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## Review of The Supreme Court on Trial, by C. S. Hyneman.

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In summary, this is different from the books that have been produced before. It would be a worthwhile accomplishment even if no course in creditors' remedies were offered in American law schools. For course use, it is less a casebook than it is a do-it-yourself kit from which a first class teaching tool can be assembled. The result is well worth the effort.

RONAN E. DEGNAN\*

THE SUPREME COURT ON TRIAL. By Charles S. Hyneman. New York: Atherton Press, 1963. Pp. IX, 308. \$6.50.

Professor Hyneman's book represents still another entry in the current debate over the proper role of judicial review in a democratic society.<sup>1</sup> Although he approaches this subject via an analysis of several recent attacks upon the United States Supreme Court, Professor Hyneman essentially deals with the same topics—the legitimacy of judicial review, the proper standards applicable to constitutional adjudication, and the alleged departure of the school segregation cases<sup>2</sup> from those standards—that have served as the subject of several books and at least a score of articles published within the past five years.<sup>3</sup> Indeed the writing in this area has grown so voluminous that it is difficult for anyone except a full-time student of constitutional law to read it all. Accordingly, any evaluation of a new book in this area must take into account the "competition." Judged in this light, *The Supreme Court on Trial*, while a fairly interesting and possibly useful volume, hardly ranks as "essential reading" for the lawyer who is interested in the subject of judicial review. Professor Hyneman obviously has produced

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to be of as little aid to the eye as possible. I doubt that Professor Countryman had any choice about this.

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1. A more complete description of this debate may be found in Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587 (1963). In many respects, the current debate is merely the latest chapter in a long standing controversy over the proper function of the Court. See, e.g., the literature cited in Sutherland, Book Review, 74 HARV. L. REV. 197 n.3 (1860). See also BOUDIN, GOVERNMENT BY JUDICIARY (1932).

2. *Brown v. Board of Education*, 347 U.S. 484 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

3. See, e.g., BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); BLACK, THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960); MASON, THE SUPREME COURT: PALLADIUM OF FREEDOM (1962); MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT (1961); ROSTOW, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW (1962); WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW (1961). Various law review articles are collected by Shapiro, *supra* note 1, at 587 n.1. See also Wright, *The Supreme Court cannot be Neutral*, 40 TEXAS L. REV. 599 n.2 (1962).

a better work than several other authors dealing with the same topic,<sup>4</sup> but, in my opinion, his contribution still falls far short of the excellence of the best literature in this field.<sup>5</sup>

One favorable aspect of Professor Hyneman's book is that the several sections into which it is divided, unlike the segments of some generally superior books,<sup>6</sup> are tied together by something more than the fact that they deal in some general way with the Supreme Court. The forty chapters in *The Supreme Court on Trial* are divided into five major sub-books, each of which builds progressively toward the final conclusions offered in part five, titled "Judicial Power and Democratic Government."

In the first sub-book Professor Hyneman carefully examines recent criticisms leveled against the Supreme Court, concentrating primarily on the criticism which stemmed from the school segregation cases. He describes in detail the various forms this criticism has taken and notes that such criticism has ample precedent in similar attacks which have been made in every significant period of the Court's history. This leads him to conclude that the nation has not lived comfortably under dramatic demonstrations of judicial power<sup>7</sup> and that, in part, this has been due to a "widespread suspicion" that the power of judicial review was never intended by the founding fathers but was usurped by the courts.<sup>8</sup>

Whether there is any reasonable justification for suspicion is the concern of the second sub-book. After examining the language of the Constitution, the writings of the founding fathers, the reasoning of *Marbury v. Madison*,<sup>9</sup> and the arguments of commentators, Professor Hyneman finds that, "men who fear extensive judicial power may reasonably cling to a conviction that a doctrine of judicial review was not originally incorporated in the Constitution but was grafted onto it by subsequent practice."<sup>10</sup>

In part III the author considers another basic line of attack against the Court, the frequently raised charge that it has "cross[ed] the boundaries of judicial power and invad[ed] a realm intended exclusively for the political branches of government."<sup>11</sup> He finds that the basis for such charges lies in the significant policy-making power which is almost inevitably a part of constitutional interpretation. As

4. See *e.g.*, BLOCH, *STATES' RIGHTS: THE LAW OF THE LAND* (1958); Nichols, *An Appeal To Save Our Written Form of Government*, 13 DE PAUL L. REV. 15 (1963).

