Giving Substance Its Due


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The debate over the legitimacy and appropriate scope of judicial review has not cooled. John Hart Ely's influential Democracy and Distrust has apparently become an opening shot in another battle between proponents of activism and restraint, rather than the final volley the author might have desired. Theories outlining the proper measure of judicial authority abound, as do critiques of such theories. Nonetheless, two current books, Philip Bobbitt's Constitutional Fate and Michael Perry's The Constitution, the Courts, and Human Rights are welcome additions to the increasingly crowded literature of judicial review. Both books are powerful studies that not only examine the shortcomings of judicial review in a democratic society, but refreshingly explore the potential values of constitutional decisionmaking as well.

The tensions that arise between judicial review and democratic theory are easily described. When the federal judiciary negates an action of a legislature or member of the executive branch, electorally accountable institutions are overridden by electorally unaccountable judges. If one accepts the premise that important governmental decisions in a representa-

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3. P. Bobbitt, Constitutional Fate (1982) [hereinafter cited by author and page number only].
tive democracy are to be made by elected representatives, broad judicial authority is disconcerting from the outset.

For the modern American citizen, however, the problem is more than theoretical. Despite the many ways in which some see our government as less than truly representative, American voters cling stubbornly to the belief that they can show their displeasure with the performance of government officials by voting errant officials out of office. With the federal judiciary, however, citizens are not even allowed this traditional prerogative. Not only are constitutional decisions made by judges who cannot be removed through the ballot, but the rulings are particularly irksome to overturn. Amending the Constitution is a slow and cumbersome process, and the congressional authority to regulate the jurisdiction of the Supreme Court is problematic and rarely used.5

Of course some constitutional decisions present greater difficulties than others. On those rare occasions when a ruling is based upon an unambiguous and widely shared interpretation of the constitutional text, the tension between judicial review and electoral democracy is minimal. The Court can tell democratic enthusiasts that it is merely enforcing long-standing mutual promises made by the nation as a whole, not by the judiciary. A decision, for example, that prohibits governmental classifications based on race seems not only justified by the language and history of the equal protection clause but also grounded in an expressed consensus of constitutional values that mitigates any danger of judicial usurpation of legislative power.6

Decisions based upon the clear mandates of the constitutional text, however, are rare. Far more often, courts base their rulings on values other than those unambiguously constitutionalized by the framers. Statutes are invalidated because they infringe an asserted right to privacy,7 to freedom from gender discrimination,8 or to any of a number of judicially recognized “rights”9 clearly beyond the contemplation of the framers. Advocates of such noninterpretive review argue that the courts should go beyond the references contained in the constitutional text “and enforce norms that cannot be discovered within the four corners of the document.”10

Since it is anchored in judicially created values, noninterpretive review conflicts with democratic principles: Rights discovered by judges appear to

5. See infra note 82.
10. J. Ely, supra note 1, at 1.
prevail over conflicting interests asserted by more representative institutions. This perception of conflict, fueled by public antagonism to modern noninterpretive decisions like Engel v. Vitale,\textsuperscript{11} Roe v. Wade,\textsuperscript{12} and Swann v. Charlotte-Mecklenburg Board of Education,\textsuperscript{13} has sparked a barrage of claims and counterclaims about the legitimacy of judicial review.

The responses pressed by theorists to the counter-majoritarian difficulties of noninterpretive review have run the gamut. Proponents of restraint, such as Berger,\textsuperscript{14} Bork,\textsuperscript{15} and Rehnquist,\textsuperscript{16} argue that the Court may void the actions of other branches of government only on the basis of values constitutionalized by the framers. Activists like Tribe\textsuperscript{17} and Fiss\textsuperscript{18} seek broad judicial implementation of values unbounded by the language of the text to assure greater protection of individual autonomy and equality. In Democracy and Distrust, John Hart Ely stakes out a middle ground, advocating judicial scrutiny of the political process but disclaiming similar judicial authority over its substantive outcomes.\textsuperscript{19}

Bobbitt and Perry enter this debate as strong proponents of noninterpretive review. Although their books differ in tone and emphasis, Constitutional Fate and The Constitution, the Courts, and Human Rights have similar jurisprudential missions. Both run counter to the current trend in constitutional scholarship, which attempts to narrow the focus and function of judicial review. Both propose to replace narrow review with a non-textual analysis to implement an evolving consensus of constitutional values—a method of adjudication that Henry Monaghan derides as no more than asking, “Is that what America stands for?”\textsuperscript{20} Bobbitt and Perry, however, apparently see America’s constitutional “stand” as a matter of no small import. Their works reflect the belief that the United States Supreme Court should be an active participant in our continuing effort to mold a more just society.

\textsuperscript{11}370 U.S. 421 (1962).
\textsuperscript{12}410 U.S. 113 (1973).
\textsuperscript{13}402 U.S. 1 (1971).
\textsuperscript{14}R. Berger, Government By Judiciary (1977).
\textsuperscript{17}L. Tribe, American Constitutional Law (1977).
\textsuperscript{19}J. Ely, supra note 1.
The next two sections of this review examine the visions of judicial authority and competence presented in each of the two works. The final section takes a broader look at the significance of these arguments in the context of recent efforts to define the role of the federal judiciary in our constitutional system.

I. Constitutional Fate

Philip Bobbitt's *Constitutional Fate* is a subtle examination of the legitimacy of judicial review. Unlike most analyses of the subject, the work adopts no overarching principle as its justification for judicial authority. Rather, Bobbitt offers a typology of constitutional arguments used to support judicial review. Bobbitt devotes separate chapters to historical, textual, doctrinal, prudential, structural, and what he describes as “ethical” constitutional argument. Yet these theories are characterized not as a priori logical justifications for constitutional review, but as accepted conventions in a continuing dialogue on the appropriate scope of judicial authority.

This perspective, in turn, arises from a larger understanding concerning the purposes of legal argument. Legal argument, in Bobbitt’s view, cannot establish independent legitimacy for judicial review because its debates and analyses reflect a pre-existing commitment to such legitimacy. Yet legal argument nonetheless plays a central role in the process of legitimation. Through the formulation and development of the conventions of legal arguments, and their communication to legal experts and laymen alike, the authority of the Court is vindicated in the eyes of the American people. Bobbitt explains:

> [T]he Constitution is a sort of self-excited circuit. As it is applied in the courts, among other places, it gives rise to observer-participancy. Ask any American adolescent what to look for to determine whether a society is just, and he or she will answer, sooner or later, with conceptions drawn from the applications of the Bill of Rights. Judges, litigants, journalists and juries are responsible for what they often believe themselves merely to be witnessing. Out of the chance collisions of interests, random acts of observer-participancy arise.

