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Symposium Foreword

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SYMPOSIUM

JUDICIAL REVIEW AND THE CONSTITUTION—THE TEXT AND BEYOND

FOREWORD

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The magnitude of the role which constitutional law plays in keeping the United States the mighty and productive nation that it is cannot be overestimated. In a very serious sense, constitutional law, and its uniquely American corollary, judicial review, are the tender threads upon which the whole awesome political venture, initiated only some 200 years ago, depends.[1]

Those of us who work in other vineyards tend to forget, or, even worse, to take for granted, the constitutional processes upon which we all so heavily depend. That is why a symposium such as this is of such value. It helps to remind *all* lawyers—not just those who happen to teach and work in the area of constitutional law—how important these constitutional processes are to each one of us. It also gives us a helpful report on the present condition of that universe; a prognosis about changes which may result from the inevitable social, political, philosophical, and ideological shifts which our society continually undergoes; and, finally, some observations about how these changes may affect society as we know it today.

We have been warned that there are legislative proposals in the Congress which could drastically alter the processes to which we have become accustomed.[2] One commentator has deplored the apparent failure of responsible persons to take these proposals seriously, and laments

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1. The briefness of our life as a nation was brought home to me during the bicentennial celebrations of 1976 when my son asked me how it felt to have lived through 25% of all American history. If I live to the year 2000 he'll have to make it 33%.

2. Graduation Address by Senator Thomas F. Eagleton, University of Dayton School of Law (May 16, 1982); Meserve, *Limiting Jurisdiction and Remedies of Federal Courts*, 68 A.B.A. J. 159 (1982); Taylor, *Limiting Federal Court Jurisdiction: The Unconstitutionality of Current Legislative Proposals*, 65 JUDICATURE 199 (1981). *But see* Anderson, *The Government of Courts: The Power of Congress under Article III*, 68 A.B.A. J. 686 (1982).

what he calls the absence of "early warning" signals.[3]

We do not have to look far to see what can happen if popular devotion to the concept of constitutionally limited government is not kept vigorous and strong. In the 1950's the legislature of the government of South Africa, by a bare majority vote, removed from the lists of voters all those who had been officially characterized as "coloured."[4] The British South Africa Act, however, which had granted sovereignty to the Union of South Africa, had a clause which unmistakably required any such action to be taken by at least two-thirds of the members of both houses of the legislature sitting in joint session.[5] Since the government of the Union of South Africa derived its power from the British South Africa Act, the Appellate Division of the South African Supreme Court was compelled to rule that the legislative action was void because it had not followed the procedure clearly established for the protection of a certain class of voters.[6] Later on, a legislative attempt to nullify the effect of the earlier decision by transferring "jurisdiction" from the regular judicial system to a "court" composed of legislators sympathetic to the disenfranchisement process, was also found to be in violation of the British South Africa Act.[7]

These two decisions, representing, as they did, the triumph of constitutional principles in protecting fundamental rights from the tyranny of an ascendant political majority, were widely hailed and celebrated. Typical of these salutes was the statement of Erwin Griswold, then Dean of the Harvard Law School:

> [T]he steadfast way in which the judges of the Appellate Division of the Supreme Court of South Africa have twice upheld that constitution has provided two great landmarks in the field of constitutional law, and in judicial history, which will strengthen constitutions and the traditions of the bench in many other places.[8]

But this great victory was, unfortunately, short lived. The dominant political party, acting by simple majority votes in the two houses of the legislature, redrew the election laws in such a way as to permit that party to acquire, by this artifice, the necessary two-thirds legislative majority.[9] As a result, the coloured voters were ultimately struck

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3. Friendly, *Query: Judges and Journalists; Whose End of the Boat is Sinking?*, 65 JUDICATURE 389 (1982).

4. Separate Representation of Voters Act, No. 46 of 1951.

5. South Africa Act, 1909, ch. 9, §§ 35, 152.

6. Harris v. Minister of the Interior, [1952], 2 S.A.L.R. 428 (App. Div.).

7. Minister of the Interior v. Harris, [1952], 4 S.A.L.R. 769 (App. Div.).

8. Griswold, *The Demise of the High Court of Parliament in South Africa*, 66 HARV. L. REV. 864, 872 (1953).

9. Senate Act, No. 53 of 1955.

from the election lists by a procedure in nominal compliance with the constitution.[10] In *Collins v. Minister of the Interior*,[11] the same Court which had won such high praise from Dean Griswold and others, was compelled to surrender, and found itself unable to invalidate the legislatively adopted procedures under which otherwise constitutionally protected interests had been erased.

The sober lesson to be learned from the South African experience was well summarized by a Canadian scholar:

> [I]n none of the crisis situations in the great English-speaking countries where courts have been involved in power conflicts with executive or legislative authority, have the courts for any considerable length of time withstood a co-ordinate authority that has had a substantiality of public opinion behind it.[12]

We forget such happenings at our peril. Also, if we take too much for granted that which our heroic predecessors have confided to our custody, we do that at our peril as well.

This symposium focuses our attention, once again, upon the delicate but vital mechanisms of our constitutional system, and, in so doing, strengthens and benefits that system. We are all very much indebted to the scholars who have contributed so much of themselves in bringing forth a volume of such conspicuous balance and depth.

10. South Africa Act Amendment Act, No. 9 of 1956.

11. [1957] 1 S.A.L.R. 552 (App. Div.).

12. McWhinney, *Law and Politics and the Limits of the Judicial Process—An End to the Constitutional Contest in South Africa*, 35 CAN. B. REV. 1203, 1208-09 (1957).