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Judicial Review: A Wasting Asset

Louis Lusky†

The Supreme Court's power of judicial review is a vital national resource. It facilitates self-government and enables potentially disaffected minorities to win recognition of their grievances without resort to civil disobedience, rebellion, or other forms of lawless self-help.¹ The power can lose much of its value, however, if it is persistently over-used.² In this author's opinion, it *has* been persistently over-used in recent years.

In the name of the Constitution, the Court has invalidated a great many official actions that have not offended prohibitions specified in the text (or inferable from its structure), on the basis of new constitutional rules of its own devising. Some of these innovations are legitimate because they are necessary for satisfaction of national commitments to self-government and preservation of the open society,³ commitments reflected in the original Constitution. More and more such innovations, however, not being explainable on this basis, outrun the Court's legitimate authority. This Article, without attempting a complete enumeration, examines enough of these innovations to illustrate the point.

I. The Commitments to Self-Government and the Open Society

The commitment to self-government is evidenced by the guarantee to the states of a "Republic Form of Government,"⁴ and by provisions for fairly frequent congressional and presiden-

† Betts Professor of Law Emeritus, Columbia Law School. A.B., University of Louisville, 1935; LL.B., Columbia Law School, 1937.

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1. L. LUSKY, *BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION* 38-39 (1975).

2. *Id.* at 41.

3. *Id.* at 21.

4. U.S. CONST. art. IV, § 4.

tial elections.⁵ By providing a channel for peaceable change in the law, the electoral system helps tame dissatisfaction with existing conditions which might otherwise erupt in lawless self-help.⁶

From its beginning, the nation has been committed not only to self-government but also to preservation of what is commonly called the open society — a society in which personal autonomy can be and is maximized⁷ because nearly everyone accepts the law as morally binding on him. That makes possible the maintenance of civil order without coercion through extensive policing.⁸

The open society is vulnerable to disruption by those who do not accept the law as binding upon them. A thoroughly disaffected group may be quite small — far too small to mount a successful rebellion — and still be capable of enough disruption to force an open society to close.⁹ Even a small band of malcontents, feeling no obligation to comply with the law, can make people afraid to walk the streets or ply their trade without extensive police protection. In the interest of public safety, resort is had to some or all of the trappings of a police state, such as searches and arrests on mere suspicion, widespread surveillance, wholesale employment of informers, curfews, and preventive detention.¹⁰ The intrusive police measures affect everyone's freedom, and the whole society is less open.

In this connection, a special problem exists with respect to

5. *Id.*, art. I, §§ 2, 3; art. II, § 1; amend. XII, XVII.

6. See L. LUSKY, *supra* note 1, at 120-21.

7. U.S. CONST., preamble: "We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution . . ."

8. Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 3-5 (1942).

9. Lusky, *The King Dream: Fantasy or Prophecy?*, 68 COLUM. L. REV. 1029, 1030 (1968).

10. *Id.* at 1031. For a recent illustration, see *United States v. Salerno*, 107 S.Ct. 2095 (1987), upholding the preventive detention provision of the Bail Reform Act of 1984, 18 U.S.C. § 3141(e) (Supp. III 1985). The statute authorizes denial of bail if necessary to assure "the safety of any other person and the community." The Court noted that the statute responded to "the alarming problem of crimes committed by persons on release . . ." *Salerno*, 107 S.Ct. at 2098 (quoting S. REP. No. 225, 98th Cong., 2d Sess. 3, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3185). The Court went on to say: "[T]he government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *Salerno*, 107 S.Ct. at 2102.

"discrete and insular minorities"¹¹ — members of racial, religious, or other groups who have reason to fear that their needs will be discounted in the process of compromise that characterizes most legislation.¹² Such minorities have reason to fear that the bond of community kinship, which leads legislators to identify with most of their constituents and take full account of their needs in fashioning legislation, is attenuated in their case. The danger is that they will not accept the legislative compromises as binding on them if they perceive the law to treat them less favorably than others and, despairing of relief through the political process, will be driven toward lawless self-help. The consequent threat to the openness of the society has already been mentioned.