To illustrate the development of these conventions of legal argument, Bobbitt employs an imaginative technique. He focuses not on abstract jurisprudential theories, but on the responses of paradigmatic spokesmen to salient events in recent constitutional history. The language of Justice Black brings textual argument into focus. Henry Hart supplies the voice

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21. *P. BOBBITT* at 5.
22. *Id.* at 240.
for doctrinal argument; Alexander Bickel speaks for prudential argument; Charles Black epitomizes the use of structural constitutional argument. Bobbitt's emphasis on constitutional players not only lends credence to his notion of observer-participancy, but makes the book quite readable.

A major portion of Constitutional Fate is devoted to the development of a distinct category of constitutional argument that Bobbitt calls "ethical argument." He describes this method of analysis as

constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people. It is the character, or ethos of the American polity that is advanced . . . as the source from which particular decisions derive.23

The term "ethical argument," therefore, is employed because of its etymological basis ("expressive of character") rather than for its connotations of moral argument.24

Although ethical argument sounds like substantive due process revisited—and though Bobbitt's principal examples of accepted ethical arguments are substantive due process cases like Griswold v. Connecticut,25 Skinner v. Oklahoma,26 and Moore v. City of East Cleveland27—the two concepts are analytically dissimilar. Substantive due process, at least as applied by the federal courts, is a doctrine of rights. If the Court determines that a substantive right—typically the right to privacy—exists, that right is treated as if expressly listed in the Bill of Rights.28 The constitutional inquiry turns, therefore, not on whether government has exercised a power affirmatively allotted to it, but on whether a particular exercise of conceded governmental power impermissibly intrudes upon some reservoir of individual liberty.

Ethical arguments, however, "arise from the ethos of limited government and the seam where powers end and rights begin."29 The constitu-

23. Id. at 94.
24. Id. at 94–95. Bobbitt seeks to ground ethical argument in a constitutional ethos of limited power rather than moral argument generally. To equate constitutional decisionmaking with moral philosophy, he argues, runs contrary to our society's "considerable moral pluralism." Id. at 139. Despite the fact that ethical argument is an obviously open-ended concept, it does not ask whether particular government action is morally desirable. It instead has its foundation in our constitutional conventions. As discussed infra at pp. 182–83, Perry mistakenly seeks to equate constitutional decisionmaking with ethical argument.
25. 381 U.S. 479 (1965).
28. In Griswold v. Connecticut, 381 U.S. 479 (1965), for example, the Court determined that a substantive right to privacy was implicated by state interference with intimate marital decisions. As a result of the implication of a fundamental right, the legislation involved was subjected to strict scrutiny.
29. P. BOBBITT at 162.
tional inquiry focuses on whether government—given its "limited" nature—is empowered to employ the challenged means in the first place. In the abortion cases, for example, questions of substantive due process resolve around judicial declarations of abortion as a fundamental right. Once the Court determines abortion is such a right, the state must give compelling justification for its intrusions upon that right or the statutes must fall. Absent interference with a constitutionally significant individual right, however, the analysis need not review the regulatory means employed by the state. Ethical argument, in contrast, measures the state's means against the "ethos of limited government." If a state should not be able to coerce private acts, then the statute falls. All exercises of government power are therefore subject to review under the ethical analysis, since any such exercise might violate the ethos of limited government. Bobbitt considers *Erie Railroad Co. v. Tompkins* to be an instance of ethical decisionmaking, for example, because its rationale derives from the limited nature of federal power. The dangers of potential judicial usurpation are increased by the breadth of ethical review, but ethical argument does avoid the difficulty of deriving particular "fundamental" rights from only the vaguest of constitutional mandates.

The method of deriving ethical arguments is itself somewhat obscure, however. The ethos of limited federal power—which Bobbitt derives both from the Bill of Rights and, with respect to state governments, from the Civil War Amendments—is hardly precise guidance for difficult constitutional questions. Bobbitt is nonetheless able to present some plausible examples. He argues that the text of the Fifth Amendment suggests a "larger principle that government may not force defendants to assist in their own condemnation," and that the Fourth Amendment points to the tenet that "privacy may only be infringed by government on a showing of necessity." Recalling *Erie*, Bobbitt also suggests that ethical argument can derive directly from the limited nature of expressed powers.

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30. 304 U.S. 64 (1938).
31. P. BOBBIIT at 169.
32. Id. at 150.
33. Id.
34. Id. at 196-219. Though it is not central to this essay's analysis, nor I think to Bobbitt's book, *Constitutional Fate* also examines what Bobbitt terms an "expressive" function of judicial review. Quoting Hans Linde, Bobbitt argues that constitutional rulings may help to "shape people's visions of their Constitution and of themselves." Id. at 219 (quoting Linde, Judges, Critics, and the Realist Tradition, 82 YALE L.J. 227, 238 (1972)). Viewed through the lens of such a function, cases like Abington School Dist. v. Schempp, 374 U.S. 203 (1963), and United States v. Nixon, 418 U.S. 683 (1974), appear more fully justified. *Schempp*, the radical prayer case, though often ignored, expressed concretely the constitutional demand for removal of religious pursuits from the public schools. Similarly, *Nixon*, for all its doctrinal difficulties, expresses our constitutional belief that the President is not above the law. P. BOBBIIT at 196-217. Like ethical argument, the expressive function of judicial review emphasizes the self-definitional aspects of constitutional decisionmaking.
Because it is so clearly tied to shared American perceptions about the Constitution, Bobbitt’s portrait of judicial authority is attractive. Yet *Constitutional Fate* is not without its shortcomings. Ethical argument may begin from a different premise than its beleaguered cousin, substantive due process, but the concept is every bit as unbounded in scope. Bobbitt’s examples of ethical principles like “government may not coerce intimate acts” and may not “confine a person dangerous to neither himself nor to others” depend upon liberal use of judicial imagination. And though Bobbitt’s method can be distinguished from modern substantive due process review, it is strikingly similar to that of cases like *Lochner v. New York* and *Coppage v. Kansas*. In striking down regulations that interfered with the “free” market system, those cases employed “ethical” arguments by characterizing such intrusions as inconsistent with the American ethos of individual liberty. Bobbitt acknowledges as much by claiming that these cases’ “new use of the old concept of the police power” was in many ways “a promising dialectical move.” Bobbitt nonetheless criticizes the *Lochner* line of cases as an abuse of constitutional review by a particular political faction. Yet one could use Bobbitt’s method to draw an equally broad ethos of freedom of contract from the constitutional provisions protecting economic expectations, such as the contracts clause and the takings clause.

By employing an “ethos of limited government” to construct meta-principles of constitutional law, the federal judiciary could attain a substantial breadth of interpretive leeway. A “states’ rights” court might discover principles of federalism in the Tenth and Eleventh Amendments that would make *National League of Cities v. Usery* and *Younger v. Harris* pale in comparison. A court motivated by principles of egalitarianism, by contrast, could take its generalities from Article IV’s guarantee of a republican form of government, the privileges and immunities clause, and other repositories of liberal philosophy. Further, Bobbitt uses the ethical principle that “government may not mutilate persons save in self-defense” to challenge the death penalty, though deriving such an argument flies in the face of the framers’ intentions.

