BOOK REVIEW

The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-made Law, CHRISTOPHER WOLFE, Basic Books, Inc., New York, New York, 1986, pp. 356.

The United States is in the midst of a political controversy concerning the role of the judiciary. The recent desire of the coordinate branches of the Federal government to limit the activism of the judicial branch is evident from former President Reagan's ill-fated non-acquiescence policy,[1] the appointment of the controversial William Rehnquist as Chief Justice of the United States Supreme Court,[2] the impolitic statements of Edwin Meese, former Attorney General of the United States,[3] and the nomination and ultimate rejection of Robert Bork for the United States Supreme Court.[4] Thus, Christopher Wolfe's book, The Rise of Modern Judicial Review ("Judicial Review"), comes at a critical point in the development of our constitutional jurisprudence.

Mr. Wolfe, a professor of political science at Marquette University, charts the changes in the nature of judicial review since its inception in early English and American common law. He

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[1] In 1984, the Reagan Administration's Social Security Administration adopted the policy of denying benefits to thousands of people in situations similar to cases in which federal courts had required payment. *See, e.g.*, Pear, *U.S. Flouts Courts in Determination of Benefit Claims*, N.Y. Times, May 13, 1984, § 1, at 1, col. 3. This controversial policy was soon abolished. *See, e.g.*, Pear, *U.S. Will Drop Efforts to Halt Aid to Disabled*, N.Y. Times, June 4, 1985 § 1, at 1, col.2.

[2] President Reagan chose Chief Justice Rehnquist based in large measure on the latter's well-known reputation for "conservative" views and disapproval of "judicial activism." *See, e.g.*, Savage, *Rehnquist Sworn In as Chief Justice . . . Reagan Urges "Judicial Restraint"*, L.A. Times, Sept. 27, 1986, § 1, at 2, col. 1; Taylor, *Rehnquist and Scalia Take Their Places on Court*, N.Y. Times, Sept. 26, 1986, § 1, at 8, col. 3; Savage, *14 Years On Court; Rehnquist's Conservatism Remains Firm*, June 18, 1986, § 1, at 1, col. 5.

[3] Mr. Meese advocated the overthrow of *Miranda v. Arizona*, stated that Supreme Court precedents are not necessarily binding, and criticized the incorporation of federal constitutional rights to the States. *See, e.g.*, Shenon, *Law Review Article by Meese Assails Rule on Warnings to Suspects*, N.Y. Times, Jan. 23, 1987 § A, at 13, col. 1; Taylor, *Meese Says Rulings by U.S. High Court Don't Establish Law*, N.Y. Times, Oct. 23, 1986, § A, at 1, col. 6; Lewis, *Abroad at Home*, N.Y. Times, Sept. 30, 1985, § A, at 15, col. 1.

[4] It has been said that President Reagan chose Judge Bork on the basis of his ideology as well as his judicial merit. *See*, Boyd, *Picked for High Court; Reagan Cites His "Restraint"*, N.Y. Times, July 2, 1987, § A, at 1, col. 6; Taylor, *Judge Bork: Restraint vs. Activism*, N.Y. Times, Sept. 13, 1987, § 1, at 1, col. 1; *see also* Greenhouse, *Bork's Nomination Is Rejected 58-42; Reagan "Saddened"*, N.Y. Times, Oct. 24, 1987, § 1, at 1, col. 3.

theorizes that the judiciary has improperly usurped the legislative function under the guise of constitutional interpretation. While professing to be a neutral historian, rather than an advocate of the contemporary "conservative" trend, his description of the changes in American judicial power calls into serious question the present nature of judicial review.

The author begins his inquiry by quoting Alexander Hamilton in The Federalist Papers.

> The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment. . . .[5]

Mr. Wolfe argues that modern judicial power is more an exercise of will, that is, legislative power, than the use of judgment or interpretation.[6]

The book is divided into three parts, in accordance with the author's tripartite view of the history of American judicial review. He refers to the "traditional" era, extending from the founding of the Constitution in 1789 to the ending of the Civil War in 1890; the 'transitional" era, from 1891 to the "Court-packing" scheme of President Roosevelt in 1937; and the "modern" era, from 1938 to the present.