5. See, *e.g.*, BICKEL, *op. cit. supra* note 3; BLACK, *op. cit. supra* note 3.

6. See, *e.g.*, ROSTOW, *op. cit. supra* note 3; WECHSLER, *op. cit. supra* note 3.

7. HYNEMAN, *THE SUPREME COURT ON TRIAL* 31 (1963).

8. *Id.* at 84, 123.

9. 5 U.S. (1 Cranch) 137 (1803).

10. HYNEMAN, *op. cit. supra* note 7, at 114.

11. *Id.* at 129.

an illustration of the Court's past exercise of this power, Professor Hyneman describes in detail the shift in the judicial interpretation of the due process and interstate commerce clauses during the nineteen thirties.

Turning from policy-making in the past to policy-making in the present, Professor Hyneman presents in part IV the heart of his book—an analysis of the school segregation cases. Building upon the points made in previous sections, the author concludes that the school segregation decision has carried judicial review, and consequently judicial policy-making, to a “new peak of judicial power.”<sup>12</sup> He stresses that, unlike the significant cases of the past, such as the laissez-faire decisions of the thirties, the ruling in the segregation cases does not merely confirm the status quo by preventing new reforms, but operates affirmatively to force a highly significant social change upon society. Professor Hyneman apparently feels that the Court in this decision has travelled farther into the “domain” of the legislature than ever before; thus, opening up the possibility of a “new regime” in constitutional law. The author views this potential new regime as the offspring of the philosophy of “judicial activism.” Accordingly he closes section IV with a lengthy description of this “contemporary school of thought” and its “plea” for “aggressive judicial review.”<sup>13</sup>

In the concluding sub-book, part V, Professor Hyneman considers the desirability of judicial activism as compared to a judicial process which leaves significant policy making to the political process. Professor Hyneman notes that the latter alternative has the advantage of being more democratic and more efficient. Legislatures not only are more responsive to the people, but, because of their ability to move on a step by step basis, to back up when they have gone too far, and to limit new rulings to a prospective application, they are also a more effective body for the institution of social reform. Professor Hyneman notes that some would prefer bold judicial action precisely because the Court is not completely responsive to the popular will and therefore better suited to limit majority excesses. Although he does not flatly reject this position, Professor Hyneman's negative reaction is clearly indicated by his description of its proponents as painting a “picture of the Supreme Court as a wise father, admonishing his children to a higher morality by reading appropriate verses from the Scripture.”<sup>14</sup> Professor Hyneman has difficulty with the argument which justifies bold judicial action on the ground that the inaction of the political branches has left the judiciary as the only body able

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12. *Id.* at 198-99.

13. *Id.* at 217.

14. *Id.* at 245.

to make secure the democratic process. The author is somewhat skeptical of a court's ability to determine when legislative inaction truly signifies a failure of the political process. Moreover, while he questions any group's ability to fix the outer limits of the democratic process as they apply to our institutions,<sup>15</sup> he feels that the legislative judgment in this area is at least equal to that of the judiciary.

Although Professor Hyneman professes to do no more than state the arguments on both sides, the concluding sections of *The Supreme Court on Trial* make it obvious that he finds the arguments in favor of judicial self-restraint stronger than those in favor of judicial activism. This book review is hardly the proper vehicle for a profitable discussion of the merits of this conclusion, or, for that matter, even for a discussion of the author's basic assumption that the common classifications of "judicial self-restraint" and "judicial activism" accurately reflect a true dichotomy in basic judicial philosophy rather than just a difference in the degree to which particular judges hold sacred certain constitutional rights.<sup>16</sup> What can be considered in the limited space available is this: accepting the author's assumptions and his predilections, has he made the most convincing presentation of his point of view that can be made, or, of more importance to the potential reader, has he made the most convincing presentation that has been made to date. On both counts, I feel the answer is clearly "no." Though *The Supreme Court on Trial* has several strong features, it contains too many major defects to be recommended as a primary source-book for the lawyer who is interested in exploring the basic issues raised by the current debate over the proper role of judicial review.

One such defect is the author's lack of discrimination in his choice of arguments. Frequently, he detracts from strong arguments by giving equal (and sometimes even greater) emphasis to weaker arguments, several of which are so attenuated that it is doubtful whether they should have been mentioned at all. This quality is strikingly illustrated in the arguments advanced to support the author's conclusion that the critics of the Court have a reasonable basis for suspecting that the establishment of judicial review in *Marbury v. Madison* constituted a usurpation of power not granted to the judiciary. In analyzing the *Marbury* case Professor Hyneman concentrates primarily on the question, also stressed by Chief Justice Marshall,

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15. *Id.* at 268.

