Observation

Harvard's View of the Supreme Court: A Response

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In this essay Professor Deutsch examines the legitimacy of judicial review, in part as a response to recent works by three faculty members of the Harvard Law School—John Hart Ely, Laurence Tribe, and Frank Michelman. Because of the nature of the response, this essay may also be read as a counterpoint to the articles by Professors Mark Tushnet and Gary Leedes presented in this issue. Professor Deutsch contends that questions of legitimacy are endemic to processes of political choice, whether legislative or judicial. Thus, criticisms or justifications of judicial review are flawed to the extent they assume the burden of legitimacy to be different for courts than for other political actors in a democracy. For Professor Deutsch, the legitimacy of all political processes—that is, their ability to reach outcomes about which people may disagree without endangering fundamental institutional values—turns instead on whether those processes achieve what the polity acknowledges in retrospect to have been acceptable goals, a judgment that will itself be shaped by preceding political choices. Institutional features such as the traditions of judicial conference and opinion—and the special role of precedent identified by Professor Deutsch—help to ensure the legitimacy of judicial choices in conflict with those of representative bodies. While changes in modern society may render the task of understanding the precedential value of recent judicial opinions uncertain, it is still the bond of precedent that fortifies the foundations of judicial review.

The unknowable interplay between intention and action makes it difficult to judge what is done by others. It is this fact that accounts for the existence of rules such as hearsay and its exceptions, whose proper application is mastered by only a handful of litigators. The question of the significance of one's existence is rendered problematic by the same disparity between what we intend and what we accomplish. Existen-

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tialists resolve this philosophical dilemma by arguing that only death, which defines the temporal context of an individual life, permits one to transmute the inventory of an individual's actions into the incontrovertible basis for statements about the meaning of an existence.

The legal institution known as the Supreme Court resists the solution of a definitive termination because it consists of nine separate individuals, each of whom serves for life. The work of the Court constitutes a collective enterprise. Each of the Justices, however, when writing for a majority, enunciates a precedent that binds the Court. It is my contention that the disparity between an ongoing Court and nine separate and limited lives constitutes the source of the political power exercised by the Supreme Court and that adequate explications of its opinions must necessarily take this disparity into account.

I.

By definition, there is no politics when there is agreement. In politics, choices are made that bind those that dissent. Thus, both those that exercise political power and those that are subject to it may be forced to consider questions of legitimacy. In a recent Foreword to the *Harvard Law Review*'s annual issue on the Supreme Court,[1] John Hart Ely has written a devastating critique of one set of answers offered by academics and judges to the question of what makes decisions of the Supreme Court legitimate: that the Justices can and should protect our fundamental social values. This is not the place to recapitulate the details of his critique, but especially recommended are his strictures against those who say that judges should preserve tradition, identify an underlying consensus, or anticipate future progress. Professor Ely thinks it something less than self-evident either that yesterday's majority (tradition) or tomorrow's majority (progress) should control today's, and he is unable to understand at all what it means to say that today's majority should control today's majority (consensus).

Let it be granted that political actors such as legislators and administrators must make choices about matters of "fundamental values," and let it further be granted that judges are not under the protective guidance of the Holy Spirit in accurately divining what those matters might be. The question is whether there is then no legitimate basis for the power of judicial review, whether it is always wrong for judges in a democracy to refuse to enforce the choices arrived at by

1. Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

other political actors. Professor Ely's way out is to have recourse to footnote four of *Carolene Products*:[2] judges can pass upon the legitimacy of the *process* by which fundamental values are chosen without judging the values chosen by this process.[3] To use his words, Professor Ely wants judges to restrict themselves to determining whether the "majority . . . is systematically advantaging itself at the expense of one or more minorities whose reciprocal support it does not need and thereby effectively denying them the protection afforded other groups by a representative system."[4] This process-oriented review, argues Ely, is conducted by judges, who, because they are not elected, do not have a personal stake in any particular configuration of the political process. As a result, this system of review in fact reinforces democracy, since democracy works best when such configurations are constantly tested and changed to remain compatible with the will of the majority.[5]

II.