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35. P. BOBBITT at 159.
36. Id. at 166.
37. 198 U.S. 45 (1905).
38. 236 U.S. 1 (1915).
40. U.S. CONST. art. 1, § 10, cl. 1 provides in pertinent part: “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”
42. 426 U.S. 833 (1976).
44. P. BOBBITT at 156.
Nor is the argument for applying ethical arguments to strike down the actions of state governments entirely persuasive. An ethos of limited government is easy to ascribe to the federal government, which was intentionally framed with limited powers. But state governments, at least in theory, possess plenary authority. Bobbitt nonetheless argues that an “ethos of limited government” applies to the states as a result of the privileges and immunities clause of the Fourteenth Amendment. If Bobbitt’s privileges and immunities claim were true, however, it would require the incorporation of the entire Bill of Rights. The first eight amendments are our most formal, most incontrovertible examples of ethical restraints on government. Yet complete incorporation has only rarely been endorsed by the Supreme Court, and Bobbitt ignores the interplay between his privileges and immunities argument and the incorporation doctrine.

Moreover, like any incorporationist, Bobbitt faces a strong interpretivist hurdle. In the same way that it is difficult to believe that the term “due process of law” is shorthand for “the Bill of Rights,” it stretches credulity to argue that the Fourteenth Amendment was designed to empower the judiciary to fashion “ethical” restraints on government through the privileges and immunities clause.

Bobbitt therefore seeks to bolster his claim for ethical review of state governments’ decisionmaking with a juxtaposition of the Ninth and Tenth Amendments. Because the two amendments speak of both individual and state autonomy, one can infer an ethos of limited power enforceable against local governments. Ethical argument, as a tool of constitutional review, is nonetheless a tool for increasing the federal judicial power. Whatever the Ninth and Tenth Amendments mean, it seems clear that they were not intended to increase the federal government’s power over the states.

Despite its flaws, however, Constitutional Fate is an exceptional work. Bobbitt’s concept of ethical argument is appealing for several reasons. First, it recognizes openly what most of us believe: There are truly some activities which are beyond the power of government—whether state or federal—even though they are not prohibited by the constitutional text. Second, unlike process-based theories of review, ethical review refuses to

45. This argument takes into account, of course, that state governments are empowered to effectuate different ends than is the federal government. P. BOBBITT at 154–55.

46. The bulk of the guarantees contained in the Bill of Rights have been selectively incorporated through the due process clause. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 375–78 (2d ed. 1983). Under Bobbitt’s argument, however, the Court would be compelled to enforce the entire Bill of Rights against the states “jot-for-jot,” including, for example, the right to civil jury trial and grand jury indictment. See Minneapolis & St. L. R.R. Co. v. Bombolis, 241 U.S. 211 (1916) (trial by jury); Hurtado v. California, 110 U.S. 516 (1884) (indictment by grand jury).

47. P. BOBBITT at 152–54.
Given its due countenance willingly the harm to our internalized constitutional ethos
that flows from prohibiting judicial protection of non-textual liberties.
Our present disdain for arguments that rely on characterizations of our
institutions and of ourselves leads us to accept invasions of personal auton-
omy inconsistent with widely shared ideas concerning what is properly the
government's business.48

Finally, Constitutional Fate is a strong reminder that judicial review,
properly undertaken, can serve a variety of functions and guarantee a va-
riety of interests in modern society. It provides not simply a method of
assuring compliance with the constitutional text, balancing our govern-
mental structure, guaranteeing access to the political process, protecting
individual liberties, or defining ourselves as a society. It provides, rather,
all these things.

II. The Constitution, the Courts, and Human Rights

Michael Perry's book explores the propriety of constitutional poli-
cymaking in a more traditional manner. Perry sets out to vindicate
noninterpretive judicial review in "human rights" cases.49 He systemati-
cally considers and discards a variety of theories of judicial power before
settling on his own "functional" justification for broad review in individ-
ual rights cases.

Like Jesse Choper and others,50 Perry describes the protection of indi-
vidual liberties as the paramount role of the United States Supreme
Court.51 He sees no issues arising under the rubrics of federalism or sepa-
ratio of powers that justify broad judicial authority in those fields.52
Perry strongly defends noninterpretive review in individual rights cases in
a two-step argument. First, he assails Ely's distinction between review of
process-based and substance-based rights.53 Second, Perry offers an ener-
getic justification for judicial policymaking in all human rights cases,
based upon the value of expressing a national commitment to individual
rights and upon the consistency of such a practice with basic principles of
democratic accountability. Since this functional vindication is the major
thrust of the book, I will consider it in some detail.

from denial of certiorari).
49. M. Perry at 37. Perry defines "human rights" as "the rights individuals have, or ought to
have, against government under the 'fundamental'—constitutional—law." Id. at 2.
50. See J. Choper, Judicial Review and the National Political Process (1980); Fiss,
supra note 18.
51. M. Perry at 37.
52. Id. at 60; see J. Choper, supra note 50, at 175.
53. See J. Ely, supra note 1, at 73–77; M. Perry at 21–24 (attacking Ely).
Constitutional theorists have justified extratextual judicial review by pointing to the structure of our government, American traditions, and a supposed societal consensus of values. Perry denies the existence of a particular set of traditions or values which instruct judicial decision-making. He instead identifies a fundamental feature of the American consciousness that he calls "religious"—connoting the existence of a "binding vision." This vision, Perry explains, entails "a commitment—though not necessarily a fully conscious commitment—to the notion of moral evolution," a perceived national duty to attain a "higher law" through a process Perry likens to "prophecy." It is from this perceived obligation that Perry derives his justification for noninterpretive judicial review.

To the modern skeptic, this claim may sound a bit mystical. Yet Perry does not intend to invoke the supernatural. He seeks rather to make the simple point that we have not defined ourselves as a nation merely by the interests reflected in representational democracy. To the contrary, our constitutional charter outlines basic guarantees not only of equality and political participation, but of individual liberty and autonomy as well. Moreover, if we are to attempt to describe the American ethos, as constitutional theorists seem so determined to do, that spirit has historically included the notion of moral evolution. Realizing our own fallibility and the commensurate need to seek a fuller understanding of ourselves and our fellow citizens, we are willing to look beyond existing political and moral conventions for new answers.

