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A COLLECTION OF ESSAYS ON THE SUPREME COURT OF THE UNITED STATES

FOREWORD

THE ROLE OF THE MODERN SUPREME COURT

*Ronald D. Rotunda**

In *The Federalist* No. 78,¹ Alexander Hamilton examined the judicial department. He relied on that branch to safeguard the limitations drafted into the Constitution. While the judiciary is “incontestably” and “beyond comparison the weakest of the three departments of power,”² he conceded, nonetheless, the constitutional limitations on legislative excess “can be preserved in practice no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.”³

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1. THE FEDERALIST No. 78 (Alexander Hamilton) (published under the name of *Publius* in 1788); see ALEXANDER HAMILTON, JOHN JAY, & JAMES MADISON, 2 THE FEDERALIST, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES (1937) (collecting the series, which began appearing in the New York press on October 27, 1787). Hamilton wrote all of *Publius* on the judiciary. See JULIUS GOEBEL, JR., THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 312 (1971).

2. THE FEDERALIST No. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (citation omitted) (quoting de Montesquieu stating that: “Of the three powers above mentioned, the judiciary is next to nothing.”).

3. *Id.* at 524 (emphasis added).

The legislators cannot be the constitutional judges of their own powers, Hamilton argued to those whose support of the new Constitution he sought.

It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. *The interpretation of the laws is the proper and peculiar province of the courts.*⁴

If there is any "irreconcilable variance" between the Constitution and a statute, "that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."⁵ Thus, "whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former."⁶

Hamilton quickly anticipated — and as quickly dismissed — any concern that a doctrine granting courts the right to declare legislative acts void would imply a "superiority of the judicial to the legislative power."⁷ The doctrine of judicial review only supposes that the power of the people is superior to both the legislative and judicial power because "where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former."⁸

To those who would argue that the courts, "on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature,"⁹ Hamilton responded that

[t]his might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the

4. *Id.* at 525 (emphasis added); *cf.* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

5. *Id.* at 526.

6. *Id.*

7. *Id.* at 524.

8. *Id.* at 525.

9. *Id.* at 526.

consequence would equally be the substitution of their pleasure to that of the legislative body.¹⁰

While Hamilton emphasized that the Constitution controlled over ordinary legislation and that judges, who must interpret the Constitution just as they interpret ordinary statutes, should only follow the superior law of the Constitution, he never answered the more difficult question: how carefully should the judiciary scrutinize legislation challenged as unconstitutional? What if judges exercise “will” rather than “judgment”? As Charles Evans Hughes (who was to become Chief Justice in 1930) warned in 1907: “We are under a Constitution, but the Constitution is what the judges say it is.”¹¹

In *Marbury v. Madison*,¹² Chief Justice John Marshall, speaking for the Court, for the first time actually invalidated an Act of Congress. While he did not cite Hamilton’s *Federalist Papers* No. 78, he adopted much of Hamilton’s reasoning. Marshall, however, unlike Hamilton, emphasized the language of the Constitution, specifically the Supremacy Clause.¹³ In *Marbury* the Court invalidated a congressional statute that was interpreted to expand the original jurisdiction of the Supreme Court, contrary to the way that the Court interpreted Article III of the Constitution. In justifying judicial review, Marshall gave the example of a person convicted of treason under a statute that declares that only one witness is necessary for conviction.¹⁴

The Constitution clearly states that “[n]o Person shall be convicted of Treason unless on the Testimony of *two* Witnesses to the

10. *Id.* (capitalization in the original). Hamilton concluded that because judges are the “bulwarks of a limited Constitution,” their need for independence argues strongly for the life tenure that the Constitution guarantees. *Id.*

11. Charles Evans Hughes, Speech before Elmira Chamber of Commerce (1907), in *ADDRESSES AND PAPERS* 133, 139 (1908).

12. 5 U.S. (1 Cranch) 137 (1803).

13. While the Supremacy Clause was central to Marshall’s reasoning, Hamilton never mentioned it. The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

14. *Murphy*, 5 U.S. (1 Cranch) at 179.

same overt Act. . . ."¹⁵ In the hypothetical, the Constitution requires a precise number of witnesses and the statute under review just as clearly does not meet the precise number. Does Marshall's example mean that he thought that the Court should only invalidate legislation that is clearly in conflict with the Constitution? Should — must — the Court, in case of doubt, defer to the legislative judgment?

Marshall, like Hamilton before him, did not focus on this question, and few of their contemporaries probably expended much thought about it.¹⁶ But subsequent judges and commentators certainly have. The essays in this issue are in that tradition.

