THE ROLE OF JUDICIAL ACTIVISM: NEITHER SWORD NOR PURSE?

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> *Whoever attentively considers the different government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated, The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.*
>
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It is familiar constitutional dogma that, at both federal and state levels, our form of government embraces what is commonly known as the doctrine of the separation of powers. This principle is expressly embodied in the New Jersey constitution which provides that

> [t]he powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.[1]

Despite the precision of this language, courts and commentators substantially agree that compartmentalization of all government powers into discrete legislative, executive and judicial spheres never has been truly accomplished, either in New Jersey or elsewhere, and

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** THE FEDERALIST No. 78 (A. Hamilton).

[1] N.J. CONST. art. 3, para. 1. Although there is no similar express statement of this doctrine in the Federal Constitution, the concept of separation is implicit in the textual commitment of the totality of the "legislative," "executive" and "judicial" powers of the United States to "Congress," the "President" and the "Supreme Court," respectively. U.S. CONST. arts. I, II, III. However, even prior to ratification of the Federal Constitution, it was clear that complete autonomy of departments was neither practicable nor intended. *See* THE FEDERALIST No. 47 (J. Madison).

probably never can be.[2] The exigencies of governance stand in the way of such precise arrangements. There always has been some overlapping, some apparent intrusion of one branch of government into a sphere of activity explicitly alloted to some other branch.[3] Notwithstanding the unavoidable overlapping and blending of delegated powers, the doctrine of their separation has remained an ongoing, if somewhat amorphous, aspect of our polity. But recent developments—judicial reform of municipal zoning,[4] state-wide financing of public education,[5] and school busing to achieve racial balance,[6] among others—bid fair to test anew the validity of this principle.

While their factual circumstances differ widely, such notorious cases of judicial intervention can be viewed as variations on a theme. A typical scenario may evolve as follows: The judiciary by adjudication determines that a particular condition or state of affairs is in violation of the Constitution. The latter explicitly or by reasonable inferences imposes the responsibility to correct the condition either upon the legislature or the executive—the two so-called political branches of government. For whatever reason, the appropriate political branch does not respond or responds only inadequately. Thus the unconstitutional condition is allowed to persist. A person having standing to complain comes before the appropriate court, calls attention to the earlier adjudication of unconstitutionality and to the persistence of the offending condition. The court is then asked to afford relief. There is no way for the court to grant this relief without trenching upon a power constitutionally allotted to another branch. What response should the court make to the aggrieved litigant?

There would seem to be several alternatives. The court could refuse to act. In so doing it would presumably point out that, since the judicial power is essentially limited to adjudication[7] and since a

[2] *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 23, at 16 (1978); Gibbons, *The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers*, 5 SETON HALL L. REV. 435, 435–36 (1974).

[3] As one example of this intermingling of powers, consider the administrative process. There a single regulatory agency may legislate by exercise of its rule-making power, execute by its active regulation of an industry or area of government and perform the judicial function when holding hearings to adjudicate rights and punish infractions.

[4] *E.g.*, Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977); Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

[5] *See* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973). For full procedural history of this case, see note 17 *infra*.

[6] Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass.), *stay of implementation denied*, 523 F.2d 917 (1st Cir. 1975), *aff'd*, 530 F.2d 401 (1st. Cir.), *cert. denied*, 426 U.S. 935 (1976).

[7] While this is true in the abstract, the position of the Supreme Court of New Jersey should be especially noted. The grant of judicial power to the courts—what is commonly called

determination of unconstitutionality has already been made, separation of powers principles forbid it to proceed further. It might add that the appropriate relief should be sought, not from the judiciary, but rather, directly from that branch of government having the obligation and the power legitimately to afford relief. There is no doubt that this would be the orthodox answer, as well as the one finding most support in history, precedent and constitutional theory.

In the alternative, a court might choose to order some selected representative of the apparently derelict branch of government to grant the relief sought. The adoption of such a course clearly presents grave problems. A court does not normally, either directly or indirectly, order a legislature to pass a particular law or counsel the executive with respect to molding policy or enforcing the laws. An exception appears to occur when the judiciary requires legislative help in order to meet obligations that have been constitutionally imposed upon it. This, for instance, is the case when, in order to meet a constitutional demand, the judiciary requires funds it does not possess. In such a situation, the court may properly ask the legislature for fiscal assistance. Analysis reveals an important constitutional distinction between the court's order in the first instance and its request for funds in the second.

