Edited by Kenneth M. Holland

Judicial Activism in Comparative Perspective

JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE

Also by Kenneth M. Holland

THE POLITICAL ROLE OF LAW COURTS IN MODERN DEMOCRACIES (*with Jerold L. Waltman*)

WRITER'S GUIDE: POLITICAL SCIENCE (*with Arthur W. Biddle*)

Judicial Activism in Comparative Perspective

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Preface

The subject of this book is judicial activism. Those judges who believe that it is legitimate for them to formulate social policy are called judicial activists; their colleagues who would confine the judiciary to the task of applying to specific cases laws and regulations made by the so-called 'political branches' of government are known as advocates of judicial restraint. The heart of the issue between them is the proper relationship between the courts, on the one hand, and the legislature and administration, on the other.

This book grew out of a panel at the 1989 annual meeting of the New England Political Science Association in Cambridge, Massachusetts, entitled 'Judicial Activism in Comparative Perspective.' The enthusiastic response of the audience to the presentations and the lively conversation among the participants that continued well beyond the scheduled time period led to a discussion of the desirability of producing an edited volume built on the stimulating papers of Hiroshi Itoh, Joseph Board, Mary Volcansek, and Gary Jacobsohn. As the chairman of that eventful panel, the task of finding a publisher and seeking additional contributions fell to me.

No volume in print attempts to do what the authors of the essays found on the following pages collectively have done – analyze the concepts of judicial activism and restraint in comparative perspective. There is a fine collection of studies on judicial activism within the United States, edited by Stephen C. Halpern and Charles M. Lamb, published in 1982 under the title *Supreme Court Activism and Restraint.* There is a need, however, for a comparative approach. Given the fact that the term 'judicial activism' was coined by United States social scientists, it is not surprising that the literature on the policy-making of courts is overwhelmingly concerned with the phenomenon as it appears in the United States. Mauro Cappelletti's excellent 1989 work, *Judicial Politics in Comparative Perspective*, paints too broadly for the student of judicial activism across national boundaries.

The principal criteria employed in selecting the eleven countries included in this volume were degree of judicial independence and emulation by other nations as a model. Thus ten fall into the category of industrial democracy. The eleventh polity, the Soviet Union, was included as a representative of Marxist and formerly Marxist regimes now engaged in a process of

fundamental political and economic reform. Each of these newly aspiring democracies will have to settle for itself the role its courts will play in the political system.

It is still the case that political scientists committed to the analysis of institutions, especially in the comparative politics subfield, tend to focus on the legislative and executive functions. Many of us still feel uncomfortable in regarding the courts as 'political' actors. That they are increasingly important players in the process of policy formulation in more than one polity is evident in the following pages.

The authors, each of whom was free to examine the relationship between the courts and other governmental institutions in the way that made most sense within the context of his or her country's political realities, do address a number of similar queries, such as: To what extent does one find judicial activism here? What are its dimensions and peculiar forms? What are its political implications? Since the Second World War, has the trend been toward more or less judicial activism? What are the constitutional, social, political, and economic conditions or intellectual climate that are or would have to be present for the courts to play an active policy-making role? Are the prospects for more or less activism?

Common threads weave the various chapters together, revealing both a judicialization of politics in a number of putatively democratic regimes and the obstacles to the emergence of a powerful policy-making judiciary in several other nations. Taken together, the essays raise profound questions about the future of parliamentary government and liberal democracy. The introduction alerts the reader to the most intriguing of these common threads and poses some hypotheses for future testing.

I would like to thank Mr. T. M. Farmiloe, publishing director, for both his initial enthusiasm and ongoing support for the project. I also owe a deep debt to the contributors, who labored diligently to keep within their guidelines and deadlines. Finally, I wish to thank Richard Morgan of Bowdoin College, past president of the New England Political Science Association, for suggesting that his organization would be interested in a panel devoted to comparative analyses of judicial activism.

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Introduction

Judicial activism comes into existence when courts do not confine themselves to adjudication of legal conflicts but adventure to make social policies, affecting thereby many more people and interests than if they had confined themselves to the resolution of narrow disputes. The activism of a court, thus, can be measured by the degree of power that it exercises over citizens, the legislature, and the administration.

Judges in the United States, especially justices of the Supreme Court, have been making law for more than a century. The best example from the antebellum period is *Dred Scott v. Sandford*,[1] in which the Court established a national policy of permitting the extension of slavery to all the western territories, regardless of the wishes of the territorial legislatures, the Congress, or the president. During the Progressive Era, the Court established a policy of free labor markets and vetoed efforts of the state and federal legislatures to restrict liberty of contract through minimum wage, maximum hour, and child labor legislation. More recently, the Supreme Court has made national policies regarding the racial composition of schools and work places, school prayer, capital punishment, apportionment of seats in the legislature, birth control, and abortion.

