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Panel: Judicial Review and Constitutional Limitations

JUDICIAL REVIEW AND CONSTITUTIONAL LIMITATIONS

Panel Coordinator: Nina Totenberg, legal correspondent for National Public Radio

Panelists: Justice Shirley Abrahamson, Wisconsin Supreme Court

Judge Patricia Wald, Court of Appeals for the District of Columbia

Jesse H. Choper, Dean, Boalt Hall School of Law, University of California, Berkeley

John Hart Ely, Dean, Stanford University School of Law

The Constitutional Law Panel of the NAWJ brought together distinguished theoreticians and practitioners of judicial review. Deans Choper and Ely presented abbreviated versions of their recently published theories* on the legitimacy of judicial review in a democratic society. Justice Abrahamson and Judge Wald responded with observations on the practical applications of state and federal constitutional principles to the cases they must adjudicate daily.

Deans Ely and Choper both contend that there is an inherent dissonance between our democratic form of representative government and the power of the Supreme Court to overturn legislation or adjudicate conflicts between the political branches. As a totally appointed body, the Supreme Court is not by definition politically responsible and ought to confine itself to safeguarding the rights and interests of those groups who are not well represented in the electoral process—minorities and the politically and economically disadvantaged.

Dean Choper would have the Supreme Court deny review of all claims based on federalism. He sees no need for review of federal statutes which allegedly violate states' rights because state interests are adequately represented by Congress which created the disputed legislation. Likewise, Dean Choper would

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* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).

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

not have the Supreme Court act as a referee in power struggles between Congress and the President. Both political entities are adequately armed to defend against the other's invasion of its prerogatives.

The proper exercise of judicial review by the Supreme Court, according to Dean Choper, is in the area of individual rights, where the Court must act to preserve and protect the rights of the under-represented. Analogously, Dean Choper urges judicial review where the executive or legislative branches seek to curtail the power of the courts. Because the federal courts are also outside the electoral process and therefore not represented, they must be allowed to guard against incursions into their proper authority by the other branches.

Dean Ely perceives the evolution of constitutional law since Reconstruction as having had one basic theme: extending fuller and more equal participation in the political process to previously unrepresented groups. The Supreme Court's sole legitimate function according to this thesis is to assure that government does not so exercise its majoritarian mandate as to discriminate arbitrarily or invidiously against minorities.

Since the basis of individual rights' protection is derived from somewhat inchoate constitutional language—the Equal Protection and Privileges and Immunities Clauses of the 14th Amendment, for example—the most important and burdensome task of the Supreme Court is to give content to the words of the document. There have been two traditional approaches to the problem of constitutional interpretation: one would look to the intent of the Framers and limit the operation of the document to its eighteenth century mandate; the other would identify traditional socio-political values and seek to uphold them by extending constitutional protection to rights and values so identified. Dean Ely sees both these approaches as offensive to the democratic ideal, the former because it delegates power to persons long-since dead and the latter because it is too vulnerable to the individual biases of judges. Instead, he proposes a middle ground between strict and broad construction that is basically

an elaboration of the *Carolene Products*[1] footnote, to wit, courts must protect the politically disadvantaged against oppression by the majority. When the court exercises judicial review in the context of individual rights, its anti-democratic quality is minimized. Full and equal participation for minorities cannot be entrusted to elected officials since it may be in their self-interest to keep certain groups out of the political process, opening up the possibility of discrimination by electoral mandate.

Justice Abrahamson and Judge Wald made the following remarks in response to Deans Ely and Choper's presentations.

JUDICIAL REVIEW - THE QUEST FOR LEGITIMACY AND CERTAINTY (NOTES FROM THE TRENCHES)

Judge Patricia Wald, Court of Appeals for the District of Columbia

I

I will begin by being perfectly honest with you. I don't lay claim to any scholarly background in this field. I don't even hail from academia. I did, however, spend a week or two at the end of the summer in a more or less hit-or-miss foray into the vast literature of judicial review, including Dean Ely's and Dean Choper's writings (some of them). I can't pretend to have absorbed it all; I felt somewhat like the bar mitzvah boy in the shul with the Talmudic scholars. At times, I was reminded of Herman Wouk's comment about the U.S. Navy—judicial review must be "a system designed by geniuses to be carried out by idiots." I do not suggest we judges are idiots, but I do admit that in deciding several hundred cases a year—even for us appellate types—(1) we don't get time to keep as current as perhaps we should with the law reviewers and jurisprudential thinkers; and (2) we probably don't have enough time on each case to figure out *how* to apply the theories, even if we could decide which ones to accept or reject. It may be, as the con man hero of *The Music Man* preached (I confess, in my spare time I often go to the movies instead of reading law reviews), you just have to think "restraint" or "norms" or "interpretativist" or "processed-

1. U.S. v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

based" values, and the music will come out right, but I'm dubious.

