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Robert Bocking Stevens, Law and Politics: The House of Lords as a Judicial Body, 1800-1976

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BOOK REVIEW

Law and Politics: The House of Lords as a Judicial Body, 1800-1976. By Robert Bocking Stevens. Chapel Hill: University of North Carolina Press, 1978. Pp. xviii, 701, $30.

Robert Stevens is unusually well qualified to write a history of the House of Lords for an Anglo-American audience. He was born in England, educated at Oxford and at Yale and practiced law in London and in New York before becoming professor of law at Yale and later provost at Tulane. In 1978 he became president of Haverford College. He has brought to his subject a brilliant mind, a comprehensive knowledge of Commonwealth and American law and institutions,[1] an elegant, jargon-free style, and a concern for legal and social detail that comes across to any interested reader. This is a book that American lawyers in particular will find especially fascinating and will gain more from than will the layman. The lawyer will be attracted partly by the author's frequent references to American legal institutions and concepts.

It is a happy circumstance that the first serious book-length study of the House of Lords as a judicial body[2] is so wide in scope and so intensively researched. In the *Preface* Stevens describes his research:

> In completing the research for this book I have tried to be exhaustive with respect to both the decisions of the House of Lords and the law lords who comprise its membership. I have, if not read, at least glanced at all the reported decisions of the House of Lords, and, in the House of Lords Record Office, I have sampled the unreported decisions from the 1830s until the present. With few exceptions, I have read all the documents written by or to any Lord of Appeal in Ordinary, at least insofar as these materials are traceable through the British Museum and the National Manuscripts Commission; I have

1. *See*, for example, his erudite history of American legal education: *Two Cheers for 1870: The American Law School* in LAW IN AMERICAN HISTORY 403 (D. Fleming and B. Bailyn, eds. 1971).

2. Anyone interested in the subject should read L. BLUM-COOPER & G. DREWRY, FINAL APPEAL: A STUDY OF THE HOUSE OF LORDS IN ITS JUDICIAL CAPACITY (1972), an excellent book but somewhat less ambitious in scope than Stevens'.

> also attempted to read all the extralegal writings of the law lords, as well as an extended sample of the speeches of the law lords in the House sitting legislatively. In addition, I have talked at length to a number of the present and recent law lords.[3]

In short, he has read virtually everything relevant—and it shows.

The book begins with a description of the House of Lords in 1800 as "an equal partner (if not the senior partner) with the Monarchy and Commons in the governance of England," whose constituency was the aristocracy or oligarchy which then ruled England.[4] Its legislative and judicial roles were far less differentiated than they are today. The appellate process then was seen as an integral part of the overall political sovereignty vested in the Lords. There was virtually no recognition of the concept of separation of powers as it is presently understood. While the Lords generally relied on the judges who had been summoned when a point of English law was concerned, any peer, whether law-trained or not, was entitled to take part actively in the judicial work of the House. In 1834 the Lords for the last time decided an appeal without *any* law lords present.[5] But lay peers continued to play a role. Indeed, as late as 1883 a lay peer attempted to vote in an appeal, but his vote was ignored.[6]

From this early form he traces the development of the House to a modern institution which clearly (perhaps too clearly) differentiates its legislative and judicial functions.[7] The latter are carried out by law-trained Lords of Appeal in Ordinary (generally elevated from the Bench) who sit in separate panels of five in order to handle the pressure of appellate work which in earlier days had grown too

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3. R. STEVENS, LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY 1800-1976 xii (1978).

4. *Id.* at 4.

5. *Id.* at 29.

6. *Id.* at 54. It is worth noting that the establishment of the House of Lords as a professional court distinct from its legislative functions and the exclusion of lay peers from voting occurred in 1884 without any *legal* change being made in the formal structure of the House. This is an outstanding example of the force of tradition and convention as a form of social structuring and social control in Britain: while the form remains the same the practice changes. *Id.* at 33.

7. Until the point was reached where its appellate functions became differentiated from its other work, the House of Lords (as distinguished from the lower courts) had made relatively little contribution to the common law of England and only a limited one to equity. From then on, with an adequate supply of law lords (previously lacking), there was a much greater opportunity for it to shape English law. *Id.* at 30. *See also* Hiller, the Law-Creative Role of Appellate Courts in the Commonwealth, 27 I.C.L.Q. 85 (1978).

burdensome for a House with undifferentiated roles and non-professionalized judges. Along the way he also explores in detail the Lords' role on the Judicial Committee of the Privy Council,[8] the forum of final appeal for Empire and Commonwealth cases, and the various attempts to merge the jurisdictions of the two bodies.[9]

A key factor in the development of the House as a judicial body has been the role of the Lord Chancellor. His office involves a combination of both political and legal functions and hence, in this overt form, has no direct counterpart in the United States.[10] This combination of functions, as it has been applied to the appointment of Lords of Appeal and the assignment of the "right" law lords to particular cases, combined with the returning of the House to issues of public law (with the consequent development of Prime Ministers' interests in the appointments of Lords of Appeal), has in recent times had significant influence on the judicial role of the House. Stevens says, "In short, life (has) been discovered in a body that in 1955 had shown considerable evidence of terminal irrelevance."[11]

The significance of the Lords' irrelevance is best shown through what is to this reviewer the most fascinating thread woven through the book: the analysis of the Lords' philosophical or jurisprudential posture and its impact on the development of public and private law. The core of the book is this analysis of the role of the law lords over especially the last hundred years.