II. The Legitimacy of Constitutional Innovations

The orthodox conception of judicial review, proclaimed in *Marbury v. Madison*,¹³ is that it consists of interpreting the text of the Constitution and invalidating any statute or other official action that conflicts with the text as so interpreted. For some time, however, the Supreme Court has been supplementing the text by proclaiming new constitutional rules.

Not all such innovations should be condemned as usurpations of authority. Many of them can be defended as legitimate because necessary for fulfillment of basic national commitments. For centuries, courts have recognized a principle of interpretation encapsulated in the Latin maxim *ut res magis valeat quam pereat*. Freely translated, it means "so that the enterprise's main purpose may succeed rather than fail." This Article will refer to it simply as "the Maxim." A court resorts to the Maxim when it has to decide whether and how the decision of a case is governed by a written instrument of some kind, and the words of the instrument do not explicitly apply to the factual situation then before the court. In that event, applying the Maxim, the court is guided by the purpose or purposes for which the writing

11. The term comes from *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). See Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

12. See Lusky, *supra* note 8, at 4.

13. 5 U.S. (1 Cranch) 137 (1803).

was produced. If it is a contract or a treaty, the court asks what was the purpose of the parties; if a will, what was the purpose of the testator; if a statute, what was the purpose of the legislators; if a constitution, what was the purpose of its framers and ratifiers?¹⁴

The Maxim has been used in so many legal contexts that it can fairly be said to pervade the law.¹⁵ Perhaps its most familiar application is the doctrine of *cy pres*, or equitable approximation, in the law of charitable trusts.¹⁶ But it also has an established place in constitutional law. Judge Learned Hand, in his 1958 Oliver Wendell Holmes Lecture, after rejecting other grounds for accepting as legitimate the judicial review of federal statutes, proceeded to acknowledge its legitimacy in these terms:

For centuries it has been an accepted canon in interpretation of documents to interpolate into the text such provisions, though not expressed, as are essential to prevent the defeat of the venture at hand; and this applies with special force to the interpretation of constitutions, which, since they are designed to cover a great multitude of necessarily unforeseen occasions, must be cast in general language, unless they are constantly amended. If so, it was altogether in keeping with established practice for the Supreme Court to assume an authority to keep the states, Congress, and the President within their prescribed powers. Otherwise the government could not proceed as planned; and indeed would almost certainly have foundered, as in fact it almost did over that very issue.¹⁷

14. *E.g.*, *Purvis v. United States*, 344 F.2d 867, 870 (9th Cir. 1965) (contract); *Zdanok v. Glidden Co.*, 288 F.2d 99, 104 (2d Cir. 1961), *aff'd sub nom. Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (collective bargaining agreement); *Pastan v. Pastan*, 378 Mass. 148, 155 (1979) (will); Note, *The South West Africa Cases: Ut Res Magis Pereat Quam Valeat*, 115 U. PA. L. REV. 1170, 1191 (1967) (treaty).

15. The LEXIS memory bank reveals use of the Maxim (in its Latin form) in cases involving the following 34 subject matters: acknowledgements; administrative law; agency; banks; bills and notes; charities; chattel mortgages; collective bargaining agreements; constitutional law (federal and state); contracts; corporate reorganization; executors and administrators; future interests; guaranty and suretyship; infants; injunctions; insurance; intoxicating liquors; judgments; labor law; land patents (grants); mechanics' liens; motor vehicles; municipal corporations; patents; public contracts; replevin; restraint of trade; schools; statutes; supersedeas; trusts; vendor and purchaser; wills.

16. *See, e.g.*, G.T. BOGERT, TRUSTS § 147 (6th ed. 1987); 2 J.W. PERRY, A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES (7th ed. 1929) §§ 687, 723.