The process Professor Ely designates as a representative system can be defined as the political mechanism by which groups arrive at the principles that constitute an acceptable consensus. To be accepted, a principle—whether a judicial precedent, a legislative enactment, or an administrative rule—must be sufficiently general and coherent to represent something the polity believes can be identified despite the changes the future will bring. Any workable consensus, moreover, must also meet the political requirement of being at least minimally acceptable to the various groups and individuals involved. When this consensus is unanimous, tradition and progress coalesce, thus vitiating the problem of legitimacy. When agreement is something less than unanimous, however, there will be arguments, and they may be formulated in terms of legitimacy. Plaintiffs may argue that the status quo is illegitimate because it violates fundamental rights; defendants may argue that recognition of rights in the circumstances presented represents illegitimate change in the social status quo. And as new frontiers begin to function as symbols of an irrecoverable past rather than as social safety valves for the accommodation of dissatisfied individuals, it will become increasingly likely that the recognition of rights will be perceived as illegitimate governmental action.

2. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1937).

3. *See* Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

4. *Id.* at 486-87.

5. *Id.* at 487.

Revolution, in this context, can be defined as the point at which a given political system has failed. Revolution, which signifies the loss of legitimacy, occurs whenever enough individuals are sufficiently dissatisfied that the desire for replacement of choices embodied in the present system outweighs concern over the potentially unsatisfactory consequences of new choices. For individuals, revolutions involve shifts in the criteria by which they identify themselves as political actors; a successful revolution demands a sufficient number of individual shifts to produce a change in the political values held by the society. Individual social and political identifications are, in the ordinary course, matters governed by habit, by the experience of the past. Revolution can thus be defined (in terms of the individual) as the replacement of habitual by spontaneous political behavior. Spontaneous political behavior in this sense is perceived by the individual as a free act, although it is, of course, capable of being rationalized. If the revolution succeeds, however, meaning that a shift in social values has occurred, new terms that define individuals as political beings have come into existence, and the shifts in individual identifications can be denominated rationalizations only if there is no such thing as a free act.

In retrospect, therefore, successful revolutions are perceived as spontaneous acts rather than rationalizations of manipulations that have succeeded in achieving undisclosed political ends. Given these terms, the question Professor Ely fails to answer about changes in the status quo wrought by the judiciary is whether they are distinguishable from those attempted by other political actors, or whether one must conclude that judicial decisions, like other political acts, will in the end be judged legitimate only if they have successfully achieved what in retrospect we acknowledge to have been their goals.

III.

The answer to that question lies in the fact that as members of an appellate court become acquainted with each other's views, individual rationalization becomes more and more difficult if any other member, desiring to reach a different result, thinks it important to demonstrate that the argument being advanced is actually a rationalization; the institutions of the judicial conference and opinion, in short, serve to maximize the likelihood that individual rationalizations will be exposed. If we believe particular political decisions will be better to the extent that their meaning is clearly apprehended by the actors making them, then the searching dialogues forced upon judges by the institutions of the judicial opinion and conference render judicial entities such as the

Supreme Court more likely than other political bodies to arrive at trustworthy choices. The dialogue that constitutes this process can be seen as a current manifestation of the Socratic method revealed by Plato in the *Republic*, a text basic to Western political philosophy. This is not to say that judicial institutions always function effectively. It is, however, the aspect of the Supreme Court's work embodied in these dialogues, rather than Professor Ely's dichotomy between process and substantive choices, that legitimates the imposition of the Court's political choices upon the society at large.

It was through the image of Platonic Guardians that Learned Hand argued that judicial review was illegitimate insofar as it permitted political decisions to be overridden by those not subject to the electoral process.[6] The institution of judicial review, however, was not without its defenders. A later Holmes Lecture by Herbert Wechsler[7] stressed the contrast between the nature of political choice, which he defined as essentially arbitrary, and legitimate judicial decisionmaking, which he argued should be neutrally principled. Strikingly, however, the only example cited of a principle meeting such standards was the Court's abandonment during the New Deal of any attempt to limit congressional control of the economy through use of the commerce and taxing powers.[8]

A view of constitutional guarantees as limits on political power informed Henry Hart's seminal article, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic."[9] Unlike Wechsler, however, Hart, in defining the nature of the judicial process, betrayed awareness of its common-law origins and thus argued that in the last analysis it is the *state* courts that cannot be deprived of the authority to render decisions in conflict with constitutional legislative or executive action.[10] What Hart failed to recognize was the uniqueness of the American judiciary. Although the British judiciary failed to gain independence from or equality with either the legislature or the executive, several factors coalesced to make it possible for the United States judiciary to become so fully a separate and equal branch. The holding of *Marbury v. Madison*,[11] whose precedential significance is the announcement of that status, consisted of a judicial refusal to accept a grant of power from the legislature, a holding difficult for the

6. L. HAND, THE BILL OF RIGHTS 1-30 (1958).
7. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).
8. *Id.* at 23-24.
9. 66 HARV. L. REV. 1362 (1953).
10. *Id.* at 1401.
11. 5 U.S. (1 Cranch) 137 (1803).

legislature to contest. Yet more important in the Supreme Court's assumption of its role as constitutional arbiter are the series of decisions[12] on which Wechsler relied, in which the Court, while delineating the meaning of the commerce clause, shifted political power over the economy from the states to Congress.