I am not being altogether cute about this nor—God knows—contemptuous of the very considerable creativity that is encapsuled in these various theories of the proper functions and scope of judicial review. I also believe the exercise has a worthwhile by-product as a counter to the periodic—and not always intellectually honest—tirades about judicial restraint and judicial activism that pepper our politics and do affect individual judge's selections, evaluations, and perhaps, in elective states, even tenure. At a more profound level, any institution including the judiciary should always be concerned with the legitimacy of its actions and the framework within which it properly functions, particularly in a democracy.

I do believe, however, that the jurisprudence of judicial review is formidable, and I think, in its present form, not very susceptible to immediate application by practicing judges (at least not on the so-called "inferior" courts which all of us inhabit). I will quote you one paragraph as an illustration, not for the validity of its remarks, certainly, but only to illustrate the diversity and elusiveness of the guidelines we are called upon to implement in our decisions:

> Professor Michaelson has devoted much of his academic career to cementing a union between the distributional patterns of the modern welfare state and the federal constitution. Professor Karst would guarantee a whole range of nontextually based rights against government to ensure "the dignity of full membership in society," which, he asserts, inheres in the "right of equal citizenship." Professor Fiss argues that the courts should give "concrete meaning and application" to those values that "give our society an identity and inner coherence [and] its distinctive public morality." Professor Dworkin charges the courts with enforcing our "constitutional morality," namely, the moral principles "presupposed by the law and institutions of the community." Professor Perry sees the court as having a "prophetic" role in de-

> veloping moral standards in a "dialectical relationship" with congress, from which he sees emerging a "more mature" political morality. Professor Richards urges that the court apply the contractarian moral theory of Professor Rawls' *A Theory of Justice* to constitutional questions. Professor Alfange tells us that the court should "translate . . . the national will into constitutional terms." Professor White's urging that the courts invoke "reasons that appeal to deeply embedded cultural values" is echoed in Professor Lupu's invitation that the court protect those fundamental values "that have a solid underpinning in our historical traditions." Dean Sandalow describes constitutional law as "the means by which we express the values that we hold to be fundamental in the operations of government." Professor Brest summarizes the view of many when he states that "constitutional adjudication should enforce those . . . values which are fundamental to our society." So doing, Professor Brest states, will "contribute to the well being of our society—or more narrowly, to the ends of constitutional government." So it goes.

That was from a discussion by Professor Monaghan for the non-interpretive school criticizing the interpretive school. His own non-interpretive friends, I might add, are not necessarily easier to follow; although they do have the merit of simplicity—we judges are urged not to look beyond the words in the document, or in some cases, the words the drafters of the documents said elsewhere, but at least no further than the era in which the Framers of the constitution lived.

All of this is by way of saying that I am not at all sure that the debate among the judicial review jurisprudentialists is really aimed at affecting the behavior of ordinary judges at all, although they constantly talk about us, and of course every case that the Supreme Court eventually decides has to pass through one of our courts.

Nonetheless, the quintessential judicial review question of whether something done by the executive or Congress or the state (not often for us because we live in that non-state, the Dis-

trict of Columbia) violates the Constitution comes to us rarely. I venture to guess that out of 600 cases decided last year in our court, only a few (in fact I can think of only one or two last term and only three the term before) involved a serious frontal attack on the constitutionality of a congressional enactment or an executive action. And even though the Supreme Court grinds out 150 or so opinions each term, it is interesting that most of the articles and books arguing about judicial review use as their conversation pieces only a handful of cases: *Brown* v. *Board*,[2] *Roe* v. *Wade*,[3] the death penalty cases, *Baker* v. *Carr*,[4] perhaps the school prayer and legislative veto cases, along with a few contrasts from the heyday of the 30s—*Lochner*,[5] *Hammer* v. *Daggenhart*,[6] and *Carter* v. *Carter Coal Co.*[7] The point is simple: constitutional cases for most federal judges are a rarity—gourmet fare, definitely not the bread and butter of our everyday worklives.

