The democratic character of judicial review

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Harvard law review. THE DEMOCRATIC REVIEW. Character. Of judicial. Eugene V. Rostow *

It would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community. The idea that judicial review is undemocratic is not an academic issue of political philosophy. Like most abstractions, it has far-reaching practical consequences. I suspect that for some judges it is the mainspring of decision, inducing them in many cases to uphold legislative and executive action which would otherwise have been condemned. The reconciliation of judicial review and democracy Ely postulates is a court acting merely as the instrument by which the logic of our commitment to democratic means may be fully played out, even where consensus about means disintegrates over the playing out. The trick is in deciding, however, precisely what the consensus is about, and in relating one's conclusions to some empirically viable explanation of the system as it stands. 44. But see Rostow, The Democratic Character of Judicial Review, 66 HARV. L. REV. 193 (1952). Judicial review, they have urged, is an undemocratic shoot on an otherwise respectable tree. "Ending the power of judicial review would leave legislators free to do whatever they want, restrained only by their own consciences and
their fear of political repercussions," Jacob Sullum points out at Reason. “Depending on who happens to be in power, legislators might enact Bouie's policy agenda, or they might endorse torture, approve warrantless searches, abolish the presumption of innocence, close down newspapers that criticize them, or exclude immigrants based on their race." In the death-penalty cases, Bouie wanted the court to use judicial review to overrule state laws, prohibiting some executions regardless of the democratic will. Americans were fairly evenly split on the travel ban—depending on the wording used in each poll. Judicial review is how the court determines the meaning of the Constitution. If you believe that Supreme Court Justices appointed for a lifetime tenure by whatever President happens to be in office at the time a new Justice or two or several must be appointed, then it's democratic, especially if you share the ideology of the appointees and their nominating President. If you don't share their vision and beliefs, then it isn't.