Justices' New Clothes

By ANTHONY LEWIS

LONDON, April 23—The flurry over the Supreme Court's unanimous new decisions on school segregation will not long obscure a growing unease, on other matters, among the Court's real friends and critics. They know the Court cannot always be wise or even consistent. The one thing they do ask of judges given such great power is intellectual honesty. Something must be said when that has gone wrong. It has.

The problem facing the Court right now is not unexpected. President Nixon's two appointees, Chief Justice Burger and Justice Blackmun, have changed the balance. Issues that were decided by narrow majorities in recent years are arising again, before a new majority disposed to decide them the other way. But would it look right to change principles so hastily?

In a number of cases this term the new majority has chosen to avoid this dilemma by pretending that it does not exist. The Court purports to stick with a recent precedent, but then comes to the opposite result by drawing a factual or legal distinction that does not really exist. In the words of a leading student of the Supreme Court, not a man given to hyperbole, "it is dissembling."

The latest and most serious example was a citizenship case decided April 5. The opinion, for a 5-to-4 majority, was by Justice Blackmun. It was an opinion of remarkable unpersuasiveness.

The case was this: Congress has provided that a child born abroad with one American parent is an American citizen — but shall lose that citizenship if he fails to reside in the United States for five years between ages 14 and 28. Aldo Mario Bellei, son of an American mother and Italian father, challenged the statute. The Court upheld its constitutionality. Mr. Bellei lost his citizenship.

Just seven years ago, in the case of Angelika Schneider, the Supreme Court held a related citizenship law unconstitutional. It provided that any naturalized American who returned to the country of his birth for three years lost his U.S. citizenship.

The Court decided the Schneider case on a clear theory: Every American citizen, by whatever method he became one, is on an equal footing. He has "a constitutional right to remain a citizen," as the Court put it in a subsequent case, "unless he voluntarily relinquishes that citizenship." The Court found that purpose in the opening sentence of the Fourteenth Amendment, which defines as citizens "all persons born or naturalized in the United States."

AT HOME ABROAD

In the new case Justice Blackmun and those joining him—the Chief Justice and Justices Harlan, White and Stewart—could have said candidly that they did not accept the theory of the Schneider decision and were overruling it. For their real belief is plainly that the Constitution allows Congress to set reasonable limits on citizenship, a view held by many.

But the opinion did not say that. It did not challenge the Schneider theory. It simply said the Bellei case was different because Mr. Bellei was not, in the language of the Fourteenth Amendment, "naturalized in the United States." Hence the amendment did not apply to him at all. Next case.

The trouble with that argument is that it has so little support in history or reason. From the very beginning that clause of the amendment has been regarded as comprehensive, covering all the ways in which one can become an American citizen. Congress has so assumed; successive Supreme Court justices, majority and dissenters, have so written. In the Constitutional sense Congress can only naturalize someone "in the United States," and the statute did so to Aldo Bellei at the moment of his birth.

Under Justice Blackmun's reasoning, the Constitution means this: Someone who was born of Italian parents in Italy, lived there till age 40, then moved to America and was naturalized can immediately return to Italy and live there without fear of losing his citizenship. But a man born abroad of one or even two American parents can have his citizenship taken away by some future Congress unless he meets a long residence requirement or some other test of loyalty.

That is the result of reading the Constitution of the United States as if it were a bill of lading. As always, thoughtless analysis makes bad law.

It is sad to imagine what Felix Frankfurter would have thought of all this. Justice Frankfurter believed passionately that the Supreme Court should allow Congress broad power to lay down rules for citizenship. But he also believed it was the Court's duty to say honestly what it was about. Only by doing so, he thought—only by the attempt at intellectual persuasion — could judges justify their extraordinary function in American life.

Pretending to follow precedents while abandoning their philosophical basis will not persuade anyone. It will only bring disrespect on the Court. Everyone can see the justices' new clothes.