II

My second point is that few judges I know reach out for or even want to decide constitutional issues. Such reticence does not stem from innate humility alone; but from a weary recognition that anytime you reverse some governmental action on constitutional grounds, it almost inevitably means *en banc* review, or *certiorari* granted and probable reversal. The prognosis, of course, is quite different if you decide that challenged action *is* constitutional. I suggest there is institutionally and experientially a very strong built-in bias in the lower courts against holding laws or actions violative of the federal constitution. I note that in the last two *en bancs* our D.C. Circuit sent up there, in which we held warrantless search of closed containers in automobiles by police unconstitutional under the fourth amendment[8] and congressional action allowing veterans organizations,

2. 349 U.S. 294 (1955).
3. 410 U.S. 113 (1973).
4. 369 U.S. 186 (1962).
5. Lochner v. New York, 198 U.S. 45 (1905).
6. 247 U.S. 251 (1918).
7. 298 U.S. 238 (1936).
8. Ross v. United States, 655 F.2d 1159 (D.C. Cir. 1981) *rev'd*, 456 U.S. 798 (1982).

but no one else, unlimited use of tax deductible contributions for lobbying purposes unconstitutional under the equal protection clause,[9] we were promptly reversed; the third one—striking down regulations prohibiting sleeping in Lafayette Park as part of a demonstration for homeless people has been granted *certiorari*, stayed, and a third reversal may be waiting in the wings.[10] In over four years on the court, in my memory, except for a piggyback on the legislative veto controversy, only once has a court in our circuit held a governmental action unconstitutional, and had that decision survive, and then only by a 4-4 vote because of Justice O'Connor's abstention.

As a matter of fact, in last year's Supreme Court product I could find only six or so invalidations on constitutional grounds of state or federal *laws* (not including variations on the death penalty requirements and a few tax cases). And there were several *reversals* of circuit court decisions holding state or federal laws *unconstitutional*. But it's worth taking a look at an example in both categories in terms of our theories of judicial review.

Marsh v. *Chambers*[11] decided that the 200 year-old-practice of state legislatures paying chaplains for opening prayers was constitutional, although the Tenth Circuit, using the usual tests for establishment clause violations, had said it was not. Legislative prayers, the Court said, are "deeply embedded in the history and tradition of this country,"[12] and the Framers who wrote the constitution contemporaneously voted to pay their chaplain. "Their actions revealed their intent."[13] In response to the argument that this was the opening wedge, the Court emphasized that "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow";[14] no threat exists "while this Court sits."[15] Justice Brennan was not so easily comforted. He pointed out that there was no attempt by the majority to justify this practice under

9. Taxation with Representation of Washington v. Regan, 676 F.2d 715 (D.C. Cir. 1981) *rev'd* 103 S. Ct. 1997 (1983).

10. Community for Creative Non-Violence v. Watt, 703 F.2d 586 (D.C. Cir. 1983) *cert. granted* 104 S. Ct. 65 (1983).

11. 51 U.S.L.W. 5162 (1983).

12. *Id.* at 5163.

13. *Id.* at 5164.

14. *Id.* at 5165.

15. *Id.*

ordinary tests for establishment clause violations: it merely carved out an historical exception to the first amendment prohibition. He questioned the assumption the Framers wouldn't have authorized inconsistent practices:

> Legislators influenced by the passions and exigencies of the moment, the pressures of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact, and this must be assumed to be as true of the members of the First Congress as any other.[16]

I guess this is a noninterpretive decision—or is it? I don't think it's textual. Justice Brennan doesn't seem to place as much faith in the legislature as Dean Ely. Maybe the Court shouldn't have taken it at all, since it was a political question. My own reaction is everyone wanted the question settled once and for all, and now it is. Most people knew how it would come out, and they're relieved.

