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Stuart Streichler. *Justice Curtis in the Civil War Era: At the Crossroads of American Constitutionalism.* Charlottesville: University Press of Virginia, 2005. xiii + 271 pp. $37.50 (cloth), ISBN 978-0-8139-2342-0.

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Defending the Constitution during Troubled Times

For a man who served only six years on the Supreme Court, Benjamin Robbins Curtis certainly found himself at the center of the constitutional storm in the Civil War era, one that raged not abstractly "but in actual controversies over power and individual rights" (p. xii). Given that Curtis began his tenure on the Supreme Court considering the constitutionality of the Fugitive Slave Act (while on circuit) and resigned shortly after his disagreement with Chief Justice Roger B. Taney over the Court's opinion in *Dred Scott*, this seems almost an understatement. Nor was slavery the only storm in which Curtis was caught. He publicly denounced Lincoln's suspension of the writ of habeas corpus and his Emancipation Proclamation, and went on to defend Andrew Johnson during the first impeachment trial of a U.S. president. Whether called by official duty or self-invited, Curtis was immersed in the Civil War era's most dramatic constitutional crises.

In this new biography on Justice Curtis, Stuart Streichler weighs the judge's contributions to American constitutionalism "at the crossroads." With an eye on political and intellectual context, Streichler analyzes Curtis's common-law approach to reading and interpreting the Constitution. With his other eye on the historical outcomes of the issues at hand, Streichler assesses Curtis's long-term contribution to constitutional thinking. The result is a graceful and rewarding study of jurisprudence-in-action, making this one of those rare books that sits comfortably both in the research library and on the nightstand.

Streichler begins by positioning Curtis's legal thought squarely within the Whig tradition. Duly noting his Harvard training, his law-office apprenticeship, and his political rise among the Conscience Whigs of Boston, Streichler maps a conservative legal mind that regarded as sacred the legal principles of contract and private property, and perceived an active role for government in promoting economic development. Like many Whigs, Curtis was heavily influenced by Edmund Burke's ideas, particularly the notion that rights and liberties were part of a common law inheritance enshrined in political institutions.

The book is then divided into analytical chapters covering specific topics, roughly sequential with Curtis's life. We learn first about Curtis's views on the fugitive slave controversy, then about his understanding of federal-state divisions of the power to regulate commerce, his prescient reading of constitutional due process, his dissent from the majority in *Dred Scott*, his public disagreement with Lincoln over the executive's scope of power, and his defense of Andrew Johnson during his impeachment trial.

The value of organizing the material in this fashion lies in Streichler's ability to carry the analysis beyond Curtis's immediate contribution and examine its impact on the course of American jurisprudence. In the case of federal regulation of interstate commerce, for instance, Curtis's opinion for the court in *Cooley v. Board of Wardens* (1852) decisively broke with the past. Whereas both Roger Taney and Joseph Story understood commercial regulation in terms of exclusivity (i.e., belonging "either"to the states or to the federal government), Curtis imagined it as a shared power, exercised concurrently as circumstances demanded and umpired by federal courts. In their adjudication of disputes between the state and federal government over commercial regulation, Curtis expected the courts to exercise not a heavy formalism, but a healthy pragmatism. *Cooley*, contends Streichler, became the "doctrinal engine" for the unprecedented extension of federal authority over the states in the period after the Civil War (p. 95). While *Cooley* may have been a bridge to a more active federal judiciary, it did not anticipate modern doctrine. Streichler carefully differentiates the governing principle in *Cooley* from the "undue burden" test adopted by the end of the nineteenth century and the twentieth-century theory of the dormant com-

merce clause. Even though Curtis's formula in *Cooley* was ultimately discarded, its basic propositions clearly endured and were more influential than legal scholars have admitted (p. 97).

Curtis also anticipated judicial review on substantive due process grounds. While riding circuit in 1852, Curtis struck down a Rhode Island statute that allowed for seizure of property upon summary judgment in cases involving the sale of liquor without a license. He went on in *Murray's Lessee v. Hoboken Land and Improvement Company* (1856) to flesh out the idea of due process as citizens' vested right that no legislature could take away. Curtis proposed a two-part test in examining due process claims. The first was to test statutes against the Constitution itself. The second was historical, examining the settled usage of due process at the time of the drafting of the Constitution to see if statutes deprived citizens of rights contained in the historical understanding of what due process meant.

