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Judicial Review and American Democracy

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JUDICIAL REVIEW AND AMERICAN DEMOCRACY. By *Albert P. Melone* and *George Mace.* Ames: Iowa State University Press. 1988. Pp. xiv, 289. $28.95.

In *Judicial Review and American Democracy,* a collection of essays on judicial review and political theory, political scientists Albert P. Melone and George Mace[1] have compiled what they term the "classic statements" on the constitutional implications of judicial review (p. xii). Although the editors contribute some essays of their own, they clearly do not wish to advocate their particular views or slant the "debate" toward any particular view. Indeed, they "suspect . . . that those seeking certitude may find [the] book wanting" (p. xiii). As a result, the book contains no unifying, central thesis; rather, it presents a series of ongoing arguments.

Judicial Review and American Democracy is divided into three parts. Part I, written by Melone and Mace, sets the stage for the debates by describing the nature of judicial review and its origins, and presenting Chief Justice Marshall's opinion in *Marbury v. Madison.*[2] In Parts II and III, the authors generally fade into the background and present only brief introductions for a series of essays written by others.[3] Part II contains five pieces on the relationship between judicial review and legislative power. The essays examine whether *Marbury* ventured beyond the scope of power granted to the judiciary by the Constitution. Part III contains nine pieces discussing the relationship between judicial review and democracy. These essays inquire whether it is "democratic" for nine justices, who are not politically accountable, to negate the enactments of representative legislatures. Thus, the book proceeds within a framework that focuses on two of the most fundamental aspects of judicial review: its constitutional legitimacy and its compatibility with democracy.

Part II's debate over judicial review's legitimacy begins with the dissenting opinion of Judge John B. Gibson in *Eakin v. Raub,*[4] which is "considered by many to be the most effective answer given to John Marshall's famous arguments in support of judicial review" (p. 67). In *Eakin,* Judge Gibson argued that a judicial veto over a legislative enactment constitutes a usurpation of legislative power, because the judiciary's ordinary function is to interpret, not legislate. Just as it would

1. Albert P. Melone is a Professor of Political Science at Southern Illinois University at Carbondale. George Mace, formerly an Assistant Professor of Political Science, Southern Illinois University at Carbondale, is now in private business.

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

3. The final three essays were written by Melone and Mace, however.

4. 12 Serg. & Rawle 330 (Pa. 1825).

be deemed usurpation for the Congress to override a Supreme Court ruling, Judge Gibson argued,[5] it is unconstitutional for the Court to strike down a legislative enactment.[6]

Part II next contains an essay by James B. Thayer,[7] rebutting Gibson on the usurpation question. Thayer agrees with Gibson that a court enters the political realm when it declares a legislative act unconstitutional. But while Gibson urged that the courts abrogate the power of judicial review entirely, Thayer argues that the power is legitimate if used sparingly — only when the legislative enactment is invalid beyond all reasonable doubt (pp. 92-93). Thayer believes this would serve to protect the judiciary from backlash generated by institutional jealousies (p. 95).

In contrast to Thayer, Supreme Court Justice Horace H. Lurton supports a broader exercise of judicial review. He argues that judicial review protects against legislative and executive overreaching (p. 113). However, the next essay, by Louis Boudin,[8] rebuts Lurton point by point. He cites evidence demonstrating that the Framers did not intend judicial review, and argues (somewhat inconsistently) that this "revolutionary" power should be exercised, albeit with self-restraint (pp. 136-39). An essay by Charles Beard concludes Part II, attacking Boudin's views with a more extensive examination of original intent.

The editors begin Part III's debate over democratic compatibility with the letters of Brutus, written by the anti-federalist John Yates, who contended that the powers accorded the judicial branch in the proposed Constitution would lead to the eradication of the states as discrete governmental entities. Melone and Mace follow this with the classic response of Alexander Hamilton in *The Federalist*.[9]

Referring to the concerns raised in Part II, Eugene V. Rostow begins the next essay with the statement: "A theme of uneasiness, and even of guilt, colors the literature about judicial review" (p. 210). To

5. It is not uncommon, or considered illegitimate, for Congress to "overrule" Supreme Court interpretations of statutes when those rulings are premised on ambiguous questions of statutory interpretation. *See, e.g.*, Grove City College v. Bell, 465 U.S. 555 (1984), and the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 287 (1988). However, Judge Gibson probably envisioned a situation where Congress attempted to contravene a clear constitutional holding, as opposed to clarifying an ambiguity.