The New Jersey constitution places upon the supreme court the obligation to "make rules governing the administration of all courts in the State."[8] In attempting to meet this constitutional obligation, the court may encounter a need for funds in excess of those originally appropriated by the legislature. The judiciary is entirely within its rights—it is acting legitimately—when it makes a request of the legislature for such funds. It must have them if it is to perform properly a constitutional function that has been entrusted to it. Not to seek such fiscal aid when needed would be to abjure a constitutional responsibility.

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the power of adjudication—appears in article 6, section 1, paragraph 1: "The judicial power shall be vested in a Supreme Court, a Superior Court, County Courts and inferior courts of limited jurisdiction." In addition to the grant of traditional judicial power, the supreme court is invested with certain legislative and administrative powers. Article 6, section 2, paragraph 3 provides

> [t]he Supreme Court shall make rules governing the administration of all courts in the State, and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and discipline of persons admitted.

This notwithstanding the language of article 3, paragraph 1. *See* text accompanying note 1 *supra*.

[8] N.J. CONST. art. 6, § 2, para. 3.

On the other hand, suppose the constitutional obligation to be that of the legislature. An example might be the duty of the legislature under our state constitution to provide a thorough and efficient education.[9] Where the judiciary perceives that the legislature has failed to meet this obligation due to a lack of available revenues, what should be its response? All would agree that there should be an adjudication of unconstitutionality. Should the judiciary go further and request or direct the legislature to provide necessary funding?

Pause here to observe the difference between a request for funds required to meet the court's own constitutional obligation and a demand that funds be raised and appropriated to meet what the court has declared to be a legislative obligation. They are in no sense the same nor should they be thought to be. In one case the court is doing what it must to fulfill a duty imposed upon it by the constitution. It can neither levy a tax nor appropriate funds from the public treasury. It must turn to the legislature for help. If the request is reasonable, presumably help will be forthcoming. It has been often remarked that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[10] The situation is entirely different when the court directs that funds be raised and appropriated to meet what the court itself has decided to be a legislative duty. Here the court is seeking by indirect coercion to compel a particular exercise of powers properly belonging to another branch of government.

Finally, let us consider a third alternative. Suppose that instead of ordering another branch of government to act, the judiciary itself undertakes to correct the unconstitutional condition. If money is needed, the problem of legitimacy described above is compounded by institutional limitations. Courts are in no way equipped for such an undertaking. They do not have the facilities, the manpower or the expertise to put in train a project as large as the restructuring of a school or prison system. Nor can they take account of all monetary needs, as does the legislature, and determine fiscal priorities intelligently. In attempting to do so the judiciary would become subjected, almost perforce, to pressure from special interest groups and otherwise find itself politically engaged.

This judicial encroachment on legislative and executive prerogative poses a serious dilemma for courts, and indeed for the people of

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[9] For discussion, see text accompanying notes 17–25 *infra*.

[10] Missouri, Kan. & Tex. Ry. v. May, 194 U.S. 267, 270 (1904); McCutcheon v. State Bldg. Auth., 13 N.J. 46, 79, 97 A.2d 663, 680 (1953) (Jacobs, J., dissenting) (quoting Missouri, Kan. & Tex. Ry. Co. v. May, 194 U.S. 267, 270 (1904)).

the state and nation as well. Parenthetically, it is not entirely clear why it has only lately emerged as a problem. It may perhaps be due to the rapidly evolving mores of our times. As recently as 1956 an eminent constitutional authority could say with perfect truth, "[y]et all that courts can do is to say something."[11] This seems no longer to be true but we must look to the social historian to explain the reasons for the change.

In the 1920's it was customary to remark that "[t]he least government is the best government." A hands-off, *laissez-faire* attitude prevailed and characterized government's relationship to the individual. The depression of the 1930's and the New Deal did much to change this, as did, to a lesser extent, the Second World War. In any event, impelled by forces too strong to resist, government became involved in the lives of individual citizens to a degree this country had previously neither known nor foreseen. Benefits such as social security, unemployment compensation, medicare and the like now provide hitherto unknown governmental aid, while vastly increased taxes are a constant reminder of its source. Citizen involvement with government has become more prevalent and citizen demand upon government to supply and provide has become more exigent. Inevitably the ensuing problems have led to the courtroom. As de Tocqueville remarked years ago, "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[12] Today, the same may be said with respect to economic, social and personal problems as well. Whatever the reason may be, courts now are called upon to answer more questions and resolve more problems than every before.

Returning to the particular issue posed above, if the court adopts the first alternative and stays its hand, what are the results? The most obvious one is that the unconstitutional condition will continue to exist, absent any relief from the appropriate political branch. Constitutional rights will still be denied to some persons. There is no way of minimizing the significance of this, nor should we seek to do so. It must be regarded as a failure, at least temporarily, and a very serious one.