Having embraced this view, Perry argues that noninterpretive judicial review in individual rights cases provides a desirable accommodation of

57. M. Perry at 97.
58. Id.
59. Id.
60. Id. at 99 (emphasis added).
61. Id. at 97.
62. Id. at 98.
65. Perry argues that his notion of a binding religious vision reflecting a commitment to moral evolution is not essential to his functional argument for non-interpretive judicial review. M. Perry at 100. In a fundamental way, however, the notion is essential to Perry's work. First, he makes a great effort to establish the proposition—which indicates that he thinks it vital to his thesis. Second, it appears that Perry ultimately seeks to attack Ely for adopting too narrow a description of our constitutional structure. For Perry, Ely wrongly makes all of our constitutional values participational ones. Perry argues that we have both democratic interests and interests of moral evolution. To this extent, therefore, the "religious" argument lies at the heart of Perry's work.
our twin societal aims of democratic accountability and moral evolution.\textsuperscript{66} In our system of government, only the judiciary serves as a medium of moral reevaluation, because the politically accountable branches tend to deal with political-moral questions by voting the established moral conventions of the majority of their constituents. Perry’s argument is therefore a functional one. The claimed result of judicial policymaking in the civil rights area is “a far more self-critical political morality than would otherwise [exist].”\textsuperscript{67} Broad constitutional review is justified, therefore, because we are committed as a people to moral evolution and because we are able to proceed farther along that path with judicial review than without it.

The final link in Perry’s functional vindication of noninterpretive review is to claim that such review is consistent with principles of electoral accountability. He bases this conclusion on the “significant political control” over review that Congress can wield by limiting the jurisdiction of the federal courts.\textsuperscript{68} The Constitution, the Courts, and Human Rights thus successfully formulates an argument for noninterpretive review that extends its usefulness beyond process-based values. As discussed in the final section of this essay, Perry counters both the internal logic and the ultimate desirability of Ely’s arguments in Democracy and Distrust. Yet Perry’s book raises questions of its own.

The tone of Perry’s work seems strangely at odds with its content. Bobbitt’s book is written powerfully, yet subtly. His arguments are understated; his critique, while forceful, is not mean spirited. Perry’s style, in contrast, can fairly be characterized as contentious. Indeed, like a new gunfighter trying to build a reputation on more established names, Perry seems bent on attack. The book is replete with statements that “Ely is wrong,” “Bork is wrong,” and “Dworkin is flatly wrong.”\textsuperscript{70} If Perry’s substance calls for charity and moral elevation, his style does not.

Further, the alignment of judicial review with a religious commitment of the American people to moral evolution is initially disconcerting. A perfunctory review of American history would lead one to conclude that the depth of our societal commitment to virtue is not substantial. But even apart from the questionable vigor of our search for virtue, Perry’s descriptions of an “American Israel,” “beacon to the world,” and light of “moral

\textsuperscript{66} M. PERRY at 102.
\textsuperscript{67} Id. at 113.
\textsuperscript{68} Id. at 128.
\textsuperscript{69} Id. at 24.
\textsuperscript{70} Id. at 180 n.103.
\textsuperscript{71} Id. at 75.
leadership carry the implication of a unique American commitment to moral evolution that the rest of the world discards.

Perry's primary criticism of theorists such as Ely applies with equal force to his own work. He claims these analysts "justify the particular species of constitutional policymaking they want to salvage from an interpretivist attack . . . [yet] at the same time . . . condemn species of policymaking for which they have no sympathy." Ely, for example, argues for activism concerning process-based rights yet disdains judicial review under the demand for "due substance." Like a good liberal, Perry advocates activism in both of these instances, yet deplores it in pursuance of federalism and separation of powers. Further, if Ely interprets the Constitution as a document replete with representational democracy, Perry redesigns it as a tool for moral evolution. Perhaps we all theorize in our own image.

Finally, Perry takes his functional justification for constitutional policymaking too far. Since his argument for noninterpretive review is essentially that we are more capable of fulfilling the American commitment to moral evolution with it than without it, the theory is not easily bounded. It is not dependent upon either the text or the structure of the Constitution. As a result, Perry claims that the function of a judge in a human rights case is indistinguishable from that of a legislator facing the same issue.

The role of a judge called upon to interpret the Constitution, however, is inescapably distinct from that of a legislator addressing a similar issue. Unlike a legislator, the judge in a constitutional civil rights case typically is being asked to overturn the prior decision of another branch of government. That distinction can hardly be considered inconsequential. Further, it seems difficult to disagree with Professor Monaghan's statement that "the making of constitutional law simply ought not to be like the making of common law." While broad interpretive powers in the common law context can be exercised to further legislative will, judicial policymaking in the constitutional context thwarts legislative authority.

In addition, equating the role of the constitutional jurist with that of the

72. Id. at 98.
73. As Reinhold Niebuhr wrote decades ago: "[W]e are still inclined to pretend that our power is exercised by a particularly virtuous nation. The uniqueness of our virtue is questioned by both our friends and our enemies. All historic virtues and achievements are more ambiguous and fragmentary than we are inclined to believe." R. Niebuhr, The Children of Light and the Children of Darkness ix (1960).
74. M. Perry at 76-77.
75. "Due substance" is actually Professor Monaghan's term. See Monaghan, supra note 20, at 358-59.
76. Id. at 386.
77. See J. Ely, supra note 1, at 68.
moral philosopher diminishes the importance of the constitutional text. Implicitly it suggests that hard-won constitutional amendments carry no more weight than the particular moral speculations of a federal judge. As Fred Schauer has pointed out: "The authoritative nature of the text, the existence of a substantive content beyond a mere formal authorization for judges to philosophize, compels us to reject [the] . . . notion of one-to-one fusion of constitutional law and moral theory." 78

Perry feels free to argue for constitutional policymaking by the judiciary bounded only by the "significant political control" that Congress can exercise by limiting the jurisdiction of the federal courts. Perry's argument is similar to a recent suggestion by Charles Black that the Ninth Amendment should be given an expansive substantive interpretation by the federal courts—again subject to popular control through congressional power to restrict jurisdiction. 79 That power, however, is not free from doubt in its own right. Were such a "regulation" to be seen, for example, as an abrogation of an essential function of an independent judiciary, or as merely a veiled means to accomplish an unconstitutional substantive end, serious constitutional questions would arise. 80

There is also a risk attaching to arguments for judicial activism that seek to "cure" anti-majoritarian tensions by relying upon congressional authority to control judicial power. The public in general, and Congress in particular, might accept only half the equation: A recalcitrant Congress might reject Perry's claim that the federal courts should support an activist human rights agenda but accept his suggestion that the power to restrict judicial authority is clear.

Further, since Perry conditions noninterpretive judicial review upon the power to restrict jurisdiction, a Congress adopting his theory would quickly come to see its own silence as accepting a particular exercise of judicial policymaking. Rhetorical claims of a duty to restrict what the Supreme Court can decide would soon follow. 81 The exceptions clause would not long remain a shadowy, but largely unemployed, threat to judicial independence. Congress would likely second-guess the Court at will.