Now let's compare a case where the Supreme Court did overturn a law: the legislative veto case. Chief Justice Burger began with the presumption that the challenged statute is valid.[17] "Its wisdom is not the concern of the courts"[18]—but "by the same token, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it."[19] (Since 1932, 295 congressional vetoes have been inserted into 195 statutes.) The opinion's analysis is primarily textual—all legislation must be passed by both Houses and presented to the President. It was the Congress' arbitrary use of the legislative power that gave rise to the device of the presidential veto. Bicameralism was another check on that power. "Art. 1, sec. 7 represents the Framers' decision that the legislative power . . . be exercised in accord with a single finely

16. *Id.* at 5170-71.
17. I.N.S. v. Chada, 103 S. Ct. 2764 (1983).
18. *Id.* at 2780.
19. *Id.* at 2780-81.

wrought and exhaustively considered procedure."[20] Recognizing, however, that not "every action taken by either House [is] subject to the bicameralism and requirements of Article I, whether actions taken by either House are, in law and fact, an exercise of legislative power, depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in its character and effect."[21] Finding the action in *Chadha* to be essentially legislative, the result came easily. When the Framers wanted to permit one House to act alone, as in impeachment, confirmation, and ratification, it said so.

So, based on the limited sample of one term, why does the Court invoke judicial veto when it does, and vice versa. Except for legislative veto—brewing for years in the courts—the instances are very circumscribed where the veto wipes out a legislative enactment. A church veto over taverns in Massachusetts; demonstrating on the Supreme Court sidewalk; requiring I.D. from suspicious persons in California—not very heady constitutional stuff. The abortion cases this year present a special situation. Basically the Court was policing: it went through a series of state and local restrictions laid down on exercise of the basic right it reaffirmed for a woman and her doctor to agree whether to terminate a pregnancy; upheld some as permissible, denounced some as imposing an impermissibly heavy burden on the exercise of the basic right. Historically there are about one and a half cases a term that turn constitutional scholars on. This year it was the legislative veto case.

And make no mistake—it was a bonzo. It will take years to dig out of the ashes. That was a constitutional confrontation. Was the Court right? Should it have decided the case—a separation of powers case? I think it had to—a variety of laws affecting all sorts of people depended on a yes or no answer. Maybe there was no process deficiency—how could there be, given the infinite variety of matters involved in hundreds of legislative vetoes—no insular minority—but there was a three decades' long conflict between the two major branches of government simmering. Surely it could not have been fought out on the streets, or with United States Marshals, or with infinite inaction. In any society

20. *Id.* at 2784.
21. *Id.*

as complicated and varied as ours, there must be an umpire—preferably one accepted by the bulk of parties and people. We cannot keep moving unless there is one. Hence, I have a gut skepticism that judicial review really can or should be contained by narrow theories, most of which are incomprehensible to the judges. Like chaplains, we are "part of the fabric of our society."[22] As I perceive it, we have no rampant campaign to overturn state or federal laws passed by legislatures: quite the opposite. Courts are remarkably political, in the lower capital sense of the word. When such a danger presents itself—as in the 30's—the chances are politics will triumph. Meanwhile, the translation process of the jurisprudential theories into our daily work is difficult if not impossible. Pragmatist that I am, I doubt if judicial review really can be limited to process deficiencies, or insular minorities, or even civil rights. We need the third branch—underpaid, beholden to none, occasionally out of touch, but always independent to cool a hyped-up society in its hottest disputes. It's silly to pretend otherwise—there's no place else to go.

III

This is not, however, to say that our only contact with constitutional issues in judicial review comes by way of such rare direct challenges.

There is an intermediate group of cases—not large, but not insignificant—where lower federal courts, confronted with the potential of a possibly serious constitutional question, employ—as indeed, we have been instructed to—time-honored diversionary techniques to prevent head-on constitutional collisions. We decide non-constitutional questions first, so that we may never have to reach the constitutional ones. The judge's notion of whether there is a serious constitutional question present and what form it takes, of course, colors her judgment on the statutory construction. Now, most of us legal realists recognize that in so doing we are making implicit—sometimes ex-

22. Marsh v. Chambers, 51 U.S.L.W. 5164.

plicit—constitutional judgments about what that document will or will not tolerate, in order to interpret the statute to avoid the constitutional question. Thus, through the back door, we make a pass at more constitutional questions than it may appear. But the rules under which we operate when we are on our constitutional avoidance track are different from the conflicting themes of constitutional adjudication so hotly debated in articles and seminars.

