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THE CRISIS OF JUDICIAL REVIEW

0. Social Practices

This is not going to be an exercise in analytic legal philosophy. I want to talk about the actual power that judges have in a democracy and the unease that this gives rise to among our citizens. But those of you who know your jurisprudence should be able to discern as I proceed in this lecture that I am interested too in what H.L.A. Hart called the practice theory of rules—the way in which the most prominent secondary rules of a legal system—and, among those, its constitutional rules especially—emerge first as practices and become normative as they establish a following among members of the political community.

Now, the practices that ground our legal rules can be more or less respectable, more or less benign. A pogrom is a social practice. And the environment in which a social practice subsists may exhibit a great deal of anger and bitterness. Social practices can be more or less stable, with a greater or lesser degree of contestation among those who participate in them. A practice like judicial review can be a critical mess; it can be on the edge of collapse; it can be, as I'll say, in crisis. That's the subtext of everything that follows.

1. Dobbs case

What does a social practice look like when it's in crisis? Well, let's see. Almost a year ago, on June 24, 2022, the Supreme Court of the United States issued its ruling in the case of *Dobbs v. Jackson Women's Health Organization*. (That's Jackson, Mississippi.) The decision had been widely anticipated. Indeed, a draft of it was leaked a month or two earlier in a startling violation of the Court's protocols. And despite seemingly rigorous inquiries, no one has been identified as the leaker, though Justice Alito says he thinks he knows who it was.

Anyway, by a 6-3 majority, the Court upheld Mississippi's Gestational Age Act (state legislation banning abortion after fifteen weeks of gestation, except for certain medical emergencies). The majority rejected out of hand the idea that the U.S. Constitution—specifically the 14th Amendment—prohibited restrictions on abortion of the kind that Mississippi had enacted. And 5 of the 6 judges in the

Dobbs majority voted to overturn both *Roe v. Wade*,[1] the 50-year-old precedent that had established a woman's right to end a pregnancy before viability, and *Planned Parenthood v. Casey,* which had reaffirmed the basic holding of *Roe* in 1992.[2] 5 out of 6: Chief Justice Roberts felt it unnecessary to overturn these precedents in order to uphold the Mississippi statute. But there it is: even without the Chief Justice's vote, *Roe v. Wade*—the high-water mark of liberal judicial review in the United States—is gone.

In his concurrence in *Dobbs*, Justice Clarence Thomas said he might be willing to go further. Given the opportunity, he would hold that the 14th Amendment could also not be used to uphold the principle of same-sex marriage, as it was in *Obergefell v. Hodges* (2015),[3] threatening perhaps to overthrow that precedent as well. There have been suggestions, too, by those whose ideology and money have fueled this judicial uprising, that, in the Court's present mood, it might be worth seeking an overthrow of any and all state legislation that *permits* abortion, on the much more aggressive ground that these permissions deprive blue-state fetuses of their 14th Amendment rights to life.

Needless to say, the decision in *Dobbs* evoked an angry response.[4] And this is part of what I want to talk about, though I'm going to align it also with the paroxysms of rage that erupted earlier this year concerning proposed changes to judicial review in Israel. The Israeli outburst has been in abeyance for a few weeks, but now we are seeing the demonstrations again and it's likely to explode once more if Netanyahu presses on with his reforms.

Of course, there's always anger on one side or another when a Supreme Court decision is handed down. But the response to *Dobbs* seems worse. Commentators and citizens are talking about a crisis in the Court's legitimacy. Even the justices are talking about a crisis in legitimacy. I think they're right.

So, for example, a Gallup poll earlier this year found a sharp downturn of the Supreme Court's approval ratings in the United States. "Only 47% of Americans said they had a "great deal" or "fair amount" of trust in the court, a 20-

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[1] *Roe v. Wade,* 410 U.S. 113 (1973).

[2] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[3] *Obergefell v. Hodges* 576 U.S. 644 (2015).

[4] In the US, fury elicited by the *Dobbs* decision is likely to be aggravated by another conservative-trending decision on affirmative action, in the next few weeks. *Students for Fair Admissions (SFFA) v. University of North Carolina* and *Students for Fair Admissions v. Harvard University*. The Court's final decision is expected by June as the court wraps up its work for the 2022 session.

percentage point drop from 2020 … the lowest level of trust among Americans since 1972." Nearly two-thirds of Democrats (64%) now say the Supreme Court has too much power—though of course a case can be made that the unpopularity of the *Dobbs* decision reflects liberal views wishing that the court had hung on to the half century of *Roe*-based power to strike down pro-life statutes.

2. My opposition to judicial review

Some of what I want to say this evening is personal. Thirty years ago, the *Oxford Journal of Legal Studies* published an article of mine—"A Rights-Based Critique of Constitutional Rights"—in which I set forth some grounds of general opposition to the practice of constitutional review: the power the Court refused to exercise as applied to Mississippi's Gestational Age Act. I have pursued that reasoning in many writings since: most comprehensively in "The Core of the Case against Judicial Review," published in the *Yale Law Journal* in 2005.[5]

A quick word about terminology. My opposition is directed to judicial review of *legislation*, not judicial review of executive action, which is part and parcel of the rule of law. And my opposition is directed at what is known in the trade as *strong* judicial review of legislation, not at any of the various weak forms of judicial review.[6] In a system of strong judicial review, a court may determine that a piece of primary legislation is to be struck down or, even if it remains, formally speaking, on the statute books, that it is not to be applied or enforced on account of its incompatibility with the Constitution or Bill of Rights.