If the exceptions clause is not thus transposed—as one hopes it will not be—one would do well to recall that it has not been employed in over one

hundred years.\textsuperscript{82} It thus seems imprudent to make it the linchpin of a theory of constitutional interpretation. As it is, jurisdictional control merely permits adherents of judicial activism to deflect claims that judicial review is inconsistent with democratic principles.

III. THE SCOPE OF JUDICIAL AUTHORITY

Both Bobbitt and Perry offer substantial critiques of the works of John Hart Ely, though only Perry makes such criticism a focal point of his book. Ely's \textit{Democracy and Distrust} thus makes an appropriate point of departure for evaluating the success of Bobbitt's and Perry's arguments.

Ely has argued that noninterpretive review is justifiable only when it serves to clear "the channels of political change on the one hand . . . [or to correct] certain kinds of discrimination against minorities on the other."\textsuperscript{83} Although process-based or "participational"\textsuperscript{84} review is to be encouraged, examining the substance of political decisionmaking is beyond judicial competence.\textsuperscript{85} Perry has no objection, of course, to Ely's embrace of process-based analysis, but he attacks the distinction between participational and substantive review as unsupportable.

Perry sees Ely's attempted distinction as based upon two arguments: first, that a societal consensus supports participational but not substantive review; and second, that process-based review is supported by the history and structure of the Constitution. The former argument, according to Perry, fails because consensus breaks down on the fringes of constitutional analysis. Even if most of us agree, for example, that freedom of speech is important, there is no similar agreement that a draft resister should be allowed to wear a jacket displaying "fuck the draft."\textsuperscript{86} Ely's second argument is unacceptable to Perry because it enforces a theory of representative democracy that Ely infers from our constitutional structure rather than from the theories actually expressed in the text.\textsuperscript{87}

Attacking Ely from a different direction, Bobbitt argues that Ely is misguided in attempting to provide a single, axiomatic foundation for consti-

\textsuperscript{82} The two cases treating Congress's powers under the exceptions clause are \textit{Ex parte McCardle}, 74 U.S. (7 Wall.) 506 (1869), in which the Court acceded to a deprivation of jurisdiction over habeas corpus appeals, and \textit{United States v. Klein}, 80 U.S. (13 Wall.) 128 (1871), in which the Court held that Congress could not eliminate the Court's jurisdiction over the property claims of unreconstructed southerners in order to control the results in a particular case.

\textsuperscript{83} \textit{J. ELY, supra} note 1, at 74.

\textsuperscript{84} \textit{Id.} "Participational" review, referring to judicial review designed to assure the litigant's participation in the political or social process, should be distinguished from Bobbitt's use of the term "participatory constitution." Bobbitt refers to the broad spectrum of participation in the process of constitutional decision-making.

\textsuperscript{85} \textit{Id.} at 43–72, 116–25.


\textsuperscript{87} \textit{M. PERRY} at 90.
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tutional review—the promotion of representative democracy. Such an effort, argues Bobbitt, fails to recognize that judicial review appropriately performs a variety of functions in our system of government. Instead, Ely attempts to derive a doctrine justifying review from a single element of its practice:

Impressed by a certain feature of the Constitution, the contemporary critic makes that feature a model for the description of all Constitutional law. This accounts for the current interest in the celebrated Carolene Products footnote. It is the result of recognizing a form of Constitutional argument but, at the same time, being trapped within it and declaring this perspective to be the only legitimate one.88

Bobbitt’s critique of Ely’s work hints at the important features of Constitutional Fate and The Constitution, the Courts, and Human Rights. Both books are reactions against the recent scholarly trend seeking to narrow the scope of constitutional law. Each author convincingly argues that process-based theories undervalue vital aspects of constitutional adjudication. Perry argues that a strict Carolene Products’ footnote-four theory of judicial power is not only internally inconsistent, but also silences the most effective institutional voice in the American dialogue of moral evolution. Bobbitt suggests that although there have been occasions when ethical argument was used as a trump by a particular political faction, our constitutional charter is both a guarantee of political access and a document of personal liberty. Current proposals to ignore unspecified personal rights would therefore do violence to the “constitutional ethos that every [jurist] has internalized.”89

The appeal of limited theories of judicial review, of course, is that they attempt the “development of [a] constitutional theory, which could serve as a constraint on judges by providing some standard, distinct from mere disapproval of results, by which their performance could be evaluated.”90 Yet the abandonment of all non-textual substantive constitutional protection is a high price to pay for containment of the Justices. It is not only friction with other branches of government that threatens the institutional capital of our highest court. The passivity of the Vinson Court, for example, may have harmed the standing of the United States Supreme Court more than did the activism of its successor.

Moreover, restrictive theories of judicial review appear to presume that by employing the proper formula we can eliminate the subjectivity, uncer-

88. P. BOBBITT at 247.
89. Id. at 147.

tainty, and moral responsibility inherent in modern constitutional review. American constitutional scholarship seems plagued by a desire to avoid the accountability that is a necessary component of political-moral decisionmaking. One cannot shun responsibility by claiming that “one stands by the Constitution and that, in turn, the Constitution itself stands for the proper values.”91 Unless one advocates “an extraordinarily radical purge of established constitutional doctrine,”92 and perhaps the discarding of judicial review itself, the claim that one stands by the Constitution is hollow.93

Participational theories, as Perry reveals, reflect their authors’ views of the appropriate characteristics of representational democracy, rather than any set features embodied in the Constitution. Even “pure” interpretivist, or textual review, must hinge on the very noninterpretivist premises of Marbury v. Madison94—a fact that must provide little consolation to any “strict constructionist.” Claiming strict allegiance to the Constitution, or to the representational values “implicit” in it, does not allow us to escape the responsibilities inherent in the development of a constitutional jurisprudence for present and future generations.

Nor can we render the enterprise entirely predictable. Much of modern constitutional theory seeks to tidy up the potentially unruly features of constitutional adjudication. Scholars fret—not always unreasonably—over the placement of broad substantive powers in the hands of federal judges. As a result, they labor mightily to remove both doubt and danger from the U.S. Reports. Theorists such as Ely search for the “one and only truth about the Constitution.”95 But certainty, as Justice Holmes commented, “is illusion, and repose is not the destiny of mankind.”96 Nor, we have learned, can it be the cornerstone of American constitutional law.97

Bobbitt and Perry successfully resist this tendency in constitutional theory. Both willingly accept that there is neither one true meaning of the Constitution nor one purpose which informs judicial review. Rather, constitutional adjudication is a meandering process by which we seek to as-

91. See Levinson, Law as Literature, 60 Tex. L. Rev. 373, 400 (1982).
93. A pure interpretivist must, for example, reject almost the entire body of law developed under the due process clauses of the Fifth and Fourteenth Amendments, the incorporation of the Bill of Rights, the desegregation decisions, the prohibition against gender discrimination, and the equal protection requirements enforceable against the federal government. Id. at 710–13. Indeed, judicial review itself is not clearly justified under “pure” interpretivism.
94. 5 U.S. (1 Cranch) 137, 178 (1803); see Nichol, Standing On the Constitution: The Supreme Court and Valley Forge, 61 N.C.L. Rev. 798 (1983).
95. Levinson, supra note 91, at 380.
96. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 466 (1897).
97. “Of course, our craving for certainty may cause us to search for the immutable. This is most apparent in law, where the myth of certainty has a persistent appeal. But the law cannot be certain, in large part because language itself is not certain.” Schauer, supra note 78, at 831–32.
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sure political and social equality, to etch out those freedoms secured to autonomous individuals, and to define and express ourselves as a society. With such an ambitious agenda, judicial review will never be smooth and uncontroversial.