These later analysts of the Supreme Court, in studying its role in the American polity, are also concerned with the conflict between democracy and judicial review. In spite of Hamilton's assurances that under judicial review the judges merely enforce the popular will as expressed in the fundamental law of the Constitution, there is no doubt that judicial review, in a very fundamental sense, is at war with democratic rule. "Popular sovereignty suggests *will*; fundamental law suggests *limit*."¹⁷ To protect minority rights, the Court cannot merely be a seismograph reflecting majority rule.

These two questions — how active should the Court be; to what extent should judicial review conflict with democratic rule — are very much related. The more active the Court is, the more it conflicts with majority rule.¹⁸

Judge Learned Hand, for example, believed that the judicial power to invalidate legislation was "not a lawless act" but was hardly supported by the language of the Constitution, and that therefore it should be used sparingly, only when necessary to prevent the government from violating a clear and paramount constitutional principle.¹⁹ Hand reasoned:

15. U.S. CONST. art. III, § 3, cl. 1 (emphasis added). The clause goes on to state that in lieu of two witnesses a confession in open court is sufficient.

16. One of Hamilton's coauthors of the *Federalist Papers*, James Madison, thought that the Supreme Court would only invalidate laws that *clearly* violated the Constitution. See ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 9 (1960).

17. *Id.* at 12 (emphasis in the original).

18. See Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 *STAN. L. REV.* 759 (1992) ("For at least the past generation, the countermajoritarian difficulty has transfixed constitutional theorists.").

19. LEARNED HAND, *THE BILL OF RIGHTS* 14-29 (1958).

[S]ince this power is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution.²⁰

Hand's argument for judicial self-restraint relies on the other branches of government to fulfill their constitutional responsibility. He shared early concerns that too frequent a use of judicial power atrophies the other organs of government. Judicial review is "always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and moral education and the stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors."²¹

Judicial activism, Professor Thayer warned, "dwarf[s] the political capacity of the people, and . . . deaden[s] its sense of moral responsibility."²² Professor Thayer, as Hand, would exercise review only in the most extreme cases. A court can only disregard a law subject to constitutional attack "when those who have the right to make laws have not merely made a mistake, but have made a very clear one — so clear that it is not open to rational question."²³

In contrast, Professor Herbert Wechsler was satisfied that, because the framers intended to create the power of judicial review, there is a greater constitutional role for the judiciary.²⁴ Like Mar-

20. *Id.* at 15.

21. JAMES BRADLEY THAYER, JOHN MARSHALL 106 (1901).

22. *Id.* at 107. For example, in 1935 President Franklin D. Roosevelt urged a congressman to support a certain bill. His letter concluded: "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation." Letter from Franklin D. Roosevelt, 32nd President of the United States, to Samuel B. Hill, Member United States House of Representatives, D-Washington (July 6, 1935) (referring to H.R. 8479, "A Bill to Stabilize the Bituminous Coal Mining Industry and Promote its Interstate Commerce"), in 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 297-98 (1938), quoted in RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW 11-12 (3d ed. 1989).

23. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent. This process has already been carried much too far in some of our States. Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere.

Id. at 156.

24. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

shall, Wechsler relied on the language in the Constitution, the Supremacy Clause, to justify the judicial role. Yet to assure that judges should exercise "judgment" rather than "will," Wechsler argued that the judiciary should intervene against democratic laws only when the judges could find a "neutral principle" that is independent of the judges' view of the policies behind the law. Because he believed that judicial review is "anchored in the Constitution," specifically in the Supremacy Clause, the obligation to exercise that review cannot be attenuated.²⁵

Yet while Wechsler found a greater role for the judiciary than Hand, he dissented vigorously "from those more numerous among us who, vouching no philosophy to warranty, frankly or covertly make the test of virtue in interpretation whether its result in the immediate decision seems to hinder or advance the interests or the values they support."²⁶ If judges are result-oriented and let their judgment turn on the immediate result before them, then courts become "naked power organ[s]," and different judges, with different sympathies, may properly reach different conclusions.²⁷ Wechsler elaborated:

[a]d hoc evaluation is, as it has always been, the deepest problem of our constitutionalism, not only with respect to judgments of the courts but also in the wider realm in which conflicting constitutional positions have played a part in our politics.

Did not New England challenge the embargo that the South supported on the very ground on which the South was to resist New England's demand for a protective tariff? Was not Jefferson in the Louisiana Purchase forced to rest on an expansive reading of the clauses granting national authority of the very kind that he had steadfastly opposed in his attacks upon the Bank?

. . . .