16. See, e.g., Kadish, *A Note on Judicial Activism*, 6 UTAH L. REV. 467 (1959); McWhinney, *The Great Debate: Activism and Self-Restraint and Current Dilemmas in Judicial Policy Making*, 33 N.Y.U.L. REV. 775 (1958); Rodell, *Judicial Activists, Judicial Self-deniers, Judicial Review and The First Amendment—or, How to hide the melody of what you mean behind the words of what you say*, 47 GEO. L.J. 374 (1959).

whether the Constitution was meant to be "paramount" law (*i.e.*, prevailing over contrary legislative acts). The author concludes that opponents of judicial review may "reasonably" take comfort from the fact that Marshall, in reaching an affirmative answer, "offered an appeal to generalized experience" as his initial support and turned only secondarily to the language of the Constitution itself.<sup>17</sup> Surely the concept of what constitutes "reasonable" support for a position is strained to the limit when the order of a judge's argumentation in an opinion is given such significance. It is hard to understand why, instead of emphasizing this point, indeed, instead of stressing so heavily the question of whether the Constitution was intended to be paramount law, Professor Hyneman did not concentrate on the point generally recognized to be the weakest link in the argument for judicial review<sup>18</sup>—Marshall's premise that, accepting the Constitution as paramount law, the Court's interpretation of that law should be binding upon co-equal branches of the government.<sup>19</sup>

Another significant defect in *The Supreme Court on Trial* is that too frequently it contains the very flaw which the author complains of in the work of others, namely that it is "long on argument and short on evidence."<sup>20</sup> Of course, many of the conclusions in a book of this type are not capable of proof, but too frequently Professor Hyneman has either failed to offer any evidence, or has offered dramatically insufficient evidence to support conclusions which must be supported by something more than logic.<sup>21</sup> For example, it is Pro-

17. HYNEMAN, *op. cit. supra* note 7, at 97, 124. Professor Hyneman's analysis throughout this section goes only to the question of whether anyone could *reasonably doubt* the constitutional legitimacy of judicial review and not to the question of whether the case for judicial review might not still be more convincing than the case against it. *Id.* at 93, 113-14, 117-26. Compare BLACK, *op. cit. supra* note 3, at 1-27.

18. See, *e.g.*, BICKEL, *op. cit. supra* note 3, at 2-14; BLACK, *op. cit. supra* note 3, at 13-16, 26-27; HAND, *THE BILL OF RIGHTS* 7-10, 27-30 (1958).

19. Professor Hyneman does recognize this problem at one point, HYNEMAN, *op. cit. supra* note 7, at 120, although he does not discuss the possibility of allowing each branch of the federal government to judge the constitutionality of its own actions. Some commentators have found support for such a system of "concurrent review" in the writings of Thomas Jefferson. See Krislov, *Jefferson and Judicial Review: Refereeing Cohn, Commager and Mendleson*, 9 J. PUB. L. 374 (1960); Mendleson, *Jefferson on Judicial Review: A Reply to Professor Krislov*, 10 J. PUB. L. 113 (1961); Mendleson, *Jefferson on Judicial Review: Consistency Through Change*, 29 U. CHI. L. REV. 327 (1962). See also Hand, *op. cit. supra* note 18, at 3-4.

20. HYNEMAN, *op. cit. supra* note 7, at 244.

21. It should be acknowledged that in at least a few instances the absence of documentation is most understandable. For example, in discussing the Court's unanimity in the school segregation cases, the author cites a "widespread conviction among lawyers and other close observers of the Court that the Supreme Court judges were far less in agreement than [Chief Justice] Warren's [opinions] would indicate." *Id.* at 211. Professor Hyneman has been sharply criticized by one reviewer for his failure to cite "which lawyers and which other close observers" hold this conviction. The absence of such references, in that reviewer's opinion, reduces Professor Hyneman's statement

fessor Hyneman's view that "throughout our history" much of the criticism of the Court has stemmed from a "significant social doubt that power to overrule Acts of Congress was conferred on the courts by the Constitution."<sup>22</sup> Yet, to support this position he offers little more than the statements of fourteen supporters of the Roosevelt court-packing plan who declared that judicial review of congressional legislation constituted a usurpation of power. Certainly, such a limited number of statements, coming within a single period of time, can hardly substantiate a general conclusion as to the nature of the criticism against the Court from the days of *Marbury v. Madison* to the present. Another example of the author's apparent lack of interest in furnishing evidentiary support for his conclusions is found in his citation of only a single "illustrative" article to document a rather dubious statement that "the leading law reviews today" are "dominat[ed]" by the view that "the Supreme Court is chief custodian of the nation's conscience and it must be supreme in saying what that conscience requires."<sup>23</sup> In a few instances, moreover, Professor Hyneman has not provided the reader with even a single citation to support his conclusions.<sup>24</sup> Thus, he offers no support for his statement

