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Justice Curtis in the Civil War Era: At the Crossroads of American Constitutionalism

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Review

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Streichler, Stuart *Justice Curtis in the Civil War Era: At the Crossroads of American Constitutionalism.* University of Virginia Press, $37.50 hardcover ISBN 813923425

Let Us Now Praise Practical MenBenjamin Curtis and he Dangers of Principled Pragmatism

Benjamin Curtis served on the U.S. Supreme Court from 1851 to 1857, and was intellectually active during a time of intense and widespread debate about the meaning of various Constitutional provisions, and of constitutionalism in general. Discussion was emphatically not reserved to the intellectual classes, and at any moment one could find newspaper editorials, sermons, pamphlets, popular magazines, debating societies and political speeches addressing questions ranging from secession to the commerce clause. Curtis could only flourish in such conditions: he seems to have been born to argue, and delighted in the technicality and minuti of the law. Both luck and talent led Curtis to occupy, in Struart Streichler's words, a position at the center of a contest over American constitutionalism that was waged not in abstract terms but in actual controversies over power and individual rights (xi-xii). From this position, Curtis was able to challenge in succession the highest court, the president, and the Congress for abusing power (209). His challenge to Congress took the form of an adroit and creative defense of Andrew Johnson at his impeachment trial, while his challenge to Lincoln came in the form of an extended argument against his use of military tribunals for civilians. But it was the first event û Curtis scolding the Supreme Court in a blistering dissent in Dred Scott, that led Streichler to investigate his life and thought more fully.

Streichler, Fulbright Lecturer in the Graduate School of Law and the Department of American Studies at Tohoku University, found himself drawn to write about Curtis by the justice's withering û and highly influential û dissent in the infamous Dred Scott v. Sanford case of 1857, a case which seemed to many

to indicate that the Supreme Court had simply gone insane. Streichler was mildly surprised to find the field of Curtis Studies largely unoccupied, the only biography being a memoir published in 1879 by Curtis' brother, and set about to remedy that.

He seems to have collected quite sufficient data about the life and thought of Curtis to have written the traditional biography û his endnotes are almost as enjoyable to read as the main text û but thankfully he is not interested either in detailing the trivia of Curtis' life as a lad or in interpreting his thought as the result of various childhood traumas or the Ineluctable Forces of History. There is indeed relatively little biographical fact: just enough to place the man in context, to broadly outline the major events of his life, and to give the reader some sense of his character.

It is exactly the right approach, for it gives Streichler room to examine what interested him (and us) about Curtis in the first place: his thought and its impact on the constitutional history of the Civil War era (xi). But this approach can make a book like this devilishly hard to organize. Presenting biographical data in chronological order at least creates a work which in some sense tells a story, albeit perhaps a boring or unimportant one. Some authors who, like Streichler, wish to concentrate on abstractions and thought, are aided by a clear developmental path in either the content of the subject's thought or the mode of analysis. Streichler has no such luck. Benjamin Curtis' thought process seems to show no developmental path whatsoever. There is neither maturation nor degeneration, neither increasing sophistication nor discernable winnowing. This is not to say that he never changed his position on anything, but he seems to have come on the scene with an unshakeable set of core assumptions and techniques and to have applied them indiscriminately to everything he examined in the field of Constitutional law, throughout his career.

This makes Streichler's task of organization a bit more difficult. In order to tell a story, he rather loosely groups Curtis' commentary around major events more-or-less chronologically presented. But in order to examine the thought, Streichler has to jump back and forth now and then, reminding readers of what has been said before, and giving little previews of coming attractions to be examined later. That he manages to do this without confusing or annoying the reader is testament to his clear and engaging writing style and his remarkable grasp of the meaning and implications of Curtis' own work. The result is a beautiful case study of a legal thinker whose main guiding principle seems to

have been that of not having any guiding principle.

Now a crack like that clearly demands explanation, and I hasten to note that I am not referring to anything distasteful or scandalous in Curtis' life, but merely recognizing his unremitting pragmatism in approaching life and law: Curtis was above all else a lawyer in the most literal sense of the term. He loved the law, living in it like a fish in a pond, and seems to have believed from the beginning that if we would all simply live our lives like the truest of lawyers, most of our problems could ultimately be resolved to most of our mutual satisfaction. But for this to happen, Curtis would have us distinguish between a lawyer and a lawgiver: only the latter can afford to be concerned with highfalutin ideals and principles and grand theories of human nature. True lawyers take the law as they find it and apply it to circumstances as they find them: arguing, debating, pushing and shoving, dealing and compromising and searching out middle ground to produce practical solutions which contestants can find acceptable, if not perfect.