Thus, the way in which we most often address fundamental constitutional rights is through statutory construction. In this way, our perceptions of fundamental rights and values are infused into our statutory interpretations, rather than made the centerpiece of explicit constitutional decisions. But other facets of the judicial review debate are muted in this context: the legitimacy of judicial review at all, the separation of powers problems inherent in it, the strength of presumptions of legislative validity, hierarchies of values, insular minorities, and the *Carolene Products* footnote.[23] In passing on the interpretation rather than the validity *per se* of congressional enactments, we are cosmetically allied with Congress—enforcing its intent, not challenging its constitutional judgment. And we have been entrusted with the power of reviewing enforcement of its enactment by Congress itself. We are its designated agent, not an interloper. We are engaged in a search for its intent, and under prevailing rules of statutory construction, confined in that search to the words that came out of its collective mouth: in hearings, committee reports, floor debates. Unlike the explorers of constitutional law, we are not ordinarily allowed to run at will, foraying into the Framers' private letters, newspapers of the times, and even contemporary eighteenth century thinkers in other lands. But still we construe in the shadow of the Constitution and that shadow can often account for the tilt that throws our construction one way or the other.

So constitutional shadows put a thumb on the scale in favor of a construction avoiding the question. Whether that rule of statutory construction can or is being carried too far is another question. Why, after all, should courts avoid legitimate constitutional questions through this device, if it means skewering true

23. 304 U.S. at 152-53 n.4.

legislative intent?

Whether a decision involving an important or even "fundamental" right arises in or is decided by statutory construction or constitutional adjudication seems to be a function of the lawyer's tactical judgment, the clarity, or even governmental level of the legislative response which may, in turn, reflect the status of the issue in the national agenda or in the agenda of the political groups to which the political branches respond. It can—at least at the Supreme Court level—also turn on the Court's choice of responses—whether it wishes to turn from the constitutional issue and take refuge in a presumption of statutory construction or bite the constitutional bullet. Lower federal courts, I believe, generally hold back more from the constitutional course.

IV

What has all this to do with Professors Ely's and Choper's themes on judicial review? For one thing, federal courts, at least, strike down relatively few actions as unconstitutional but, when they do, they are more apt to be executive than legislative actions. Executive actions, in my experience, tend to be less directly representative than those of Congress; executive decisions reflect more bureaucratic input. Hence, we in the courts may be less representation-enforcing even when we do declare actions of the political branches unconstitutional than would first appear.

Second, most of the cases where we do perform constitutional adjudication do not involve declaration of new rights—those decades may indeed be gone forever—the right to an abortion, to one person one vote, to desegregate schools. Rather, they involve constitutional balancing, deciding whether the burden placed on the exercise of some right or power is justified by the strength of the interest asserted by the legislative or executive branch. The questions that must be answered in the balancing cases include: How heavy or light is the burden? If it is light or trivial, stay on square one. If it is heavy, go on to square two. How strong or weak is the state interest asserted to justify the burden? How important in the rights' hierarchy is the right or interest being burdened? The value judgments come in

answering those questions about heavy and light, very important or only somewhat important. And, to be honest, the Supreme Court (and other judges) do appear to use a wide range of sources, including newspapers, undocumented assertions, history, sociology, common sense, medical lore, statistics, law reviews, almost anything printable, in making those qualitative decisions.

This is not to say that concerns about judges overruling majoritarian decisions do not apply to such decisions. In overruling a legislative or executive action because it places too heavy a burden on a right, the Court is redoing a balance the other branch presumably has already done. And when the decisions on what is heavy, light, strong, or weak come from a potpourri of informational sources, there will always be doubt that the judges can do a better job of weighing them than the popularly elected branches. Conceivably, they may do a less biased or more honest weighing job, but certainly they have no inherent claim to competence in such scaling. Yet, this is the way the Supreme Court has told us to do the job, and certainly if we look at the way they do it, I agree it's not always reassuring. This year's abortion cases are a classic illustration. The basic right to an abortion had been declared long since, and that decision, the Court said, would not be revisited.