Contrast that with the review of legislation by British courts under the Human Rights Act. In the UK a court may make a public determination that a statutory provision is inconsistent with some requirement of the Human Rights Act (it can make a Declaration of Incompatibility), but this is without any immediate effect on the enforceability of the law. Or—as in Canada—Parliament may legislate *notwithstanding* the provisions of the Charter of Rights and Freedoms. Or,

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[5] *A Right-Based Critique of Constitutional Rights*, 13 OXF J OF LEGAL STUDIES (1993), 18-51. Jeremy Waldron, *The Core of the Case against Judicial Review*, YALE LJ, 115 (2006), 1346.

[6] For this terminology, I draw on Stephen Gardbaum's book *The New Commonwealth Model of Constitutionalism: Theory and Practice* (2013). For my money, something like the British system, with its Declarations of Incompatibility, seems admirable, because "[i]t combines ultimate parliamentary responsibility with a 'canary in the coalmine' function for the judiciary, exercising whatever expertise they may have in matters of rights to alert the polity formally and publicly to the dangers posed by certain pieces of legislation." Or, as Mark Tushnet puts it, "weak-form systems hold out the promise of protecting liberal rights in a form that reduces the risk of wrongful interference with democratic self-governance."

as is proposed in Israel, parliament—the Knesset—may, under certain conditions react to the judiciary's striking down legislation by enacting an override, which in the ordinary case may last at least for the life of the Knesset that enacted it.

I won't repeat the argument here against strong judicial review. That's not the point of this lecture. Anyway, the basic case is well-known. It is sometimes conveyed using Alexander Bickel's delicate phrase—"the countermajoritarian difficulty,"[7] though that's a bit of misnomer because, in one obvious sense, judicial review *is* a majoritarian practice. It allows a simple majority of judges—in the US, 5 to 4—to strike down legislation that has been enacted by majoritarian processes in parliament or congress or some state assembly. Only this time we're talking about the very complex majoritarian processes practiced by legislatures, especially bicameral legislatures—though even in unicameral bodies like the Israeli Knesset or the parliament of my native New Zealand, passage of a statute is much more complicated than the crude majority voting of the sort you see in a supreme court when it strikes down a statute by 5-4.

And of course, everything depends on what the majority is a majority <u>of</u>—a majority of nine unelected judges, or successive majorities of hundreds of representatives accountable through elections to millions of constituents in a democratic system. Judicial review is countermajoritarian in the broader anti-democratic sense of countermajoritarian. When every political institution in the community is divided on some issue— the electorate, the legislature, and the judiciary—judicial review takes the final decisional vote away from the people and their representatives and gives it to the judges. Theirs are the heads we count. Remember these are major moral choices on which the people are likely to have strong, angry, often quite well-thought-through opinions—like abortion or affirmative action—or church and state, election finance, military service, pornography, settlements policy, the treatment of prisoners, same-sex marriage, and so on— what I have called elsewhere "watershed issues," many of them defining major choices in political morality that every modern society must face.

As my late friend and teacher Ronald Dworkin put it—(and he was an ardent *defender* of judicial review)—on these "intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries," the people and their representatives simply have to "accept the deliverances of a majority of the justices, whose insight into these great issues is not spectacularly special."

[7] Bickel citation

3. Should I have celebrated *Dobbs*?

I think *Dobbs*—the abortion case—was wrongly decided. I can say that, can't I, even if I also believe—as I have for a long time—that there should be no strong judicial review of legislation at all? After all, I don't deny that there is a Constitution in the United States and I believe that by its terms it protects women from the inequality and oppression that arises out of religiously-motivated moral intrusions by the state. I believe *Roe* was a good decision in 1973, so far as the logic of the constitutional scheme was concerned.

Sure I oppose judicial review. But either you have it or you don't. The United States has it, for better or for worse. And for me the most important consideration is that people were *relying* on this long-standing constitutional practice. Maybe one should shut up and check one's credentials as a wholesale critic of the practice, if one proposes to participate in arguments about how, at a retail level, the power that judicial review confers upon courts should be exercised. One says something like, "Well, if courts are going to distort our politics by exercising strong judicial review of legislation, they could at least have the decency to get the issues right."

Reliance here is not the same as the reliance-talk that informs discussions of *stare decisis*, though I'll say quite a bit about that in a moment. I'm talking right now about very broad background political reliance at the level of institutional opportunities. So long as strong judicial review of legislation exists, it makes sense for people to invest their energy and resources in the politics of the judiciary—getting appropriate candidates nominated and confirmed and securing rights through judicial remedies, doctrinal protections, precedent-based firewalls, law review essays, amicus briefs, and so on. Relying on the judiciary, they might reasonably be expected to place less emphasis on other means of rights-protection, like legislative politics. Courts have a responsibility to be mindful of the trust vested in them, and to do their best to reach decisions commanded by the Constitution.

