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THE ROLE OF THE JUDICIARY IN THE MODERN INSTITUTIONAL STATE

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Almost a quarter of a century ago I entered public life in my native state of New Jersey as an executive assistant to Governor Robert B. Meyner. At that time, the budget for the State of New Jersey was $242 million. We appropriated $72 million as our contribution to education and $60 million for our support of the then combined Department of Institutions and Agencies which included traditional penal systems, hospitals, and homes for the mentally and physically disabled. We provided practically no medical care for the needy or elderly.

Since that time there has been a dramatic growth in institutional commitments of government to society. Our current state budget is nearly $5 billion; almost $2 billion is allocated for education, and nearly $1 billion for human services. We support a system of mass transit with appropriations of several hundred million dollars.

Equally dramatic are the changes in other forms of delivery of services to citizens. I campaigned for, and was able to have enacted into law, a substantially revised statutory system affecting landlord-tenant rights. Similarly, I have been an active supporter of protection of consumers' rights through administrative action by the Division of Consumer Affairs in the Attorney General's Office. Moreover, I lobbied strongly for the creation of a Department of the Public Advocate designed to provide a voice for those New Jersey citizens unable to speak for themselves.

Throughout these years of structural change, I have had a unique opportunity to observe the unfolding issues from a variety of levels: first, as an Executive Assistant to the Governor; then, as a Chief Prosecutor for one of the state's most populous counties, Essex; next, in the position of a member of the Board of Public Utilities Commissioners, as a member of a Governor's Cabinet; and, finally, before seeking the office of Governor, as an Assignment Judge in the Superior Court of New Jersey. From this perspective I would like to share my reflections as to why courts exist and what roles they can perform better than the other developing branches of government.

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We must first ask ourselves if we really need courts and if they in fact perform functions which cannot be done by the executive or the legislature. To understand this we must understand our own history. Based on our political experience before the War of Independence and as colonists governed under written charters proceeding from the English Sovereign, the terms and limitations of these charters were subject to forfeiture, review, and final appeal to a Privy Council. This restraint on the exercise of power was considered normal, and it was a usual procedure when our colonial courts enforced these chartered rights.

The revolution cut the cord that tied us to Great Britain and the foreign sovereign by designating a new ruler—the people. Under almost every state constitution and under the federal Constitution this power of the people was reposed in three branches of government, executive, legislative and judicial.

Historically, resolution of disputes had been a function of the executive in royal governments and English courts began as an extension of the executive delegation of royal power to the King's agents. It was only relatively late in the process that judges claimed to have independence from the King to interpret the law.

We also know that legislatures can resolve disputes among parties. The British Parliament passed many bills deciding for one private interest over another. Congress and state legislatures still pass "special" bills which may affect a single individual or dispute. In sum, the need to resolve disputes, in itself, did not mean that a separate independent judicial system was required. In the modern institutional state, many disputes are solved on an executive or administrative level through consumer representatives, or through efforts of public advocates to obtain uniform lease-hold relations.

I submit, however, that although the judiciary is not in a strict sense essential to society, it has evolved to its present state perhaps because it is perceived as resolving disputes better than the other branches of government. If we ask ourselves whether we prefer to have personal disputes resolved by the executive, legislative or judicial branch, I believe the consensus of the public will answer that a judicial resolution of disputes is preferable.

Why is this so? I believe it is because of the credibility of the judiciary in the eyes of the general public. Of the three branches of government, the judiciary is the only one which claims to make its decisions based on permanent objective standards divorced from democratic or majoritarian political processes. Opinions of courts are, at least in theory, based upon an objective analysis of the facts of each case, compared with existing law or constitutional mandates and expressed in a logical and well-reasoned statement supporting the

judgment. The strength of the judiciary has been its ability to base decisions on this mystical combination of objectivity and permanence. While finding the law is no simple task, there remains this public acceptance that judges interpret a higher law which is fixed and certain and fair.

Some examples of history demonstrate the difficulty, however, of applying these principles of objectivity and permanency to interpret changing economic and social circumstances. National experience, even within the last half century, has demonstrated the unpredictability of labeling individual judges as strict constructionists, conservatives, judicial activists or liberals.