A free society, as Niebuhr observed, requires confidence in “the ability of men to reach tentative and tolerable adjustments between their competing interests and to arrive at some common notions of justice which transcend all partial interests.” Constitutional Fate and The Constitution, the Courts, and Human Rights are significant jurisprudential works because they spring from such confidence. Neither book is without internal inconsistencies, and neither provides a tidy theory with which to cabin wayward Supreme Court Justices. Yet Perry reveals the importance of the role the judiciary can play amid our stumbling steps toward self-improvement, and Bobbitt attempts to put flesh on a constitutional ethos that may be the strongest feature of our national character. If perfect consistency and containment require the forfeiture of those two values, they may not be worth the price.

98. R. Niebuhr, supra note 73, at xii.
The SEC: A New American Institution


John Wheeler†

The Transformation of Wall Street1 subtly reveals that the Securities and Exchange Commission has fully become an American institution. Through its persistent adherence to certain fundamental values and its ability to attract high-quality staff attorneys and commissioners, the SEC has greatly influenced Wall Street during crises of confidence and changing technology. Like the New York Times or the law schools at Harvard2 and Yale, the SEC is an organization of unusual power, longevity, and responsibility.

By showing that the SEC has become an institution in this special sense and by giving readers the “feel” of the professional life and attitudes within the Commission, Professor Seligman’s book earns its place in the library of both practitioners and academics. The securities lawyer will gain a better sense of how the SEC handles rulemaking, enforcement, and securities registration,3 while the academic will have a better idea of how government can be a leading force in a complex and constantly changing field.

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In the spirit of full disclosure, the author states that he has served five years at the Commission, as Assistant General Counsel, Special Counsel to the Director of the Division of Corporation Finance (Edward F. Greene), and Legal Assistant to Commissioner Roberta S. Karmel.


3. Firms practicing in these areas may wish to purchase R. KARMEL, REGULATION BY PROSECUTION: THE SECURITIES AND EXCHANGE COMMISSION VS. CORPORATE AMERICA (1982), as a complement to Seligman’s book. Ms. Karmel focuses on the post-1976 period, while Professor Seligman concentrates on the years from 1932 to 1976.
An organization must persist if it is to become an institution. May 27, 1983, marked the fiftieth anniversary of the passage of the Securities Act of 1933; June 6, 1984, will be the fiftieth anniversary of the passage of the Securities Exchange Act of 1934 and the SEC’s birth. Fifty years is a long time in a world of rapid social and technological change. Certainly some of the SEC’s cohorts from the New Deal have fared less well. Still, Professor Seligman emphasizes the SEC’s present institutional strength by recounting its past so completely. Indeed, the book could not be more complete without becoming unwieldy. The body of the book is a thorough, chronological recountal of the SEC’s history, supported by 108 pages of endnotes. Professor Seligman also includes a 23-page index, a superb fact-finder. The one-page table of contents, however, could use amplification. In addition, some of the chapters are so long (Chapter 10 is 58 pages and Chapter 12 is 129 pages) that interspersed headnotes would help the reader navigate through the book. Because the book is laid out chronologically, topical headnotes would be of special help.

While some may disagree with Seligman’s conclusions, none would doubt his scholarship. Seligman has carefully documented the SEC’s impressive history. The past alone argues that the SEC has become an important American institution. The true measure of the SEC’s success, however, goes beyond this fifty-year history.

7. The Banking Act of 1933 (Glass-Steagall Act), ch. 89, 48 Stat. 162 (1933) (codified in scattered sections of 12 U.S.C. and 18 U.S.C. (1976)), is undergoing major reexamination. See Noble, Safety of Deregulation of Banking is Debated, N.Y. Times, July 18, 1983, at D1, col. 1. It has been eroded by mergers and advances in technology that allow broker-dealers and investment bankers, on the one hand, and commercial banks, on the other, to encroach further into each other’s traditional markets. Id. at D8, col. 3. Congress has decided to phase out the Civil Aeronautics Board. See Feaver, Inside the CAB, Washington Post, July 15, 1983, at A23, col. 1.
9. See Longstreth, Book Review, 83 Colum. L. Rev. (forthcoming Oct. 1983) (SEC Commissioner stating that Professor Seligman is at his “scholarly best, displaying the strengths of a meticulous historian”). In the course of research on early SEC history, I cite-checked many of the notes of Seligman’s early chapters and found them flawless. His history of the 1970’s comports with my understanding from my tour on the staff. Moreover, the book is not only soundly researched and documented, but clearly distinguishes the author’s opinion from his recital of facts.
II.

A truly public institution must stand for widely shared values. Professor Seligman captures the underlying values of the SEC by quoting President Roosevelt on the purpose of the 1933 Act: "[I]t adds to the ancient rule of caveat emptor the further doctrine: 'Let the seller also beware.' It puts the burden of telling the whole truth on the seller. It should give impetus to honest dealing in securities and thereby bring back public confidence." The 1933 Act applied this simple philosophy to the public sale of securities by the issuing companies; the 1934 Act applied it to those companies' subsequent periodic reporting, and established direct restraints and inspections on certain stock market activities.

The heart of the SEC's work has thus always been to assure that public companies issuing securities tell the truth about themselves, that they keep telling the truth, and that the people trading those securities are utterly honest and fair. The objective is integrity. Compared to the work of other agencies, the SEC engages in little direct regulation of business affairs. Its goals and its actions are therefore easy for the public to grasp and support. Indeed, the SEC makes an occasional appearance in popular culture, and its activities are frequently covered in the press. The series of major legislative enactments that have both deepened and broadened SEC jurisdiction also indicate that the Commission's purposes reflect important societal values. Professor Seligman details the controversies surrounding the original 1933-34 legislation, the 1964 securities acts amendments extending reporting obligations to a broader class of issuers, and the 1975 amendments vesting the Commission with authority to integrate and automate securities trading into a national market system. Seligman's full accounts of the political give-and-take preceding each enactment allow the

14. Lloyd Cutler has pointed out that this precise and narrow mission is an important reason why the SEC has endured as a strong agency. L. Cutler, Remarks at the SEC Awards Ceremony (Nov. 21, 1979).
15. In a recent episode of the soap opera spoof, "Soap," a businessman's spurned mistress "turned him in to the SEC" for double-dealing in stocks. And in the movie Bring There, the protagonist at one point counsels caution lest there "be a call from some kid lawyer at the SEC."
reader to gauge the changing attitudes of Congress and the executive branch toward the Commission.

