Supreme Court Activism and Restraint

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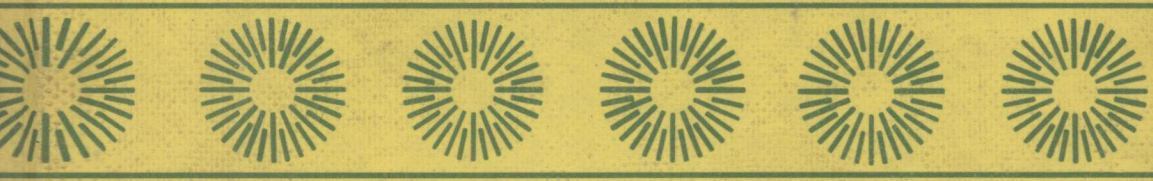

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Preface

The purpose of this book is to bring together for the first time in one place a collection of original historical, normative, and behavioral essays on the exercise of activism and restraint by the U.S. Supreme Court. Judicial activism and restraint are central concepts for students in any discipline who study the Supreme Court. Therefore, this volume can be used by upper-division undergraduates and graduate and law students studying constitutional law, legal history and philosophy, and judicial process and behavior.

The book is designed to examine questions of Supreme Court activism and restraint by presenting a wide spectrum of views on the character and scope of the Supreme Court's power in the American political system. Rather than advancing one point of view, the book illuminates the fundamental issues in the debate over the Court's power by providing provocative and conflicting perspectives on those issues. In this way, the book poses and explores afresh the enduring questions that have long informed scholarly inquiry on the Court's function in our constitutional system.

Despite the central place that students of the Supreme Court must assign to the concepts of activism and restraint, it is surprising that no volume in print attempts to do what we have tried to accomplish in this book. The salience of the subject matter, the diversity of positions advanced, the presentation of material written specifically for this volume, and the inclusion of chapters written from historical, normative, and behavioral perspectives lead us to believe that this book fills a substantial gap in scholarly work on the Court. To be sure, Raoul Berger's *Government by Judiciary* (1977), Donald L. Horowitz's *The Courts and Social Policy* (1977), and Lino Graglia's *Disaster by Decree* (1976) address some of the issues on which our contributors focus. However, these books have a narrower scope than this volume, are uniformly critical of the Supreme Court's policymaking, and advance highly individual assessments of the Court's proper role. It should also be emphasized that the chapters in this book were completed in 1979 and 1980, and thus do not address questions and arguments presented in two important books published recently: Jesse H. Choper's *Judicial Review and the National Political Process* (1980) and John Hart Ely's *Democracy and Distrust* (1980).

Like any book of this scope and length, the editors have benefited from the cooperation and assistance of many people since the volume was first conceived in 1978. First, of course, we express our deep appreciation to the contributing authors whose efforts will ultimately determine the value of this volume. Second, several anonymous reviewers significantly contributed to the process of substantive revisions. Finally, we wish to thank Karen Finger for typing various versions of the chapters, Robert Wigton for his assistance in proofreading the manuscript, and Caitlin McCormick for her editorial suggestions.

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Part I
Historical Perspectives

The concepts of activism and restraint bear directly on what is perhaps the central question that can be asked about the U.S. Supreme Court—what is the proper role and range of powers of the Court in our governmental system? This has been an enduring question for scholars of the judiciary throughout the Court's history. Indeed, in the past several years we have witnessed a flurry of controversial books and articles on the "Imperial Judiciary" or "Government by Judiciary" which have once again raised scholarly and public debate about the role of the Court.[1] Most of this literature suggests that the courts are reaching out and grabbing too much power in the American political system.[2]

The chapters in part I focus on historical issues, showing that the history of the Supreme Court has been an extraordinary one. Unquestionably, the Court has evolved into a unique governmental institution. This is true primarily because of the frequency and significance of the Court's intervention in major political, social, and economic issues throughout our nation's history. There was surely little prescience at this country's founding of the position and authority the Court was to claim and win for itself in our system. It is worth recalling that in their history of the Republic, Morison and Commager concluded that "the Constitution left this branch of the government [the federal judiciary] even more inchoate than the others."[3] Indeed, even a cursory examination of the Constitution provides striking evidence of the unspecified nature and formless character of the judicial power established in Article III. A comparison with the other branches is instructive.

