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Commentary—Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects

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COMMENTARY

SOME REFLECTIONS ON THE JUDICIAL ROLE: DISTINCTIONS, ROOTS, AND PROSPECTS

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At most discussions of exploding rights and expanding remedies, commentators alternate in decrying and cheering the developments of the last quarter-century. Indeed, this remarkable series on equality includes many of those deplorers and applauders. When I read some of the observations in the earlier papers delivered here, I was reminded of a conference not long ago on the subject before us today, the changing role of our courts or, as some put it, the rise of the "imperial judiciary." There, as in some earlier sessions here, there was a preponderance of extremes: some bemoaned the passing of the alleged halcyon era of self-restraint and principle while others embraced the recent developments uncritically. Indeed, one distinguished academic announced that concern with principle, restraint, legitimacy, and competence was simply the song of "academics or losers, or both." Those exaggerated, uncritical portrayals always bring to my mind a favorite *New Yorker* cartoon. It depicts a meek-looking, bald-headed fellow driving away in his little car—I suppose he could have been an academic or a loser, or both. The car displays a bumper sticker with the legend "The Truth Lies Somewhere in Between." That is precisely my reaction to most discussions of the changing role of the federal courts.

But in airing my counsel of moderation here, I find my stance partly preempted by Archibald Cox's thesis. Ordinarily in discussions of this sort, to sound reasonable is to be different. In terms of my interest in being different, I have the misfortune of being on the same program with Archibald Cox, the quintessential reasonable man. One might say, therefore, that it is a mistake to invite two members of the same rare species of reasonable men to discuss the same subject. And that limits my capacity for being distinctive to offering some micro-differences rather than macro ones.

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Let me turn to some differences in emphasis and perception, which may distinguish me from Archibald Cox. I will articulate some distinctions that seem important in thinking about the problems of the changing role of judicial institutions. I will suggest some differing identifications of the major historical roots of our current situation. Further, I will venture my own guesses about where we may be heading.

I.

First, let me elaborate some significant distinctions too often overlooked or blurred. The distinctions pertain to the recent trends, and to the problems raised by those trends. The trends, as Professor Cox has so well summarized, are those of exploding rights and expanding remedies. The problems, as he has correctly raised, are those of legitimacy and of competence.

I think we should be wary of viewing these rights-remedies-legitimacy-competence issues as a largely undifferentiated continuum. Without denying their interrelation, one gains clarity by distinguishing the expansion of rights from the problems of competence. Not every expansion of rights generates novel, difficult problems of remedies. Some expansions create problems primarily of competence, not legitimacy; some, only problems of legitimacy, not competence. In short, not every modern growth in the role of courts presents an intertwined rights-remedies-legitimacy-competence problem.

In my view, the problem of legitimacy is most closely associated with the establishment of new rights, not with the development of new remedies. By contrast, the problem of judicial competence—of institutional expertise and effectiveness—is characteristically associated with remedies, not rights. Moreover, legitimacy problems about rights and competence problems about remedies do not typically coexist. Some newly created rights of the most questionable legitimacy generate no remedial difficulties at all. By contrast, some newly established rights of the clearest legitimacy generate the most difficult questions of remedial competence. I submit that it is rare to find a new development where one simultaneously sees serious questions of legitimacy on the rights side as well as serious problems of institutional competence on the remedial side. For me, those distinctions have some important implications, to which I will return after I give you some illustrations of the distinctions and correlations, or lack thereof, that I have in mind.

Note, for example, that some of the perplexing modern remedial burdens on our courts stem from the most legitimate source imaginable, the United States Congress. The proliferation of statutory rights, often with concomitant generous grants of jurisdiction and generous allowances of standing, such as in the environmental area, is a notable modern phenomenon. When we speak of the recent explosion of rights, we often are really thinking of legislatively created rights for which there is no question of legitimacy, but a very grave one of competence.

One can find the same lack of correlation between legitimacy-rights problems and remedial-competence ones in constitutional law. In my view, *Brown v. Board of Education*[1] was an entirely legitimate decision. Similarly, I have no difficulty accepting a reading of the eighth amendment that prohibits the maintenance of inhumane jails. Yet, despite their legitimate constitutional underpinnings, the school desegregation and jail cases have thrust the federal courts into the most difficult spheres of remedial competence, raising all of the problems regarding the administrative, managerial, and legislative roles of courts.