4. Overriding a precedent

And then, *in addition*, there is the business of *stare decisis*—a more particular reliance on a precedent like *Roe v. Wade*. As the plurality observed in *Planned Parenthood v. Casey*: since 1973,

> people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The

> ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.

The Court in *Planned Parenthood* analyzed the precedent in *Roe* as a sort of a promise. Which means there was something like the breaking of a promise in *Dobbs*.

5. Confirmation process

And that promissory element bears some scrutiny, in our consideration of the crisis of judicial review.

When they were appointed, the confirmation hearings for Justice Gorsuch and for Justice Kavanaugh in the halls of the Senate, echoed with assurances by these nominees that they recognized *Roe v. Wade* as a well-established precedent of fifty years standing, reaffirmed several times in that period, and—they assured the senators—that it deserved to be respected as such.[8] No hint was given to the Senate or to the public that at the earliest opportunity an occasion would be contrived to swiftly overturn *Roe*, on the ground asserted several times by Justice Alito, once he had a free hand in the matter, that *Roe* had no juridical respectability whatsoever. That's what Gorsuch, Barrett and Kavanaugh signed up for in their concurrences in *Dobbs*. But none of them gave that as their view of *Roe* in the hearings.

So, public assurances were given on the status of *Roe* as a precedent. And—it turns out—those assurances were and were intended to be misleading.

I'm not saying exactly that the candidates perjured themselves. But they certainly didn't mind if swing voters in the Senate, like Senator Susan Collins or citizens watching the confirmation hearings on C-SPAN reasonably took away a misleading impression of the nominees' intentions on the vitality of existing abortion law.

It is not surprising that people sought these assurances, though some defenders of the conservative nominees have suggested that it was impudent to put such a question. On both sides, abortion is an issue that people care about. As the late Justice Scalia put it, in his dissent in *Planned Parenthood v. Casey*, we should never lose sight of two facts:

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[8] Kavanaugh: Senator, … it is settled as a precedent of the Supreme Court, entitled [to] the respect under principles of stare decisis. And one of the important things to keep in mind about *Roe v. Wade* is that it has been reaffirmed many times over the past 45 years, as you know, and most prominently, most importantly, reaffirmed in *Planned Parenthood v. Casey* in 1992."

> the American people love democracy and the American people are not fools. As long as … people thought … that we Justices were doing essentially lawyers' work up here … the public pretty much left us alone. … But if in reality our process of constitutional adjudication consists primarily of making value judgments ... then a free and intelligent people's attitude towards us can be expected to be … quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better.

Justice Scalia pointed these considerations in a different direction so far as the politics of abortion were concerned. But the logic applies here too and the observation is important: the American people had and have a legitimate interest in this matter. Their representatives in the Senate quite reasonably thought they were entitled to know as much as possible where each nominee stood on abortion rights before indicating their approval or disapproval in a very close vote to confirm an appointment to the highest court in the land. And, as I say, assurances were given.

6. Set-up for the decision in *Dobbs*

And then the justices overturned the precedent anyway. Despite the placatory tenor of their remarks given during their confirmation hearings, it seems as if legislators were in cahoots with conservative politicians to set up a confrontation on abortion as soon as a conservative judicial majority presented itself. Once a majority was in place on the Court, then state legislatures began to crank out laws to test the newly populated court on the issue. That's what the Mississippi Gestational Age Act amounted to. And those who had given confirmation assurances went cheerfully ahead and cut away this underpinning of reproductive freedom, without so much as a qualm. Cheerfully?—Well, actually there was a great deal of anger and resentment on the part of some of the justices, motivating how they approached the abortion issue—most notably Justices Thomas and Kavanaugh—anger and resentment for the way they had been treated in their confirmation process. We need to understand how certain constitutional practices operate in a field of anger, with participants snarling and muttering at each other. "Why, then... Ile fit you!"

Along with Justices Alito, Barrett, and Gorsuch, Clarence Thomas and Bret Kavanaugh *rushed* to overturn *Roe* even though, as Chief Justice Roberts pointed out, there was no need to do so in order to uphold the statute at issue in *Dobbs*. No hint of this eagerness was given in the justices' assurances as nominees—no hint of their determination to override this precedent a.s.a.p., even in a case where they didn't need to.

As I said, this has had an acute impact on the institutional legitimacy of the Court. *Planned Parenthood v. Casey* didn't just argue for legal stability. The Court in *Casey* warned what might happen if legal stability were held hostage to changes in court's membership:

> A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the political branches of the government. No misconception [the Justices said] could do more lasting injury to the Court and to the system of law which it is our abiding mission to serve.[9]

If the outcome changes depending on the partisan politics of the people delivering it, then that's a problem for any attempt to reconcile judicial review with the rule of law. For it makes the practice sound a helluva lot more like the rule of men than the rule of law.

