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Symposium: Judicial Review versus Democracy

Foreword

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One might commence this preface with the exclamation—"What, another set of articles on judicial review!" I encourage you to read on, however. Each generation has something to say about that most fundamental aspect of our constitutional system, judicial review. The miracle seems to be that each generation has something new to add to the ongoing debate.

At about the time I was in law school, the important "debate" between Judge Hand¹ and Professor Wechsler,² and then the equally important work of Professor Alexander Bickel,³ were published. This collection of commentary upon judicial review spawned much very good literature and new thinking on the topic.⁴ Now, two new and important books,⁵ and perhaps one about to come,⁶ have and will generate yet another round of new thinking.⁷ This Symposium, "Judicial Review versus Democracy," contains a very important collection of the current thinking of many of the country's leading constitutional theoreticians—thinking triggered, but not limited, by Professor Ely's and Professor Choper's books.

I am personally fascinated by the apparent cyclical nature of this discussion. It seems to push itself forward to a prominent position in legal literature and thought at about twenty to thirty year intervals. Thus, the important

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1. L. HAND, *THE BILL OF RIGHTS* (1958).

2. H. WECHSLER, *POLITICS AND FUNDAMENTAL LAW* (1961); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

3. *E.g.*, A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

4. *See, e.g.*, C. BLACK, JR., *THE PEOPLE AND THE COURT* (1960); E. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* (1962); Gunther, *The Subtle Vices of the "Passive Virtues"*—A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 1 (1964); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959). Cf. R. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (1960).

5. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); J. ELY, *DEMOCRACY AND DISTRUST* (1980).

6. Professor Michael Perry of the Ohio State University faculty has a book about to be published, tentatively titled *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY*, that will undoubtedly cause much comment and thinking.

7. *See, already*, Monaghan, *Book Review*, 94 HARV. L. REV. 296 (1980).

theoretical work concerning judicial review that surrounded the constitutional revolution of the 1930s⁸ preceded by about twenty-five years the works of Wechsler and Bickel.

It may be, perhaps, that the issues surrounding judicial review are so important to the development of every new constitutional scholar that each generation of these scholars will naturally rethink and add to what has been said before. It may also be that critical cases come along once every so often reflecting basic developments with regard to the thinking within the Supreme Court on fundamental issues of constitutional law and the role the Court should play.

Professor Wechsler's and Professor Bickel's works and the commentary that followed can in very large measure be traced to *Brown v. Board of Education*⁹ and its progeny, and to the reapportionment issue, which the Court eventually faced squarely in *Baker v. Carr*.¹⁰

It may be less clear, but I believe the current interest in judicial review can be traced rather directly to *Roe v. Wade*¹¹ and, perhaps, to lesser attempts to grapple with the questions involved in the "rational relation to a legitimate end" test, the Court's appropriate role in applying that test, and the exercise of legislative power. That balance, I believe, is one of dynamic tension endemic to our system of government. It is one upon which I can confidently predict we have not heard the last. Generations to come will have more to say on that issue, and they too will have fresh insights. In the meantime, I invite you to enjoy and ponder over the diverse collection of thoughts that follow here.

8. E.g., M. COHEN, THE FAITH OF A LIBERAL (1946) (written in 1938); H. COMMAGER, MAJORITY RULE AND MINORITY RIGHTS (1943); F. Cohen, *Transcendental Nonsense and the Functional Approach*, in THE LEGAL CONSCIENCE (L. Cohen ed. 1960) (written in 1935); L. Hand, *The Contribution of an Independent Judiciary to Civilization*, in THE SPIRIT OF LIBERTY (I. Dilliard ed., 3d ed. 1960). Cf. L. BOUDIN, GOVERNMENT BY JUDICIARY (1932); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). reprinted in 1 SELECTED ESSAYS 503 (1938).

9. 347 U.S. 483 (1954).

10. 369 U.S. 186 (1962).

11. 410 U.S. 113 (1973).