Once again, Curtis's general proposition–that courts could protect citizens from legislatures through judicially overruling statutes–survived his specific formula. Moreover, there is little evidence that Curtis's successors really understood the due process test he created. As Streichler notes, the Court cited Curtis in *Hurtado v. California* (1884) when it declined to strike down a California statute that did not require a grand jury indictment in capital cases. Only Justice John Marshall Harlan argued (correctly, it would seem) that the majority had misread Curtis (p. 110). Still, Curtis was the first Supreme Court justice to sketch out such a test, placing him in the vanguard of proponents of judicial authority to check legislative infringements on personal liberty.

However prescient Curtis's understanding of judicial protection of due process, he proved unwilling to apply such thinking to Congress's Fugitive Slave Act of 1850. Curtis encouraged acquiescence to the statute, publicly combated abolitionists who urged resistance to it, and stood with Daniel Webster in advocating that anyone who rescued fugitive slaves from federal marshals was guilty of treason. The paradox should immediately strike the reader: how could Curtis, who understood the importance of constitutional due process so well, overlook the obvious shortcomings of the Fugitive Slave Act of 1850? "Uncharacteristically for Curtis," writes Streichler, "his legal analysis of the Fugitive Slave Act was superficial" (p. 65). One could make the same complaint of Curtis's counter to the abolitionists' call to disobey the law on moral grounds: obeying the law itself was an act of morality, said Curtis, and daring to substitute one's arbitrary conscience over the collective wisdom expressed in the legislature was an act of vanity and caprice. But rehearsing these arguments (not original to Curtis by any means) does not explain why a justice so willing to imagine an expanded role for the judiciary in protecting civil liberties as well as regulating interstate commerce would not scrutinize the Fugitive Slave Act of 1850.

Streichler elides an answer, although his analysis is suggestive. One of the consistent themes in Curtis's jurisprudence was the importance he placed on the appropriate limits that the Constitution set for the different branches of government. Legislatures, he declared over and over again, were not omnipotent. But then again, neither were the courts. Curtis, in arguably his most famous moment, dissented from Taney's reasoning in *Dred Scott* and resigned from the Court after a bitter dispute with the chief justice. This story Streichler tells elegantly and forcefully. Curtis rebutted Taney's claim that blacks could not be citizens of the United States and also pointed out that personal rights did not necessarily flow from citizenship, but rather from particular state laws. He also took issue with Taney's insistence that the Court could constrain Congress's constitutional duty to govern the territories, including the right to ban slavery from them. This, claimed Curtis, "transcended the authority of the court" (p. 138). As Streichler labors to make clear, this was consistent with Curtis's understanding of how the constitutional structure clearly removed some issues entirely from the purview of the Court.[1]

Although Streichler does not make the connection, this same thinking was evident in Curtis's unwillingness to meddle with the Fugitive Slave Act. The law was bundled into the Compromise of 1850, a collection of statutes that attempted to restore sectional harmony. Congress's authority to pass fugitive slave legislation had been conceded for decades and affirmed by state acquiescence and the Supreme Court. The courts had no business intervening in such matters. Given the Union-brokering nature of the statute, resistance to Congress's constitutional settlement threatened the Union itself. It was not so far a leap to consider this treason. Curtis's belief in limits restricted the Court from weighing in on both the Fugitive Slave Act and Congress's right to restrict slavery from the territories.

Streichler's later chapters clearly provide evidence for such a thesis. Curtis withdrew his support from Lincoln during the Civil War when he felt that the wartime president's overreaching damaged constitutional limits placed on the executive branch (p. 157). Likewise, he served as lead counsel for President Andrew Johnson in

his impeachment trial before the Senate largely to defend the integrity of the executive against an aggressive legislature. His arguments, suggests Streichler, turned a political impeachment into a legal trial and contributed mightily to Johnson's survival (p. 173). In both cases, Curtis put the Constitution first, even at the expense of expediency during great crisis.

All these elements contribute to a fascinating story. Streichler's prose is fluid, and he is particularly deft at explaining difficult legal concepts in plain English. Anyone wishing to understand more about the transforming power of the Civil War era on American constitutional thought and practice will benefit from reading this book. Its real strength, in this reviewer's opinion, lies in its ability to recover the intellectual matrix in which Curtis operated without losing sight of the very real political travails of the Civil War era. For that, Streichler has contributed a first-rate work on an important figure.

Note

[1]. Keith E. Whittington, "The Road Not Taken: *Dred Scott*, Judicial Authority, and Political Questions," *Journal of Politics* 63 (2001): pp. 365-391. Whittington argues that Curtis had paved a respectable path for judicial deference to the legislature on constitutional grounds. Streichler takes note of Whittington's argument, but does not consider its implications in explaining Curtis's constitutional understanding of the Fugitive Slave Act.

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