I don't mean that people have been unaware till now of the significance of the court's membership. The politics of judicial appointment has always been conducted with an eye to the balance between liberals and conservatives on the Court. Everyone knows that five votes defeat four, and they have been anxious to secure that fifth vote for their side.

But somehow in the midst of all this, we managed to sustain the myth of the court's juridical competence as a sort of a noble lie, and to proceed, even while angry, on the basis that they were not merely advancing a hyper-partisan conservative or liberal agenda.[10] And we would smile when we heard that Antonin Scalia and Ruth Bader Ginsberg swapped recipes and ate dinner together, even if she didn't go hunting with him and Vice President Cheney. Anyway: no more; that trust among ideological rivals has evaporated. Ordinary citizens know this and they echo it in their own engagement with this practice. It's in crisis. People are saying out loud and furious, that the court's decision-making is a function of the embittered ideological preferences of its members, with the membership being determined by the raw political power of the presidency.

Plus: in the midst of all this, compounding the sense of crisis, we have issues about the justices' finances, and billionaire gift-giving, credit card payments, private jets, luxury hotels, real estate assistance, school fees paid by conservative

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[9] O'Connor J., *Planned Parenthood v. Casey*, quoting Stewart J. in *Mitchell v. W.T. Grant* (1974).

[10] Reproaches against those who are willing to deny the court legitimacy. Fury. Threats. Alito in WSJ. Alito on assassination. At least one person arrested for early stages of assassination attempt against Bret Kavanaugh. Alito on deliberate undermining of the court's legitimacy, as a sort of retaliation for the decision in *Dobbs*.

billionaires, who are also sponsoring outsize donations to ideological causes that have been taken up by family members of at least one of the justices.[11]

In the United States, justices on the Supreme Court are not formally bound by the code of ethics applicable to other members of the federal judiciary. Chief Justice Roberts has presented this as a matter of trust; the highest court doesn't need formal rules. But that trust is draining away also and willing forbearance has collapsed. Again, this is what a social practice, anchoring a rule, looks like when it is beginning to unravel.

7. Nomination / Confirmation process controversies

There are institutional ways too in which the process of judicial appointment has been poisoned in the United States, with frank and open recognition that it is all about the strategies of bitter partisan politics.

You may remember that in 2016, Senate Republican leader Mitch McConnell refused to schedule hearings for Merrick Garland (our current Attorney-General) after President Obama nominated him to replace the late Justice Scalia on the Court. McConnell spoke as if there were a convention that an outgoing President was not entitled to nominate a Supreme Court justice in an election year. Garland's nomination became a dead letter and in 2017, the newly elected Donald Trump nominated Neil Gorsuch to replace Scalia. And then, in what turned out to be the last year of his presidency, Trump nominated Amy Coney Barrett. She was nominated and confirmed with lightning speed, notwithstanding the Merrick Garland precedent, around 30 days before Election Day.

So it appears the US no longer enjoys a well-established system of good-faith back and forth, in the nomination and confirmation processes. A constitutional practice is partly a matter of rules enacted by the Framers, enlivened and complemented by conventions that exist as structured practices among members of the political community. The practice is disintegrating. What we see is an unravelling of conventions, a disruption of the practice that they constitute, some unprincipled tit for tat, and a lot of blatant gaming of the system for political ends. This is the pathology side of the practice theory of rules. There is no good faith in the system of presidential nomination and Senate confirmation any more. It has always teetered on the knife-edge of politics; now its remnants are held hostage to the most determined and divisive partisanship.

[11] Maureen Dowd NYT 5/7/23

Shocking? Well, it is no surprise. The issue of judicial appointments is always liable to erupt, given what's at stake in the justices' decisions. As Scalia observed, the American people are not fools. And now that fully-financed partisan engineering of changes of judicial personnel is the best explanation of changes in juridical outcomes, we have to ask ourselves: how long is it likely—how long was it *ever* likely—that people would put up with this?

8. Israel crisis over judicial appointments

It is not just an American matter. The United States is the flagship of strong judicial review—and its pathology affects shared confidence in the practice throughout the world.

So, for example, the crisis of judicial review in the US is more than matched by paroxysms of rage in Israel over a proposal to move from a largely judge-controlled system of judicial appointments to a system that involves a substantial element of majority party-political input and control. The anger is intense, though it is worth noting that what is envisaged in the proposals of the Netanyahu coalition is a system of judicial appointment for Israel that is still much less embroiled with politics than the American system ever was, even at its best. (We have been considering it at its worst.)

The proposal caused an immense eruption of discontent in Israel in February and April. All my Israeli friends were out on the streets of Tel Aviv and Jerusalem.[12] The eruption was from the liberal side—those who have vested their faith in judicial review. And it has been by no means quiet and restrained. Cars were set on fire, highways blocked by protestors; in Tel Aviv police had to resort to stun grenades and tear gas.

This is not populist fury: this is the fury of the secular and educated classes. Lawyers, judges, educators, civil servants. There is of course populist rage in Israel as well as the United States, affecting attitudes toward juristocracy. There are Trump-like concerns about disenfranchisement of ordinary people in both countries, with judicial mechanisms seen as part and parcel of their disenfranchisement. It just so happens that a populist right-wing coalition is making the proposal, and the secular liberal wing of Israeli society is reacting. For the moment, right-wing fury is channeled by the Netanyahu coalition. As the practice of judicial review begins to come apart, it is entirely contingent where fury happens to erupt.

