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Book Review: The Supreme Court and Judicial
Choice: The Role of Provisional Review in a
Democracy. by Paul R. Dimond.

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was simply a prophet before his time, the value of whose insights we are only now coming to appreciate. But one cannot argue this and argue *at the same time* that Madison is an altogether reliable guide to the shared understandings of his time—in other words, to the original meaning of the Constitution.

We should remind ourselves that no one's views, not even those of *the* founding father, can be said to represent and reflect what was agreed to in particular constitutional provisions. And the scholar and the constitutional interpreter want, precisely, to know *what was held in common*. We want to know how the words and concepts that were used in constructing constitutional provisions were understood by *the generality* of politically active persons who used them and debated them. The ideas and beliefs of a James Madison or a James Wilson (or a John Bingham) are valuable in helping us to draw an intellectual map of a piece of our constitutional past, but their views must never be confused with the map itself. Madison without Patrick Henry, Richard Henry Lee, William Patterson, George Washington, John Adams, and Fisher Ames, is a tinkling symbol—sometimes one with a sweet clear note, perhaps, and always audible in the score, but not uniquely carrying the meaning of the score itself.

THE SUPREME COURT AND JUDICIAL CHOICE: THE ROLE OF PROVISIONAL REVIEW IN A DEMOCRACY. By Paul R. Dimond.¹ Ann Arbor, Michigan: University of Michigan Press. 1989. Pp. vi, 163. \$27.50.

*Robert J. Steamer*²

As history so painfully reminds us, nations that have not discovered an institutional means of accommodating that abiding tension between popular rule and limited government court political instability, a condition which inevitably leads to the degradation of the constitutional order and the loss of democracy. In the American system judicial review has been the primary mechanism for preserving the symmetry of the constitutional structure, as it has enabled the Supreme Court to resolve power conflicts between the states and the nation, as well as between the president and Congress, and to validate and refine the individual rights guaranteed by the Constitution. Even after two hundred years of practice, how-

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ever, perennial questions tug at the nation's conscience, indicating that judicial review is not an unqualified success. How can the Court make legitimate choices when the phrases of the Constitution are open-textured, so that their meaning depends upon the discretion of the judges, a discretion from which personal predilections can never be totally eliminated? And if the Justices make a colossal error—one that is unacceptable to an overwhelming majority of the people—how can the damage be repaired with a minimum of shock to the system? In this volume Paul Dimond joins the distinguished group of scholars who have tried to answer such questions.

Dimond's thesis is that judicial rulings in constitutional cases should be understood as *provisional* rather than *final*, as a means of initiating a continuing dialogue *with* the people rather than as judgments forever binding *on* the people. Dimond contends that he is not offering a precise description of how the Supreme Court acts or should act but is only proposing a new way of thinking about its decisions. "Provisional review," he suggests, "provides a different lens through which to see how the Court may interact with the people over time in interpreting the Constitution." Seen in such a light, the Court's decisions simply posit a point of view which initiates a national dialogue on a constitutional issue.

Divided into two sections, the book first examines the indeterminate nature of the American constitutional structure and proposes a theoretical foundation for the author's thesis; the second section deals with the idea of promoting a national debate over the meaning of the Constitution through the use of provisional review. Confronting the dilemma of judicial review in a democracy, Dimond begins with a critique of three areas of judicial decision-making: the segregation cases, federal-state conflicts, and the Bill of Rights.

Among the most open-ended of the Constitution's clauses are those of the fourteenth amendment, and thus in *Brown v. Board of Education* we see a clear instance of judicial choice. The Warren Court, without any mandate in the language of the equal protection clause, nor so much as an allusion to racial separation in the debates surrounding its adoption, declared segregation in the public schools unconstitutional. Nevertheless, argues Dimond, interpreting the equal protection clause as prohibiting such "caste discrimination" is not inconsistent with the text, or the framers' intentions. Though not compelled, the decision was well within the range of legitimate choices authorized by the Constitution. What about *Plessy v. Ferguson*? Just as the decision in *Brown* was appropriate, the ruling in *Plessy* was not, since the Justices in the latter case ignored the anti-

caste principle which, according to Dimond, is at the core of the equal protection clause. It is the violation of this principle, the relegation of an out-group minority to second class status, that justifies the Court's finding of a denial of equal protection.

