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Introductory Panel Questions

Panel

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Introductory Panel Questions

Professor Russell: One basic question I would like to put to Professor Tribe is whether in the United States system of constitutional judicial review there is any serious possibility for change? I ask this because I hold the thesis that our two countries have two opposite political myths. Yours is that you have a perfect Constitution if only the country would live up to it. Ours is that we are a terrific place to live if only we could get the right Constitution. Canadians like myself and my colleagues spend hours, days, months and years discussing alternatives for constitutional change, including the grand alternative for expanding judicial review through a constitutional bill of rights. These are serious considerations in our country but I do not think there is any serious danger of our changing the Constitution. I throw out the question whether the fundamental base of your system, obedience of the Court, demands political obligation and therefore should be changed. Is that a serious question in the United States?

Professor Tribe: Let me preface an attempted answer to the first question by saying that anyone who lives by the crystal ball has to learn to eat ground glass. I do not think one can safely predict matters of fundamental direction in a world where things change so much more rapidly than anybody expects. Technology transforms the face of life and all predictions are hazardous. Having said that, let me predict that, at least in our lifetimes, the basic structure that the American system has found so adaptable to changing circumstances is not likely to be changed.

The proposition that somehow we might radically depart from the notion that the Supreme Court has a very basic and fundamental and respected role to play, I find almost unthinkable. That is not to say we do not think in very much the terms you describe: that the country would be terrific if only the Constitution could be patched up. Remember that John Marshall stated in *McCulloch v. Maryland* that in order to project a vision of how flexible the courts ought to be, "we must never forget that it is a *constitution* we are expounding."

A number of Americans have forgotten that it is a constitution they propose to amend. It is becoming increasingly popular to pursue various policy objectives by rather casually suggesting constitutional amendments. Whether such amendments seek a balanced budget or the preservation of unborn life, their advocates claim that such objectives are fundamental, or perhaps required by some higher morality.

As we approach the bicentennial of our 1787 Constitutional Convention, there is talk of a new Convention to re-examine our form of government. Broad proposals might fly from such a constitutional Pandora's Box. Would we be more efficient if we moved toward a parliamentary form? Have we so moved toward an imperial-managerial form of judicial activism that we ought to clip the courts' wings?

While these and other questions are on the agendas of various groups, I would be remarkably surprised if any of them bore very ripe

fruit. Our experience of it has been so extraordinary that most people shrink from the prospect of truly radical constitutional change.

Professor Russell: Your last remark I would agree with. I often ask my students this question, of all the countries which have had constitutionalism where the constitution has been in force and has been the prescribed rule by which the political game is played, have any of them ever made fundamental changes in their Constitution, fundamental alterations without either a civil war or threat of civil war. I have never had a student name such a country.

Professor Tribe: Even if one cannot think of an example of a country which has experienced such a change, that could be in part because there are really so few countries which even have a strong judicial tradition.

Professor Russell: It may be that constitutionalism is such a precious thing that there is a sense that one should not change it. What goes into creating a constitutional system in the first place?

Professor Tribe: The Constitution that we have today is part of an evolving system; the American Constitution has evolved in an apparently continuous way, interrupted only rarely by radical change. And even radical changes are assimilated by redefining the past. This would not be the case if the Constitution could be amended merely by a majority of the House and of the Senate, or at the other extreme, only by unanimous votes of the House, of the Senate, and of all fifty state legislatures. The former would subject the Constitution itself repeatedly to the political inferno, while the latter would freeze it forever in time. But between these two extremes, and short of something apocalyptic like war or revolution, it seems to me quite plausible that the Constitution will always seem continuous—in hindsight.

Professor Russell: One other point of interest in the comparison of our two situations is the focus on the Court as a national political philosophy. It has articulated the fundamental questions of political philosophy for both nations.

Professor Tribe: I think that the Court has wisely recognized that, when it is asked to articulate underlying values, it risks diluting the constitutional document into a kind of porridge of values which can then be manipulated by the ingenious legal gourmet. Instead, the Court has provided a language which has enriched the discourse of political philosophy.

Professor Russell: I think the question of equality is probably the most difficult social problem for a community of rational people to work out to distribute the pains and pleasures and the rewards. It is a fundamental problem for every society, certainly in the western tradition and it seems to me your Court, whether one agrees with its answers to these questions of formal and substantive equality, has grappled with that question in a very deliberate and self-conscious way. I do not think anyone would claim our Canadian Court has yet made a contribution.

Some Canadians would like to see a contribution by having a mandate to interpret a constitutional bill of rights. But our Court has a particular Judicial Committee and the Supreme Court has articulated a theory of federalism, the theory of Federalism which has been of paramount importance to distributive justice in the Canadian community. I have the impression that the articulation of Federalism has been largely abandoned in your judicial review. For us it remains a vital component. We sometimes do not recognize it for what it is.