Article I of the Constitution establishes the legislative branch. It discusses the nature of the powers of Congress in approximately 2,300 words. The description of Congress in Article I, Section 8, includes a lengthy and rather precise elaboration of the authority that the national legislature was intended to exercise. Article II of the Constitution creates the executive branch. It describes in roughly a thousand words the authority of the president and lists the numerous specific powers, as well as the more general responsibilities, granted to the chief executive.

In striking contrast to the constitutional provisions structuring the power of the Congress and the president, Article III, which establishes the federal judiciary, consists of less than four hundred words. It contains no listing or itemization of powers of the sort found in the Articles creating the judiciary's sister branches. While Article III, Section II, speaks directly to the jurisdiction of the federal court system, there is no attempt whatever to delineate the nature of the judicial power. In fact, Article III, Section I seems to take that question for granted by simply stipulating, without further explanation, that "[t]he judicial

Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The form and substance of that power receives little elaboration. In fact, the Court's most dramatic power, that of judicial review, is not explicitly recognized or authorized in the Constitution, but derives from the clever but refutable logic of Chief Justice Marshall in *Marbury* v. *Madison.*[4]

The constitutional omission regarding the distinctive nature of the judicial power is of critical importance in appreciating the historical development of the Supreme Court. To a greater degree than has been true of the other branches, the Court has determined for itself the dimensions of its role in American government. To be sure, there was an uncertain start as prominent political and legal figures refused to accept, or resigned, seats on the Court, because the institution lacked the prestige and authority of Congress and the presidency.[5] However, beginning with several major—most would say activist—decisions under the chief justiceship of John Marshall from 1801 through 1835,[6] the Court gradually established its place as a third coordinate branch of our national government. Few would disagree with Lawrence Friedman's assessment that the great chief justice "had a sure touch for institutional solidity."[7] The Marshall era transformed the Court into far more than an ordinary court of law: it became a powerful policymaking body, which asserted and won the authority to influence some of the most salient issues of our nation's formative years. It is perhaps not entirely coincidential, then, that near the end of the Marshall era de Tocqueville was moved to remark that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[8]

And so it has been throughout the course of American history as constitutional law and American political history have become inextricably intertwined. Of course, some Courts have leaned more toward frequent and influential intervention into the political process, while others have been relatively quiescent. Carl B. Swisher characterized such oscillations thus: "[i]n some periods and situations the Court appeared . . . so cautious and so eager to avoid decision of constitutional questions as to be derelict in the performance of its duties. At other times it has stirred popular wrath and damaged its prestige by deciding questions beyond the scope of seeming necessity."[9] In this sense an understanding of Supreme Court activism and restraint is vital, for in large measure the Court's tendencies toward activism and restraint constitute the core of its history and its impact on American national development. These concepts or their equivalents have therefore been used for nearly two hundred years to describe and understand the work of the Court.

Part I is composed of five chapters that attempt generally to place some of the questions about activism and restraint in historical perspective. In the initial chapter, Charles M. Lamb analyzes the concept and practice of judicial restraint, thus providing an introduction to restraint by examining and critiquing its basic premises and its leading maxims. Lamb emphasizes the subjective, relative nature

of the concept and asks whether we should not totally abandon the notion of restraint because of the perplexing problems and ambiguities associated with it. He concludes that, although the concept of restraint suffers from several weaknesses, scholars have yet to develop an acceptable substitute; hence, Lamb argues that it should not at present be abandoned. Lamb further contends that rigorous behavioral research holds out the prospect of clarifying some of the limitations of the label.

Marvin Schick, in chapter 2, argues that judicial activism is a dynamic concept that must be assessed in the context of the politics and history of a given era. During most of the Court's history, he says, there was comparatively little judicial activism. However, he maintains that within the last half-century virtually every Supreme Court has been activist. Schick believes that this is due not to the predilections of individual justices, but to changes in the Court's environment. The pool of potential litigants is broader now, and it is more organized, attentive, and politicized than ever before. The growing politicization of the Court's environment has significantly changed the range and nature of issues brought before the justices, according to Schick, and has altered the role of the high tribunal in our governmental structure.

In a judicial system based upon precedent, one would expect that a Court's formative years would leave an indelible imprint on future developments. In a provocative argument in chapter 3, however, Wallace Mendelson examines the work of the Marshall Court during the country's early years and reaches some unorthodox conclusions as to the legacy that the Court left for latter-day judicial activists. The chapter challenges the conventional wisdom that Marshall was the first and perhaps the greatest exemplar of judicial activism.[10] It is a serious misreading of our constitutional history and law, Mendelson argues, to see the seeds of contemporary judicial activism in the work of the great chief justice. Mendelson's chapter, along with those of several other authors in this volume, raises the bedeviling issue of how one can properly define and apply the labels of judicial activism and restraint.