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[12] "Core of the Case" cited in Israeli dispute. Also in India over same-sex marriage. Dicey.

So, we have the unseemly spectacle of two sides confronting each other, screaming at each other—both sides waving the blue-and-white Israeli flag, both in the name of democracy: one in the name of the right of a majority (or a coalition that can command a majority) to have its legislation adopted; the other insisting that democracy means checks and balances, not simple majority rule. And the second lot are supported by all my American friends, signing public letters protesting these changes. (Perhaps judges, lawyers, and legal scholars in the UK also.) All protesting that the Netanyahu proposals will undermine democracy. The opponents of the proposals, at least the ones I know, are condescending to anyone who says (in defense of the proposals) that supporting the power of unelected and unaccountable judges, especially when not rooted in a popularly endorsed constitution, is the opposite of democracy. "The opposite of democracy: really!!" That sort of condescension is a general feature of the stage on which the dysfunction plays itself out.

One way or another—the US crisis and the Israeli crisis represent the future of judicial appointments and constitutional argument in a system of judicial review. A politically engaged people will not remain indifferent to appointments issues indefinitely.

Even societies whose appointments processes have tottered along in benign obscurity—like the UK, with its elaborate scheme of a Selection Commission advising the Lord Chancellor and the Lord Chancellor advising the Prime Minister and the Prime Minister advising the king, and the king asking the dairymaid, with most ordinary people having only the mistiest idea of how it works—even societies without a high-profile bitterly-politicized appointments process are in my view likely to face eruptions of grievance, once consequential decisions begin being made by narrow majorities—especially if such decisions are manipulated by those entrusted with the process of appointment. Be careful what you wish for, if you advocate for strong judicial review in this country (UK). The appointments practice may not *seem* shaky, but it can readily be made so. As judicial review comes apart at the seams, the business of judicial appointment will reveal itself—and quite rightly in a democracy—as one seam that is all too readily unpicked.

9. Israel crisis: (2) Legislative override

As well as the proposal about judicial appointments, Israel has also been convulsed by the Netanyahu coalition's proposal to move from a strong to a weak system of judicial review.

The proposal is complex. At the moment, the Israeli court strikes down a statute, and that's that. What is envisaged, however, is something like this: if the

Supreme Court purports to strike down a statute, that strike-down can be overridden, for the term of the current Knesset, by a simple majority of law-makers notwithstanding the judicial order—unless the strike-down order was given by a consensus of the full bench of the court, in which case, any override will require support of not just one but two Knessets with an election in between.

Elsewhere systems of weak-form judicial review vary significantly in their strength. The new system envisaged for Israel is one of the strongest, because like the Canadian system—and unlike the law in the UK or New Zealand—it does still acknowledge a role for the court to strike down legislation. It just makes that strike-down conditional in a number of ways. And although the proposal is motivated on democratic grounds, it has generated a huge oppositional outcry: fury that any limits at all are being placed on judicial power.

As I said a moment ago, part of what is going on is a fight about the meaning of democracy, with a suggestion, on the one side, that Israel needs these reforms to vindicate basic democratic principles (because interference by an unelected court is undemocratic) and, on the other side, by the puzzling claim that Israel will become much less of a democracy if judicial power is diminished in any way. That rather Orwellian understanding of "democracy" has been a staple of defenses of judicial review for as long as I can remember.

What a mess! The former position—pointing effectively to the countermajoritarian difficulty—infuriates defenders of the status quo. They say judicial review *is* democratic and they howl with derision at any suggestion from the Right that it is not, saying that the proponents of these changes have a crude and sophomoric understanding of the democratic process. For this evening's purposes, the issue is not who is right or who is wrong about democracy, but what this controversy—and this condescension—is doing to the shared vocabulary that we bring to our political engagements.

10. What is legitimacy?

My subject is legitimacy. When we talk about a crisis of legitimacy, we often just mean the Court's unpopularity, and the hard things that people are saying about it. I spoke earlier about a collapse of the court's approval ratings. It's not immediately clear why anyone should be concerned about that—there aren't any elections for that drop in ratings to foreshadow.

But let's also be mindful of a more technical understanding of legitimacy: a conception of immense importance in politics.

Legitimacy is not just a matter of justification—the perceived rightness or wrongness—the merits—of what is done by the institution in question. Political decisions are always the subject of disagreement; so in politics there always have to be two dimensions of evaluation. There is justification, which is what we disagree about. And there is legitimacy in the face of disagreement about justification. Legitimacy, here, is a matter of explaining to those who disagree with a given decision why they should nevertheless accept it, put up with it, comply with it, and in the last resort refrain from taking up arms against it. Legitimacy refers to the capacity of a political system to generate support for the implementation of laws and policies among those who are opposed to them on their merits, those who campaigned against them, who voted against them or would have voted against them if they'd had the chance.