Rather, what the Court had to decide was whether a wide variety of state and local government responses attempting to restrict and control the right went too far constitutionally in burdening it. Among the regulations challenged were ones requiring hospitalization after the first trimester, notification and consent by parents for unmarried minors, that the physician tell the patient certain specified things including that the fetus is a human being, that the unborn child may be viable, that abortion is a major surgical procedure and may result in severe emotional disturbance, a twenty-four-hour waiting period requirement, and a requirement that fetal remains be disposed of in a "humane" manner. Violations were criminally punishable.

One gets the distinct feeling from reading Justice Powell's majority decision that the Court sensed that many of these restrictions were enacted in order to erode or even wipe out altogether the basic right. In that sense, it may have been a case of

disingenuous legislation akin to strategems and weaseling on basic rights to erode school desegregation policies in the early civil rights days of the 60's. Even if we are dealing with women, not blacks, in abortion cases, and women have access to the political process, still something sticks in the gut about presuming the legislature has gone about its balancing conscientiously when the results cry no. And indeed the Court was not particularly deferential in these cases to the legislative balance.

Several of the restrictions were struck down on what seems to be a basis of common sense, common knowledge, accepted (in some quarters) dogma; conversely, the dissents' howls of anguish seemed equally based on individual preconceptions of how the world works and how people and institutions will react. Neither side offered any empirical proof of their assumptions.

In our court recently, we had to decide if restrictions on signs five or ten feet, upheld by aluminum tubing, unduly burdened the acknowledged right to demonstrate in front of the White House. Were it to be left entirely to legislative or executive discretion, a cumulation of such restrictions could at some point make the right worthless—common sense tells us that. So courts are left to do the eternal balancing act. My trouble with the thrust of the representation reinforcement limitation is that it forces courts to sit by and watch a hostile legislature or executive do away with a constitutionally declared right through the device of restrictions.

COMMENTS

Justice Shirley S. Abrahamson, Wisconsin Supreme Court

I'm delighted to participate on this panel. Ordinarily, in interpreting writings like constitutional or statutory provisions or appellate opinions, we have to guess at the Framers' intent. We have with us today two framers, and they can set forth their own intent. I think they must know how it feels to be interpreted since they have been so well reviewed and discussed. I wonder if they say to friends, as an appellate court judge sometimes says from the bench, "Did I say that?"

I originally thought of coming up and saying, as Dean Ely and perhaps Dean Choper hinted (or maybe they did more than hint), that perhaps their works and this discussion have no value for state court judges, other than as an interesting intellectual exercise. But Judge Patel would be disappointed with such a response, and I thought the messages of these two deans have meaning to more judges than just those on the United States Supreme Court.

So I decided that I would give this more thought. I spent $28.50 for Choper's book, $6.95 for Ely's book, and I, like Judge Wald, xeroxed and read many, many pages of reviews and articles by scholars in the field of judicial review. As I read, I still had the uncomfortable feeling that maybe this panel was not the forum for a state judge. But a newspaper piece I read put the two books into a special perspective.

Since I'm a populist, I always read the local newspapers—especially when they're delivered free of charge to the hotel room. A letter to the editor in yesterday's *San Francisco Chronicle* raises the issue that the academy raises as to judicial review, that is, the legitimacy of court action which appears to be counter-majoritarian. But the letter raises the issue not in the olympian field in which our two academicians write, namely judicial review under the federal Constitution by the highest court of the United States, but in the everyday workings of a state court interpreting state statutes. I read the letter (which some of you may have read) not in terms of the merits of the case discussed by the letter writer, but as an example of a lay person's—I assume it's a lay person's—discussion of the issue of legitimacy of judicial decision making.

The letter is entitled, "A Just Society?" It reads as follows:

> In a just society, where the courts bowed to the will of the people [I think that's a reference to majoritarianism] Archie Fain would not be allowed to walk the streets as a free man. He would either be put in the gas chamber or he would face life imprisonment.
>
> In a just society—

The letter writer doesn't refer to our society as "democratic" as the academicians do. Lay people talk about a *just* society. I do

not think the word "just" appears often in the two books we are talking about today. To continue with the letter:

> In a just society, 62,000 people signing a petition to keep this convicted murderer in prison would have an effect on the courts. But not in this case, where the justices have ruled that 'public outcry' is not sufficient reason to keep Fain in jail.
>
> In a just society, the governor of California, acting on executive privilege and with the will of the people in mind, would be allowed to rescind Fain's parole without interference by courts.
>
> Fain's release is the worst miscarriage of justice and the democratic process I've ever experienced.[24]