In his treatment of federal-state conflicts Dimond urges the Supreme Court to resurrect the privileges and immunities clause of the fourteenth amendment as a standard for defining "fundamental national rights of membership in the national community that may also bind the substance of state law." Such an interpretation of this presently lifeless clause, though not compelled, would be a legitimate exercise of provisional judicial review, and would merely initiate a dialogue about which individual national rights should bind the states.

Concerning the Bill of Rights, Dimond defends judicial invalidation of acts of Congress in three areas: "representation-reinforcing" values with respect to the first amendment and to congressional reapportionment (John Hart Ely's view); the anti-caste limits on congressional lawmaking; and the clear statement rule, meaning that Congress must avoid ambiguity and legislate with clarity in constitutional areas or face judicial invalidation of its handiwork, such invalidation, of course, being provisional. Thus "the Court retains the authority to assure that the national lawmaking process is in fact representative"

In the concluding half of the study Dimond explores the techniques by which provisional review might operate in the areas of free speech, discrimination, abortion, and education. He suggests at the outset that none of the structural limits that provisional review imposes on national legislation compels Congress to reach any particular result; they require only that Congress act in a manner consistent with representative democracy, that it not prejudicially harm any out-group, and that it carefully articulate the constitutional issues. Using hypothetical illustrations, Dimond purports to resolve constitutional issues through a provisional review that involves a sort of constitutional game of catch in which Court and Congress throw the ball back and forth. Where the ball comes to rest depends upon which player makes the wiser decision, but even then the game begins again when the national "ongoing dialogue" suggests that the law needs revision. While the Court has never overtly embraced the structure of provisional review, says Dimond, historically "the Court's judgments have been provisional in fact." So long as the Court's decisions are not viewed as final, the conflict between judicial review and representative democracy is resolved.

After observing that provisional review has existed in practice,

Dimond then suggests that the Court need not embrace it in all of its aspects at once. I find this confusing. If we already have had it, why the concern about how suddenly to adopt it?

In part the confusion is dispelled by Dimond's imaginative proposal that the Court use the privileges and immunities clause rather than the due process clause "as the source for positing substantive national rights of individuals under section 1 of the fourteenth amendment as against the states." For example, Dimond purports to deflect the usual objections to *Roe v. Wade* by positing the right either of the unborn child or of the woman who wants an abortion as a privilege of national citizenship. This would be "provisional" since Congress might then provide a different answer, which answer again would be subject to judicial review. In this hypothetical case Dimond suggests that Congress might enact a Pro-Life-Pro-Mother Act which would, among other things, regulate abortions, provide pregnancy leaves, fund unwanted childbearing and require paternal support for all children. Alternatively, Congress might enact a State Choice Act on Bearing Children, authorizing each state to establish its own policy as long as it contains no anti-woman bias. In reviewing state legislative responses to the national statute, the Supreme Court would provide a continuing dialogue with the people over the abortion issue. That is, the Court, having espoused either a pro-choice or pro-life position, each being a valid possibility as a privilege of national citizenship under the fourteenth amendment, would simply set the stage for renewed congressional action and further judicial review. In sum, Dimond purports to resolve the conflict between policymaking by an unelected, life-tenured Supreme Court and representative government by (1) giving Congress the power to override the Court's interpretation of most national rights that bind the states, and (2) limiting judicial review to the process of lawmaking with the exception of "a surprisingly few substantive values enumerated in the Bill of Rights. Thus, provisional review provides a structure for judicial interpretation of the Constitution that is consistent with the nation's commitment to representative democracy."