Critics of judicial law-making in the United States refer to it as government by judges and argue that it is illegitimate in a liberal democracy, where policy-makers should be responsible to the electorate. Federal judges there are appointed by the president, with the Senate's consent, for life. Other critics question the competence of judges, restrained by the adversarial system, to make sound social policy. Proponents of activism respond that a powerful judiciary is necessary to protect minority rights and the public interest at the hands of majorities motivated by folly or injustice.

The concern of this book, however, is not with the pros and cons of judicial law-making but with the more empirical question of how widespread judicial activism is in the world, and to what extent the United States' Supreme Court has been a model and inspiration for activist judges in other countries. In the following pages, eleven scholars with expertise in comparative judicial studies examine the degree of activism exhibited by the judiciary in eleven major nations. The group selected includes five common law countries – England, the United States, Canada,

Australia, and Israel – five Roman law regimes – Italy, Germany, France, Sweden, and Japan – and one country with a socialist constitution – the Soviet Union. Because the sample was not randomly drawn, we can educe no generalizations true for all nations, even those with a more or less independent judiciary. Each of the eleven, nevertheless, is a major actor upon the world's stage, whether because of population, military prowess, industrial or economic might, or degree of commitment to liberal democratic principles. Among them are some of the principal trend-setters for formerly communist regimes now engaging in the often wrenching process of political reform.

How do these countries compare on a scale of judicial activism? Here is a tentative and somewhat impressionistic ranking, starting with the most and descending to the least active:

Level of Judicial Activism

		COUNTRY
MOST ACTIVE	1.	United States
	2.	Canada
	3.	Australia
	4.	Germany
	5.	Italy
	6.	Israel
	7.	Japan
	8.	France
	9.	England
	10.	Sweden
LEAST ACTIVE	11.	U.S.S.R.

On the basis of these eleven separate studies, one can draw a few conclusions and formulate several hypotheses for future testing.

PRINCIPAL FINDINGS

First, judicial activism is a phenomenon distinct from judicial review. Judicial review is expressly provided for in Swedish and Japanese law, but the Supreme Court of Sweden has never found a law of the Riksdag to be repugnant to the constitution. Similarly, the Japanese Supreme Court only rarely has invalidated a law of the Diet. By contrast, there is no provision for judicial review in Israel, but the Supreme Court in that country has

assumed a determined law-making role. Israel, like England, has no written constitution. The Israeli Supreme Court, however, has used its judicial power to establish constitutional norms binding on the government.

Secondly, judicial activism, generally speaking, serves the ends of liberalism. This pattern is especially apparent in Israel, whose founding incorporated two conflicting principles: (1) a state which is the home of the Jewish people, where the needs of the religious community are paramount, and (2) a liberal state, based on the equality of all men and whose end is individual liberty, which requires a secular state which is neutral regarding competing religions and belief systems. The Supreme Court has sided solidly with the liberal pillar of the regime and regards its principal role as protecting individual freedom from religious oppression. The extension of liberalism is also evident in the decisions of the German and Italian Constitutional Courts and the Japanese Supreme Court. The Italian Court, in its early years after the Second World War, struck down a number of laws enacted during the fascist period. Similarly, the Japanese Court has invalidated laws based on Confucianism, such as a patricide law that made murder of a parent a more serious crime than homicide involving a sibling, child, or non-relative.

The German Constitutional court made perhaps the most dramatic decision in the name of liberalism in 1975 when it voided the Federal Parliament's legalization of abortion. The Court said that no country responsible for the deliberate killing of six million Jews can afford to take human life lightly.[2] Although the decision has evoked many critics, what matters here is that the Constitutional Court regarded its policy decision as serving the goals of liberalism. The highest courts of the United States and Australia have championed economic liberalism in the face of what the justices perceived as socialist threats to the free market. This mission dominated the U.S. Court between 1900 and 1937, and in the 1940s the Australian High Court tamed the Labor Party and restricted the scale of that country's welfare state. Consistent with nineteenth-century liberal thought, the individual rights protected by activist judiciaries tend to be negative rights, such as property rights or freedom of speech, where the evil to be forfended is government intervention, rather than positive rights, such as education or a minimal standard of living, where government is the benefactor. Although often a force for liberalism, judicial activism is not a proxy for individual freedom. Although England and Sweden do not rank high in the scale of judicial activism, individual liberties are as widespread and secure in those countries, if not more so, as they are in higher-ranking nations, such as Israel and Japan.

Judicial power, as United States history vividly illustrates, for example,

in *Plessy v. Ferguson*,[3] where the Court upheld state interference with the freedom of railroad companies by requiring them to maintain separate cars for blacks and whites, need not be a force for liberalism at all. This is certainly the case in the Soviet Union, where the courts have served the interests of the Communist Party. Judges admit, for example, that about ten per cent of criminal cases are decided in accordance with the request of the local party boss.[4] One of President Mikhail Gorbachev's reforms, the establishment of a Commission on Constitutional Review, may at first light appear to be a liberal innovation, until one realizes that its intended function is to negate laws enacted in republics attempting to gain independence. Thus the only delegates to the Soviet Parliament who voted against chartering the commission were from the Baltic republics. On the other hand, the Soviet Supreme Court, following President Gorbachev's endorsement in 1988, is leading an effort to establish the presumption of innocence in criminal trials.