This confusion of labels was never more obvious than in 1936. A Supreme Court, which we now consider to have been a conservative guardian of the status quo in American society, was comprised of judicial activists who expanded the protection of liberty under the fourteenth amendment. The dissenters in *Morehead v. New York ex rel. Tipaldo*[1] assailed this expansion of liberty as a deification of the private wage bargain because it invalidated state minimum wage laws as depriving employer and employee of what the court called the "equal right to obtain from each other the best terms they can by private bargaining."[2] Such a decision is inconceivable to us now. It is ironic to speak of freedom of contract for those who, because of economic necessities, give services for less than needed to keep their bodies together. Justice Harlan Fiske Stone suggested the basis for such a decision when he said:

> [I]t is difficult to imagine any grounds, other than our own personal economic predilections, for saying that the contract of employment is any the less an appropriate subject of legislation than are scores of others, in dealing with which this Court has held that legislatures may curtail individual freedom in the public interest.[3]

Out of this constitutional crisis of the New Deal developed a plea for judicial self-restraint. The Supreme Court had invalidated laws dealing with the exploitation of women in industry, the regulation of wages in the coal industry, and the regulation of wages for children. The result was to play into the hands of radical change, and, into this breach Franklin D. Roosevelt stepped with his famous courtpacking scheme:

> [He] had begun to suspect that a majority of the Justices would continue to treat the Constitution as a device for preventing action

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[1] 298 U.S. 587, 627-31 (1936) (Hughes, C.J., Brandeis, Cardozo & Stone, JJ., dissenting).

[2] *Id.* at 610.

[3] *Id.* at 633 (Stone, J., dissenting).

> rather than as an instrument of progress . . . , [so he boldly declared] that 'the number of Justices should be increased at once so as to give a favorable majority.' Prospects for obtaining a favorable majority through the normal process of retirement were slim, despite the fact that several members of the bench were well [into their seventies and eighties] . . . . Nevertheless, the President preferred to delay action until 'forced' by public opinion.[4]

One commentator of the time observed " '[i]t is better strategy, politically, to let a universal popular exasperation set the forces of reform in motion.' "[5]

The rest is known. Despite popular outcry, despite almost universal dissatisfaction with the decisions of the Court, an attempt by an executive to attack the institution itself resulted in one of the greatest closing of ranks in recent political history. Through the years and despite increasing evidence that judicial interpretation, not fundamental law, regulated the power to govern, the American people had come to regard the court as a symbol of their freedom and as an impregnable bar against any risk of dictatorship and personal government. Every segment of society soon joined in the struggle to preserve the institution. History does not reveal how this issue would have been resolved if Chief Justice Hughes and Justice Roberts had not, in the next term, found their way to sanction collective bargaining provisions of the Railway Labor Act and, in a most sweeping decision, to uphold the Wagner Labor Relations Act. The New Deal's judicial field day wound up with opinions upholding Social Security taxes and the Old Age Pension system and establishing the fundamental constitutional support for the social changes of the New Deal.

What are the lessons of this experience? Judicial activism could be applied in defense of conservative economic policies, but the institution of the judiciary, despite its weaknesses, had the confidence of the American people.

This problem of judicial choice is compounded by a system which allows me, or a succeeding Governor, during the term of a justice of our state supreme court to consider the judicial philosophy of the individual as well as his predilection for social change. Of course, there are dangers in judicial policy making, but I believe these dangers are inherent in the system and actually give the system strength.

Surprisingly, little debate or critical analysis was devoted to the judiciary in the deliberations of the Framers. "Farrand's records of the

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[4] A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 437-38 (1968) (citation omitted).

[5] *Id.* at 438 (citation omitted).

Convention contain almost no reference to the separation of powers as it relate[d] to limits on the judiciary."[6] It is surmised that the national judiciary was created " 'more in deference to the maxim of separation than in response to clearly formulated ideas. . . . [I]f there was debate in terms of need and utility, it was not reported.'"[7] Ratification debates instead tended to focus on the parameters of executive and legislative power.

Perhaps a simpler view of the role of the judiciary can be found in the words of Alexander Hamilton. Suspicious of democratic powers he said in his 78th Federalist:

> It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. . . . Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. *It only supposes that the power of the people is superior to both*, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.[8]

This is a fundamentally radical thought—that the people are paramount, and is reflected, oddly enough, in the powerful slogans of the Sixties, which witnessed revolutionary change in the way courts went about doing their business. "Power to the people" was a constant refrain of protesters of that era.

In response to this deep-felt need, there has developed the role of the judiciary as an instrument of justice designed to restore power to the people. In so doing, the courts raised a new question with respect to their role. The question was not so much whether they had exceeded their substantive decision-making power but rather whether they had exceeded their procedural decision-making power by deciding problems in a different way and in a new and different historical pattern. Are they deciding questions best decided by other institu-

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[6] Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 497 n.155 (1980).

[7] *Id.* at 497 n.155 (quoting J. GOEBAL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 206 (1971).