In chapter 4, Daniel Novak continues that theme in his exploration of activism and restraint in the economic sphere. He finds that Supreme Court decisions on economic and property rights present a consistent pattern of activism throughout much of our history. As Novak sees it, almost from its inception the Court protected business freedom and defended property rights against encroachments by elected legislatures and executives. Novak examines the Court's intervention in these matters from the country's founding to the 1930s. The Court's economic activism reached its peak, of course, in the conflict over President Franklin Roosevelt's New Deal. That conflict ultimatley deflated the Court's economic activism and caused it to retreat from its prominent role in national economic policymaking.

In the fifth and final chapter of part I, Gregory A. Caldeira and Donald J. McCrone provide an overview of the Supreme Court's development by asking

whether the Court has been more activist in modern times than it was in previous eras. The authors measure activism by tallying the number of instances per year from 1800 to 1973 in which the Supreme Court invalidated state or federal laws. Historical patterns are presented and analyzed. The authors conclude that there was no significant trend in judicial activism toward the state and federal legislatures before the Civil War. However, they see the Civil War as a watershed period: from the end of the war through 1973, their data show that there have been gradual, albeit irregular, increases in the number of federal and state statutes invalidated by the Court each year.

Notes

1. See, for example, Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge: Harvard University Press, 1977); Archibald Cox, *The Role of the Supreme Court in American Government* (New York: Oxford University Press, 1976); John Charles Daly, Abram Chayes, Ira Glasser, Antonin Scalia, and Laurence Silberman, *An Imperial Judiciary: Fact or Myth?* (Washington: American Enterprise Institute for Public Policy Research, 1979); Ward E. Elliott, *The Rise of Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1845-1969* (Cambridge: Harvard University Press, 1974); Nathan Glazer, "Should Judges Administer Social Services?" *The Public Interest* 50 (Winter 1978): 64-80; Nathan Glazer, "Towards an Imperial Judiciary?," *The Public Interest* 41 (Fall 1975): 104-123; Lino A. Graglia, *Disaster by Decree: The Supreme Court's Decisions on Race and Schools* (Ithaca: Cornell University Press, 1976); Donald L. Horowitz, *The Courts and Social Policy* (Washington: The Brookings Institution, 1977). For a sampling of the earlier literature that also raises the specter of an "Imperial Judiciary" and urges judical restraint, see Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962); Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper and Row, 1970); Louis B. Boudin, *Government by Judiciary* (New York: Goodwin, 1932); Learned Hand, *The Bill of Rights* (Cambridge: Harvard University Press, 1958); Philip B. Kurland, *Politics, the Constitution and the Warren Court* (Chicago: University of Chicago Press, 1970); Philip B. Kurland, "Foreword: 'Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government,' " *Harvard Law Review* 78 (November 1964): 143-176; Henry M. Hart, "Foreword: The Time Chart of the Justices," *Harvard Law Review* 73 (November 1959): 84-125; Louis H. Pollock, "Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler," *University of Pennsylvania Law Review* 108 (November 1959): 1-34; Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (November 1979): 1-35.

2. Daly et al., *An Imperial Judiciary*, p. 11.

3. Samuel Eliot Morrison and Henry Steele Commager, *The Growth of the American Republic* (New York: Oxford University Press, 1962), 1:322.

4. 1 Cranch 137 (1803).

5. See, for example, Robert G. McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 1960), p. 31.

6. For examples see *Marbury v. Madison,* 1 Cranch 137 (1803); *Fletcher v. Peck,* 6 Cranch 87 (1810); *Martin v. Hunter's Lessee,* 1 Wheaton 304 (1816); *McCulloch v. Maryland,* 4 Wheaton 316 (1819); *Cohens v. Virginia,* 6 Wheaton 264 (1821); *Gibbons v. Ogden,* 9 Wheaton 1 (1824).

7. Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), p. 117.

8. Alexis de Tocqueville, *Democracy in America,* ed. Phillips Bradley (New York: Knopf, 1945), p. 280.

9. Carl Brent Swisher, *The Supreme Court in Modern Role,* rev. ed. (New York: New York University Press, 1965), p. 5.

10. It is interesting to point out that Mendelson, like most other scholars, has previously classified Marshall as an activist. See Wallace Mendelson, *Justices Black and Frankfurter: Conflict on the Court,* 2d ed. (Chicago: University of Chicago Press, 1966), p. 116.