing low-income housing units outside the central city and the desirability of helping the ill-housed in rural areas; (4) the use of the subsidy programs to bring about cost-saving changes in construction techniques; and (5) the provision of subsidies for occupancy in existing rather than newly-constructed units.

Missing from the author's otherwise comprehensive analysis is an examination of the political realities of subsidized housing which must be taken into account in formulating viable new strategies and solutions. The slow pace of our present programs is explained not only by the economic and administrative inefficiency of the approach, but also by its political unpalatability. There is a fundamental inequity built into the approach of constructing new housing for low-income families. While a policy of taxing *A* to provide housing for

*B*, who would otherwise live in squalor, has a simple appeal to human generosity, a policy of taxing *A* to provide *B* with better housing than *A*'s requires an almost godly degree of altruism. Implicitly, at least, Congress has resolved the problem by limiting the structural and environmental amenities of new units, thereby avoiding both the need for larger subsidies and the politically damaging charge of building "penthouses for the poor." Accordingly, the oft-repeated goal of a "decent home and suitable living environment for every American family" has usually been interpreted in the strictly material sense — "four walls, a roof that doesn't leak, and indoor plumbing for every low-income household."<sup>9</sup> This is so in spite of the likelihood that the marginal cost of amenities may not be large.<sup>10</sup>

The significance of the interlocking political and economic considerations cannot be underestimated. New housing for the poor must be of sufficient quality to last at least the life of the mortgage, which is generally 40 years. Therefore, so as not to be functionally obsolete years prior to its physical obsolescence, new housing must include certain facilities which were yesterday's "luxuries." The perils of false economy reach beyond the structure itself to the lifestyle it promotes and the security it provides. Indeed, if the model tenement of the late 19th and early 20th centuries is the foundation of today's slums, the austere projects of today may well be, if some are not already,<sup>11</sup> the cornerstones of the slums of tomorrow. Yet patent political reality makes it improvident to antagonize the middle-class elements of a predominantly middle-class society.

Therefore, in spite of noble intentions, the direct approach of providing new housing for the poor does not create a suitable framework in which to resolve these conflicting claims. If we are to simultaneously achieve large volume construction and provide the

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<sup>9</sup> TAGGART 75.

<sup>10</sup> Taggart reports a study of project costs in New York City, in which estimates were made of "basic housing costs" on a number of projects, by subtracting the cost of every unnecessary item or special feature. For public housing these nonessential items amounted to only three percent of development costs. In unassisted FHA projects these items were only 11 percent and even in luxury apartments in Manhattan, they accounted for only 14 percent of total costs, indicating that the price of luxury may not be large. Whatever the cost, Taggart concludes that the public is not likely to approve of luxury apartments for public housing. TAGGART 3.

<sup>11</sup> A case in point is the Pruitt-Igoe Housing Project in St. Louis.

This project, a high rise complex of unbelievable grimness and severity, has deteriorated from a national model when it was opened in the mid 1950's to an example of all that is wrong with public housing at the present time. . . . The design and site problems can probably only be remedied by tearing down the existing complex and starting over. In fact, in the long run that may be the only feasible solution. Salsich, *Housing and the States*, 2 URB. LAW 40, 52 (1970).

poor with decent housing, there is no reason why we have to follow a single path to achieve these objectives. Rather, as Mr. Taggart suggests, without recognizing the political underpinnings, we should pursue a variety of approaches and techniques, such as continuing new construction in conjunction with rehabilitation and housing allowances for adequate existing units. The present Administration, under industrialist-turned-statesman George Romney, however, is following the monolithic approach of subsidizing new and costly construction, while de-emphasizing rehabilitation with little apparent reason and discounting the subsidization of existing units out of fear of the inflationary effects.<sup>12</sup>

The Federal Government could pursue a more politically attractive alternative by subsidizing housing construction for middle-income families who also suffer from the shortage of mortgage funds and high interest rates; and it could alleviate the housing problem of the poor by subsidizing low income families vis-à-vis a general housing allowance. The effect would be to increase housing turnover and thereby freeze a sizable portion of the existing adequate housing stock for poor families. This in turn would create a harmony of political interests and an economically viable system.

Any criticism of Mr. Taggart's work is not directed at its organization or its treatment of complex federal programs, both of which are excellent, but rather at the occasional myopia of an essentially economic analysis of broad social problems. Such criticism is slight, however, in view of the competent treatment of the technical aspects of housing development and the incisive suggestions for improving individual program performance. *Low-Income Housing* must be recognized as a well executed contribution to the ongoing effort to improve, as well as expand, federal housing assistance.

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<sup>12</sup> TAGGART 145-46.