One's first reaction on reading this thoughtful and provocative study is that it is more descriptive of what *is* than of what ought to be done. The book's thesis largely turns on the meaning of the word "final." Constitutional decisions have rarely been final in the sense of permanent; most are eventually modified by judicial reinterpretation; some lose status simply by desuetude; a few are terminated by constitutional amendment. Eventually the dynamic of representative government does have its way, and with a few nota-

ble exceptions constitutional decisions have been *final* only for periods ranging from three years (*Flag Salute Cases*) to fifty-eight years (*Plessy to Brown*) to ninety-six years (*Swift v. Tyson* to *Erie Railroad v. Tompkins*). Most do not last without modification for even a generation. Witness those memorable decisions of the Warren Court, *Miranda v. Arizona* and *Baker v. Carr*, both of which have undergone considerable revision.

The most prominent and controversial decisions of the 1988-89 Term—abortion, affirmative action, and flag burning—moved very swiftly into the arena of national debate, precisely the process advocated by Dimond. This is not to suggest that the Court consciously regarded its decisions as provisional, only that they were so in fact. In those difficult areas one suspects that is what they will always be—“final” only for an indeterminate period. It seems doubtful, however, that any Supreme Court in the foreseeable future will openly call its decisions “provisional”; any such concession would undermine *Marbury v. Madison*.

My only basic criticism of this carefully reasoned, innovative argument has to do with Dimond's inability to transcend relativism in discussing constitutional interpretation. Clearly, judicial choice is a fact of life in all appellate courts in all governmental systems. Under written constitutions which are imprecise because of the necessity for generality in fundamental law, a judge is put to the ultimate test of competence, integrity, and disinterest when he must choose among several options in hard cases. In Dimond's scenario, if the constitutional language is vague and original intent is unascertainable (occasionally but not always the case) the Court makes a choice followed by a national debate with an ultimate resolution based upon the popular will. This is not constitutionalism but populism. Constitutionalism is supposed to limit popular government. Judicial review after all was born of a Federalist distrust of democracy. When constitutional language and original intent are unclear, there still are right choices and wrong choices, but right and wrong are devoid of any permanent meaning in a relativistic framework where no standard exists. We need to recall that the framers—of the original Constitution and of the Civil War amendments—were nourished by the natural law tradition, embracing the notion that all human beings possess equal dignity and equal worth. That is why the Court was clearly wrong in *Plessy* and clearly right in *Brown*. The abortion issue is much more complex, because two antagonistic rights are at stake, and nothing in the language or spirit of the fourteenth amendment supports either *Roe* or its opposite. Dimond's proposed solution to the abortion problem begs the issue,

since it ultimately becomes a question for national debate and solution by representative bodies. Why not leave unspecified constitutional rights with the legislatures in the first place?

It is unlikely that a national consensus will ever be reached on a fixed set of rules for the exercise of judicial review so long as right and wrong remain relative terms determined by counting votes. Only if we return to the founders' public philosophy can we retain the spirit of constitutional government. Otherwise, constitutional choices are made on the basis of personal preference. We cannot expect the Constitution and a stable American system to survive the onslaught of the Jacobin ideology which permits personal desires to determine public policy. Such an attitude will not preserve history's most successful constitutional order nor that noble document "intended to endure for ages to come" upon which it is based.

CONCEPTUAL CHANGE AND THE CONSTITUTION.
 Edited by Terence Ball¹ and J.G.A. Pocock.² Lawrence, Kansas: University of Kansas Press. 1988. Pp. x, 218. \$25.00.

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Most of the essays in this volume originated as papers for presentation at an April 1987 conference at the Folger Institute for Renaissance and Eighteenth-Century Studies, where Professor Pocock has for some time now been a leading presence in collective reflection on how best to approach the history of political thought. It's no surprise, then, that the book offers methodological self-consciousness aplenty. But if anything, Professor Ball's distinctive methodological commitments are even more apparent here than are Pocock's. Indeed, some of Ball's fellow contributors to this volume have taken a stand squarely with him in these commitments, which look to the current *Begriffsgeschichte* ("conceptual history") movement in Germany as a guide for improving the study of the history of Anglo-American political theory. To be sure, several of the essays collected here don't show any special affinity with this new school of conceptual history; but what's most noteworthy about the volume overall is how so many of them do.

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