Where does such a lawyer find such law? In the deposit of the legal culture, and in particular in Curtis' beloved common law. Curtis's constitutionalism was grounded above all else in the common law (5), notes Streichler, and his approach to both political theory and constitutional development can probably best be characterized by a phrase made popular in the twentieth century by the philosopher of science, Karl Popper: piecemeal engineering. A foe of political metaphysics (14), Curtis rejected idealistic reasoning as being far too simplistic for the extraordinary complexity that besets political affairs. Wholesale solutions based upon mental gymnastics alone simply aggravate problems by forcing solutions to conform to theory, instead of the reverse. There is instead a practical wisdom based in experience which far outperforms abstract reasoning from a priori principles:

He believed that each generation adapted social and political practices to meet the needs of its day, the institutional arrangements that emerged over time reflected the collective experience of successive generations. Because the political knowledge of any single generation was limited by its own experience, it followed that no present generation was likely to understand fully the merits of the institutions that had evolved to that point. (15)

The parallels to Burke are obvious, and it should come as no surprise that Curtis found himself at home in the Whig party and, like Burke, viewed both law

and liberties as an entitled inheritance (15).

This point of view found expression in Curtis' method of constitutional interpretation, which he referred to as practical construction. By this he seemed to mean, according to Streichler, that the judiciary, in interpreting the Constitution, was obliged to give substantial weight to the practices of the elected representatives of the people (22). Such deference must not be taken to the point of a wholesale surrender to popular opinion expressed in the coordinate branches, however: Curtis believed that elite lawyers and judges must serve as a check on uninformed opinion, through their understanding of the common law -- the deposit of faith, as it were -- found expressed in the decisions and reasoning of hundreds of actual court cases throughout American and English history.

Curtis was clearly on to something here, of course, and many excellent arguments have been made in support of the famously-British science of muddling through political problems, and against sacrificing practical reasoning on the altar of ideological consistency û notably by Popper himself (Cf. especially his The Poverty of Historicism). But any first-year law student can articulate the dangers in over-reliance on precedent to resolve legal problems. In principle, the idea seems unassailable: deciding like cases in like manner seems manifestly fair, and produces an agreeable consistency of policy which both hints at some underlying universality of principles of justice and provides a consensus about the rulebook according to which the game of life may be played. These are highly desirable outcomes.

In practice, however, problems arise. In the first place, every case, perhaps merely by virtue of being a case, is arguably unique. No matter how many, or what proportion, of circumstances surrounding one resemble those of another, they can at most only resemble them, and cases are therefore decided not only on their merits, but by prior argument about which circumstances are relevant to the comparison, and whether they permit cases to be differentiated. In addition, it doesn't take long for there to develop a large number of past cases, many only subtly different from one another, from which a court may take guidance. If the deposit of the common law is large enough, courts may cherry-pick precedent on their way to deciding cases arbitrarily. Precedent is chosen to fit the desired outcome rather than ruling and guiding decisions û no entitled inheritance is transmitted, and both the practical and symbolic benefits of uniformity may be lost.

And all this is beside what is perhaps the greatest difficulty of all: consistently deciding cases the way they were decided in the past only works to our benefit if past cases were decided correctly in the first place. Let us only briefly imagine a world in which Plessy v. Ferguson were still the law of the land.

Curtis seems not to have lost much sleep over these worries. If he did consider them, Streichler has uncovered no soul-searching commentary or has not presented it. We must suspect that it does not exist. The style of Curtis' arguments is consistent throughout: it is what is called in classical rhetoric arguing from circumstance, and naturally enough, it produces differing results when presented with different circumstances.

Streichler himself senses the problem when he notes in several places in the book that he is troubled by Curtis' varying stands on the matter of race. He seems to have expected the hero of Dred Scott to have been a consistent abolitionist or -- even rarer for the time -- an anti-racist. But in fact, the man never developed anything close to a principled position in these matters, and actually defended the Fugitive Slave Law in public oratory and from the bench; once famously û and for a newly-appoint justice, rather bafflingly û instructing a federal grand jury that forcible resistance to the law constituted treason (39). Streichler does not defend Curtis' variability on these matters û far from it û but he is willing to chalk it all up to the exigencies of the time, and reminds us of the dangers of judging from a twentieth-century perspective.

