REJOINDER

*Mark Tushnet**

In this brief response I address two issues raised by these generous comments. Rivka Weill[1] and Margit Cohn[2] prod me to provide a more theoretical underpinning for the historical account I offered, and all three commenters suggest that the U.S. experience does not shed much light on the normative case for constitutional review presented by Alon Harel in other work.[3] I sketch a theoretical account of the historical narrative, grounded in the structure of U.S. government and politics. That sketch may have some implications for conceptualizing the course of constitutional development in other polities. Then I raise some questions about Harel's theory of constitutional review as a mechanism for providing individuals with a forum in which they can receive an explanation of why they are properly being subjected to treatment that harms them individually, if one is available. I end with a suggestion connecting the two components of this Rejoinder.

My historical narrative is connected to a branch of the study of what has come to be called American political development, and specifically to an account of American political development in which transformative presidents introduce and then stabilize successive "regimes." These regimes combine distinctive programmatic goals with institutional innovations aimed at providing continuing political support for the transformative president's programs and the ideas that animate those programs and give them some intellectual staying power. The dynamics of the regime account include establishment, stabilization, and decline, to be followed by another regime transformation's establishment and so on.

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[1] See in this issue Rivka Weill, *Is it the Right Revolution? On Tushnet's* The Rights Revolution in the Twentieth Century, 42 ISR. L. REV. 483 (2009).

[2] See in this issue Margit Cohn, *"Everything Flows": Mark Tushnet's Rights Revolution and the Impact of Constitutional Dialogue*, 42 ISR. L. REV. 472 (2009).

[3] See in this issue Alon Harel, *The Vices of Institutional Instrumentalism: A Comment on Tushnet,* The Rights Revolution in the Twentieth Century, 42 ISR. L. REV. 465 (2009); *see, e.g.,* Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991 (2006). *See also* Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, *available at* http://ssrn.com/abstract=1272493.

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The general account takes the following form. Each regime puts new institutions in place, staffed by people generally committed to the regime's programs and ideas. These institutions elicit support from the regime's primary constituencies, who might be thought of as an institution's clients. In return for what they receive from the institutions, the clients provide political support for the regime as a whole. Even leaders of opposition parties generally accept the regime's programs, contending that they will be better at implementing them than the party currently in charge. Over time, though, this equilibrium is disturbed. Sometimes external events reduce the efficacy with which the institutions provide the benefits, and the clients reduce their support. More interesting, the clients push the institutions into pursuing their missions ever more forcefully and intensively. Captured or at least strongly influenced by the clients, each institution makes larger and larger demands on the regime as a whole, and the aggregation of demands taxes the regime's fiscal and administrative capacity. In addition, and again perhaps more interesting, the programmatic or ideological demands emanating from the institutions undermine the regime's programmatic commitments overall, with each institution engaged in ideological "overreach." The result is that the regime loses political support to the point where opposition leaders abandon their previous lukewarm support for the regime and propose to replace it with a new set of programs and institutions. They may not succeed, of course, but even if they do they will be operating for quite a long time within an institutional context still dominated by the institutions of the prior regime, over which they will layer their own innovations.

Political leaders seeking opportunities to win elections play a central role in this account, and in the United States that means politicians who run for the presidency. Their ability to transform one regime into another is affected not only by their ability to articulate new programs and ideas and to design (or locate close aides who can design) new institutions but also by the state of the party system. As a prior regime degenerates, transformative leaders are likely to find their party united behind them, because every subordinate party leader sees the looming opportunity to take control of the government. Party unity may fragment after a regime transformation, as the subordinate party leaders now seek to take control not of the government as a whole but of some of its institutions, bypassing the president. And of course some of them see themselves as potential successors to the transformative president. To succeed in their own quest for the presidency, these leaders must simultaneously show their commitment to the regime and its principles and demonstrate their ability to do something different from and better than what the transformative president accomplished.

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It would unduly extend this response to connect this general account to the historical narrative I provided. Two points, one specific to the U.S. context and the other more general, are worth emphasizing. One thing a transformative president does is eventually gain control of the Supreme Court, typically by the natural processes of resignation, retirement, or death followed by replacement, but occasionally through a reasonably direct confrontation with the Court. In a metaphor introduced by political scientist Martin Shapiro, transformative leaders typically lead an assault on the courts before they are elected, then take over the fortress and have to decide whether to dismantle its weapons or turn those weapons against their adversaries.[4] Unsurprisingly, politicians usually make the latter choice. The key point here is that one important mechanism of constitutional change is the staffing of the Supreme Court by transformative presidents.

The more general point is that a regime analysis might well be available in other democracies that have been sustained over a reasonably long period (I leave that qualification deliberately vague). Of course the mechanisms will be different: prime ministers rather than presidents, for example, or multi-party governments and proportional representation rather than the U.S.-style two party system will drive the analysis. My guess is that thinking about constitutional change in regime terms will illuminate constitutional development outside the United States.