The letter is an interesting commentary on what the writer perceives as the judiciary functioning in a counter-majoritarian way, a commentary not from an academician, not from a judge, but from a representative of the people whom the judicial system serves. Now, we could discuss, but I won't, the merits of the Fain case, the procedural posture of the case, and the rules of statutory construction. The letter, however, raises a broader question, for all of us, whether we be at the first level of a trial court, at an intermediate appellate court, or at the highest court of the state or federal system. It is the question which I believe underlies the Ely and Choper works: How do we judge, and what is the legitimacy of our actions?

These two books concerning legitimacy of judicial action are directed, unlike the letter, at judicial review by the United States Supreme Court. Constitutional interpretation and the legitimacy of judicial review appear to come into vogue in academic discussions every twenty years or so. As we again question the concept of judicial review in the 1980's and are concerned about the power of the judiciary in this country, it is interesting to note that our European colleagues are turning more and more to the judiciary and to the adoption of judicial review.

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24. San Francisco Chronicle, Oct. 8 1983, at 32, col. 4.

Let me tell you why I think the two books, at one and the same time, do and don't have something to say to the state judge in her everyday world of judging.

The two authors pose the question of the legitimacy of judicial review in a democratic society on the grounds that judges are not elected representatives of the people, and that judicial decisions are final. These themes do not apply to many state courts since, first, many state judges are elected and, second, generally our decisions are not final.

I am a judge, elected statewide on a contested, nonpartisan ballot. One can argue that I am a representative of the people. I, like the legislator, come to office with a mandate from the people. This reasoning is not totally satisfactory. The nature of the commitment I made when running for election differs from that of the legislator. I did not promise, like a legislative candidate, to support any group or any group's wishes in deciding an issue that comes before the judiciary. I did not in my campaign explain my personal views on issues pending before the court or the state, or explain my personal value system. I made a promise to the people of the state that I would be a good judge; I promised I would be fair and would administer justice impartially; I would obey and abide by and support the federal and state constitutions. Running for election I sounded very much the way a nominee for a federal judgeship sounds in a Senate confirmation hearing. I promised to interpret the law and abide by the majoritarian view expressed in the statute unless contrary to the Constitution. I promised to interpret the constitutions as written and to abide by the doctrine of *stare decisis*. Although many have commented that the legislative process is not an expression of majority will, I cannot cast myself as a representative of the people, as can a legislator who has run on a platform which the people evaluate and review in terms of the legislator's individual decisions on the merits of an issue.

Second, state court decisions are rarely final—not even the decisions of the highest court of the state are necessarily final. As long as the court is not final, according to the Ely-Choper theses, the majoritarian democratic process can work. The court may slow things down awhile, but the majority can still act to overrule the court.

As to the federal Constitution, I as a state court judge do, of course, interpret the federal Constitution. State court decisions on federal questions are not final—but they are important. Although it is popular to think that the United States Supreme Court is protecting individual rights via the federal Constitution, you know that trial judges, state and federal, protect individual rights every day. State and federal judges deal with search and seizure, as an example, much more frequently than does the United States Supreme Court. The state courts touch the lives of more people a day than the United States Supreme Court does in the 150 to 200 cases it hears in a year.

As to the state constitution, our state court might very well be the court of last resort. I might be final if the United States Supreme Court really believes me when I write that I'm interpreting the state constitution, and the Court does not view me as being devious and trying to avoid its review. In any event, even if the state supreme court is final in its interpretation of the state constitution, in many states, the people, by majority rule, can overrule the court decision.

The major part of the state judge's job is to interpret and apply state laws. It is my job to interpret state statutes, not make state policy. The legislature sets forth the policy, I fill in the cracks. Sometimes the cracks are large, sometimes they're small. But in any event, the legislature can change the "fillings."

As to the common law, judge-made law, judges have broad authority. And yet we're reviewable and reversible by the state legislature.

In Choper and Ely terms, we state judges are not countermajoritarian because our decisions for the most part can be changed, at least for future cases, by the majority acting through the legislature.

