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Book Review

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BOOK REVIEW

BY WHAT RIGHT?—A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION. By Louis Lusky, Virginia: Michie, 1975. Pp. 446. $16.00.

This book addresses itself to the questions: "Is the Supreme Court still the law's servant, or has it now set itself above the law? *By what right* does it revise the Constitution?"[1]

In this election year the Court's decisions have come under increased notice and scrutiny as the candidates take stands on the issues with which the Court has dealt. Two of the most salient issues are abortion and bussing. *By What Right?* provides a useful background to evaluate the Court's decisions on these issues.

The author, Louis Lusky, initially expresses his reverence for the Supreme Court as the "finest of our institutions."[2] He goes so far as to state that of all the federal, state, and local governmental units, the Supreme Court is the only one which has performed splendidly.

Lusky advocates the use of neutral principles in reaching judgments, based on analysis and reasoning transcending the immediate results that are achieved. He does not argue with the results achieved in most cases but disagrees with the means used to achieve the results. The means used by the Court in recent years has been to a large extent the "compelling governmental interest" test.[3] Under this test if a right is fundamental or a classification suspect, governmental interference can not be justified unless it furthers a compelling governmental interest. Lusky states that the Court, bent on expanding its power, can use this formula and thereby sidestep the need to explain why the judgment of the Court should be preferred to that of the legislature. The Court may merely classify a right or interest as fundamental, or a classification as suspect, without any reference to any known standard.

Roe v. Wade,[4] the 1973 abortion decision, is cited as an example of where the "compelling governmental interest" test was used to reverse the presumption of constitutionality,[5] requiring the official action outlined in the statute to be the only possible way to attain an important public objective. This burden of showing constitutionality can seldom be met, and the statutes are usually struck down. It does not seem to matter that the voters through their representatives have voiced their approval of the statutes in question.

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1. L. LUSKY, BY WHAT RIGHT? 19 (1975).
2. *Id.* at vii.
3. *Id.* at 264.
4. 410 U.S. 113 (1973).
5. L. LUSKY, BY WHAT RIGHT? 265 (1975).

Lusky suggests the possibility that if the Equal Rights Amendment fails to be ratified, the Court will proceed to effectuate it nevertheless—by declaring sex classifications suspect and applying the compelling governmental interest test.

The author advocates the use of the concept of "Implied Judicial Power" in the Court's decision making. Implied judicial power is the authority the Founding Fathers intended to invest in the Court so it could

> serve as the Founder's surrogate for the indefinite future—interpreting the Constitution not as they themselves would have directed if they had been consulted in 1787, but as is thought right by men who accept the Founders' political philosophy—their commitment to self-government and the open society—and consider themselves obligated to effectuate that philosophy in the America of their own day.[6]

After showing how this doctrine has evolved from *McCulloch v. Maryland*,[7] Lusky states that this principle can be used to evaluate the Court's work and can be used to defend the Court from accusations that it has placed itself above the law. Before implied judicial power is resorted to the following questions must be asked: (1) Is the national objective involved within the framework of the Constitution? (2) Is action of the Court necessary to attain this objective or could this objective better be handled by the normal political processes? If the answers are affirmative, the implied judicial power may be resorted to and new constitutional law formulated.

This implied judicial power approach would provide the demonstrable restraint to keep the Court from acting even if the end is socially desirable.

The author also advocates the use of "tentative judical review" instead of "definitive judicial review" in many areas. Tentative judicial review occurs when the Court does not claim the last word in declaring some official action to be unconstitutional, but may subsequently yield to a contrary determination by another organ of government.

Definitive judicial review occurs when the Court explains its decisions on the basis of legal propositions which it denies the power of the legislatures to change.

In dealing with cases on abortion, contraceptives, and pornography, which Lusky defines as "neo-privacy" cases, the Court, according to the author, should use tentative judicial review and allow the legislature to decide if there is a legitimate collective interest in regulating these activities.

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6. *Id.* at 21.
7. 17 U.S. (4 Wheat.) 316 (1819).

As for the racial discrimination cases the Court should adhere to definitive judicial review and should go to the extent of repudiating the *Slaughter-House Cases*[8] and *Civil Rights Cases*[9] which hold that Congress has no powers to forbid private discrimination under the fourteenth amendment.[10] Lusky speculates that the fourteenth amendment[11] should be read to allow Congress to pass laws prohibiting even private discrimination to eliminate the vestiges of slavery.

The author warns against the utilization of judicial review beyond the boundaries of demonstrable necessity and predicts adverse consequences if this warning is not heeded. One consequence may be an effort to pass an amendment to the Constitution. For example, the Court's recent abortion decision is presently considered a political issue and opponents of the issue are seeking a constitutional amendment.

A second consequence may be attempts to change the Court's positions through new appointments and the impeachment process. Such position-changing appointments were made when President Nixon appointed Chief Justice Burger and Justices Blackmun, Powell and Renquist. In 1970 Congressman Ford spearheaded an attempt to impeach Justice Douglas and there was talk of impeaching Chief Justice Warren.

A third and more drastic consequence may be erosion of respect for the law as declared by the Court and outright defiance of the law.[12]

In justifying its decisions, it is clear that the Court has attempted to tie its decisions to precise wording in the Constitution. As a result, in some cases it strained the Constitution's language in its interpretations. The Court has adopted this approach so it can point to the Constitution's wording to justify its decisions to the bench, bar, and public. If the Court should abandon this linking to wording, as Lusky advocates with his implied judicial power approach, the Court's detractors may even more readily accuse the Court of using its own subjective judgment and making its own law, not merely interpreting the wording and intent of the framers of the Constitution and amendments.

However, the utilization of the implied judicial power approach to judicial review could also be used, as well as the compelling gov-

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8. 83 U.S. (16 Wall.) 36 (1873).
9. 109 U.S. 3 (1883).
10. L. LUSKY, BY WHAT RIGHT? 359-60 (1975).
11. The fourteenth amendment provides in part:
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unted States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
12. *See* GRAND FORKS HERALD, Sept. 3, 1976, at 18, col. 2. In the American Parties' political advertisement, Martin Vaaler states that if elected Governor of North Dakota, "I pledge to defy the United States Supreme Court decision on abortion, even fly to Washington, if necessary, to express the pro-life will of our people." *Id.*

ernmental interest approach, to further expand the power of the Court to revise the Constitution. The Court in its own wisdom could decide that it is the only branch which can effectuate a needed national objective. This decision could be entirely subjective.

Lusky's concept of tentative judicial review does have merit in allowing the legislature to change laws which are constitutionally impermissible rather than having the Court rewrite the law specifically.

By What Right? is very informative and an excellent outline of where the Court has been and what the Court should consider doing to retain its high position of esteem within our system of government.

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