By contrast, many newly articulated constitutional rights of the most questionable legitimacy have generated no serious remedial difficulties. For example, I have not yet found a satisfying rationale to justify *Roe v. Wade*,[2] the abortion ruling, on the basis of modes of constitutional interpretation I consider legitimate. Yet, the implementation of *Roe v. Wade* was feasible through traditional judicial remedies by enjoining state officials from enforcing unconstitutional abortion laws. *Reynolds v. Sims*,[3] a decision in which my former employer, Earl Warren, took more pride than any other in his career, and a decision to which Solicitor General Archibald Cox contributed greatly, stands as another example of that category. Despite the questionable constitutional underpinnings and the potential remedial problems raised by *Reynolds* and reviewed by Cox, implementation of reapportionment decisions has in most cases proved quite easy—easy, surely, in comparison with the complexities of some school and jail and mental hospital decrees.

And so I maintain that relatively few situations simultaneously present problems of substantive legitimacy and remedial competence. But there *are* situations in which both difficulties arise and interact in sig-

1. 347 U.S. 483 (1954).
2. 410 U.S. 113 (1973).
3. 377 U.S. 533 (1964).

nificant ways. Perhaps the best example is the "new" equal protection, the venture encouraged by Warren Court dicta in the late sixties and advanced by advocates and academics to read substantive rights and affirmative governmental duties into the equal protection clause so as to assure governmental provision of the necessities of life, of welfare, of housing, of municipal services, and of education. But, as Professor Michelman's article in this symposium demonstrated,[4] that effort can raise the gravest difficulties of legitimacy: it requires considerable departure from the text, history, and structure of the Constitution to what has recently been called "transtextual" analysis or fundamental value interpretation, an unabashed, extraconstitutional embracing of the view that the Supreme Court is a legitimate articulator of desirable moral values. I personally doubt that even the Warren Court would have followed through on all of the implications of its "new" equal protection dicta. The Burger Court, though not immune to infusing values of questionable constitutional legitimacy into the basic document, as it demonstrated in *Roe v. Wade*,[5] has made it unmistakably clear, as it did in *San Antonio Independent School District v. Rodriguez*,[6] that it will not join the campaign to read welfare rights into equal protection. That judicial reluctance has both substantive and remedial aspects. When courts try to resolve the polycentric issues of allocating limited public funds and compel the political institutions to implement the judicial choices, there is not only doubt about the legitimacy of the venture, but also related doubt about the obvious problems of institutional competence to succeed in the enterprise.

The welfare rights field is unusual in raising questions both of substantive legitimacy and remedial competence. I think they are often separable questions, and I think it is useful to keep them as separate as possible. Like Archibald Cox, I have concerns about both sets of problems—those of legitimacy and rights and those of competence and remedies. But in my view, as I will elaborate below, the legitimacy-rights problem is a deeper and more serious one than is the competence-remedies problem.

4. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659.
5. 410 U.S. 113 (1973).
6. 411 U.S. 1 (1973).

II.

Before elaborating on that conclusion, let me turn from the issue of important distinctions to that of the historical roots of the new, remedial, administrative, quasi-legislative role of the federal courts. Professor Cox noted the experience with *Brown v. Board of Education*[7] as one important turning point toward the adventurous new role of federal courts. In an earlier lecture in this series, Professor Philip Kurland used the refrain, "*Brown v. Board of Education* was the beginning."[8]

I agree, but I would state the relevance of *Brown* somewhat differently. I see its importance as even greater than does Professor Cox. I think that the process beginning with *Brown II*,[9] the 1955 implementation decree of the Supreme Court, was *the* watershed, not just a contributing cause. And I differ from Professor Kurland in his portrayal of the decree and the thinking that went into it. *Brown II* was a watershed in a different sense than he described.

As I have noted, *Brown I*, the ruling on the merits, was a legitimate one, but I think the opinion was flawed, though I would not use terms as strong as those invoked by Professor Kurland. Nor would I agree with his ascription of the reasons for the flaws. I think him wrong in claiming that "the opinion was the result of desperate negotiations aimed at assuring unanimity rather than clarity"[10] and was a "committee effort" bearing the "stigmata of compromise."[11] Rather, I believe that the opinion was the product of a unanimous, well-meaning, but questionable strategic judgment to produce a document that could be printed in full in the newspapers and could serve as an immediate force of public persuasion. Such an opinion understandably deemphasized traditional legal argumentation. And the failure of the *Brown I* opinion as a public document suggests that the Court acts most wisely as well as most legitimately when it remembers that its basic mission is to be a court of law justifying its results in terms of the law.

But for the problem of changing institutional roles before us today, *Brown II*, the "with all deliberate speed" decree of 1955, not *Brown I*,

7. 347 U.S. 483 (1954).

8. Kurland, "Brown v. Board of Education *was the Beginning," The School Desegregation Cases in the United States Supreme Court: 1954-1979*, 1979 WASH. U.L.Q. 309 quoting A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 7 (1970).