For a period beginning around 1800 to about 1955 the ideology of substantive formalism, born of utilitarianism, dominated the judicial work of the House. The orthodoxy was that Parliament made the laws which judges applied while judges in addition "discovered" the common law or delivered it up like a midwife. The

8. R. STEVENS, *supra* note 3 *passim*. The contribution that this book makes to the previously sparse literature on the Privy Council is significant.

9. *Id.* at 28, 31, 43, 50-52, 58-60.

10. *Id.* at 85, 92.

11. *Id.* at 554. That "life," however, has provoked death threats since the writing of Stevens' book. While elements in the British Labor Party have regularly called for abolition of Lords' legislative role, a series of three cases decided by the House within a short period of time (Grunwick Processing Laboratories Ltd. v. Advisory, Conciliation and Arbitration Service [1978] 1 All E.R. 338, 357 [H.L.]; Secretary of State for Education and Science v. Tameside Metropolitan Borough Council, [1977] A.C. 1014, 1036 [H.L.]; Gouriet v. Union of Post Office Workers, [1977] 3 All E.R. 70) and seen by some to reflect a reactionary bias, moved Michael Foot, then Lord President of the Privy Council, Leader of the House of Commons and Deputy Leader of the Labor Party, to call for the abolition of their *judicial* role as well. An interesting question is whether the House of Lords *can* lawfully be abolished. *See* Mirfield, *Can The House of Lords Lawfully be Abolished?*, 95 L.Q. REV. 36 (1979).

emphasis on formal logic that underlay substantive formalism led to judicial automatism and a destructive, narrow, semantic approach to statutory interpretation—in terms of the American debate, an emphasis on excessive self-restraint and conservatism rather than on judicial activism, and the pursuit of an instrumental or creative role.[12] As a result, the Lords have long been hard put to answer the question of why the second appeal—that is, the judicial appeal from the Court of Appeal to the House of Lords sitting in its judicial capacity rather than its legislative capacity—should not be abolished. What could they do that had not already been done below? An answer to this question is offered by Stevens in a way that makes good sense to Americans who, as Yale's Abraham Goldstein has pointed out,[13] can find the English legal system intelligible only if it is appreciated that as yet no Realist revolution has occurred in England.

One of the many other fascinating aspects of this book is Stevens' study of personalities and the personal contributions of individual judges to the work of the House and, more recently, the growth of English and Scottish law.[14] In the process of this analysis he rightly says, "[Lord] Denning is certainly the most interesting and possibly the most important English judge of the twentieth century."[15] Some would say that he should omit the word "possibly" and substitute "common law" for the word "English." His study of Denning is particularly absorbing.[16]

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12. For an insight into the reviewer's bias toward a creative role for appellate courts see Hiller, *supra* note 7, and publications cited in note 1.

13. Goldstein, *Research into the Administration of Criminal Law: A Report from the United States*, 1966 BRIT. J. OF CRIM. 27, cited in R. STEVENS, *supra* note 3, at 490. Perhaps the failure of a Realist revolution may be attributed to the fact that such an approach has been bypassed by Marxist teaching, which ignores the House of Lords as irredeemably bourgeois and not worthy of analysis along Realist lines. There are, however, some realists at work. *See*, among others, the writing of Philip Thomas and William Twining, especially W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

14. On the influence of Scots law *see, e.g.*, A. DENNING, BORROWING FROM SCOTLAND (1963), J. KEITH, THE SPIRIT OF THE LAW OF SCOTLAND (1957); T. SMITH, BRITISH JUSTICE: THE SCOTTISH CONTRIBUTION (1961).

15. R. STEVENS, *supra* note 3, at 488. The subtitle under which this statement fuller look at Lord Denning's creative views and work *see* A. DENNING, THE DISCIPLINE OF LAW (1979).

16. It is of some importance to an understanding of Denning to consider that he sat in the House of Lords for five years—from 1957 to 1962—but then voluntarily stepped down to the Court of Appeal where he felt he would have more influence in the shaping of English law. There he *has* been able to have more influence because (1) cases are heard there before they move up to the House (if further appeal is taken); (2)

It is impossible to convey here the lucidity and relevance of Stevens' treatment of many individual jurists (especially the contributions of the Scottish lords),[17] but one may catch a glimpse of it in the following paragraph where he also gives a hint of his answer to the questions posed above.

