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Book Review: The Limits of Judicial Power: The Supreme Court in American Politics

David S. Bogen

University of Maryland School of Law, dbogen@law.umaryland.edu

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The Limits of Judicial Power: The Supreme Court in American Politics. By William Lasser. (Chapel Hill and London: University of North Carolina Press, 1988. Pp. 354. Index. \$32.95.)

This book discusses the power and vulnerability of the Supreme Court by examining it in periods of crisis. Professor Lasser concludes that the Court's power to resolve these political crises was limited but that its institutional position was never in serious danger. He argues further that the resolution of those crises makes it unlikely that a similar political crisis will arise again, and this makes the Court more powerful and active on controversial issues today.

More than half the book is devoted to three major crises in the Supreme Court's existence—the *Dred Scott* case, the Reconstruction era, and the New Deal court. Within the limits imposed by space, these sections provide a splendid overview of the legal issues before the Court and the political reaction to its decisions. Lasser makes both the politics and the law clear.

Those three crises reveal the Court under its greatest stress. Critics attacked the Court for obstructing necessary federal laws and succeeded in reversing or limiting the effect of the decisions which were the focus of their attack. These were periods of national debate over fundamental political principles quite unlike the usual broad consensus that typifies American political debate. Lasser writes that during such periods of "critical realignment," the Court is least capable of playing an effective role.

Although the Court could not control the outcome of these political cataclysms and was vilified for attempting to do so, Lasser claims that the Court itself was never in danger. His analysis of *Dred Scott* and Reconstruction politics relies heavily on Stanley Kutler's *Judicial Power and Reconstruction Politics* (Chicago: University of Chicago Press, 1968). Kutler's revisionist view attacked the conventional wisdom that the Court's political vulnerability during the Reconstruction era made it a timid, weak institution. Kutler argued that the advantages of the Court's institutional role always outweighed the negative reaction to particular decisions. Thus, critics attacked the decisions of the Court, but not the Court itself.

Lasser expands Kutler's thesis to the New Deal and into the modern era. He adds a new dimension of political theory to explain the past and to suggest a significant shift in the modern era. Lasser argues that the groups most critical of the Court's decision needed to preserve the Court's traditional role in judicial review. "The policies advocated by Lincoln, the radical Republicans and Roosevelt required a strong national government and depended on a broad interpretation of the federal

government's powers under the Constitution" (p. 258). Only the Court could legitimate such powers, so it was important to capture the Court as an ally and not to destroy it.

The survival of the Court as an institution results, at least in part, from its inability to maintain its decisions in the face of sustained and overwhelming popular opposition. When that opposition prevails, usually through new appointments to the Court, its very success becomes a reason to support the Court. Lasser suggests that the futility of any attempt by the Court to resolve political crises during periods of critical realignment makes the effort unwise. Thus, *Dred Scott* made the Court a target of Republican scorn as a tool of the "slave power." If the Court finds itself unwittingly caught in the middle of a political crossfire during a period of critical realignment, Lasser urges retreat. For example, in *Ex parte Milligan*, the Court held that military courts cannot convict a civilian where the civil courts are open and functioning. The decision was relatively uncontroversial when it was announced but became the center of a storm of controversy by the time it was published because intervening political events placed the scope of military power at the center of Reconstruction policy. The Court then acted cautiously to extricate itself. *Ex parte McCordle* raised a challenge to part of the Congressional Reconstruction program. Chief Justice Salmon P. Chase delayed decision until Congress passed legislation depriving the Court of jurisdiction. Chase then held that the Court had no jurisdiction to decide the case which had already been argued before it, a decision Lasser praises as "an act of great vision and statesmanship" (p. 253).

Lasser reconciles his praise for Chase's discretion with his view that commentators have overestimated the vulnerability of the Court by arguing that periods of "critical realignment" are rare and that they are unlikely to arise in the future. He states that the power of the modern Court is deceptive because it has distanced itself from those issues capable of creating full-scale crises which would reveal the limits of its political strength. According to Lasser, the resolution of the slavery issue after the Civil War meant that fundamental divisions in American politics centered on economic policy. This was settled by the New Deal. Thus, Lasser says that "the Court's role in policing the broad contours of federal policy has decreased almost to the vanishing point" (p. 264).

Lasser examines the decisions of the modern era which have provoked political responses—decisions on segregation, free speech, reapportionment, school prayer, criminal procedure, busing remedies, and abortion. He even discusses the debate on judicial review between then Attorney General Edwin Meese and Justice William Brennan as well as the rejection of the nomination of Judge Robert Bork to the Supreme Court. This discussion of the modern era compresses a great deal, and some statements need further explanation. Lasser refers to *Reed v. Reed*, for example, as "a landmark decision calling for heightened scrutiny of laws that discriminate against women" (p. 209). Although heightened scrutiny of gender distinctions may have been implicit in its decision, the Court did not acknowledge there that it was doing anything new. Lasser also blunders by citing Justice Byron White's dissent in *Miranda* for the proposition that the Court should not make new