[8] THE FEDERALIST PAPERS 102 (L. DeKoster ed. 1976) (emphasis added).

tions? How deeply is the court affecting one element of society when it decides whether a woman has a right to an abortion at public expense? How deeply felt is the feeling of a legislative body when a court orders that body to reapportion its members? Has the intervention of courts into these areas once considered political been helpful? Has the lack of legislative leadership or legislative consensus on a federal and state level been partially due to judicial interference in traditional legislative processes? Would legislative systems indeed work better without the courts?

I do not suggest that I have the answer to these questions. But based upon my experience as a chief executive, I do say there is a proper role for the judiciary in helping to resolve fundamental social problems when the development of a majoritarian consensus is beyond practical expectation. I leave the specific description of this role to the scholars of the law who are now beginning to rationalize and harmonize this extraordinary growth in novel forms of litigation.[9] The semantics of the modern scholar are foreign to me; he deals with subjects such as transformations of dispute resolution models, the new formalism, the dilemmas of instrumentalism, and intransigence and political power. Suffice it to say that there are two schools of thought. The first school, as suggested by Professor Fiss, is that what we have witnessed and what we are still witnessing is a dramatically new form of justice, "its roots in the Warren Court era and the extraordinary effort to translate the rule of *Brown v. Board of Education* into practice."[10] To that end, courts were forced to transform radically the status quo in order to reconstruct social reality. "No one had a road map at the outset . . . [or] a clear vision of all that would be involved in trying to eradicate the caste system embedded in a state bureaucracy."[11] Professor Fiss' theory is that there are practically no standards for decision and even those suggested in *United States v. Carolene Products*,[12] concerning legislative failure and the protection of a "discrete and insular minority," failed to explain the decisions which followed. His theory suggests that the role of the judge is, if I may exaggerate for purposes of illustration, a Don Quixote seeking out the meaning of constitutional values by working within the constitutional text, history, and social ideals and by searching for what is true, right, or just. Why must such a knight wait for legislative failure to

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[9] *See* Fiss, *The Supreme Court, 1978 Term—Foreword: "The Forms of Justice,"* 93 HARV L. REV. 1 (1979). *See generally* Eisenberg & Yeazell, *supra* note 6.

[10] Fiss, *supra* note 9, at 2.

[11] *Id.* at 3.

[12] 304 U.S. 144, 152 n.4 (1938). *See* Fiss, *supra* note 9, at 6.

find what is true, right, or just? He recognizes, just as we recognized in the Thirties, that the further one moves from simple application of law to fact, the easier it is for judges to enact into law their own preferences in the name of having discovered the true meaning, say, of equality or liberty.

Other commentators, such as Professors Eisenberg and Yeazell, are of the opposite school of thought and believe that the new litigation represents an historical continuity and that no one familiar with the traditions of the common law and its regulation of large complicated corporate businesses or large and complex trusts finds such action by a court extraordinary.[13] Indeed, the oldest writs, such as certiorari or mandamus, are the tools of administrative supervision. These writers suggest, and I tend to agree with them, that what we are seeing is not a new form of litigation but an old form of litigation applied to what have heretofore been considered political questions. Once the Supreme Court had embarked upon administrative supervision to enforce its decrees it was just one final step to determine, in *Baker v. Carr*,[14] that Tennessee's districting scheme distorted the concept of one man, one vote and established the loss of a constitutional right of an order higher than the constitutional principle of avoiding involvement in political issues because of the separation of powers.

My personal experience in such constitutional litigation has led me to the conclusion that the courts do have a substantive role as an instrument of justice in determining the institutional arrangements of power in the modern state. In our own State of New Jersey, Kenneth Robinson was a young student in a Jersey City grammar school when persons having an interest in his welfare and in a city budget brought a suit against Governor William Cahill alleging that, as a result of the resources of local taxable properties being insufficient to generate revenues to provide a thorough and efficient education, Kenneth was denied his constitutional right to such an education as mandated by the New Jersey Constitution.[15] Kenneth Robinson convinced the Supreme Court of New Jersey that he indeed had a right to this constitutional value and that the existing institutional forms of government did not afford him the vindication of that right. What was needed

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[13] *See* Eisenberg & Yeazell, *supra* note 6, at 488-94.

[14] 369 U.S. 186 (1962). *See* Eisenberg & Yeazell, *supra* note 6, at 501.