> When the history of the twentieth-century judiciary comes to be written, Denning's name may well be the most prominent, not so much for what he did, but for what he showed was possible. Indeed, all four law lords discussed in this chapter posed fundamental questions about the role of the appeal process. Once substantive formalism was left behind, the questions of what guided the law and in which direction could no longer be ignored. For Radcliffe the guide was a kind of fundamental or natural law; for Devlin, a *Volksgeist* to be derived from basically democratic sources. Reid, more of a craftsman and less of a philosopher, preferred to apply a concept of common

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on the Court of Appeal the Judges generally sit in panels of three—rather than the House's five; and (3) as Master of the Rolls, Denning governs the makeup of the panels and can decide what cases he will sit on. He explains his move as follows:

> Many a time I have been asked: "Why did you step down from the House of Lords?" My answer is: "I was too often in a minority. In the Lords it is no good to dissent". In the Court of Appeal it is some good. On occasion a head-note there says: "Lord Denning dissenting." Let me recall a few which have pointed to the way ahead and have led to decisions by the Lords which might never have taken place except for my dissenting from previous precedents; such as *Chandler v. Crane*, *Christmas* about negligent statements, *Bonsor v. Musicians' Union* about trade unions, *Conway v. Rimmer* about Crown privilege, *Padfield's* case about ministerial discretion, and *Schorsch GmbH v. Hennin* about judgments in foreign currency.

A. DENNING, *supra* note 15, at 287. He goes on to say that, though many times he has found himself in dissent, even his dissents (especially in the Court of Appeal), have been "worthwhile" because on occasion they have ultimately persuaded other judges (as shown above) or Parliament. Charles Evans Hughes said: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, the intelligence of a future day, when a later decision may possibly correct the error in which the dissenting judge believes the court to have been betrayed." C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1936). The same of course applies—and perhaps more so—to the Court of Appeal. Of this Denning is well aware. In fact, he is counting on it.

17. His description of Lord Keith as having had "an innate sense of the creative element in the appellate process" would seem to apply to most of the Scottish law lords. R. STEVENS, *supra* note 3, at 512. Ironically (or perhaps because Scot's law is more creative) the House often mishandles Scottish appeals. *See* A. DONNER, THE ROLE OF THE LAWYER IN THE EUROPEAN COUNTRIES 31-33 (1963). For an illustrative case *see* White & Carter (Councils) Ltd. v. McGregor, [1962] A.C. 413.

> sense behind the shroud of judicial restraint. Judicial restraint was not something that came easily to Denning. He saw few political or intellectual reasons why, in the areas where litigation took place, the appeal judges should not be law-givers. These four partly competing concepts may well reflect the lines of battle along which discussion of the appellate process could take place in the later 1970s and the 1980s.[18]

This facing toward the future is where the book leaves us. He ends the book by saying:

> The next decade will show whether the appeal judges are capable of providing a rationale that will at a minimum make them an essential element in the British Constitution and, ideally, raise the issue of whether they might not appear as junior partners of Parliament in the lawmaking process.[19]

One wonders, for example, what future role the House of Lords might play in the event of an enacted Bill of Rights[20] or the Privy Council might occupy in the event of devolution.[21] This remains to be seen and promises exciting new developments in English law and institutions.

Robert Stevens' book is an outstanding piece of legal historical scholarship. I know of none to equal it in our time, though there are a number of fine legal historians writing in England today.[22] The scholars are ceasing to be intimidated by the works of Holdsworth and Pollack and Maitland. Anyone interested in English law, the function of judges and the role of law in society will find it utterly fascinating. While, because of its seven hundred pages and many absorbing footnotes and tables, it is not a book that one can read in one sitting, this reviewer resented all distractions that kept him from doing so. On the other hand, it is a book that one hates to finish because then the magic link with a brilliant storyteller is broken.

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18. R. STEVENS, *supra* note 3, at 505.

19. *Id.* at 627.

20. A written Bill of Rights for England is one of Lord Justice Scarman's favorite ideas. *See* L. SCARMAN, ENGLISH LAW—THE NEW DIMENSION (1974).

21. *See* Brewster, *The Rule of Law and the Voluntary Society*, 14 J. SOC'Y. PUB. TCHRS. OF L. 286, 289 (1979).

22. *See, e.g.*, L. BLUM-COOPER & G. DREWRY, *supra* note 2; L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 (1948-) (4 Vols. to date); E. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975).

Finally, there is credit due the publisher. A book whose author attempts to accomplish as much as does Stevens' presents many problems in terms of format, type style, cost of materials, proofreading of appendices, bibliographies, indices and thousands of detail-filled footnotes. The University of North Carolina Press has produced a product technically and aesthetically worthy of the manuscript.

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