In seeking to establish legitimacy, one can't just appeal to the perceived merits of the decision. People disagree about that. That's what *gives rise to* the problem of legitimacy. One appeals to something like the procedure by which the decision was made, a case that one can make without requiring the other party to give up their opinion that the decision was wrong.

A classic argument of legitimacy might be the majority-principle in a democracy. One explains to those who disagree with a given decision that it was taken in the context of fair deliberation followed by a fair vote among citizens or their (elected) representatives. A decision was necessary: someone had to win and someone had to lose. And the opinions of those who lost were given the best hearing possible in the political community consistent with an equal hearing for others. In the subsequent counting of opinions, their votes were given as much weight as possible consistent with an equal weight for all the votes—all the opinions—of the citizens or their representatives. One says this with reference to a popular vote, or one says it in reference to the complex procedures of a representative legislature whose members are elected by popular vote. This is something respectful one can say to unreconciled opponents.

But we *can't* say that to an ordinary citizen who disagrees with a *judicial* decision; we *can't* say it was arrived at by a vote and a mode of counting votes that was fair to people like her.

I know scholars use the term "legitimacy" in various different ways. My colleagues here may propose a different definition. That's fine: you can use words as you like. But whatever you call it, there has to be *some* element in political morality that does this work, that performs this function that I have identified—explaining why those who can't be shaken from their disagreement with the merits of a decision should nevertheless put up with it.

In this light, the legitimacy of judicial review has always been a problem, because there is nothing like a democratic argument available. And don't talk to me about substantive legitimacy: that's an oxymoron given the extent of disagreement that we see in modern societies.[13] Substantive legitimacy will convince those who don't need convincing, but legitimacy has to do its hardest work among those who are substantively opposed to the outcome.

The problem is well known. Some of us take the counter-majoritarian difficulty out of its box every year or two and wave it in front of the goggling eyes of our opponents. It has long been a sort of game we play, like a philosopher's puzzle.[14] Now, though what's happening is that the practice has rubbed itself raw, and the absence of legitimacy is there, bleeding, for everyone to see, surrounded by the ruins of what was necessary for its institutional substance—the poisoned politics of appointments, the poisoned politics of rights, and the poisoned politics of constitutionalism, and the poisoned politics of the judiciary.

11. Checks and balances

Maybe there is such a thing as *systemic* legitimacy: legitimacy as part of a broader institutional system of checks and balances—the idea that the more centers of institutional power there are involved in a decision, cutting across one another, the better. But "checks and balances" (like "pomp and circumstance") is one of those phrases that rolls quickly off the tongue, but needs very close scrutiny—not least in the assumption that it can do the work of legitimacy, when there are legitimacy questions about the various agents of the checking and the balancing. In Israel it is said that we can't just have the Knesset making all the decisions, prevailing on account of its elective credentials. There have to be checks and balances: that's why we need a strong and independent court.

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[13] Can we say that a court is more likely to get the substantive issues right? Legislatures more likely to be afflicted by self-interest and distorting factors. In the US, people don't buy this anymore—when it looks as if prior politics and big money are impacting directly on the environment in which justices are appointed and in which they reach their decisions.

[14] The case against strong judicial review is not just analytic; it is not just a game that we play, when we want to take out and polish the countermajoritarian difficulty. The problem with strong judicial review of legislation is that it's a practice perched precariously atop a poisoned politics, with the participants standing around snarling and muttering at each other. It is liable to break down in unpredictable ways on familiar or unfamiliar issues. If you want to reply to critiques of strong judicial review, you should have something to say about these prospects—not just propositions that elicit applause from those who already agree with you.

But not every form of institutional empowerment can count as a reputable check or a respectable balance. Once upon a time, in this country, Parliament could pass laws, mostly through the House of Commons, but the approval of the House of Lords was required, and so was the consent of the sovereign king or queen. There's your checks and balances—vetoes with crowns, miters, and coronets. Well, my understanding is that you did away with this system, for the very good reason that apart from the House of Commons component, the other checks were either autocratic or aristocratic in their character. And neither of them had any legitimacy that could reconcile opponents to the way their vetoes were exercised. The veto by the monarch faded away in the early 18th century; it was last exercised, I think, by Queen Anne in 1707, vetoing the Scottish Militia Bill. And provision was made in the Parliament Acts of 1911 and 1949 for removing the final force of the Lords' veto—on the grounds that the representatives of the people should not have to submit to the authority of the peerage.

Look, the acceptability of a system of checks and balances depends on the political standing of the various agencies doing the checking and the balancing. Think about checks and balances in an American state: a decision by an elected Assembly of Representatives and a check by an elected state Senate plus a check by an elected governor (which can be overridden). Three separate institutions, together preventing the peremptory unilateral decision-making that constitutionalists fear so much, but still each of them presenting its own form of democratic legitimacy, each of them. That's respectable checks and balances.

No one today would accept the Anglican synod as a checking institution on the process of ordinary legislation not affecting the church; no one would accept an input by organized members of the British Academy, distinguished though we all are. Or the labor unions, considered as such, or Arsenal Football Club. For these cases, mere incantation of the phrase "checks and balances" is not enough, and it is not enough for the power of the judiciary either. The checking institutions require their own legitimacy, and that is what seems to be missing in the non-legitimated authority of courts.