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to "mere . . . scuttlebut." Fellman, Book Review, 32 GEO. WASH. L. REV. 449 (1963). It should be noted, however, that this very bit of "scuttlebut" has been advanced on the basis of "information that has filtered out [of the Court]" by one of the closest and most careful observers of the Court. See Lewis, New Look at the Chief Justice, N.Y. Times, Jan. 19, 1964, § 6 (Magazine), p. 9. Moreover, while the sources of such "scuttlebut" are not identified by Professor Hyneman—possibly because it was felt unnecessary since all they had to offer for publication was their own speculations—the arguments which support their conjecture are clearly stated and it is primarily on these arguments, not the authority of others, that the author relies.

22. HYNEMAN, *op. cit. supra* note 7, at 92. See also *id.* at 123. *But see* Barron, *Decision Without Power—The Dilemma of the Supreme Court*, 40 NORTH DAKOTA L. REV. 57, 60 (1964) ("presently . . . [the Court's] power of judicial review is rarely questioned"); Kurland, Book Review, 28 U. CHI. L. REV. 188 (1960) ("the argument . . . that the court has improperly usurped the power of judicial review is no longer urged by any except those mired in the deep South.")

23. HYNEMAN, *op. cit. supra* note 7, at 196. The article cited, Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960), is hardly typical of the current literature as indicated by the articles referred to in note 3 *supra*. See also Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35, 36 n.6 (1963).

24. This disregard for documentation has carried over to the author's description of the conclusions reached by others. See, e.g., HYNEMAN, *op. cit. supra* note 7, at 100, 102, 165, where the author describes the position taken by "lawyers of considerable renown," "students of American History," and "some writers on constitutional law" but fails to give any references to the authors whose work he is describing. This shortcoming is overcome in large measure by the bibliographic notes in the appendix to the book. In fact, to the general reader, the bibliographic notes are probably of much greater value than would be the documentation of the author's general statements. There are several instances, however, in which the author's descriptions of the views attributed to others are subject to question, and, at least here, citations should have been furnished. E.g., *id.* at 165, where it is stated that "some writers on constitutional law have stretched these facts [of the *Jones & Laughlin* case] into a con-

that "there are many . . . opinions [of the Supreme Court] in which fear of future enactments is offered as a main reason for holding the present enactment invalid."<sup>25</sup> This is hardly a matter so obvious to any student of constitutional law that no citations are needed. In fact, I am somewhat puzzled as to what cases Professor Hyneman had in mind when he made his statement.

Although Professor Hyneman's disregard of the need for evidentiary support of his conclusions is often disconcerting, probably the most serious defect in his book is a somewhat related tendency to oversimplify, usually by overgeneralizing. In his description of judicial activism, for example, Professor Hyneman attempts at times to convert the position of a single author into a basic premise of what he considers to be a whole school of jurisprudence. Thus, he states that it is a good guess that virtually all students of constitutional law who think of themselves as judicial activists share the view that "the failure by the State to bar discrimination [by private citizens, organizations, and business firms] is state action denying the equal protection of the laws."<sup>26</sup> It seems very unlikely, however, that more than a handful of those described as judicial activists would support this approach to the state action problem.<sup>27</sup> In fact, a leading member of what Professor Hyneman would call the "activist" wing of the Court has clearly rejected this viewpoint,<sup>28</sup> and the author cited as the source of this position only advanced it as one of several possible approaches to the state action issue.<sup>29</sup> Professor Hyneman's tendency to oversimplify is also illustrated by his description of various Court decisions in the 1930's. For example, in describing the Court's "turn-about" during that period, the author places his emphasis upon the impact of the Roosevelt court-packing plan and makes no mention of those factors which have led some commentators to conclude that the later decisions upholding New Deal Legislation would have been made even if the Roosevelt plan had never been announced.<sup>30</sup> Similarly, Professor Hyneman characterizes the *Jones & Laughlin* "sub-

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clusion that the Supreme Court will never again hold a national statute invalid on the ground that it is not necessary and proper to an enumerated power or encroaches on a power reserved to the states."

25. *Id.* at 208.

26. *Id.* at 219 quoting in part from Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555, 569 (1951).

27. Certainly the general literature on the state action problem, both by so-called "activists" and "passivists," does not reveal much support for this view. See, e.g., the various articles cited in Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUP. CT. REV. 101, 115 n.41, 116 n.42, 129 n.73, 134 n.80.