The transitional era, according to the author, was characterized "by its assumption that the Constitution was both intelligible—it had a real or true meaning that could be known if one read it properly—and substantive—it established principles that were definite and clear enough to be enforced as legal rules, rather than merely proclaiming vague generalities."[7] In the transitional era, however, judicial review transformed into "a defense not so much of the Constitution as of the natural law (or, more precisely, natural rights) and above all of property rights."[8] Mr. Wolfe asserts that, while the justices of this transitional era had departed from the practice of the previous period, they retained the traditional era's theory and understanding of judicial review. This obscured the process of change. He also postulates that post-1937 constitutional interpretation, despite its seeming deference to the legislature, reflected "the victory of a distinctly modern understanding of judicial power as

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5 The Federalist No. 78, at 393-394 (A. Hamilton) (G. Wills ed. 1982).

6 Judicial Review at 4-5.

7 *Id.* at 3.

8 *Id.* at 4.

fundamentally legislative in character."[9] While this new "legislative" power of the Courts is never defined clearly or distinguished from other forms of governmental power, the author concludes that modern decisions in the field of civil liberties are simply a transplantation of the now-discredited "legislative" notions of economic due process embodied in decisions of the pre-1937 Court.

Mr. Wolfe appears to equate "judicial activism" with usurpation of the legislative function, exemplified by his statement that "[b]y the 1970's, it almost seemed as if it were difficult to find an issue in which some federal judge somewhere might not intervene to lay down the 'law.' "[10] To illustrate, he quotes from Donald Horowitz's *The Courts and Social Policy*:

> [T]he scope of judicial business has broadened. The result has been involvement of courts in decisions that would earlier have been thought unfit for adjudication. Judicial activity has extended to welfare administration, prison administration, and mental hospital administration, to education policy and employment policy, to road building and bridge building, to automotive safety standards, and to natural resource management.[11]

Thus, concludes Mr. Wolfe, the courts exceeded the proper scope of their power. He does not, however, take into account the changing functions of American government since its inception and the vastly expanded role of the federal authority, under the influence of which all branches of the federal government have enlarged their compass.

Mr. Wolfe appears to recognize, however, that the understanding of how the courts have reached their present state cannot properly be explained by reference solely to their self-serving explanations. The legal opinions promulgated by the Supreme Court to explain its actions are properly a factor in the analysis, but it must also be recognized that its reasoning is a case-oriented and often expedient analysis of the particular issues before the Court. Mr. Wolfe carefully scrutinizes the effects as well as the words of the more important cases for evidence of the doctrinal shift which is the cornerstone of his thesis. Overall, this is a well-researched and thoughtful analysis.

In discussing the doctrine of judicial review and the possible alternatives to the present system, the author suggests that, while

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[9] *Id.* at 6.

[10] *Id.* at 7.

[11] *Id.* (quoting D. Horowitz, The Courts and Social Policy at 4-5 (The Brookings Institution 1977)).

judicial review is the correct constitutional doctrine, it could lead to an unqualified judicial supremacy, destroying the principle of separation of powers. In his opinion, the failure of the courts to pay more respect to the doctrine of legislative supremacy has already or will soon cause such a result. To remedy the problem, Mr. Wolfe suggests a return to the doctrine of co-ordinate review, obsolete since *Marbury v. Madison*.

> There is no necessary problem with judges giving effect to unconstitutional laws, anymore than with presidents enforcing unconstitutional laws passed over their vetos. In both cases, they are not responsible for the unconstitutionality per se—the blame for that belongs to the legislature. One can easily imagine a polity in which judges and executives were not permitted to consider whether laws violated the Constitution, but simply took the laws as they were given, and enforced them.[12]

This unhappy exercise in imagination demonstrates Mr. Wolfe's willingness to replace the now-traditional norms of American jurisprudence with long-discredited historical models. This willingness of conservative scholars to advocate drastic reactionary change while decrying the slow process of juristic evolution reveals the disingenuous nature of their position.[13] The ability to place blame on another for the exercise of extraconstitutional authority cannot justify the refusal of a court to execute its function of deciding between differing views of the Constitution. Mr. Wolfe also implies that the fault for the alleged judicial excesses lies with the legal profession, "whose influence in society is magnified with the expansion of judicial power."[14] While it is no doubt true that the American Bar has had a profound influence upon the shaping of our American institutions, the modern judiciary is a product of prudent change in the light of experience over years. Thus it should remain, despite Mr. Wolfe's carefully reasoned (but long-ago passe) disillusionment with the rise of modern judicial review.

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[12] Judicial Review, at 99.

[13] *See, e.g., Taylor, Newest Judicial Activists Come From the Right*, N.Y. Times, Feb. 8, 1987, § 4, at 24, col. 5.

[14] Judicial Review at 352.

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