17. L. HAND, THE BILL OF RIGHTS 14-15 (1958).

In 1985, the Court followed the same line of thought in overruling *National League of Cities v. Usery*,¹⁸ where the Court had held that state and local governments enjoy a tenth amendment immunity from federal wage and hour regulation under the commerce clause. In *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁹ the Court said:

The central theme of *National League of Cities* was that the States occupy a special position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. Of course, the Commerce Clause by its specific language does not provide any special limitation on Congress' actions with respect to the States. [Citation] It is equally true, however, that the text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for "[b]ehind the words of the constitutional provisions are postulates which limit and control."²⁰

The Maxim has long been part and parcel of constitutional interpretation. In the context of judicial review, this Article will call it "the necessity principle." When is it necessary for the Court to devise a new constitutional rule, and when not? Broadly speaking, it is necessary when it is the only way to head off disaffection that is likely to result in lawless self-help on the part of people who despair of obtaining fair consideration of their needs and opinions through the political process. Such despair may arise from restriction of the voting franchise or other official interference with the political process. It may also be felt by members of discrete and insular minorities who have reason to consider themselves victims of official discrimination or neglect. On the other hand, the necessity principle does not justify the Court in making a new constitutional rule to deal with a problem that can fairly be resolved through the political process.

This limitation is important. It is the reason voters continue to respect judicial review as a legitimate aspect of self-government, and do not use their power (through their elected repre-

18. 426 U.S. 833 (1976), *overruled*, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

19. 469 U.S. 528 (1985).

20. *Id.* at 547 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)) (nonconsenting state is immune from suit by foreign sovereign).

sentatives) to curtail it — as they might well do, should they come to believe that the Court is eroding their power of self-government by invalidating official action without regard to the necessity principle.²¹

III. Disregard of the Necessity Principle

For the last 25 years or so, the Supreme Court has been introducing constitutional innovations at an ever-increasing rate. A number of its decisions cannot be justified under the necessity principle. No one of them, by itself, is enough to jeopardize self-government. Taken together, however, they betoken progressive erosion of popular sovereignty.

One such innovation was *Cohen v. California*.²² Paul Robert Cohen was held to be constitutionally protected from punishment for strolling back and forth in a county courthouse wearing a jacket on the back of which was the painted admonition "Fuck the Draft." He was convicted under a statute prohibiting disturbance of the peace by "offensive conduct,"²³ the state court finding his language to be offensive because it fell below the "minimum standard of propriety and the accepted norm of public behavior."²⁴ The Supreme Court reversed,²⁵ emphasizing the fact that Cohen's words expressed his opinion on a political issue; and that was certainly pertinent. The Court apparently gave no weight, however, to the likelihood that Cohen's expletive would offend passers-by without adding to the substance of his message.

The Court had decided long before, in *Chaplinsky v. New Hampshire*,²⁶ that freedom to express one's opinion does not include the right to express it in a manner hurtful to others. "[W]ords . . . which by their very utterance inflict injury," the Court said, "are no essential part of any exposition of ideas" and are not protected by the Constitution.²⁷ Chaplinsky had called a peace officer a "God damned racketeer" and "a damned Fas-

21. See L. LUSKY, *supra* note 1, at 29-30, 39-41.

22. 403 U.S. 15 (1971).

23. *Id.* at 16.

24. *People v. Cohen*, 1 Cal. App. 3d 94, 99, 81 Cal. Rptr. 503, 506 (1969).

25. 403 U.S. 15 (1971).

26. 315 U.S. 568 (1942).

27. *Id.* at 572.

cist," and the Court upheld his conviction for addressing "an offensive, derisive, or annoying word" to another in a public place. In the *Cohen* case, however, the Court overrode a state court finding²⁸ that the expletive was likely to provoke violent removal of the jacket by onlookers to protect the sensibilities of women and children who were present. The question in both cases was whether a state can insist on minimum standards of civility in political discourse. The *Chaplinsky* case held yes. The *Cohen* case, in effect, held no. And the Court's opinion in the *Cohen* case did not explain how the necessity principle justified the extension of constitutional protection to scatological expression.

Another constitutional innovation took place in *Buckley v. Valeo*,²⁹ which invalidated a portion of the Federal Election Campaign Act,³⁰ as amended in 1974 (after Watergate). In that statute, Congress had made the judgment that campaign contributions and expenditures in federal elections should be limited in order to avoid corruption and the appearance of corruption. Contributions to candidates and expenditures for candidates both have the same ultimate purpose, and both can result in corrupt practices. The Court held, however, that although Congress can limit contributions,³¹ it lacks power to limit expenditures.³² The Court treated spending to support a candidate as if it were a political statement on his behalf,³³ overlooking the fact that although money is sometimes spent for publicizing the spender's views, it is often used to defray other campaign expenses.³⁴ It thus held, in effect, that the first amendment protects more than communication.