Also, it's bit much to talk about checks and balances when one envisages a court, unchecked, having the final say.[15] The proposed Israeli reforms furnish a

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[15] Judicial supremacy, without itself being checked or balanced. Other branches may also interpret the constitution and some deference is due to their interpretations, especially where these are explicitly and thoughtfully articulated. There is an unpleasant record of dismissiveness in this regard in the American jurisprudence. (For example, *City of Boerne v. Flores*, 521 U.S. 507 (1997); "When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases

legislative check on the judicial power to check legislation. Not only a check but a balance back and forth. But, outrageously, for that very reason, proponents of the reform are accused on the streets of Tel Aviv of ignoring the need for checks and balances. Again, this is an instance of the toxic debate about strong judicial review introducing confusion and, I think, bad faith into our constitutional deliberations.

12. Legitimacy and what we owe each other.

I have gone on about this, because I believe a society replete with millions of opinionated people is in dire need of effective, respectful and intellectually honest doctrines of political legitimacy.

Legitimacy is not just a relation between the state and the individual. It concerns also the quality of relations among citizens themselves. I mean their relations in the midst of moral disagreement and adversarial political struggle. Legitimacy is about the way in which citizens reconcile themselves and each other to the laws and policies that are administered and implemented in their name. It is a matter of *what we can say to one another about the political process when some of us enthusiastically support a policy and some of us bitterly oppose it*.

Pursuing a political goal through normal political channels can be a frustrating business. I think of Max Weber's comparison of politics to "strong and slow boring through hard boards." You have to work with, and against, tens of thousands of others. And your own participation never seems decisive, never seems to be the thing that makes a difference. How one deals with these frustrations can be very revealing of attitude and character. At best it generates patience, toleration, openness to respecting (even if not adopting) others' points of view. At worst, anger, offense, and frustration.

Not all social practices that anchor our constitutional arrangements have an interface with popular attitudes. Some are mercifully esoteric. But the arrangements we've been talking about *do* and in a democracy we need to be careful not to convert agency into vanity, opposition into contempt, or frustration into condescending self-righteousness.

… the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed." –Stevens J., concurring.) The court may necessarily have the final word in particular cases, but that does not entitle it to simply shove aside—again, by virtue of knife-edge majority voting among its members—the constitutional understandings put forward by other branches. Due consideration of these is required in a balanced constitutional system.

13. Impact of constitutional adjudication on political civility.

It is sometimes said that the function of a constitutional scheme is to put certain positions beyond the reach of politics. "The idea of the Constitution," the US Supreme Court once said, "was to withdraw certain subjects from the vicissitudes of political controversy."[16] It is said that there are certain positions that are so oppressive or so discriminatory that they are not to be tolerated. They're to be taken off the agenda, demonized as beyond the pale. And we portray the constitutional court as patrolling this boundary, ensuring that the stuff beyond the pale is not ever brought back into regular politics. On this rhetoric, we say to our opponents after a victory in court: "You should never have been promoting that agenda in the first place." We no longer exhibit any magnanimity as victors. In constitutional politics, we demonize our opponents for failing to have played by the most fundamental rules of the game. I am sure you each recognize that attitude, in others if not in yourselves.[17] It's not an altogether pleasant mode of self-presentation.

But it arises in our politics because inevitably constitutional debate involves good faith disagreement about the way in which one of these taboo issues is to be understood, with reasonable rival conceptions confronting each other. Think of the abortion debate, for instance, or the debate about affirmative action. There are decent people, deep passions devout convictions, and plausible interpretations on both sides. And yet the rhetoric of popular engagement with judicial review retains the logic of demonization. We, on our side, pretend that the other side has to be denigrated as deplorable. Not just opposed, but denounced. That's not just unpleasant; it sets up a dangerous and combustible environment in which to engage with the hyper-partisan politics of the issue we are talking about.

Bernard Williams once reflected on the difference between being able to say to a losing opponent at the end of some political process, "Well, you lost," and saying to them, "You were *wrong*" or "You were proved *wrong*." The former saying, "Well, you lost," is compatible with recognizing their position as honest and honorable. We share civil space with our opponents: we have to take turns

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[16] *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 638 (1943).

[17] This raises what I would like to call aretaic issues—Word-for-the-Day: aretaic—aretaic issues about the character and characteristics that defenders of judicial review impute to their opponents. In politics, concern about the impatience, outrage at opposition, and something approaching self-righteousness. As things stand, the defense of judicial review is associated with arrogance rather than tolerance. Denigration of those who oppose the liberal judicial decisions—also the way in which defenders of judicial review present and describe the character and intellect of those who oppose it.

ruling and being ruled, so that our aim is to defeat their positions for the time being, not to demonize or eradicate *them*. This is one of the reasons why Williams was so opposed to the moralization of politics.