9. 349 U.S. 294 (1955).

10. Kurland, *supra* note 8, at 317.

11. *Id.*

must be the central concern. Professor Kurland describes *Brown II* as the root cause of all our modern problems of remedial competence. He sees *Brown II* as a conscious, deliberate, willful act by the Court to thrust federal judges into the managerial, administrative, quasi-legislative role.[12] In Kurland's view, the Court should simply have said "desegregate forthwith" and let it go at that. In my view, Kurland's version of *Brown II* is a historical Monday morning quarterbacking.

In this instance, I can speak as someone in the same position Kurland ascribed to Professor Bickel with regard to *Brown I*—someone there "at the creation."[13] I was there when *Brown II* was before the Court; I was clerking for Chief Justice Warren. Professor Kurland's proposed disposition was not viewed as a feasible alternative by anyone at the time. No one on the Court, indeed no one among counsel, really thought that a "forthwith" decree would achieve implementation. All recognized that such a decree would generate very serious problems over the authority of the Supreme Court. A "forthwith" decree might well have produced the desired results in the District of Columbia and in the border states, Delaware and Kansas. But there were also companion cases from Prince Edward County, Virginia, and Clarendon County, South Carolina. Resistance and delay there were expectable. And whatever the perspectives of history, in the spring of 1955 it was not easy to contemplate the consequences for the credibility and strength of the Supreme Court if, a year after a "forthwith" decree, inaction prevailed in South Carolina, Virginia, and elsewhere. And even a "forthwith" decree would surely have left very serious problems of implementation for the beleaguered federal judges in the South.

The only practical alternatives before the Court, then, were to issue an extremely detailed implementation decree, or to do what the Court did—hand down a more general decree to remand the cases to the lower courts, insisting that there be "a prompt and reasonable start" in the process of desegregation. That "prompt and reasonable start" provision, I remind you, was in the decree, and was intended to be a command as clear as the more widely publicized and attacked direction that, once that prompt start was made, completion of the process was to proceed "with all deliberate speed."

But my more basic dispute with Professor Kurland's depiction of the

12. *See id.* at 322.
13. *Id.* at 314.

history of *Brown II* is with his suggestion that the Supreme Court deliberately and consciously chose and encouraged the detailed administrative, managerial role ultimately assumed by lower federal courts in the decades of desegregation litigation that followed *Brown II*. That is simply not so. What the Court—perhaps naively and innocently—hoped for in 1955 was that which it described in the decree: that the initiative should be with school administrators and political officials to present plans for desegregation, with lower courts remaining in a relatively passive, traditional posture. The Court hoped that there would be speedy desegregation in the District of Columbia and the border states, that the executive and legislative branches of the national government would ultimately lend a hand, and that, in response to those stimuli, the deep South would ultimately set forth on the desegregation-initiating road.

Those hopes proved false, we know. The defendants and their political supporters in many communities did not come forth with desegregation plans. Confronted with foot-dragging, inaction, and resistance, the federal courts were increasingly pushed into taking the initiative and slowly became administrators, managers, and supervisors. But we would be forgetting history if we forgot that this was initially an unwelcomed role, thrust upon the lower federal courts and not seized by them—thrust upon them by local inaction and resistance, and inaction by the political branches of the national government as well. Contrary to Professor Kurland's version, it was not the desire or anticipation or conscious will of the Supreme Court in *Brown II* that produced those developments.

But, of course, those developments took place. And in my view they are of central importance to our current notions of remedial judicial competence and especially to the courts' own notions of what they are capable of doing. The judicial desegregation process has been much criticized, yet it accomplished a lot. It did succeed, albeit slowly, in implementing the *Brown I* condemnation of de jure public school segregation. To me, the watershed importance of the aftermath of *Brown II* lies precisely there: self-doubting judges were pushed into unaccustomed managerial roles by southern recalcitrance; but, to a considerable degree, the new judicial-administrative role worked, and that was the most critical fact of all. The successes of the lower federal courts overcame preexisting institutional doubts about competence. That success produced, above all, a psychological shift, if one can speak of the

psychology of institutions. The successful assumption of a new managerial role bred judicial self-confidence. More because of the aftermath of *Brown II* than of anything else I can think of, judges changed their minds about what judges are capable of doing. New tasks thrust upon judges and reluctantly assumed by them proved capable, to a surprising degree, of being carried out.