I turn now to Harel's normative justification for constitutional review[5] and raise some questions about it, without developing a full-scale critique. First, I think it worth emphasizing that Harel's justification does not extend to the entire range of practices of constitutional review. It will not support doctrines that allow courts to invalidate statutes "on their face," unless the courts are able to make the quite difficult predictive judgment that the number of individual cases in which applying the statute will be constitutionally unjustifiable swamps the number of cases of permissible application. Nor will it support the related approach of "abstract norm control" used in some systems of constitutional review.

I think there is a deeper problem with Harel's approach. Let me define Professor Harel's approach as one in which the courts make an "equitable" exception to the statute's application after hearing the claimant's objections to its application and after finding that the government has not provided an adequate explanation for the imposition on the claimant. Assume three facts about statutes and their administration. First, any

[4] Martin Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values, in* THE BURGER COURT: THE COUNTERREVOLUTION THAT WASN'T 218 (Vince Blasi ed., 1983).

[5] Harel, *supra* note 2.

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equitable exception to a rule's application to all the circumstances it would otherwise apply to, inevitably reduces the degree to which the rule advances whatever social goals the rule is designed to advance. One reason is that by definition, exceptions block the rule's application to some of those who contribute to the social problem at which the statute is directed. Another, perhaps more interesting, reason is that many of those to whom the rule is applied will seek to show that it should not apply to them, many of those objections will ultimately be determined to be unfounded, and the delay in implementing the rule as to those objectors is socially costly (I put aside here the possibility that the rule would be implemented while the process of constitutional review is ongoing, with some sort of compensation to those later found to be entitled to an equitable exception; in many cases post-implementation compensation will be inadequate to rectify the wrong.) Second, determining whether an exception is equitably justified is costly in the ordinary sense of "cost," whether that determination be made by some executive official or administrative agency or by a court exercising the power of constitutional review. Third, courts sometimes err in determining that an exception is equitably justified.

Now, assuming that these facts accurately describe the world of legislation, administration, and adjudication, I do not see why the following, which I call a "generalized explanation," is not an adequate explanation for the "strict" application of a statute, that is, for a court's refusal ever to find insufficient the government's explanation for its imposition on the claimant: The legislature has determined that strict application is necessary because of its assessment of the social and financial costs of administering a rule with exceptions. The social costs include the lessened effectiveness of a rule with exceptions even if exceptions were to be determined with perfect accuracy, and the losses associated with failure to apply the rule to those who are mistakenly found to be entitled to an equitable exception (whether by some executive official or by the courts). The financial costs are those associated with operation a system to determine whether an exception should be made. And this assessment of social and financial costs is not unreasonable.

Note that this is an explanation offered to the claimant of why no exception can be made in her case, and unless I misapprehend Harel's justification for constitutional review, it satisfies the minimal requirement that the government must provide an explanation for a rule's application to an objector. Now, of course there are many things one could say about the explanation. The legislature's assessment of social and financial costs might be unreasonable, for example. The incremental financial costs associated with providing an opportunity for an objector to get an explanation are likely to be small relative to the overall cost of operating a judicial system. Yet, it is

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not clear to me where, in Harel's scheme, a requirement of reasonableness comes from. In addition, a court might engage in a sort of sub-constitutional review by insisting that governments actually show that the legislature went through the assessment of social and financial costs that the generalized explanation offers. I suspect that that will rarely be true, and that legislatures faced with a requirement that they expressly deny an opportunity to make equitable exceptions will rarely do so. Yet, this is *sub*-constitutional review because the generalized explanation would block constitutional review of the sort Harel advocates, if a legislature did insist on strict application of the challenged statute.

Finally, I suspect that a fair number of people would resist the generalized explanation on the ground that rights—even a right to get an explanation— somehow cannot be denied on the basis of an assessment of social and financial costs. This is of course an objection to the generalized explanation that resonates with Dworkinian ideas. But, once we enter into a legal world in which such ideas have purchase, we have moved beyond the minimal account Harel offers: If social and financial costs cannot justify denying the opportunity to get an explanation, why should they be allowed to justify denying any other claimed right?

I conclude by returning to the regime account of U.S. constitutional history. One idea animating constitutional regimes is a regime-specific conception of the conditions under which constitutional review is justified. For example, the New Deal/ Great Society regime found justification for constitutional review by combining two elements. Review was justified when the pluralist political bargaining characteristic of that regime somehow failed, and when legislation unjustifiably intruded on a domain of individual autonomy that was the ultimate basis of pluralist bargaining. That analysis suggests that we could fruitfully ask, what are the political conditions under which specific conceptions of constitutional review take hold? Perhaps—this is entirely speculative—Harel's justification for constitutional review fits into a regime in which the very existence of constitutional review is subject to deep political contest, and that more Dworkinian approaches fit into regimes where the practice of constitutional review is accepted by all contending political parties.

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