[W]hether you are tolerant, perhaps more tolerant than I, of the *ad hoc* in politics, with principle reduced to a manipulative tool, are you not also ready to agree that something else is called for from the courts? I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is

25. *Id.* at 6.

26. *Id.* at 11.

27. *Id.* at 12.

achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?²⁸

Just as Wechsler went further than Hand, so others go much further than Wechsler and argue that judges should not at all be hesitant to invalidate laws because judges have a unique role to play as guardians of the Constitution.²⁹ Some contend that this very active form of review is justified only to protect individual rights and liberties, rather than property and economic rights. Thus the late Justice Douglas had long objected to the "school of thought here that the less the judiciary does, the better."³⁰ Douglas' view, he said, was well expressed by the late Edmond Cahn who said that "we are entitled to reproach the majoritarian justices of the Supreme Court . . . with straining to be reasonable when they ought to be adamant."³¹ Douglas believed the "judiciary was an indispensable part of the operation of our federal system" designed to play an important role "in guarding basic rights against majoritarian control."³²

Other justices have actively used their judicial power but, unlike Douglas, have not limited that activism to matters dealing with individual rights. For example, the conservative Justice McReynolds, who supported the efforts of the Court to strike down a variety of economic and social reform measures,³³ also authored *Meyer v. Ne-*

28. *Id.* at 12, 15. See generally, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 1.4, 1.6 (4th ed. 1991).

29. Cf. *Cooper v. Aaron*, 358 U.S. 1 (1958).

30. *Flast v. Cohen*, 392 U.S. 83, 110 (1968) (Douglas, J., concurring); see also WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE (1958). See generally 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 23.2-5 (forthcoming 2d ed. 1992).

31. *Flast*, 392 U.S. at 110 (Douglas, J., concurring) (quoting Edmond Cahn, *Can the Supreme Court Defend Civil Liberties?*, in TOWARD A BETTER AMERICA 132, 144 (Samuel ed., 1968)).

32. *Flast*, 392 U.S. at 111 (Douglas, J., concurring).

33. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (Bituminous Coal Conservation Act of 1935 held to be outside of federal commerce power); *United States v. Butler*, 297 U.S. 1 (1936) (Agricultural Adjustment Act of 1933 held to violate Tenth Amendment); *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935) (Railroad Retirement Act of 1934 held to exceed congressional power); *Ribnik v. McBride*, 277 U.S. 350 (1928) (employ-

*braska*³⁴ and *Pierce v. Society of Sisters*,³⁵ two of the seminal decisions in the area of civil liberties.³⁶

Meyer declared unconstitutional, under the due process clause, a state law prohibiting the teaching of any subject to any person in public or private schools in any language other than English. The invalid statute also forbade teaching foreign language in grade school. Meyer had been convicted of teaching the subject of reading in the German language.

In *Pierce* a state law prohibited private and parochial schools. McReynolds held that the law was invalid because the state unreasonably interfered with the "liberty" of the parents and the "property" of the schools.

McReynolds could impose his views regarding the unconstitutionality of a minimum wage or a law prohibiting parochial schools with consistency because, in his own words, "plainly, I think this Court must have regard to the wisdom of the enactment."³⁷ Those who have argued for judicial self-restraint are quick to point out that the danger of an activism of a Douglas is that it can lead to, and be used to justify, the activism of a McReynolds.

The two-century-old debate on the nature and extent of judicial review is vividly illustrated by the judicial philosophies found in the articles that follow. I am honored to be chosen to introduce this Symposium, for it contains a thought-provoking collection of essays from a diverse group of contributors. The authors include Senators from both sides of the aisle, individuals who have litigated before the Court, organization heads who are often responsible for affecting the diet of cases that the Supreme Court has — in short, a group of people who can offer unique perspectives on the role of the modern Court and the nature of the confirmation process.

ment agency practice and rate regulation invalidated); *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927) (theater ticket sales regulation invalidated); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (tax on products of child labor invalidated as penalty); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (congressional law prohibiting the transportation in interstate commerce of the products of child labor invalidated).

34. 262 U.S. 390 (1923).

35. 268 U.S. 510 (1925).

36. See Gary L. Bauer, *A Social-Conservative Comment on the New Supreme Court*, 26 U. RICH. L. REV. 497 (1992).

37. *Nebbia v. New York*, 291 U.S. 502, 556 (1934) (McReynolds, J., dissenting).