Given my view that *Brown I* was a legitimate decision on the merits, I find no reason to quarrel with the courts' unavoidable assumption of new tasks, which followed in the aftermath of *Brown II*. I am naive enough to think that a court should not shrink from announcing legitimate constitutional rights simply because of remedial concerns. Professor Cox referred in passing to John Marshall and *Worcester v. Georgia*,[14] the 1832 case that rejected Georgia's claim of authority over Indian lands and held the imprisonment of two missionaries illegal. That decision engendered the most threatening consequences for the Marshall Court, yet I think it represents the Marshall Court's noblest hour. When *Worcester* was decided in the spring of 1832, John Marshall and his colleagues knew that Andrew Jackson's White House and a large part of Congress and a large part of Georgia were ready to defy the Court. When John Marshall and his fellow justices voted in that case, they genuinely believed that the decision might well mean the end of effective Court authority. But they also thought that it was legally right, and so it was. And, unflinchingly, they did their duty: they decided the case on the merits, even though the immediate prospects were anxiety-producing, even though the survival of the Court was truly at stake. I think theirs was the proper judicial stance. If a decision is right on the merits, it *should be* handed down, despite fears about the consequences.

For me, then, concern about the expanding role of the courts does not stem from the aftermath of *Brown II* and the story of school desegregation. The concern arises from some of the collateral consequences of the new tasks judges undertook after *Brown I*. The problem arises from the new self-confidence generated among some judges as a result of the desegregation experience. The problem arises primarily, I think, when judges, armed with the new self-confidence generated by the fairly successful handling of the novel remedial problems of *Brown*, transfer that self-confidence to the quite different sphere of creating

14. 31 U.S. (6 Pet.) 536 (1832).

new substantive rights of highly questionable legitimacy. In short, remedial ventures in the cause of enforcing clear-cut, legitimate rights seem to me clearly warranted. Substantive ventures in creating new rights, based on the confidence generated by the success of new remedies, seem to me all wrong. And that, in one sense, illustrates my earlier emphasis on the distinction between, and interrelationship of, the rights-legitimacy problem and the remedies-competence one.

Reynolds v. Sims,[15] the reapportionment decision, illustrates the excessive readiness to transmute confidence about remedies into adventures regarding rights. The ultimate justification for the *Reynolds* ruling is hard, if not impossible, to set forth in constitutionally legitimate terms. It rests, rather, on the view that courts are authorized to step in when injustices exist and other institutions fail to act. That is a dangerous—and I think illegitimate—prescription for judicial action. Yet it is a prescription I read Professor Cox as endorsing, so long as the case is a sufficiently pressing one.

If that prescription is ever legitimate, *Reynolds v. Sims* was surely an appropriate case for it. Malapportionment in state legislatures really did create severe structural obstacles to corrective action by the political branches. But the danger of that prescription lies not only in its basic illegitimacy, but also in the tendency to invoke it too readily in less pressing circumstances. I have heard decisions in far less urgent circumstances defended in very similar terms. And a good many Supreme Court Justices believe that they are vested with the power to act on those "last resort" grounds. For example, some seek to defend the abortion decisions on similar bases. Yet the political process was not truly at a standstill with respect to abortion at the time *Roe v. Wade*[16] came down. I have heard similar arguments in defense of *Jones v. Alfred H. Mayer Company*,[17] the expansive reading of the Civil Rights Act of 1866 as a housing discrimination law, even though Congress had adopted the Fair Housing Act of 1968 shortly before the Court's decision. And I could multiply my examples. To assert that the Court is a "last resort" organ to correct injustices that are not adequately addressed by the political branches seems to me to endorse a view of the Justices perilously close to the "bevy of Platonic Guardians" rejected by Learned Hand.

15. 377 U.S. 533 (1964).
16. 410 U.S. 113 (1973).
17. 389 U.S. 968 (1967).

And so the chief perceptions I derive from this brief historical glance are twofold: the aftermath of *Brown II* was the central watershed with respect to the new managerial, administrative, remedial role of federal courts; but *Reynolds v. Sims* was the watershed for judicial creation of new constitutional rights on the basis of perceived social needs, without much regard for constitutional legitimacy.

III.

Turning from these reflections on distinctions and roots to some guesses about the future, I share Professor Cox's concern about the capacity of the federal courts to serve as supervisors of large-scale institutional reform. But I do not share the widely voiced assumption that an ever expanding role of the courts in the creation of rights and the elaboration of remedies is probable or inevitable. Instead, I think we may be near the crest. I may once again be naive and overoptimistic, but I see—and I am glad to see—a range of signs of mounting doubt and skepticism.

