

# FOREWORD: LEGISLATURES, COURTS, AND THE CONTESTABILITY OF RIGHTS†

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In the *Journal of Legislation & Public Policy*'s Inaugural Issue,<sup>1</sup> co-founders Steven Davis and Sean O. Burton listed their two reasons for starting a journal on legislation. First, they noted the legal academy's lack of interest in the study of the legislative process. Second, they echoed Judge Harry T. Edwards's lament that "significant contingents of 'impractical' scholars . . . produce[ ] abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical matter. As a consequence, . . . judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy."<sup>2</sup> Davis and Burton wrote that *Legislation* would "fill that void by providing a forum for timely, practical scholarship, thus contributing to a greater understanding of the legislative process and the lawyer's role within it."<sup>3</sup> Since its inception, *Legislation* has proved faithful to Davis and Burton's program, dutifully presenting symposia on particular substantive instances of legislation, such as ballot initiatives,<sup>4</sup> encryption technology laws,<sup>5</sup> regulation of human cloning,<sup>6</sup> and securities

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† The symposium *Legislatures, Courts, and the Contestability of Rights: A Conversation* took place on Friday, Nov. 16, 2001, at New York University School of Law.

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1. Steven Davis and Sean O. Burton, *A Journal of Legislation and Public Policy at New York University*, 1 N.Y.U. J. LEGIS. & PUB. POL'Y, at vii, vii (1997).

2. *Id.* (quoting Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992)).

3. *Id.* at vii–viii.

4. Symposium, *The Legitimacy of Direct Democracy: Ballot Initiatives and the Law*, 1 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (1997).

5. Symposium, *The Role of Encryption Technology in Business, Law Enforcement, and Constitutional Analysis*, 3 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (1999).

6. Symposium, *Legislating Morality: The Debate Over Human Cloning*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2000).

regulation.<sup>7</sup> This year we step up a level, and engage in a philosophical examination of legislation itself and its role in our constitutional system. Have we overstepped the bounds of our mandate?

Independent judiciaries in general and constitutional judiciaries in particular are sweeping the world. While the idea is generally not uncontroversial, one prominent and thoughtful dissenting voice is Jeremy Waldron's.<sup>8</sup> In *Law and Disagreement*,<sup>9</sup> Waldron argues that "the theory . . . that right-bearers have the right to resolve disagreements about what rights they have among themselves and on roughly equal terms, is the only plausible rights-based theory of authority."<sup>10</sup> Waldron, accordingly, is not warmly disposed to judicial review. He proposes that fundamental issues of rights and justice should be decided in the realm of politics in majoritarian representative institutions, rather than by a constitutional judiciary.

Waldron's arguments provided fodder for stimulating debate among the Symposium participants. The first part of the Symposium consisted of short presentations, produced here in edited form. Professor Waldron's remarks summarize the main arguments of *Law and Disagreement* and sets the stage for the reactions of the other authors. In their comments, Professors Sager and Eisgruber attack Waldron's idea head-on, arguing that judicial review is entirely consistent with and enhancing of democracy. Professor Whittington, though himself a fan of judicial review in certain circumstances, struggles to find common ground with Waldron. And Professor Ferejohn offers a comparative analysis, contrasting American-style judicial review with the European, or Kelsenian, model.

After the presentations, the participants engaged in a free-flowing conversation about themes raised by the presentations. Joining the five participants were N.Y.U. Global Law Professor Pasquale Pasquino and N.Y.U. students Melissa Schwartzberg and Iddo Porat. The conversation has been reproduced in an edited form to give readers a sense of the exciting intellectual discussion that took place.

I return to the question I asked above, regarding the institutional boundaries of this *Journal*. This Symposium is certainly responsive to the first concern and will hopefully increase academic interest in legis-

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7. Symposium, *Regulation of Securities and Security Exchanges in the Age of the Internet*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2001).

8. For related arguments, see RICHARD PARKER, *HERE, THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO* (1994); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

9. JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

10. *Id.* at 254.

lation. Professor Waldron's project in *Law and Disagreement* is to investigate legislation from a philosophical perspective, to develop a jurisprudential theory which explains how legislatures interact with courts and constitutions in the project of realizing justice in the face of intractable disagreement. But what about the founders' second concern? If the *Journal's* mission was to eschew theory, then we are guilty of overstepping our institutional boundaries. But we did so for good cause, and so we are unapologetic. The theoretical inquiry pursued at this Symposium speaks directly to contemporary concrete constitutional problems, such as the tug-of-war between Congress and the Court over the scope of religious freedom. In the spirit of Waldron's work, the editors of *Legislation* have taken the question of the *Journal's* scope into our hands. In the face of disagreement, we decided to expand our founders' directive to bring together an impressive group of thinkers for an important discussion about legislatures, judicial review, and rights, which will enrich the *Journal* and the academy.

