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The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law

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THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW. By *Christopher Wolfe.* New York: Basic Books, Inc. 1986. Pp. x, 392. $24.95.

Has the contemporary Supreme Court exceeded its constitutional powers? Are recent decisions made in the guise of judicial review actually manifestations of an activist jurisprudence? Has the Court encroached upon legislative territory?

Christopher Wolfe[1] answers these questions affirmatively in *The Rise of Modern Judicial Review.* He traces the Court's changing jurisprudential approach from the early and limited exercise of judicial review Chief Justice John Marshall enunciated in *Marbury v. Madison*[2] to the far-reaching holdings of the Warren and Burger courts. Wolfe's thesis is that the once "distinctively judicial power" of the early Court "has become merely another variant of legislative power" (p. 3). He contends that successive Courts have seen fewer and fewer definite constraints in the Constitution's language and context; the Justices instead have seen the document more as a collection of " 'presumptions' based on supposedly vague general principles" (p. 327). This modern approach requires numerous "balancing tests" to determine whether the "countervailing principles at stake" in any individual case may rebut these presumptions (p. 327).

The Rise of Modern Judicial Review begins by considering the limited role of judicial review immediately after the adoption of the Con-

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2. 5 U.S. (1 Cranch) 137 (1803).

stitution. Wolfe argues that at that time the rules for interpretation were "so generally agreed upon that they were . . . taken for granted" (p. 17). Wolfe reads Sir William Blackstone and *The Federalist* to state that the interpretive model accepted at the time of the early constitutional debates placed primary emphasis upon the words of the document.[3] Ambiguity was resolved through consideration of the language in the context of "the whole document and its parts."[4]

The incorporation of the concept of "moderate" judicial review into this traditional, literal, and contextual model of interpretation was accomplished, according to Wolfe, through adherence to three critical concepts: the "inherent limits of judicial power, legislative deference, and the political questions doctrine" (p. 101). The first concept, "inherent limits," restrained judges' individual wills, favoring instead reliance upon their *judgment* as to a law's constitutionality. Their perceptions of wisdom and social desirability were to be placed aside. The second critical concept, legislative deference, proscribed judicial review in ambiguous cases. Deferential judges recognized that "a decent respect [is] due to the wisdom, the integrity, and the patriotism of the legislative body . . . to presume in favor of [a law's] validity, until its violation of the constitution is proved beyond reasonable doubt."[5] Finally, the political questions doctrine eschewed any application of judical review to "discretionary acts of other branches," such as the presidential appointment and foreign affairs powers (p. 106). Wolfe integrates these three guiding principles of constitutional interpretation into a stringent limitation on judicial review.

John Marshall, Wolfe argues, based his theory of judicial review upon these three concepts. Marshall's process of interpretation relied upon his "effecting not his own will but the will of the law: the Constitution" (p. 41); he perceived the Constitution as an agglomeration of "*fundamental* principles that look to the distant future and not merely the moment" (p. 45; emphasis in original). Wolfe writes that for Marshall, constitutional analysis took on the foundational quality reflected in his famous admonition that "we must never forget, that it is *a constitution* we are expounding."[6] For Marshall and his immediate successors, judicial review meant solely "the power to strike down laws that *clearly* violate the Constitution"[7] — laws whose effects indu-

3. *See* pp. 20-24. This interpretive model is particularly evident in THE FEDERALIST Nos. 33 and 83 (A. Hamilton).

4. P. 24. The debates raged within a common view of interpretation. For example, in the debate over the National Bank, Madison and Hamilton arrived at opposite conclusions while agreeing on the "rules of interpretation." P. 25.

5. Pp. 104-05 (quoting Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827)).

6. P. 45 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original)).

7. P. 77 (emphasis added). Wolfe develops this language from THE FEDERALIST Nos. 78 and 81 (A. Hamilton).

bitably are to crack the foundation's cement. In brief, Wolfe argues that Marshallian judicial review does not give Justices carte blanche to choose between various reasonable interpretations.

This conception of judicial review, says Wolfe, did not last; the "balance of our 'balanced republic' " was not maintained.[8] Instead the federal judiciary began its slow but unquestionable evolution toward the present day's nearly unrestrained judicial activism.