6. Judge Gibson also argued that if the Constitution envisioned the Court as an additional barrier to legislative action, such an express provision would have been included. P. 72.

7. Thayer was a professor at Harvard Law School in the latter part of the 19th century. "This famous essay is the foundation on which Justices Holmes, Brandeis, and Frankfurter constructed their judicial philosophies." P. 77.

8. Boudin was a "New York jurist, labor lawyer, and one of the more prominent members of the American Labor Party during the early part of this century . . . ." P. 118.

9. THE FEDERALIST NOS. 78 & 81 (A. Hamilton). Hamilton argued that an independent judiciary was necessary as a check against the excesses of the other two branches. Furthermore, because its powers would be passive, the judiciary "will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them . . . ." P. 199.

assuage this uneasiness, Rostow argues that judicial review is "democratic" because the people retain the ultimate power to amend the Constitution and the Court helps maintain a "pluralistic equilibrium" in society (p. 213). In contrast, Professor Mace argues in the next essay that judicial review is "antidemocratic," but a necessary element in a "good democracy" because it helps protect the rights and liberties of political minorities (pp. 251-52). By arguing that judicial review is compatible with democracy, these authors imply that it should be exercised freely.

Melone and Mace state that this collection presents the "classic statements" on the two fundamental questions surrounding judicial review. Because of the deep entrenchment of the institution of judicial review today, these questions appear somewhat moot. Although they make for interesting political theory, are they at all relevant in today's legal community?

One response to this query can be found in Melone and Mace's statement that since these essays have never before been presented in a single book, "[this] volume represents a unique contribution to the literature."[10] While that claim may not be completely accurate, the book is a strong starting point for anyone interested in the rudiments of judicial review.[11]

A second and more compelling value of the book lies in its thematic organization. Part II's debate over usurpation reminds us that judicial review is not unquestionably legitimate. However, if this judicial power is here to stay, the task remains of reconciling it with democratic theory, which the debate in Part III undertakes. The essays of Hamilton, Rostow and Mace can also be viewed as attempts to legitimize judicial review via its theoretical compatibility with democracy — thereby completely bypassing the need to consider the more technical usurpation question. An additional point springs from the book's debate format: one's confidence in the legitimacy of judicial review correlates strongly to one's attitude on how freely it should be exercised.[12]

The book also presents an historical perspective which leads to a fuller understanding of these issues. For example, because the leading constitutional law casebooks contain little introduction and scene-setting, students will clearly benefit from Melone and Mace's explanation of the historical and political background surrounding *Marbury*.[13]

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10. P. xii; *cf.* L. LEVY, JUDICIAL REVIEW AND THE SUPREME COURT (1967).

11. This is especially true because the book contains a very comprehensive bibliography of other works in the area. Pp. 269-78.

12. For what is, at this point, the most recent discussion of this phenomenon, see Schauer, *Constitutional Conventions,* 87 MICH. L. REV. 1407 (1989) (reviewing L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1988)).

13. Ch. 4; *cf.* E. BARRET, JR. & W. COHEN, CONSTITUTIONAL LAW: CASES AND MATERIALS 26 (6th ed. 1981) (*Marbury* presented with one paragraph introduction); G. GUNTHER,

Anyone who has read the *Marbury* opinion, and knows the historical background, would agree that such knowledge is invaluable in understanding and evaluating its arguments.[14]

The book serves a similar function with regard to the proper role of the judiciary in the legal process generally. John Thayer's admonitions against overzealous judicial activism, and Rostow's "sense of uneasiness," remain relevant to contemporary debates over judicial restraint,[15] original intent,[16] and "neutral principles."[17] Indeed, throughout the book, the editors attempt to note the modern implications of the essays.[18]

The current controversy over statutory interpretation illustrates how the basic questions debated in *Judicial Review and American Democracy* reverberate throughout current legal practice. In an extensive review of various paradigms of statutory construction, one commentator recently noted that "[a]ll interpretive theories must ultimately be grounded in a political theory and a theory of law, even if the interpreter is unwilling to recognize or state the underlying premises."[19] Although most of the literature in this area tends to concentrate on the behavior of legislatures, taking a stand on the proper role of the judiciary is crucial to the search for a proper model of statutory interpretation.