[15] 62 N.J. 473, 303 A.2d 273 (Robinson I), *cert. denied*, 414 U.S. 976, *aff'd on rehearing, jurisdiction retained*, 63 N.J. 196, 306 A.2d 65 (1973) (Robinson II), *order entered*, 67 N.J. 35, 335 A.2d 6 (Robinson III), *order entered*, 67 N.J. 333, 339 A.2d 193, *republished*, 69 N.J. 133, 351 A.2d 713 (1975) (Robinson IV), *order vacated*, 69 N.J. 449, 355 A.2d 129 (1976) (Robinson V), *injunction issued*, 70 N.J. 155, 358 A.2d 457 (Robinson VI), *injunction dissolved*, 70 N.J. 464, 360 A.2d 400 (1976) (Robinson VII).

then was a remedy. The first remedy adopted by the court was an adjudication, in the traditional mold, of the invalidity of the taxing system and the institutional system of free public education with a direction that the legislature should correct this constitutional infirmity. The legislature did not act and the court's next step was to reallocate State education funds if the legislature continued to be passive. The New Jersey legislature responded to this under my leadership by passing the Public School Education Act of 1975,[16] the purpose of which was to guarantee the delivery of that thorough and efficient system of education by providing a minimum state level of funding to local school districts to equalize property values on a per pupil basis statewide. The failure in the law was that the legislature failed to provide the funds to implement the legislation. Again, the case returned to the New Jersey supreme court[17] and this time I took the most unusual step of appearing *pro se* before the court and arguing that now a suitable remedy would be to determine that since the system of public education was not functioning in accordance with the constitutional mandate, it should cease to operate and, in essence, the court should direct that the schools of New Jersey be closed. This was done and, following a bruising legislative struggle, there was enacted into law a new form of statewide taxation in the form of an income levy dedicated to property tax relief and the support of education for the State of New Jersey. Some have questioned the power of the courts to entertain and indeed to enforce in such institutional litigation remedies which result in the expenditures of public funds. It takes little observation to realize that when courts decide that welfare dispensers must give recipients a hearing before ending their benefits, additional funds have to be expended for these purposes. When indigent criminal defendants have a right to counsel, prosecuting agencies will have to spend more money. When courts order desegregation plans to be put into effect or a reallocation of pupils, funds, or teachers, public funds will be spent. Some may shudder to believe that a court could impose a tax or indeed order that a Governor's taxing proposal become law. Over a period of years I have given much thought to what other remedies would have worked—a contempt citation against the legislature, judicial redistribution of state funds and so forth. I have reflected upon the unique circumstances which placed upon the bench at the time of the *Robinson* decision a Chief Justice who had also been the Chief Executive of New Jersey, Richard

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[16] 1975 N.J. LAWS, ch. 212, N.J. STAT. Ann. §§ 18A:7A-1 to 33 (West Cum. Supp. 1980-1981).

[17] Robinson v. Cahill, 70 N.J. 155, 358 A.2d 457 (1976).

J. Hughes. It is suggested that the weakness in institutional litigation by the courts is the unwillingness of courts to extend their power beyond areas where they believe they can gain public support and institutional acceptance. One can never be certain whether our New Jersey supreme court would have confronted the legislature without the support of the executive branch.

I do not believe that our supreme court was straining to find a legal basis for a policy decision. Rather, I think the court was an instrument of justice in vindicating individual rights of litigants. Its role in that institutional litigation was gradual and it sought a remedy to suit the peculiar circumstances. Its historic conclusion is well founded in the Constitution and Hamilton's original thought that each of the departments of government was an agency of the people whose role was to give meaning and vitality to that Constitution. I realize that judges are not in control of the cases before them, that they do not have the full breadth of perspective that the legislator walking the streets has or the executive, but conversely, they are compelled to speak back, they are compelled to respond to the case before them and in the last analysis they are compelled to determine the rights of the parties before them. Long ago, James Bradley Thayer said that the judiciary should, in dealing with the acts of their coordinates, refrain from intervening wherever it is possible to do so, but he concluded by saying:

> On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. . . . For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their own responsibility.[18]

Through my experience and in my judgment, by bringing to the people and their representatives in New Jersey's constitutional crisis the sharp delineation of the spot where responsibility lay for the vindication of individual rights, our judicial system helped to bring to our elected representatives a sense of their own duty. I am concerned that in this era of diminishing resources that a court should decide the priorities for use of those resources. As this process goes on, others will articulate in a more detailed way those standards which shall be applied in this unfolding system of law as an instrument of justice. I

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[18] J. THAYER, JOHN MARSHALL 103-10 (1901). *See* J. THAYER, LEGAL ESSAYS 41 n.2 (1908). *See generally* J. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

believe the principles of the litigation I saw work in New Jersey will be applicable in other jurisdictions. The powerlessness of the minority group to alter the vindication of its rights through the political processes, the inability of traditional majoritarian political structures to reach a consensus on vindicating those rights and, finally, a lack of a comprehensive legislative response to that need justified institutional litigation helping to bring about structural reform in government. In so doing, the best traditions of the law and constitutional government were maintained.