By definition, however, the process of allocating political power differs from that of limiting it; it is this latter process that is the hallmark of judicial review, and the one that is called upon to meet the test of legitimacy. In the end, therefore, a focus on the common law origins of the judicial process avails as little as invocation of its principled nature to establish effectively its claim to legitimacy when, as in the days of the New Deal, the political choices made by judges differ from those of other political actors.

IV.

The triumph of the legal process in the making of the United States was the Supreme Court's use of the commerce clause to transform diverse political entities into a single economic unit. The Supreme Court failed when it attempted to use its power to nullify New Deal economic legislation. In terms of process, judicial power was successfully used to shape economic affairs when other national authorities had *not* acted, but was not effectively utilized in *opposition* to those bodies. A recent Supreme Court decision—*National League of Cities v. Usery*[13]—in which the Court *did* nullify the action of a coordinate branch of the national government, has been analyzed by two members of the Harvard faculty[14] in articles "overlapping in content and perception."[15]

Professor Michelman's article makes clear at the outset that the nature of the substantive holding of law contained in the majority's opinion could not be elucidated without focusing on the process of decisionmaking:

> It was the . . . powerful dissent . . . [that] first made me think there must be even more to that case than meets the eye. . . . The [dissenting] opinion speaks with a controlled intensity that at

12. *See, e.g.,* Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); United States v. Carolene Prods. Co., 304 U.S. 144 (1938); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

13. 426 U.S. 833 (1976).

14. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165 (1977); Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

15. Michelman, *supra* note 14, at 1165 n.*; Tribe, *supra* note 14, at 1066 n.8.

> first seems disconsonant with both the immediate impact of the Court's decision (denial of minimum-wage protection to state and municipal employees) and its broader doctrinal significance (recognition of some state governmental immunity from congressional regulation under the commerce clause).[16]

Professor Tribe's article concludes that

> in order to make sense of *National League of Cities* and the distinctions the Court insisted on drawing in the course of that decision, we must recognize in the Court's concern for federalism a fear that, if state decisionmaking and the demands on state budgets are not sufficiently respected, certain individual rights to decent levels of basic government services, in such areas as public health, sanitation, and fire and police protection, might not be met.[17]

Expanding minimum-wage protection would not, however, have required the closing of sanitation, police, and fire departments, nor would it have created a situation requiring those departments to provide services on a wholly arbitrary or discriminatory basis. Professor Tribe's reading, moreover, ignores the serious implications of *National League of Cities* in terms of the political power exercised by the Court.

V.

What makes *National League of Cities* a difficult decision is that, since the doctrine of intergovernmental immunity applies only to governmental agencies, its application requires formulation of a test capable of distinguishing public from private agencies engaged in the same activity. The history of the state action doctrine is testimony to the difficulties encountered in developing a workable set of criteria, and the dissent demonstrates that the task is no easier when the doctrine being applied is that of intergovernmental immunity. To refuse to make the attempt, however, inevitably entails the surrender of judicial power to adjudicate disputes based on the commerce clause, a result clearly contemplated by the dissent:

> It is unacceptable that the judicial process should be thought superior to the political process in this area. Under the Constitution the Judiciary has no role to play beyond finding that Congress has not made an unreasonable legislative judgment respecting what is "commerce." My Brother BLACKMUN suggests that controlling judicial supervision of the relationship between the States and our National Government by use of a balancing approach diminishes the ominous implications of today's deci-

16. Michelman, *supra* note 14, at 1165.
17. Tribe, *supra* note 14, at 1102.

> sion. Such an approach, however, is a thinly veiled rationalization for judicial supervision of a policy judgment that our system of government reserves to Congress.[18]

It may well be that the Court has already surrendered its power to implement the commerce clause when state authorities are sufficiently sophisticated to use fiscal measures in securing preferences for their own citizens. Thus, in *Hughes v. Alexandria Scrap Corp.*[19] the Court upheld a Maryland statute, under which Maryland businesses were afforded preferential treatment, on the ground that