Senator Strom Thurmond begins with an essay celebrating the vital role of the Supreme Court in our country. Based on the twenty-three Supreme Court nominations that his thirty-seven years in the Senate has witnessed, he comments on what the Senators should look for in a nominee.³⁸ Senator Leahy urges a broader Senatorial role in the appointment process.³⁹ Senator Grassley puts in perspective the myriad types of important questions the Court must decide every Term.⁴⁰

Benjamin Hooks of the NAACP places the nomination process in historical perspective and urges Senators "to probe deeply in the views (in general terms) of nominees."⁴¹ Edward E. McAteer, President of Religious Roundtable, urges a more restrained judiciary,⁴² while Professor Nadine Strossen, President of the American Civil Liberties Union, urges the Court to be more active to protect human rights.⁴³ Donald E. Wildmon, President of the American Family Association, and Benjamin W. Bull, General Counsel of the American Family Law Center, continue the debate as they urge the Court to adopt a more interpretive theory of judicial review.⁴⁴

Beverly LaHaye, President of Concerned Women for America, emphasizes the importance of federalism and advocates that the Court breathe new life into the Tenth Amendment.⁴⁵ Thomas L. Jipping, of the Free Congress Research and Education Foundation, objects to "government by the judiciary."⁴⁶ In contrast, Arthur Kropp, President of People for the American Way, criticizes the Court for turning "its back on its traditional roles."⁴⁷

38. Strom Thurmond, *The Supreme Court: Final Arbiter of Our Nation's Legal Disputes*, 26 U. RICH. L. REV. 443 (1992).

39. Patrick J. Leahy, *Advice and Consent: Ensuring Judicial Freedom*, 26 U. RICH. L. REV. 447 (1992).

40. Charles E. Grassley, *The Role of the Supreme Court*, 26 U. RICH. L. REV. 449 (1992).

41. Benjamin L. Hooks, *The Supreme Court as a Political Institution*, 26 U. RICH. L. REV. 451, 458 (1992).

42. Edward E. McAteer, *In Defense of a Principled Judiciary*, 26 U. RICH. L. REV. 459 (1992).

43. Nadine Strossen, *The Supreme Court's Role: Guarantor of Individual and Minority Group Rights*, 26 U. RICH. L. REV. 467 (1992).

44. Donald E. Wildmon & Benjamin W. Bull, *Conservative Supreme Court: Its Impact on Traditional Values*, 26 U. RICH. L. REV. 471 (1992).

45. Beverly LaHaye & Ellen O. Smith, *The Supreme Court: New Hope for the Restoration of Federalism*, 26 U. RICH. L. REV. 479 (1992).

46. Thomas L. Jipping, *Judiciary: Know Thy Place*, 26 U. RICH. L. REV. 481 (1992).

47. Arthur J. Kropp, *Reagan, Bush and the Supreme Court*, 26 U. RICH. L. REV. 495, 495 (1992).

Gary L. Bauer, President of the Family Research Council, notes that the Court is becoming more "conservative," but expresses concern over some cases that are "plainly 'activist'" yet are "dear to conservatives."⁴⁸ Meanwhile Anne Bryant of the American Association for University Women concludes that the Court is "chip[ping] away at the rights of women and minorities. . . ."⁴⁹

Our Supreme Court has become the most powerful judicial institution in the world today and is the envy of the newly emerging democracies of Eastern Europe.⁵⁰ It should not be surprising that such a powerful Court has not escaped controversy. These essays reflect that controversy. They strikingly disagree with each other, and thus they illuminate and illustrate the present debate on the role of the Court and the role of the confirmation process.

Will these essays help us predict the future for the Supreme Court? Perhaps, but historically we have been very poor predictors of long term trends. If the past teaches us anything, it should teach us to be modest in gauging our ability to predict the future. In 1899, the Director of the U. S. Patent Office urged President McKinley to abolish that Office because "[e]verything that can be invented has been invented." Two years later, a discouraged Wilbur Wright told his brother, Orville: "Man won't fly for a thousand years." In 1912 Captain E.I. Smith of the Titanic confidently announced: "I cannot imagine any condition which would cause this ship to founder." And Admiral William Leahy warned President Harry S Truman about the Atomic Bomb in 1945: "That is the biggest fool thing we have ever done. The bomb will never go off, and I speak as an expert in explosives."⁵¹

48. Gary L. Bauer, *A Social-Conservative Comment on the New Supreme Court*, 26 U. RICH. L. REV. 497, 497-98 (1992).

49. Anne Bryant, *Balancing the Federal Judiciary*, 26 U. RICH. L. REV. 485, 485 (1992).

50. See Ronald D. Rotunda, *Exporting the Bill of Rights: The Lesson From Romania*, 1991 U. ILL. L. REV. 1065.

51. Arthur Zeikel, *Forecasting Accuracy and the Stock Market*, AMERICAN ASS'N OF INDIVIDUAL INVESTORS, Feb. 1992, at 17-18.