Professor Tribe: Federalism was almost abandoned through the years of the Warren Court, but it has been dramatically resurrected by the Burger Court. In *National League of Cities v. Usery*, the Court for the first time in forty years struck down an Act of Congress regulating economic life on the ground that a federal wage-and-hours regulation, as applied to state and local employees, impermissibly intruded upon the autonomy of state governments. The Court found such regulation to be within the scope of the commerce clause, but held it too threatening to state independence to fall within Congress' power. In its extensions of the *Younger* doctrine, the Court has also given great force to the autonomy of state judicial and executive processes by requiring federal courts to abstain when faced with claims that state courts could vindicate.

The issue of federalism will probably play a more dramatic role in Canadian than in American constitutional thought, while the issue of equal protection will probably play a more powerful part in America than in Canada. A major contribution in constitutional law, if it is to endure, must find its roots in a crucial distinctive national experience that is ultimately reflected in constitutional language or structure.

While in Canada, that dominant experience has been the experience of struggling with federalism, in the United States it has been the experience of grappling with the legacy of slavery and with its many contradictions. The experience of the Civil War, which put an indelible stamp on American law, itself generated the Thirteenth, Fourteenth, and Fifteenth Amendments. It was not the United States Supreme Court which wrote equal protection doctrines on a clean slate. Rather, a traumatic national experience inspired a series of civil rights statutes and amendments which gave a powerful thrust to American constitutional evolution.

Gridgier: I would like to address this question to Professor Tribe. What role do you think politics has played in the actual results of particular Supreme Court decisions?

Professor Tribe: If you mean by "politics" a kind of shady or corrupt practice of voting in a way that will please one's friends in the White House or elsewhere, then I am convinced that politics has played an insignificant role in United States Supreme Court decisions.

If by "politics" you mean instead something much larger, such as the general mood and spirit of the nation and of the time, then of course politics makes a difference. It makes a difference, however, not because judges consult a profile of national opinion, but because they themselves, having grown up in our society, have internalized changing attitudes and

political philosophies. And they have been appointed by a process that is intentionally political—in the good sense of the term.

The fact that one can exaggerate political impact is well illustrated by a famous turnabout of the United States Supreme Court in the spring of 1937, which New Deal lawyer Abe Fortas described as “the switch in time that saved the Nine.” Associate Justice Roberts, who had voted the previous year in *Morehead v. New York ex rel. Tipaldo* to strike down a state minimum wage law, voted with the majority in *West Coast Hotel v. Parrish* to uphold a Washington minimum wage law. While this crucial switch was commonly attributed to the pressure of President Roosevelt’s “Court Packing Plan,” a judicial reorganization scheme proposed in early 1937, Court memoranda in fact indicate that the *West Coast Hotel* decision had already been reached at conference well before the President’s plan was announced. Justice Roberts, moreover, had voted with the majority in 1934 to uphold milk price controls in *Nebbia v. New York*.

Justice Roberts was some thirteen years younger than the three brethren with whom he joined in *Morehead*. He had a rather different background. He was less committed to their legal philosophy, with its accompanying political undertones. So in the end his switch was not just a reaction to the shifting political winds. Within a couple of years, President Roosevelt had an opportunity to replace all of the Justices who had voted with the Justice, even without the Court Packing Plan, because they retired. Thus the demise of the classic substantive due process analysis, long used as a hatchet against redistributive economic regulation, was the result not of political intimidation but of a shift in underlying philosophy, experience and the sheer fact of human mortality.

The Court creates a kind of lag time. Whether one thinks that is good or bad depends on how one wants the Constitution to be read. I think that crude politics plays a minimal role in what the Supreme Court of the United States has done.

Thomas Hudson: I was wondering if the controversy surrounding the Court Packing Plan 1938 referred to by Professor Tribe might not be the constitutional change that Professor Russell was looking for in his earlier question.

Professor Tribe: You may be asking whether the Court itself in 1937 worked an organic change in the United States. I think the answer to the question is no. I do not think the doctrinal change of 1937 was as dramatic as some people believe. The Fourteenth Amendment is alive and well in the United States. Substantive due process has a different content today, but even economic due process is not dead if one considers the recent repossession cases and cases under the Contracts Clause. There and elsewhere the Supreme Court has protected substantive interests in property and contract from what seemed to be unfair governmental action. That the Court came to view governmental regulation of working conditions, hours, and wages as something other than an intolerable intrusion upon economic liberty was indispensable, but also bound to happen, as the Court brought its view of the Constitution in line with new national realities.