The necessity principle would have justified invalidation of provisions giving incumbents an advantage over their challengers. Fair treatment of challengers tends to restore public faith in the political process; and that faith can perhaps be more com-

28. 403 U.S. at 20.

29. 424 U.S. 1 (1976).

30. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

31. 424 U.S. at 23-38.

32. *Id.* at 39-59.

33. *Id.* at 39: "It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech"

34. *Id.* at 263 (White, J., dissenting).

pletely restored if the Court, rather than Congress itself, decides whether challengers are receiving fair treatment. The *Buckley* decision, however, went further. It disapproved a sensible attempt by Congress to keep big spenders from evading the contribution limitations.³⁵ The Court did not explain how the necessity principle justified this extension of first amendment coverage.

Another constitutional innovation was made in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,³⁶ where the Court repudiated the "commercial speech" doctrine of *Valentine v. Chrestensen*.³⁷ In the *Valentine* case, the Court had denied constitutional protection to a commercial handbill advertisement, evidently reasoning that expression which merely leads to or makes or accompanies a bargain is devoid of political significance. In the *Virginia Board of Pharmacy* case, the Court brushed aside that important limitation on its authority. Holding invalid, as an infringement of press freedom, a state statute that penalized the advertising of prescription drug prices, the Court used language that Justice Peckham in 1905 might well have employed in *Lochner v. New York*,³⁸ the now-discredited leading case on substantive due process:

Here . . . the question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.

. . . .

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be

35. *Id.* at 44; cf. *id.* at 260-61 (White, J., dissenting).

36. 425 U.S. 748 (1976).

37. 316 U.S. 52 (1942).

38. 198 U.S. 45 (1905).

made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. [Citations] And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how the system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.³⁹

The last two quoted sentences seem to assume that Virginians who disapproved the restriction on advertising could not seek remedial action through the state legislature, or that the legislature was incapable of informing itself on the large price variations sheltered by the existing law. The Court did not explain these assumptions; but unless they are well-founded, the necessity principle does not justify the decision.

A cognate development, the "corporate speech" doctrine, was inaugurated in *First National Bank of Boston v. Bellotti*.⁴⁰ A Massachusetts criminal law, based on the idea that corporate intervention in politics tends to result in corruption or apparent corruption, forbade corporations to spend money lobbying on public issues not materially affecting their business or assets. The Court held the statute unconstitutional.

There was no interference with individual expression by the bank's stockholders, directors, officers, or employees. The statute did no more than say that an artificial entity, created for a non-political purpose, was not to be used by its managers for an activity foreign to the purposes for which it was created. Politically significant speech is important because it helps the voters to control their government. If individuals want to form a corporation or other organization to promote their political views, the Constitution rightly protects their ability to do so.⁴¹ But corporations do not vote. Even if, as some have maintained,⁴² there is

39. 425 U.S. at 760-61, 765 (footnotes omitted).

40. 435 U.S. 765 (1978).

41. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (state-compelled disclosure of membership lists of nonprofit political organization held unconstitutional).

42. See, e.g., *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concur-

a basis for protecting freedom of expression in the interest of individual self-fulfillment — the pursuit of happiness — the conclusion is the same. Happiness and sadness do not belong to corporations. The decision is not justified by the necessity principle and is an excessive use of judicial review.

*Elrod v. Burns*⁴³ and *Branti v. Finkel*⁴⁴ accomplished another constitutional innovation. They extended the Court's power in a different direction by giving new and broader scope to the freedom of association. These injunction suits were brought by three process servers and a security guard/bailiff in one case, and by two county assistant public defenders in the other. Their positions were not covered by the civil service system, but were left open to party patronage. Nevertheless, the Court held that incoming Democrats could not replace incumbent Republicans who had obtained their positions under the previous administrations without demonstrating "that party affiliation is an appropriate requirement for the effective performance of the public office involved."⁴⁵