The more accommodating attitude towards political defeat is sponsored by the contingency of democratic majoritarianism. I won today; you may win in the next cycle. That's ordinary political legitimacy and it's an inherently civil and tolerant form of engagement. But democratic legitimacy is largely unavailable in constitutional politics: people work hard to make it unavailable. And my worry is that the forms of legitimacy that *are* being cited—particularly *substantive* legitimacy in the vindication of constitutional rights—are inherently intolerant; they are self-congratulatory; and they demonize the opponent. The more political issues we judicialize, the greater the presence of that form of incivility in our politics. That's how judicial review poisons our politics, even at its best. And in this time of crisis it seems that people are enraged at changes in the practice of judicial review, even though they're intended to repair its dysfunction, lamenting the anticipated loss of the opportunity to portray one's opponents in this light.

14. Hart and the practice theory of rules.

I am just about done. But this is the H.L.A. Hart Memorial Lecture. What does any of this have to do with the work of Herbert Hart? Let's go back to what I said at the beginning.

Judicial review is a constitutional arrangement anchored in a social practice that I view as tattered and broken, displaying pathologies for which I'm not sure any remedy can be devised.

One of Hart's most important (if tantalizing) contributions to jurisprudence was his *practice theory of rules*—postulating that rules may begin as social practices, where (for example) a bunch of people habitually remove their hats as they come into church, an action that gradually acquires normativity for them, and obligatory force, and the force of sanctions as they develop harder and harder and more and more critical attitudes towards their own and others' behavior. When people start saying to each other (or *sotto voce* to themselves) you really ought to remove your hat *right now,* that's how normativity establishes itself.

That's a simple and benign example, and though it is analytically helpful in teaching this stuff, sometimes benign simplicity proves treacherous. For if Hart is right that the secondary rules of a legal system are anchored in social practices, then the relevant actions and attitudes must be held among millions of people. And if they are constitutional rules, then those practices have to work in an environment where people are putting on display at the same time their deepest and most

cherished convictions. That's the terrain we are talking about, an environment of hyper-partisanship fueled by immense rage, resentment and potential violence. Plus the culture wars. Plus the electoral system and ballot-counting arrangements as an arena of intense and angry partisan activity. (Again, collapse of conventions) That's the backdrop; that's where the secondary rules have to do their work.

Hart mentioned three kinds of constitutive practice: rules of change, rules of recognition, rules of administration. But that triad was for simplicity in the model he was presenting. In a mature constitutional system, there must be hundreds of them—some practices comprising pure conventions, others honoring conventions layered with rules framed by constitution-makers and constitutional amendments. The practices bear on one another, and they have to work as a system. And their mission is daunting: they have to corral the convictions and channel the campaigns of a quarrelsome people.

In Hart's model, secondary rules like rules of change and rules of recognition necessarily reflect the practice of a community of officials. He famously observed that *analytically*, social practices anchoring legal rules need not be understood or participated in by ordinary people. But, again, "analytically" takes us only so far. Inasmuch as large-scale secondary rules constitute a basis for a democratic constitution grounding political legitimacy within an angry and opinionated community, there has to be a very considerable amount of popular buy-in, and that means lay understanding and misunderstanding, lay expectations and lay criticisms. The practices (large and complex though they are) will not always have the ability to stand on their own, without popular buy-in with all its vicissitudes. And that interface between official participation and lay understanding is what I've been talking about, where critical engagement is fraught with anger and recrimination. I wish my colleagues, in jurisprudence, would teach these possibilities when they take their students through the discussion of secondary rules in *The Concept of Law*.

To put it bluntly, when we talk about the social practice theory of rules, we are not just talking about a cheerful folk-dance or a few people taking their hats off in church. The practices addressed this evening are freighted with bitter antipathy; they involve an interface between politics and the things people care most about. Nothing guarantees that these practices will hold together. We must expect to observe serious disrepair and serious dissonance, for different factions of citizens and officials are not at all on the same page, playing the same score, reading from the same script so far as their participation in the practice is concerned.

In some societies—Canada perhaps—judicial review may run smoothly; and legal scholars may have a wonderful time refining poised and confident ways of

characterizing its underlying rationale. Even in Israel and the United States, the practice may limp along under all these pressures without falling apart. So long as people are willing to pause to ask themselves whose engagement is slighted and whose participation is denigrated in the logic of these accounts, they may rest on an uneasy equilibrium of civility. I hope so.

The practices are precarious nonetheless; and who knows when the camel's back will finally buckle? A court-packing experiment of the kind being talked about in the United States, or the impeachment of one of the justices for ethics violations, or a new political issue—like affirmative action or same-sex marriage again, or a renewed assault on the electoral system. And then the shouting will begin again.

So that's what I want to draw from H.L.A. Hart's practice theory of rules. I say none of this to denigrate Hart's account. I have the greatest respect for what he achieved in Chapters Four, Five and Six of *The Concept of Law*. I just wish my colleagues in legal philosophy would explore the relevance of what he said for our debates about constitutional practice and follow the illuminating leads he laid down and push deeper beyond the book, into what, as a matter of descriptive sociology—that's Hart's phrase—what as a matter of descriptive sociology a practice like strong judicial review is likely to involve in a divided and partisan society.