I suggest, however, as Judge Wald did, that although it's interesting to look at the concept of judicial review in terms of a court striking down, with finality, legislative and executive enactments on grounds of unconstitutionality—it's a very dramatic

event when the court strikes down the work of another branch—this function of the courts has been stressed too much. Invalidation of laws is the rare event, not the common event. Thousands of laws are passed each year. Most of them are never reviewed by any court; if they're reviewed, most of them are not invalidated. We have also overemphasized the idea that the judicial decision is final. Studies show that even if a law is invalidated, the judicial decision declaring invalidity is not necessarily final. Courts have been known to overrule earlier decisions. There are a variety of ways a legislature may get around the court's decision. An interesting article by Professor Janet S. Lindgren in the *Wisconsin Law Review*[25] reports a study of the interaction of the courts and the legislature in New York State at the turn of the century. Professor Lindgren concludes that the courts' overturning of state legislation was not generally a final answer but was part of a dialogue between the court and the legislature. The legislature continued to pass laws to see what the dialogue would bring.

Although the Deans' discussions of the legitimacy of judicial review on the basis of the nonrepresentative character of the courts and the finality of judicial decisions have limited applicability to state judges (and may be challenged even as applied to federal judges), these authors nevertheless have something important to tell state judges in helping us decide our day-to-day cases.

We judges must recognize that every case is potentially one of law reform and law revision and every litigation is, in a sense, counter-majoritarian whether it's before an elected or an appointed judge. The judge, often without specific direction from the legislature or prior case law, and always without discussion with the people or the people's representatives, is making a decision binding on the parties and others who are not before the court. I spoke previously about the court's task of filling in the legislative cracks. Dean Ely objects to legislative delegation to administrative agencies. He thinks the people should hold the legislature's feet to the fire and make the democratically elected branch of government set forth legislative policy in greater de-

25. Lindgren, *Beyond Cases: Reconsidering Judicial Review*, 1983 WIS. L. REV. 583 (1983).

tail in legislative enactments. I suggest that after you deal with enough legislation as a state court judge, you realize that the legislature has frequently delegated the establishment of policy without adequate guidelines not only to the administrative agencies but also to the courts. The legislature, unable to make up its mind about key facets of the law or unable to muster a majority either for or against a particular provision, omits a key provision or leaves it ambiguous, thus delegating to state judges the task of making policy in the guise of filling in the legislative cracks. What principles guide the judge's interpretation of the statute or common law or the application of the law to the facts?

Deans Ely and Choper caution us, and especially Dean Ely tells us, that as judges we should not use our own personal value system, our own personal predilections, in reaching our decisions. I agree. But it is easy to say that the judge should not decide cases following her own sense of justice. It is easy to say that the judge should not decide cases following what she believes is the popular view, except as the popular view may be expressed by a jury instructed on the law by a judge. You will all remember reading about a judge disciplined because he decided cases on the basis of how the court-watchers seated in the courtroom voted on the case. The judge cannot be guided by the results of an opinion poll. In talking to the citizens of my state, I have not found anyone who wants me to decide any case according to popular community wisdom.

What is the judge to do when an agency or the chief executive acts in a manner that is very popular but contrary to the statutes or constitution? Each of us knows how often we have had to say: "I do not like the result I am reaching, but the statute or the constitution adopted by the people or their representatives requires that I so hold." The judge is at one and the same time independent of the people and accountable to the people.

The judge's obligation is to decide cases according to principles generally and consistently applied. Defining these principles is not easy. Deans Ely and Choper attempt to set forth general principles to guide the United States Supreme Court in making decisions, but the principles are not yet well enough developed,

and they offer little guidance in deciding the actual cases that come before the court.

We struggle to analyze the elements of decision making and to improve the decision-making process and the judgments rendered. We can devise the best system and have the best set of laws and principles, but the quality of justice depends ultimately on the quality of the women and men who sit as judges. I understand the Deans to be telling us that our decision making should not be based on our personal value system but on our sense of an institutional value system. In deciding cases we judges must be sensitive to the issues the Deans have raised—to the awesome responsibility imposed on the judiciary; to our nonrepresentative character; to the degree of finality of our decisions; to the importance of the independence of the judiciary working in a system of democratic, majoritarian rule; and to the basic constitutional concepts of protecting the minority in a pluralistic society and of protecting the majority against the tyranny of the minority. It's a big order for each of us to fill every day in every case. But I am confident we shall try to fill it.