Justice Powell, dissenting in both cases, urged that the party patronage system possesses merits (including the merit of keeping the voters in control of bureaucrats as well as elected officials) that can reasonably be thought to outweigh the advantages of the civil service system.⁴⁶ He saw no reason why the line between civil service and patronage jobs should not continue to be settled by legislation, as a policy matter.⁴⁷ "In my view," he said, "the First Amendment does not incorporate a national civil service system."⁴⁸

The Court, however, asserted power to decide which jobs can be filled by patronage. The reason it gave was that the incumbent employees' freedom of political association was at stake. The Court seems to have overlooked the interest of the

ring) (upholding a state court conviction under a California statute prohibiting criminal syndicalism): "Those who won our independence believed that the final end of the State was to make men free to develop their faculties They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness"

43. 427 U.S. 347 (1976).

44. 445 U.S. 507 (1980).

45. *Id.* at 518.

46. *Id.* at 529-30, 532.

47. *Id.* at 533.

48. *Id.* at 534.

voters in installing a government that their own associational freedom had enabled them to elect. The decision subordinates that interest to the narrower interest of public employees, without explaining how the necessity principle justifies such a result.

In 1964, the Court held for the first time that first amendment protection extends to libelous expression. Until then it had taken the position that libelous utterances are not within the area of constitutionally protected speech.⁴⁹ A new rule was announced in *New York Times Co. v. Sullivan*:⁵⁰ that defamatory statements about public officials, relating to their official conduct, are not actionable unless they are knowingly or recklessly false.

The necessity principle supports this constitutional innovation. The *Times* had suffered a \$500,000 judgment for slight inaccuracies in a civil rights advertisement criticizing the performance of the Montgomery, Alabama, police.⁵¹ The Alabama courts had applied the common law of libel, which is heavily weighted in favor of plaintiffs: liability can be imposed without proof of negligence or other fault, the defendant has the burden of proving truth, and the jury can award large compensatory, as well as punitive, damages without proof of monetary loss.⁵² These rules establish a standard of accuracy higher than the news media can achieve,⁵³ operating as they do with the tight deadlines that competition forces upon them. The large *Sullivan* judgment gave notice that press coverage of the civil rights movement in the deep South would be an extra-hazardous activity. If that judgment stood, the full picture of racial discrimination might never have been brought home to the electorate throughout the country. The news reports were politically significant expression, fueling the eventually successful drive for remedial legislation addressed to the needs of the discrete and insular black minority.⁵⁴

49. *Beauharnais v. Illinois*, 343 U.S. 250, 256, 266 (1952).

50. 376 U.S. 254 (1964).

51. *Id.* at 257-59.

52. *Id.* at 267.

53. *Id.* at 271.

54. *E.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

Building on the *Sullivan* precedent, however, the Court has proceeded to federalize a substantial but poorly defined portion of the complex field of libel law. It seems to be functioning as a common law court, revising state libel law by developing new rules on a case-by-case basis. For example, in *Gertz v. Robert Welch, Inc.*,⁵⁵ the Court held that even in a suit brought by a private figure, liability for defamatory falsehood cannot be imposed without proof of negligence or other fault,⁵⁶ and punitive damages cannot be awarded.⁵⁷ And in *Philadelphia Newspapers, Inc. v. Hepps*,⁵⁸ another "private figure" case, the Court held that the defendant cannot be assigned the burden of proof on the issue of truth or falsity, at least if the defendant is a newspaper⁵⁹ and if the speech at issue is "of public concern."⁶⁰ The Court has not explained how the necessity principle justifies such intrusion into state tort law.

In equal protection cases, the outcome often depends on whether the Court exercises "heightened scrutiny." If so, a legislative classification will be upheld only if the Court is satisfied that it serves an important purpose in an acceptable way. In other words, heightened scrutiny results in a presumption of invalidity — a heavy one in "strict scrutiny" cases, a somewhat lighter one in "intermediate scrutiny" cases.⁶¹ Both types of heightened scrutiny, however, involve judicial reexamination of the wisdom of the legislative action.