But in fact, such inconsistencies are themselves consistent with Curtis' stated objective of seeking practical solutions within the context of the contemporary law and of eschewing any appeal to ideals. Even when Curtis seems to Streichler to be on the right side of the issue, his pragmatic distaste for political metaphysics produces results which are a bit unsetting and even unsatisfying on their own terms. In not-so-popular lore, Dred Scott is remembered as the case in which the Court pronounced people of black African descent to be incapable of acquiring U. S. citizenship. Naturally, if Curtis objected to this decision, we tend to think that he must have had in mind some ringing defense of the Declaration's ideal of the equality of all men, regardless of race, etc. But in fact, Curtis' dissent, as Streichler ably shows, was based mainly on arguing from the historical fact that some black persons were legally citizens at the time of the Constitution's adoption û some may even have voted during ratification û and it therefore could not have been the intent of the Framers to incorporate Chief

Justice Taney's notion into the document. In other words, had there been no such historical evidence, or had there been evidence that the Framers had such an intention, Curtis might very well have voted with the majority. As it was,

Curtis's scheme led to some curious results. For one thing, a native-born person's claim to U.S. citizenship was conclusively determined by state of birth . . . . Then, too, following Curtis's approach, nothing in the federal Constitution prevented all of the states from disqualifying free blacks from citizenship. (128)

Practical problems resulting from practical solutions, in an attempt to avoid metaphysics.

Another example of adroit practicality ultimately failing to satisfy may be seen in Curtis' majority opinion in Cooley v. Board of Wardens of Philadelphia (1852). Streichler puts his finger directly upon the main point:

Before Cooley, the justices abstractly considered these questions in terms of sovereign power... Justice Curtis refocused the inquiry. He suggested that practical regulatory needs should guide the decision-making process, that the states had the power to regulate interstate commerce but not in every case, and that the Supreme Court had the authority under the commerce clause to nullify State laws when Congress had not acted. (67)

Curtis is impatient with the pedants who spend their days wrangling over arcane and sterile ideas of sovereignty, human liberty and Natural Law: he wants to get things done, and so proposes a practical compromise in what becomes known as the dormant commerce clause doctrine. When Congress regulates some aspect of interstate commerce, States may not, but if Congress has not occupied the field, states may regulate so long as the subject and effects of those regulations (as in the pilotage requirements at issue in Cooley) are strictly local. There are two ways, therefore, in which a subject of interstate commerce may become national in nature and be placed under Congressional gis: through Congressional preemption or through judicial determination.

Interestingly, [o]nce the justices declared a subject of interstate commerce national' that was a determination Congress could not reverse (84). What this means in practice is that the development of the law of commerce acquires a kind of ratchet, put in place by Benjamin Curtis. Over the years, in great part as the result of this idea, more and more regulatory power would accrue to the

national level, and there would be no looking back. Curtis' practical solution to the problem would, in effect, decide the metaphysical question of the limits of sovereignty in a federation.

Curtis would have appreciated this result, but, of course, from practical reasons. Above all, law must produce the uniformity alluded to earlier, that results in a comforting predictability, the sine qua non for practical success in life. Increasing concentration of decision-making power in the national government combined with increasing ability of the Supreme Court to standardize judicial interpretation were trends he approved, for precisely that reason.

Nothing comes without cost, however, and the price of such practical uniformity is the deep-set feeling that it is merely artificial, a function of particular judges interpreting particular circumstances. Streichler's comment on Cooley's impact is instructive:

More enduring than Cooley's specific formula were Curtis's basic propositions: first, that the Supreme Court could articulate the constitutional principles organizing national and state powers to regulate commerce; and second, that this would be done around some commonsensical understanding of how the federal system operates (97)

More enduring, indeed. The difficulty is twofold. In the first place, how the federal system operates is simply not the same thing as how the federal system should operate. By refocusing the inquiry, to use Streichler's polite way of describing it, Curtis commits the naturalistic fallacy. If we take a less charitable view than Streichler, and instead suppose that Curtis was actively preventing such questions from being raised, a more sinister possibility emerges.

More disturbing, perhaps, is the way in which total reliance upon such commonsensical understanding can deprive constitutional jurisprudence of its ultimate value. The Constitution is meant to lead, to be our guide in working our way through uncertain territory. We turn to it as the supreme law of the land to determine how other more specific and topical laws are to be formulated. Relying instead on historical conditions to decide what the Constitution in fact means inverts that relationship, dethroning the Constitution and subordinating it to the judicial recognition of mere circumstance (can arguments from consequence such as Wickard v. Filburn be far behind?) and depriving us of

guidance.

Uniformity may still be had, through the expedient of superordinating the Supreme Court, an agreeably practical solution to Curtis, no doubt. But it is a uniformity of the Hollow Men whose heads may as well be filled with straw as with legal principle, and the sought-after government of laws and not men will become wind in dry grass.

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