Another key indicator of societal support for the ideals underlying the securities laws is the private right of action for violations of the securities laws. Currently only a small number of federal civil securities cases include the SEC as a party.\textsuperscript{20} The effect of SEC-established precedents, however, is greatly magnified through their use by private parties.\textsuperscript{21}

III.

To become a true institution, an organization must do more than endure and promulgate widely held values. It must also be effective in achieving its goals. That effectiveness requires high-quality personnel and an institutional ability to adapt to changing circumstances. The most eloquent part of Professor Seligman’s story is his portrait of the leaders of the SEC. Individuals play an important role in building any institution, especially one as small as the SEC.\textsuperscript{22} “The greatest immediate need,’ Frankfurter would write Walter Lippmann while lobbying for the 1933 Securities Act, is ‘qualified men for key jobs.’”\textsuperscript{23} Similarly, in the 1934 House Stock Exchange Practices Hearings, another early leader of the SEC emphasized the importance of a good staff:

\begin{quote}
Mr. Mape. The law ought to be made to apply to all alike and I hate the idea that some man can go to an administrative official and get something done that another fellow on the street cannot.
Mr. Corcoran. You have to have the power to make rules and regulations in every administrative body. The answer is to pick good men on your commissions.
Mr. Mape. Well, that sometimes is no answer at all.
Mr. Corcoran. It is the ultimate answer to any governmental problem.\textsuperscript{24}
\end{quote}

The Commission has attracted good men—and now, most certainly, good women. The Transformation of Wall Street relates how successive generations of able advisors, staffers, and commissioners have worked at the SEC, starting with Frankfurter protégés James Landis, Benjamin Cohen,

The efforts of these leaders and those under them have not gone unnoticed. *Time* magazine reported in 1935 that the SEC had "won the distinction of being the most ably administered New Deal agency in Washington;"25 in 1949, the Commission staff was singled out for praise by the Hoover Commission;26 in 1976, a major congressional survey reported that the SEC was the best of the independent agencies;27 and in 1982, the Heritage Foundation wrote that the staff of the SEC is "among the best and brightest in the government . . . ."

The SEC's small size and early leadership by Kennedy, Landis, and Douglas has given it an esprit that endures, passed from one season of staffers and commissioners to another. This is the lifeblood of institutions; I have witnessed the same effect at Yale Law School, West Point, Harvard Business School, and among close friends who have been Marines. In the 1980's, references to esprit, leadership, and to these exact examples may not be fashionable, but one cannot help thinking of these comparisons as Professor Seligman's chronicle unfolds. It is first of all a chronicle of able people working well together.

Two important points not directly addressed by Professor Seligman, but plain in his book, are the impact of former staffers upon the private bar and the consistent jurisprudential tension in the SEC's life between what might be called the "Frankfurter wing" and the "Douglas wing." Frankfurter and Douglas were both brilliant, activist scholars, but there is a difference in the tenor of their jurisprudence. Frankfurter tended toward thoroughness, Douglas toward celerity. The traits represented by both dynamic men are evident throughout the Commission's life.

Douglas, the third Chairman of the SEC, was "the man who got things done."28 It was Douglas who inspired and fielded the early corps of Commission attorneys.

Douglas led the SEC on a crusade that attempted to complete the Commission's logical mandate by consolidating SEC enforcement of the over-the-counter markets, commencing enforcement of the geo-

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28. THE HERITAGE FOUNDATION, AGENDA '83, at 313 (1983). The Heritage Foundation nonetheless criticized the SEC for constantly reinterpreting its "open-ended statutes." Id.
29. The phrase is the title of the book's sixth chapter. P. 156.
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graphic integration and corporate simplification provisions of the Public Utility Holding Company Act, and replacing state standards of corporate finance, accounting, and corporate governance with SEC-enforced federal rules. No other SEC chairman ever addressed so many fundamental problems simultaneously. Not all of Douglas's initiatives succeeded. But his chairmanship was the most accomplished in the SEC's history, in part because it articulated a coherent policy framework for federal corporations law that was to guide the next two generations of corporate reform efforts.30

The Douglas tradition has strong ties to Yale Law School. Douglas went to the SEC from his teaching post at Yale. There, Douglas was closely associated with Jerome Frank, the fourth SEC Chairman and, according to Abe Fortas, a "spark plug" of the New Deal.31 The energetic Sporkin, author of the famous 1970's corporate foreign payments investigations,32 is also an alumnus of Yale Law School.

In the expansive tradition of Douglas, Manuel Cohen was Chairman from 1964 to 1969, Irving Pollack was Commissioner from 1974 to 1980, and Stanley Sporkin was Enforcement Director from 1974 to 1981. Sporkin and Pollack were deeply influenced by Cohen, whose tenure at the Commission since 1942 unquestionably made him, as Irving Pollack wrote, "Mr. SEC."33 Cohen was "one of the most activist SEC chairmen of the postwar period, [and] one not reluctant to employ Douglas's metaphorical shotgun."34

Frankfurter, the intellectual sire of the 1933 and 1934 Acts,35 was by contrast more thorough and less expansionist. His approach to running the Commission mirrored his jurisprudence and his philosophy:

The staples of contemporary politics—the organization of industry, the course of public utilities, the well-being of agriculture, the mastery of crime and disease—are deeply enmeshed in intricate and technical facts, and must be extricated from presupposition and partisanship. Such matters require systematic effort to contract the area of conflict and passion and widen the area of accredited knowledge as the basis of action.36

32. P. 540 & n.*.
33. P. 356.
34. P. 357.
36. P. 60.
The roots of this tradition run to Harvard Law School. Chairman Landis, trained at Harvard and Frankfurter's protégé, was indefatigably thorough in his Commission work:

The hallmark of his chairmanship would be an insistence on the technical competence of the Commission. His were the virtues commended by the Harvard Law Review: insistence that technical issues be empirically studied on a case-by-case basis rather than be resolved by reference to general moral or ethical principles; insistence that no administrative proposal be made until the agency thoroughly understood its practical consequences; insistence that no action be taken by the agency that could not survive review by the then-hostile Supreme Court.