28. See the opinion of Justice Black in *Bell v. Maryland*, 375 U.S. 918 (1964).

29. See Hyman, *supra* note 7, at 569-70.

30. See McWhinney, *supra* note 16; Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955).

stantial relationship" test<sup>31</sup> for determining the scope of the commerce power as providing the Supreme Court justices with "a greater invitation to enthrone their own judgments . . . than they can find in earlier opinions."<sup>32</sup> He does not, however, acknowledge that substantial variation in viewpoint had also existed under the "standards" of those older cases.<sup>33</sup>

Despite the defects mentioned above, Professor Hyneman's book may still have a significant value, if not to the lawyer, at least to the person who has no previous background in the study of constitutional law.<sup>34</sup> Viewed solely as an attempt to explore the current debate over the role of the Court, to trace its history, and to present the arguments on both sides (with the author's own conclusions clearly indicated) in a fashion understandable to one "new to the study of constitutional law,"<sup>35</sup> *The Supreme Court on Trial* has many favorable aspects. While it contains little that is new, the book does cover all the major points brought out by others, and it does so in an interesting manner which is often an improvement over the original presentation. It also presents clearly and in detail all of the background material, particularly the historical material, which a reader must have in order to appreciate the basic issues being debated. Finally, although the book does contain some ambiguities, the author generally avoids the very general, very ambiguous discussions so frequently found in this field.<sup>36</sup> His discussion of judicial activism, for example, though lacking in other regards, does go beyond a broad, vacuous description and attempts to relate this philosophy to various substantive constitutional doctrines. Of course, even as a book aimed at the general reader, *The Supreme Court on Trial* still has several drawbacks. There is, for

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31. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937): "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

32. HYNEMAN, *op. cit. supra* note 7, at 165.

33. See, *e.g.*, The opinion of the Court and the opinion of Chief Justice Hughes in *Carter v. Carter Coal Co.*, 298 U.S. 238, 278, 317 (1936). It should be noted that there were dissents not only when the "older cases" invalidated congressional legislation but also when they upheld legislation as within the commerce power. See, *e.g.*, *Chicago, Board of Trade v. Olsen*, 262 U.S. 1, 43 (1923); *Houston, East & West Ry. v. United States (The Shreveport Rate Case)*, 234 U.S. 342, 360 (1914).

34. Professor Hyneman never makes clear the exact audience for which this book was written. Since it is based on the Shambough Lectures in Political Science delivered at Iowa State University, I assume it is aimed at readers who already have some familiarity with the constitutional law field. On the other hand, certain statements in the book might indicate that it is designed primarily for people who, as the author puts it come "new to the study of constitutional law." HYNEMAN, *op. cit. supra* note 7, at 171.

35. *Ibid.* . . . . .

36. *But see* Fellman, *supra* note 21.

one, still the problem of overstatement and oversimplification. Nevertheless the overall picture presented by the book is sufficiently accurate to give the lay reader a general appreciation of the dilemma presented by judicial review in a democratic society, and what is lacking in subtlety of argument and accuracy may be compensated for by the author's clear and vigorous style of presentation.

JEROLD ISRAEL\*

RELIGION AND AMERICAN CONSTITUTIONS (1963 ROSENTHAL LECTURES).

By Wilbur G. Katz. Northwestern University Press, 1964. Pp. 114. \$3.50.

In these three amazingly comprehensive lectures on contemporary church-state problems Professor Katz of the University of Wisconsin Law School<sup>1</sup> centers his discussion on this crucial issue: should the state be neutral towards religion or should there be a strict separation between church and state?

Professor Katz, former Dean of the University of Chicago Law School, and widely known for his many thoughtful and balanced articles on the "establishment" and "free exercise" clauses of the first amendment, argues in these carefully chiselled lectures on behalf of a state neutrality towards religion that would not, however, result in an absolute or strict separation of church and state. Professor Katz analyzes the twin forces opposed to state neutrality, first, on the part of those who assert that the state must assist religion and, secondly, on the part of those who seek to forbid all state action which, however incidentally, might render some assistance to religion.

One's first reaction to Professor Katz's definition of neutrality is to associate it with the well-known test advanced by Professor Philip Kurland of the University of Chicago Law School. Professor Kurland in his volume *Religion and the Law* argued that the two clauses of the first amendment "should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden."<sup>2</sup>

Professor Katz appears to accept the Kurland thesis, but not as a principle without exceptions; the Katz hypothesis is neutrality but with an understanding that the state should be an institution which

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1. Professor Katz is also the chairman of the National Commission on Church-State Relations of the Protestant Episcopal Church.

2. KURLAND, *RELIGION AND THE LAW* 18 (1962).