Wolfe characterizes this "transitional era" as the period during which the Court's jurisprudence foreshadowed the emergence of the modern Court while retaining a theoretical commitment to Marshallian traditional values. This period ran from the final quarter of the nineteenth century through the demise of economic substantive due process. Wolfe argues that the Roosevelt court-packing plan catapulted the Court into its fully modern form.

Of pivotal importance in the transitional process, Wolfe argues, was the passage of the fourteenth amendment. Its passage increased federal power over the states, and its three key provisions — privileges and immunities, due process, and equal protection — became the vehicles for a broad expansion of judicial power during the subsequent century (pp. 120, 123). To fortify his view that the fourteenth amendment induced voluminous overexpansion of the judicial power, Wolfe argues that the ambiguous language and history of the amendment defy resolution. The resulting constitutional uncertainty compels Wolfe to advocate a drastically limited principle of judicial review: Since the traditional model, he writes, permits judicial review only in cases presenting *clear conflicts* between Constitution and statute, ambiguous (and socially controversial) cases ought to remain outside of the judiciary's province. Wolfe's comparison of this ideal and reality reveals a "historic irony" of fourteenth amendment jurisprudence (p. 143): the very ambiguities that most certainly ought to have constrained judicial activism have instead been seized upon as opportunities for judges "to 'interpret' the Constitution as they prefer and then to strike down laws that are incompatible with the preferred 'interpretations' ".[9]

Building upon this analysis, Wolfe demonstrates the transitional era's progression — perhaps Wolfe would prefer "regression" — into the modern mode of constitutional inquiry. He cites the economic substantive due process decisions as the first great expressions of the

8. P. 116 (quoting J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 419 (1873)).

9. P. 143. Wolfe's treatment of the fourteenth amendment reflects the thoroughness of his analysis, but it also forces him to distinguish any interpretation that does not fit the "transition" motif. Other commentators also have found ambiguity in the fourteenth amendment's history. A convincing argument may be made in favor of a broad reading of the amendment. *See, e.g.*, M. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 12-13, 91 (1986), *reviewed by* Book Notice, 85 MICH. L. REV. 1188 (1987).

flowering of judicial will and as a destructive salvo in the attack upon the essential distinction between legislation and adjudication (p. 144).

Although its framers intended the fourteenth amendment due process clause to require fidelity to both the "settled issues and modes of proceeding" in the common law[10] and to constitutional provisions, Wolfe contends that they most certainly did not envision the use of due process as a device for subordinating the legislatures to laissez-faire natural-justice principles (p. 145). In the *Lochner* era, with due process invoked to strike down all government acts that "arbitrarily depriv[ed] people of life, liberty or property," the Court defined "arbitrary" on a case-by-case basis (p. 153). This, for Wolfe, was a blatant invasion by judicial will, amounting to a system in which judicial determination set the general rules regulating the community. Moreover, Wolfe postulates, this growth in the legislative bench was disguised (as it still is today) in the language of traditional judicial review (p. 154).

The final part of Wolfe's book attempts to bring the history into perspective by analyzing the contemporary Court and current constitutional jurisprudence. He maintains that the departure from traditional conceptions of judicial review became most complete during the modern era (after 1937). During this third phase, the focus shifted away from economic laissez-faire toward notions of equality and individual rights.

The 1937 break with economic substantive due process is frequently considered a defeat of the Court at the hands of the political branches. Wolfe, however, sees the "switch in time" as a victory for modern judicial power. The saved Nine subsequently abandoned any attempt to articulate an " 'intelligible standard,' one of kind rather than degree," for distinguishing federally regulable economic activities from those reserved to the states (p. 180). The premises behind the *Lochner* era rise of Court power remained intact; the focus merely shifted from economic regulation to social spheres such as privacy and civil rights.

Wolfe quotes Woodrow Wilson for the modern proposition that the Constitution, an elastic and adaptable document, needs to be altered to meet contemporary exigencies.[11] In this view, the Constitution is no longer seen as a conclusive arbiter of decisions, but instead as a collection of presumptions in favor of certain policies — presumptions to be balanced against other contemporary values (p. 229). This

10. P. 137 (quoting Murray's Lessee v. Hoboken Land Improvement Co., 59 U.S. (18 How.) 272, 277 (1856)).

11. Pp. 206, 208. Wilson's views on the proper role of the document changed between his earlier and later works, although the implications for expansive judicial review did not. *See* W. WILSON, CONGRESSIONAL GOVERNMENT (1885); W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (1921); *see also* Wolfe, *Woodrow Wilson: Interpreting the Constitution*, 41 REV. OF POL. 121 (1979).