In the Frankfurter tradition, Landis was Chairman from 1935 to 1937, William Cary was Chairman from 1961 to 1964, and Roberta Karmel was Commissioner from 1977 to 1980. Though Cary studied under Douglas, he often quoted Karl Llewellyn: "Technique without ideals is a menace; ideals without technique are a mess." As Seligman points out, Douglas and Frank considered themselves involved in a political reform movement, while Cary "felt it important to behave like a lawyer."

Roberta Karmel, who joined the SEC staff during Cary's chairmanship, has asserted that the crusading SEC of the 1970's needs to return to technical rigor in bringing cases to trial, to questions of jurisdictional bounds, and to fairness to persons who are under investigation. She points out that in the 1970's "prosecutorial zeal blinded the Commission to legal and political reality," giving rise to reversals (and damaged credibility as a litigant) in the Supreme Court.

Of course, staffers and commissioners are not always wholly of one "wing" or another. Manuel Cohen began his chairmanship with a moderate approach, and his attention to technical and administrative detail are legendary. Cary was "a determined reformer."

Seligman's conclusion that the SEC has seldom been expansionist enough puts him in the Douglas wing. This is perhaps unsurprising considering that his past includes a tour with Ralph Nader's Corporate
Accountability Research Group as co-author of *Taming the Giant Corporation*. 46

Because so many SEC staffers and commissioners enter the private bar, the ranks of practitioners are influenced by these two philosophies of securities jurisprudence. The average attorney’s and commissioner’s tour in the SEC is under five years. This phenomenon increases the SEC’s influence by creating a significant flow of attorneys, trained in the Commission tradition and imbued with its institutional attitudes, into private practice. 47

*The Transformation of Wall Street* essentially ends its history of the SEC in the winter of 1976-77. 48 It therefore understandably omits a significant new strength of the SEC: the emergence of women as principals in the agency, co-equal with men. I know of no other agency, law firm, or business where the equal status of able women and men is more advanced or more gladly accepted. 49 This phenomenon evidences the SEC’s traditional first appreciation of professional excellence—the common ground of the Douglas and Frankfurter wings.

It is during conflict when an institution’s people must work well together. Seligman’s recounting of the conflicts involving the SEC are the most stirring parts of the book. The detailed history of the drafting and passage of the 1933 and 1934 Acts reads like a novel. 50 It is as well a valuable primer for anyone likely to enter the legislative fray in Washington, as is the tale of the passage of the 1964 securities acts amendments. 51 Seligman describes the American public-utility industry’s complete reorganization and the implementation and defense of the SEC’s legislative mandates; he thereby shows the fighting ability of the SEC’s staff and commissioners during its first twenty years. 52

47. The SEC averaged between 600 and 700 lawyers during the period, with turnover of between 100 and 200 per year. Total turnover would thus be at least 1000 in ten years, and the average tour under five years.
48. The book does include some later material on the SEC’s policy towards corporate earnings projections, pp. 559-61, and the development of a national market system, pp. 527-34.
49. There have recently been two female Commissioners, Roberta Karmel and Barbara Thomas. Kathryn McGrath heads the Division of Investment Management. Myrna Siegel holds the sensitive post of Ethics Counsel to the Commission and staff. Associate General Counsel Linda Fienberg heads much of the SEC’s litigation, and Alexia Morrison is Chief Litigation Counsel in Enforcement. In the Division of Corporation Finance, Associate Directors Linda Quinn and Mary E.T. Beach, Deputy Associate Director Amy Goodman, and Operating Procedures Chief Ernestine Zipoy are principal policymakers. Linda Griggs is Chief Counsel in the Office of the Chief Accountant and Ethel Geisinger directs legislative liaison.
50. See, e.g., pp. 63-64, 73-74, 96-97.
52. See pp. 131-38, 218-22 (discussion of public-utility industry reorganization); p. 169 (discussion of Douglas’s role in Richard Whitney scandal).
To remain effective, an organization requires sufficient flexibility to enable it to change with its society. Seligman ably recounts the vision of the SEC’s leaders from its inception through the 1970’s. Less obviously, change requires thoughtful criticism, and through Professor Seligman’s study we see that the SEC has benefited from an insightful securities bar which has assured continuing suggestions from the media, the White House, and Congress on how the Commission could improve its work.

Current developments suggest the same capacity for change: the emergence of a balance of women leaders in the Commission, the accord with the Commodity Futures Trading Commission to coordinate regulation of the commodities and securities markets, the accord with the Swiss government facilitating access to information on Swiss accounts used to launder or hide funds in securities frauds, the pending legislation for treble penalties in insider trading cases, the Commission’s initiatives in supporting the Vice President’s Task Group on regulation of the financial sector, the Commission’s tender-offer advisory committee, the reorganization of filings review, and the integration of the reporting requirements for the 1933 and 1934 Acts.

The breadth of these issues demonstrates that the SEC will continue to have an important mission in a rapidly changing financial community. Perhaps no issue is as crucial as the increasing impact of new informational technologies. The rapid spread of computer terminals is bringing the disclosure theory of the 1933 and 1934 Acts to full and thorough reality. Having transformed Wall Street from the grist of the scandal sheets

53. See, e.g., pp. 290–97 (Cary), 444–45 (Casey), 449 (Garrett).
54. See supra note 49.
55. For a description of all these developments, see SEC 1982 ANN. REP., supra note 22, at iii–viii, xvi–xxi; Special Report, SEC Advisory Committee on Tender Offers (special FED. SEC. L. REP. (CCH) pamphlet No. 1028, July 15, 1983).

Benston’s suggestion that there was little securities fraud before 1934 was ludicrous. His “search of the available literature” apparently did not lead him to read of a single enforcement action brought by any of the forty-seven states that enacted blue sky securities regulation laws between 1911 and 1933. Yet in the year 1932, the State of New York alone secured injunctions against 1522 persons and firms and instituted 146 criminal actions . . . . [Benston also failed to] analyze the significance of the Post Office Department’s pre-1934 securities fraud enforcement actions, common law securities fraud enforcement actions, common law securities fraud civil cases, or even such notorious events as the Pecora hearings’ revelations of the material factual omissions in the National City Company’s Peruvian bond sales.

P. 565 & n.*.
57. One might describe as “history shock” the full implementation of the historical ideals of the 1933 and 1934 Acts made possible by new computer technologies. All material information about most public companies is known and accessible to the vast majority of investors with increasing rapidity. The same innovations make possible highly individualized fund management allowing brokerage houses, mutual funds, savings and loan institutions, banks, and insurance companies to compete with
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to the hub of a reliable national market system, the SEC must now deal with the next generation of challenges. One hopes that Seligman will someday choose to chronicle these developments as well.

The Editors dedicate this issue to Professor Bittker for his long and distinguished career on the faculty of the Yale Law School. The Editors also wish to thank Professor Bittker for his continuing service as the faculty adviser of the Journal. A student publication could find no one more gently wise.