On the other hand, what is to be gained by pursuing a course of judicial self-restraint? I submit that far and away the most important gain is that the courts will have retained their "power of legitimacy"[13]

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[11] T. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 8 (1956).

[12] DE TOCQUEVILLE, DEMOCRACY IN AMERICA, i, 280 (1956).

[13] The most important quality of law in a free society is the power to command acceptance and support from the community so as to render force unnecessary, or

and will be seen to have done so. Nowhere is it said in the constitution that if there is a failure on the part of the legislature or the executive to meet a constitutional command, then the judiciary has the duty and the power to remedy the failure in fact.[14] The task of the courts seems to terminate with adjudication.[15]

Suppose, however, a state school system or prison system is deficient in ways and to an extent that lead to an adjudication of constitutional insufficiency as to the operation of the system. Suppose further that adequate correction is impossible without a substantial outlay of public funds which are not available and which the legislature neglects or refuses to provide. What avenues are available to a court seeking to fashion a remedy for an aggrieved party?

The power to tax as well as the power to appropriate revenues are legislative.[16] No one would seriously contend that they reside in the judiciary, and, as far as I know, in no such situation has a court actually undertaken to levy a tax itself or to appropriate money from the public treasury. It is clear, however, that should such a result be desired, it is possible to achieve it by indirection.

In *Robinson v. Cahill,*[17] our supreme court held that, as then financed, the state school system violated a provision of the state consitution,[18] which directs that

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> necessary only upon a small scale against a few recalcitrants. I call this quality the 'power of legitimacy' because it appears to attach to those commands of established organs of government which are seen to result from their performance in an authorized fashion of the functions assigned to them. Such commands, and only such, are legitimate. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 103 (1976).

[14] Of course, it does not necessarily follow from an absence of explicit reference in the constitution that a particular judicial power does not exist. The power of judicial review, for instance, is nowhere stated in the constitution. But Chief Justice Marshall found it to be there nonetheless. *See* Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803).

[15] Strictly speaking, one might take issue with this statement. For instance, after entry of judgment, a court, at the behest of a litigant, often does a variety of things to effect satisfaction of the award. Such action may include the sale of the defendant's lands and chattels; it may require the defendant to reveal the location of hidden assets and may result in his going to jail for contempt of court. But it will be seen that here the judiciary is exercising powers that are inherently its own. It does not invoke or purport to exercise any power traditionally in the keeping of another branch of government. Such actions on the part of the judiciary, whether or not strictly judicial, are nonetheless clearly legitimate.

[16] Gallena v. Scott, 11 N.J. 231, 239, 94 A.2d 312, 315 (1953) ("judicial authority cannot 'compel an appropriation'").

[17] 62 N.J. 473, 303 A.2d 273, *cert. denied,* 414 U.S. 976, *aff'd on rehearing, jurisdiction retained,* 63 N.J. 196, 306 A.2d 65 (1973), *order entered,* 67 N.J. 35, 335 A.2d 6, *order entered,* 67 N.J. 333, 339 A.2d 193 (1975), *republished,* 69 N.J. 133, 351 A.2d 713, *order vacated,* 69 N.J. 449, 355 A.2d 129, *injunction issued,* 70 N.J. 155, 358 A.2d 457, *injunction dissolved,* 70 N.J. 465, 360 A.2d 400 (1976).

[18] 62 N.J. at 520, 303 A.2d at 297–98.

> [t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years.[19]

In 1975, clearly as a reluctant response to this decision, the legislature did enact the Public School Education Act of 1975.[20] Its facial constitutionality was sustained, but only upon the assumption that it would be fully funded.[21] Everyone recognized and agreed that realistically the only way the money could be raised to finance the school system that had been mapped out by this legislation was by the imposition of a statewide income tax. Time went by and nothing was done.[22] Finally, more than three years after the initial adjudication of unconstitutionality, the supreme court entered an order directing that "[o]n and after July 1, 1976, every public officer, state, county or municipal, is hereby enjoined from expending any funds for the support of any free public school."[23] The order had the desired effect. The legislature did enact a statewide income tax.[24] The schools did not close and the necessary funds were raised.[25] This result may be viewed, at first blush, as a significant victory for those who believe that courts should in fact do the kind of thing that was done here. But there are at least two ways of looking at what was done. One might say that, given the constitutional duty of the legislature to fund the school program, the intercession of someone to protect the constitutional rights of deprived citizens was required. No instrumentality of government other than the judiciary seemed to be in any position to afford relief. The courts were, or thought they were, in such a position. They did act. The goal was accomplished. But the matter may also be examined from another viewpoint: The court successfully coerced[26] the legislature into doing what it, the

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[19] N.J. CONST. art. 8, § 4, para. 1.