"balancing," very much a feature of the modern era, signifies the replacement of the traditional qualitative analysis of *kinds* of power with a quantitative inquiry into the *degree* of importance attached to exercises of power.

Wolfe argues that with this departure from qualitative analysis of concrete provisions, the distinction between constitutional interpretation and common law has broken down.[12] Wolfe submits that constitutional law ought not to be judge-made law. Instead, it should be the result of judicial review applied solely to statutes that are clearly contradictory to the propositions of government envisioned by the founders. In this sense, the current state of affairs reflects "a significant shift away from the thought of the American founding" (p. 233). Wolfe finds that the modern Court's "legislating" under extraconstitutional or extended "rights," such as privacy and equality, forsakes fidelity to the original intent of the Constitution in favor of "public policy making" (p. 297). Case by case, the Court develops new balancing tests, then later alters them incrementally in reaction to shifts in Justices' policy preferences.

It is in his analysis of the modern Court that Wolfe's own values first become destructive to his anti-judicial activism thesis. He tends in later chapters to be result-oriented, molding his theory to fit his *own* policy ideals. In his consideration of decisions made during the earlier periods, Wolfe maintains a relatively detached perspective, scrutinizing *process* rather than *outcome.* However, in his examination of recent decisions, evidence of his political bias becomes so apparent that it casts doubt upon his underlying motivation. For example, Wolfe permits his anti-abortion bias to color his treatment of *Roe v. Wade,*[13] "the most raw exercise of judicial power since *Dred Scott.* . . . The Court imposed its own approbation of abortion on the nation at large" (p. 307). Although Wolfe's observations on the extent to which *Roe* represents unrestrained judicial review supports his thesis, the damnatory quality of his disagreement on the merits overshadows whatever theoretical merit these observations might have.[14]

12. Justice Cardozo's views support this changed view entirely. *See* B. CARDOZO, *Lecture III. The Method of Sociology. The Judge as a Legislator,* in THE NATURE OF THE JUDICIAL PROCESS 98 (1921). He does, however, warn against permitting a jurisprudence to exist without being "constantly brought into relation to objective or external standards" lest it degenerate into " '*Die Gefühlsjurisprudenz,*' a jurisprudence of mere sentiment or feeling." *Id.* at 106.

13. 410 U.S. 113 (1973).

14. Most disappointing on this score is a footnote critical of Jesse Choper's blessing of the abortion decision: "Law school professors are typical of intelligent elites who strongly support abortion. Perhaps this is so because it takes considerable intellectual skill to 'show' that a fetus conceived by a man and woman is not a separate 'human' being, but only 'part of a woman's body.' " P. 342 n.21 (criticizing J. CHOPER, JUDICIAL REVIEW IN THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980)). Wolfe impeaches Choper by charging that Choper assumes that "generally liberal decisions are good and conservative ones are bad." P. 342. Here Wolfe makes the identical error, merely reversing the political stance.

In his conclusion, Wolfe, in an interesting aside, considers the theories of Ronald Dworkin, John Hart Ely, and Jesse Choper. Wolfe critiques both Dworkin's expansive role for the constitutional judge[15] and Ely's elusive middle ground between "narrow clause-based interpretivism" and unrestrained judicial review.[16] Wolfe finds each theory too permissive; their presentation serves to strengthen the reader's understanding of Wolfe's own commitment to the most restrained position.

Wolfe's book is useful primarily as a history of the changing notion of judicial review and the extent to which the process has been one of accretion, with the emergence of the legislative judiciary occurring largely under a cloak of fidelity to Marshall's original perception of the Court as constitutional watchdog. Wolfe's advocacy of a return to a more limited role for the judiciary is weakened only when the approach becomes result-oriented in the later chapters. But his thesis is well-pondered and well-documented, and it achieves its goal of leaving the reader wondering whether the contemporary Court ought to "legislate" its way into provinces where John Marshall never would have dared to lead it.

— *Ward A. Greenberg*

15. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 132-33 (1977). Dworkin's "liberal theory of law" defends the constitutional philosophy of the Warren Court using what is closer to a vague generalities interpretation of constitutional provisions.

16. *See* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).