> [t]he common thread [of commerce clause cases relied on to invalidate the statute as an impermissible burden on interstate commerce] is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation. By contrast, Maryland has not sought to prohibit . . . or to regulate . . . . Instead, it has entered into the market itself to bid up [the] price.[20]

Nor is the possibility of a basic shift of power—one raised in *Hughes* and resisted in *National League of Cities*—limited to the operations of the judicial branch. Our Constitution envisages a House of Representatives capable of delaying (if not preventing) governmental measures deemed important by the larger constituencies represented in the Senate and the Presidency. As current difficulties in legislating an adequate energy program demonstrate, the larger society pays a substantial price for institutions that protect the rights of constituencies residing in relatively small territorial units. Indeed, the Court's success in imposing on such smaller units at least the short-term economic losses resulting from the commerce clause decisions is, in the end, attributable to the political lesson taught by the Civil War of the overriding importance of obedience to national law as opposed to loyalty to regional interests. Since this Nation functions as a single economic unit, however, the fact of territoriality no longer adequately serves to identify diverse economic and political interests. What originally justified the delays in the legislative process inevitably produced by the composition of the House of Representatives was a diversity of territorial interests; what produces those delays today is that many House constituencies contain a disproportionate concentration of members of a given national economic or political interest grouping. If *National League of Cities* and *Hughes* are difficult decisions, in other words, it is

18. 426 U.S. at 876 (Brennan, J., dissenting).
19. 426 U.S. 794 (1976).
20. *Id.* at 806.

because of social changes resulting in a spread of economic sophistication that limits the effective exercise of *all* forms of political power.

VI.

Professor Tribe prefaces his analysis of *National League of Cities* with a disclaimer: "I make no claims about what the Justices intended or 'really had in mind.' I haven't a clue to what that might have been, but I doubt that the conclusion of this Article was it."[21] The reading of a holding as not only unintended, but as something contrary to the intent of the opinion's author, is a permissible one, since a later Court might so construe the earlier holding, and the meaning of a precedent is what is held by that later Court. What makes the interpretation improbable, however, is that the dissent by the author of the earlier opinion (if he were still a member of the Court) would create a strikingly painful situation for members of the Court who had joined the earlier opinion.

Henry Hart's focus on law as an ongoing process obviates the need to focus on a particular decision—to ask whether an opinion *can* really mean what it says. It was precisely Wechsler's focus on this set of issues, on the integrity of the process, that made his charge of inadequate neutrality so unsettling an indictment of the decision in *Brown v. Board of Education*.[22] While a given doctrine is being developed, or insofar as a later Court is engaged in adjusting the positions taken by its predecessors, the legal process is operating to change existing patterns either by restricting or expanding the precedents contained in earlier opinions, but always while being forced to accommodate such precedents by the institutional impediments to rationalization. It is only after the passage of time, however, that retrospective reflection reveals a new pattern, still ordered and coherent, but richer than its predecessors because the Court was forced to take those earlier decisions into account in its development. *Brown*, however, was the product of a self-conscious process of litigation, and what such self-conscious campaigns minimize is precisely the time between the day the Court first announces a position and the day it reaches the outermost limits of that position. Assuming that *Brown* makes future campaigns of self-conscious litigation inevitable, the question presented is whether this situation inevitably changes the nature of the law made by decisions of the Court. It is my contention that it does not, and that the increasing diffi-

21. Tribe, *supra* note 14, at 1066.
22. 347 U.S. 483 (1954).

culty in delineating understandable patterns in the flow of decisions means only that our society is forced to live with an awareness of the essentially uncertain nature of the precedent contained in a judicial opinion.

A judicial opinion purports to present an accurate history of what it was that made the given judge resolve a described controversy in a particular way. The insistence that that description be as definitive as possible explains our society's refusal to accept oral opinions. The fact remains, however, that the same controversy can be resolved in a different way without changing the history contained in the original opinion, either by stressing more heavily an element that was considered only in passing or by expanding the universe of the elements considered in arriving at the result. That the Court engages in this process is what makes the law not only coherent but also applicable to new situations. How an individual Justice arrived at his decision, however, as well as the significance of his service on the Court, will both remain questions unanswerable until the end of that Justice's tenure creates a pattern of decisions on the basis of which incontrovertible statements can be made.