[20] Public School Education Act of 1975, [1975] N.J. Laws ch. 212, at 871 (codified at N.J. STAT. ANN. §§ 18A: 7A-1 to -33 (West Cum. Supp. 1977–1978)).

[21] 69 N.J. 449, 454, 355 A.2d 129, 134 (1976).

[22] *See generally* Note, *Robinson v. Cahill: A Case Study in Judicial Self-Legitimization*, 8 RUT.-CAM. L.J. 508 (1977); *Survey of the 1975–76* New Jersey Supreme Court Term—*School Finance Reform*, 30 RUTGERS L. REV. 814 (1977).

[23] 70 N.J. 155, 160, 358 A.2d 457, 459 (1976).

[24] New Jersey Gross Income Tax Act, [1976] N.J. Laws ch. 47, at 285 (codified at N.J. STAT. ANN. §§ 54A:1-1 to :9-28 (West 1977–1978)).

[25] The writer of this paper, as a member of the supreme court, dissented from the judgment that would have compelled the schools to close. 70 N.J. at 161, 358 A.2d at 460.

[26] "The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or *coercive influence*, direct or indirect,

legislature, did not wish to do and what it probably would not have otherwise done. Legislators are elected by the people; in New Jersey, judges are not. Does the coercion of the former by the latter suggest there may have been a failure of democratic principle?

It is true that there was no direct judicial exertion of the power to tax or the power to appropriate. It would have been a little frightening but very interesting to have discovered what the reaction of the public would have been had the judiciary sought, directly, to exercise one or both of these powers. What if, in a situation such as that described above, the legislature simply had refused to provide the necessary funding? I think the position of the court would have been an embarassing and unenviable one. Not that the judiciary should fear unpopularity. It does not. But its share of responsibility for the resulting impasse would surely have called pointed attention to what many would look upon as improper intrusion. The court would have faced a serious charge—that in seeking to accomplish a desirable goal, it had nonetheless exceeded its constitutional powers. As one commentator upon this case observed:

> Only if the court is perceived as institutionally viable and respectable will its decisions remain authoritative. Maintenance of this perception in turn requires that the court act within its own institutional boundaries by respecting the doctrine of separation of powers. In this, the court is peculiarly the master of its own fate, since it has historically and necessarily been designed as "the authoritative interpreter of the Constitution, the protestations of another 'equal' branch of the government to the contrary notwithstanding." Misapprehension of its role as interpreter, however, leaves the court susceptible to action beyond its power in remedying perceived constitutional violations. While the rights of individual litigants may thus be upheld, the cost is abuse of the judicial process and distortion of the judiciary's relationship with the other branches of government. Action at the outer reaches of judicial power therefore requires serious consideration of both the practical and legal consequences of a decision. When the court makes an intuitive judgment, not only must the judgment be supported by reasoned elaboration, but a respect for the process of legitimization is necessary in order for the court to remain an authoritative, and not become an authoritarian, decisionmaker.[27]

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of either of the others, has often been stressed and is hardly open to serious question."

Humphrey's Extr. v. United States, 295 U.S. 602, 629 (1935) (emphasis added).

[27] Note, *supra* note 22, at 523.

A proper and effective solution to the whole problem is not easy to come by. It seems clear, however, that fashioning methods designed to attain the ultimate fulfillment of such constitutional obligations as may have been imposed upon the political branches of government should form no part of the duties of the judiciary. Its function in this area properly ends with adjudication.

The final resolution of the problem, under our system of government, appears to rest with the people. If the highest court in the state interprets the state constitution in a way which conflicts with the popular will, the people may amend the constitution to conform with their wishes. In the alternative, where a constitutional deprivation persists because of lack of legislative or executive response, there may be effective resort to the polls.

> Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.[28]

A court is acting within its constitutional competence when it adjudges an elected representative or group of respresentatives delinquent in the discharge of duties; but a court may not do more than this without calling its own legitimacy into question and endangering the system of which it is a part. Once there has been an adjudication, separation of powers principles mandate that responsibility for insuring adherence to the constitution rest with one of the political branches of government and not with the judiciary. The ultimate sanction for continued refusal to meet a constitutional obligation must lie with the people.

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[28] United States v. Richardson, 418 U.S. 166, 179 (1974).