CONSTITUTIONAL LAW 2 (11th ed. 1985) (one paragraph); W. LOCKHART, Y. KAMISAR & J. CHOPER, THE AMERICAN CONSTITUTION: CASES, COMMENTS & QUESTIONS 1 (6th ed. 1986) (one page); R. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 1 (1981) (one paragraph); and G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW (1986) (one paragraph). Gunther presents an additional two and one-half pages of background after the case. Although the historical background is neglected, all the casebooks present, in the Notes following *Marbury,* extensive excerpts and commentary on the basic questions raised in JUDICIAL REVIEW AND AMERICAN DEMOCRACY.

14. *See, e.g.,* Burton, *The Cornerstone of Constitutional Law: The Extraordinary Case of* Marbury v. Madison, 36 A.B.A. L.J. 805 (1950); Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1.

15. *See, e.g.,* Posner, *The Meaning of Judicial Self-Restraint,* 59 IND. L.J. 1 (1983); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980) (Choper states that the Court should exercise judicial review only when individual liberties are at stake. One essay in chapter 14 is Professor Melone's review of this book. Pp. 253-56.).

16. *See* p. 7 (citing THE FEDERALIST SOCIETY, THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 1-10, 31-41, 43-52 (1986) (speeches by Attorney General Edwin Meese III and Judge Robert H. Bork)).

17. *See, e.g.,* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959); Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1 (1971). Wechsler's article was written in response to the views expressed by Learned Hand in L. HAND, THE BILL OF RIGHTS 1-30 (1958). Wechsler found justification for judicial review in the language of the Constitution, whereas Hand found it only through interpolation.

18. See, *e.g.,* the editors' closing remarks in their introduction to Justice Lurton's essay: "Once again, we are reminded of contemporary criticism. The principal difference is that since the mid-1950s the critical voices have come from the political right instead of the political left." Pp. 119-20.

19. Aleinikoff, *Updating Statutory Interpretation,* 87 MICH. L. REV. 20, 31 (1988).

For instance, legal process scholars Henry Hart and Albert Sacks[20] urge the judiciary to assist the legislature by searching for and implementing the general purposes behind statutes. Public choice theory criticizes this model in several ways: it allows activist judges to "abstract up" to a level of purposeful generality necessary to implement their personal views;[21] it leads to an over-reliance on nonenacted legislative history;[22] it engenders sloppy legislative enactments;[23] and it overrides the true bargains made between the legislature and interest groups.[24] These differing approaches to statutory interpretation are ultimately grounded in widely divergent views on the proper role of the judiciary: whereas legal process thought envisions an active, helpful role with respect to the legislature and society at large, public choice emphasizes a more restricted checking function that serves narrower systemic values.

Judicial Review and American Democracy provides an introduction to the most basic issues surrounding the functional nature of the judiciary in the American democratic system. Because they are so fundamental, the questions raised in the book are often resolved implicitly in contemporary debate and practice. However, a full and proper discussion of current legal controversies demands an explicit understanding and analysis of their "underlying premises." Melone and Mace's collection is an admirable effort to nurture that understanding.

— *Stanley S. Sokul*

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20. *See* H. HART & A. SACKS, THE LEGAL PROCESS: MATERIALS IN THE MAKING AND APPLICATION OF LAW (tent. draft 1958).

21. *See, e.g.*, R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 288-90 (1985).

22. *See, e.g.*, Hirschey v. FERC, 777 F.2d 1, 6-8 (D.C. Cir. 1985) (Scalia, J., concurring).

23. *See, e.g.*, Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 546-47 (1983).

24. *Id.* at 545-47.