The necessity principle may well call for such reexamination where there is discrimination against such groups as blacks or women, who have reason to doubt that legislatures take their needs and opinions seriously. Judicial review helps convince them that they have received fair treatment, and sustains their faith in the political process. The Court, however, has also exercised heightened scrutiny where discrimination has *avored* blacks and women.

55. 418 U.S. 323 (1974).

56. *Id.* at 347.

57. *Id.* at 350.

58. 106 S. Ct. 1558 (1986).

59. *Id.* at 1565 n.4.

60. *Id.* at 1564.

61. For a discussion of heightened scrutiny, see GUNTHER, CONSTITUTIONAL LAW 588-91 (11th ed. 1985).

One such case is *Craig v. Boren*.⁶² An Oklahoma statute prohibited the sale of 3.2% beer to men under the age of 21, while allowing such sale to women aged 18 or more. The Court applied intermediate scrutiny, declaring that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."⁶³ The statute was held invalid. Statistics adduced by the state indicated that young men have more auto accidents than young women, are arrested far more often for drunk driving, and, when on a date, usually do the driving.⁶⁴ The Court gave reasons why the statistics did not impress it, but did not deny that they might reasonably have impressed the state legislature — nor did the Court explain why that should not be enough. That is to say, it did not explain why the political process could not be counted on to deal satisfactorily with complaints of unfair discrimination against men.

Similarly, a majority of the Justices applied heightened scrutiny in *Regents of the University of California v. Bakke*,⁶⁵ the leading affirmative action case. Strict scrutiny was favored by Justice Powell,⁶⁶ and intermediate scrutiny by four of his colleagues.⁶⁷ The case involved a preference for nonwhites in admission to a state medical school, pursuant to an affirmative action plan.

The wisdom of affirmative action depends on circumstances of time and place. On the one hand, it may be the only practical way to mitigate the continuing effect of past discrimination.⁶⁸ On the other hand, it has the unwanted side effect of postponing the day when skin color will have no more significance than hair color or eye color, since it uses skin color as a determinant of legal rights.⁶⁹ Legislatures, being in closer touch with community conditions than courts, are better equipped to balance the op-

62. 429 U.S. 190 (1976).

63. *Id.* at 197.

64. *Id.* at 200-03.

65. 438 U.S. 265 (1978).

66. *Id.* at 290-91.

67. *Id.* at 359 (Brennan, J., concurring and dissenting).

68. *Id.* at 341-45 (Brennan, J., concurring and dissenting).

69. See *United Jewish Orgs. v. Carey*, 430 U.S. 144, 173-74 (1977) (Brennan, J., concurring in part) ("[E]ven in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness . . .").

posing considerations and decide whether affirmative action is desirable, and in what form, and for how long. The necessity principle would not seem to call for heightened scrutiny, since the political process is available to whites complaining against the discrimination.

Intermediate scrutiny was deemed applicable in *Plyler v. Doe*,⁷⁰ which held that Texas is constitutionally obligated to provide illegal aliens with free public school education. As the Court pointed out, there was indeed a danger that the illegal alien children would grow up to form a permanent underclass if left uneducated, adding to problems of unemployment, welfare, and crime.⁷¹ Moreover, the children were not morally responsible for the unlawful immigration of the parents who had brought them across the border.⁷² The Court failed to explain, however, why the Texas electorate could not be counted on to do what is best for Texans, including educating illegal alien children if that is necessary to avoid problems associated with a large underclass.

IV. Conclusion

Only the Court can keep judicial review within principled limits. This Article has proposed that it be used only for enforcement of rules contained in the constitutional text or implied by its structure, or devised by the Court to fulfill basic national commitments. This Author does not insist on this particular limit; perhaps someone else can offer a more useful one. Unless the Court respects *some* limit, however, judicial review will lose its effectiveness even in the two areas where the Court can do a better job than elected officials: protection of self-government and preservation of the open society. Those are the areas where judicial review is uniquely valuable.

The cases reviewed above indicate that the Court has ceased to observe any limit on its power to invalidate statutes or other official action if a majority of the Justices believe they know a better way — even though any defects are correctible through the political process. The consequence may be to convert judicial review into a wasting asset.

70. 457 U.S. 202 (1982).

71. *Id.* at 218-19, 230.

72. *Id.* at 220.