I would especially emphasize the mounting doubts among lower court judges and scholars; and I deliberately put less emphasis on the views of the Supreme Court. True, today's Supreme Court is more reluctant to endorse wide-ranging managerial remedies than that of ten years ago, but that may not hold true when the composition of that tribunal changes, and the Burger Court's remedial skepticism seems less important, in any event, than its readiness to roam freely in the realm of values of questionable legitimacy. With respect to concern for legitimate constitutional interpretation, for example, I see little to choose between Roosevelt-appointee William O. Douglas and Nixon-appointee Harry A. Blackmun.

I find far more significant the signs of changing attitudes among frontline judges and among scholars. The trial judge faced with supervisory responsibilities has more reason for self-confidence today than he did a generation ago. But that frontline judge's experience in managerial tasks in recent years has also given the judge more reason to be aware of the complexities and limits of the process. Let me cite just one example. A recent issue of the *Columbia Law Review* has a graphic piece by Curtis Berger, a Columbia law professor, on his experiences as a master appointed by federal judge Jack Weinstein in a Brooklyn

school desegregation case.[18] Now, my former colleague Weinstein is one of the most daring of federal district judges. But, when confronted with master Berger's proposals for the drastic promotion of institutional reform, he drew back. Even the interventionist Weinstein knew from his own past experience and that of fellow judges that there were indeed real institutional limits to judicial competence and effectiveness. And Weinstein's mounting doubts, I assure you, are by no means unique.

I find even more encouraging the recent developments in constitutional scholarship. As I said, the basic problem for me lies less in the area of remedies than in the sphere of rights. Remedial daring is warranted when there is a clear violation of a legitimate constitutional right. The central difficulty comes from the assertion of rights of questionable legitimacy. And it is precisely with regard to that rights-legitimacy phase of the problem that the changing quality of scholarly commentary is most encouraging.

That observation does not sit well with many critics of the expanding role of the courts. I repeatedly hear it said that the academics are uncritical about the Court, encourage the courts into ever more daring ventures, and are themselves a central source of the problem rather than contributors to solutions. That is not the way I see it.

Contrast, if you will, the academic commentaries of the Warren years with those of today. Most academics agreed with the Warren Court results. Many harbored private doubts about constitutional legitimacy, but few dared speak out. I know a fair number who suppressed their concerns for fear of giving aid and comfort to the enemy. My former colleague Herbert Wechsler and my former employer Learned Hand were among the few who dared criticize, despite the knowledge that their thoughtful words would soon be placed into the *Congressional Record* by the thoughtless political critics of the Court. Today, criticism is far more widespread. The motivation is not always the highest. To some extent the habit of criticism has been revived because a good many academics do not like the results sought by the Nixon appointees. Yet, whatever the motives, criticism is once again in fashion.

Far more important than the result-oriented critics are those aca-

18. Berger, *Away From the Court House and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978).

demics who worry seriously about the legitimacy of newly created constitutional rights. Perhaps I am being unduly parochial and academic as well as naive, but I am heartened by the extraordinary recent phenomenon of more serious and extensive worry in the literature than in any earlier period of my professional career. There is an outburst of writing about legitimate modes of constitutional interpretation and about limits on judicial subjectiveness and open-endedness. An unprecedented number of constitutional law scholars are writing book-length studies focusing ultimately on the central problem of legitimacy I raised earlier. John Ely and Frank Michelman at Harvard, Paul Brest and Tom Grey of my faculty—able scholars such as those—are worrying more seriously than ever about the permissible content of constitutional adjudications on the merits.

Now, I confess I don't agree with much of what I have seen of their product—most of it is still in draft. Much of what they propose strikes me as going beyond the bounds of legitimate constitutional interpretation. But I think the most important point is that they are seriously and extensively worrying about those bounds.

If I am correct that the central problem of the expanding judicial role arises primarily when courts assert rights of marginal legitimacy rather than when they engage in remedial ventures at the margins of their competence, the dramatically reviving interest in legitimacy must surely be a welcome development. The fact that I disagree with some of what Michelman or Grey offers seems to me less important than the fact that they are articulating their reasons in a way that permits reasoned response and challenge. That is surely a far cry from the characteristically impassioned advocacy and commentary of the 1960's. I think there is good reason to hope that from reasoned debate about the legitimacy of expanding constitutional rights will come a healthy skepticism about unwise ventures.

Institutional self-doubt on the bench and skepticism off the bench—those are my ultimate prescriptions and hopes. Doubt and skepticism, moreover, may be the most appropriate note for ending a commentary on Archibald Cox's article. One of our ties is our shared admiration for our former employer, Learned Hand. Institutional self-doubt and scholarly skepticism are central legacies of Hand's approach to the judicial process. I hope that we have demonstrated that it is a legacy not forgotten by at least two of his former law clerks.