Our third observation is that civic education is a prominent non-adjudicative function often performed by courts. Ralph Lerner in an essay entitled 'The Supreme Court as a Republican Schoolmaster' documented the pedagogical function performed by Supreme Court justices in the early years of the United States republic. As the justices rode circuit throughout the country, they would frequently lecture the grand juries in the principles of liberal democracy at the opening of each session of the circuit court. We can say also that the Supreme Court in the desegregation, prayer, and abortion decisions was not only formulating social policy but also attempting to change the attitudes and values of the American people. The pedagogical role is apparent in many opinions of the Israeli Supreme Court and the German and Italian Constitutional Courts. Although the Soviet courts are generally passive instruments of the Party and the Parliament, there is a sense in which they have assumed a politically significant, if repressive, role: educating the Soviet citizenry in ways of Communism.

Fourthly, we can say that the most activist courts display a penchant for a higher law, eschewing legal positivism – the view that law is the will of the sovereign backed by force. One of the lessons that John Marshall and the other justices of the U.S. Supreme Court who instructed their fellow citizens in the principles of liberalism promulgated was that the source of the Constitution's authority was not that it was the will of the sovereign people but that it coincided with the higher law of nature. The institution that has gone furthest in this direction is the Constitutional Council of France. In 1971, the Council held that the DeGaulle constitution by implication incorporated the preamble to the constitution of the Fourth Republic and most importantly the 1789 Declaration of the Rights of Man. The

Council thus in one sweep of the pen imposed formidable restrictions on the French Parliament and president. The Israeli Supreme Court, similarly, relies on the Israeli Declaration of Independence, a statement of general principles and goals. The Italian Constitutional Court regularly interprets the constitution in light of higher values, including Christianity.

A fifth conclusion is that judicial activism tends to erode both the parliamentary system and majoritarian democracy. The theory of a parliamentary system is that the government should make policy decisions and then be held accountable by the citizens at the next election. The administration works for the prime minister, who, together with the cabinet, makes all the important decisions, and the courts do not interfere. The French Constitutional Council, by contrast, was established for the specific purpose of safeguarding the constitutional powers of the president against the Parliament. The Canadian Supreme Court has reduced the discretion of the House of Commons and the provincial assemblies in areas such as civil rights and civil liberties. In the chapter on Canada, however, Carl Baar, conceding that rights consciousness fostered by the judiciary has eroded traditional conceptions of parliamentary government, nevertheless hypothesizes that the Supreme Court is forcing Parliament to enact more detailed and precise laws than those found invalid by means of judicial review. He concludes that legislative institutions, especially vis-a-vis the overwhelmingly dominant executive, are likely to be revitalized as a result of judicial activism. The jury is still out on this issue.

Not only in Canada has the executive been the victim of jurists with an activist bent. A sixth finding is that courts are playing an active role not only in constitutional cases but in review of administrative decisions as well. One of the judiciaries least willing to defy the legislative process and to make law is the English. The one area where one can speak of activism, however, is administrative law. There has been a marked trend since the 1960s for the courts to invalidate administrative decisions on the ground that the administrator violated the principles of natural justice (another example of higher law jurisprudence). The courts require that agencies provide notice of adverse decisions and an opportunity for affected parties to be heard and decision by an impartial tribunal. The Japanese Supreme Court also has imposed its own standards on administrative agencies, and the Soviet Commission on Constitutional Review attempts to assure that administrative decisions conform to the constitution. Since the 1970s, federal judicial tribunals in Australia have exercised vigorous review over administrative decisions, relegating the theory that individual rights would be protected by parliamentary review and ministerial responsibility, in the words of one judge, to 'the dustbin of history.' Likewise, Canadian

judges are employing the Charter of Rights and Freedoms to limit the administrative discretion of public officials. The rights created by the courts in their policing of administrative decision-making tend to be procedural, and thus limited, rather than substantive. One could conclude, as a result, that the courts, by providing procedural guidelines, are actually finding ways of legitimating, not blocking, government actions.

Seventhly, we can say that the activism of the U.S. Supreme Court has been both an inspiration and an admonition for the leaders and jurists of other countries. One of the earliest decisions of the U.S. Supreme court, *Marbury v. Madison* (1803), is still frequently cited by courts in countries as disparate as Italy and Japan.[5] The increasing emphasis by the English courts on due process in their review of administrative decisions shows definite U.S. influence. Israeli Supreme Court justices, one of whom was born and educated in the United States, frequently cite U.S. Supreme Court opinions as well as articles published in U.S. law reviews and books by U.S. scholars. The Warren Court (1953–1969) in the United States not only legitimated judicial activism in many similar countries but helped make judicial policy-making fashionable. This is certainly the case with the Canadian Supreme Court and Australian High Court.

On the other hand, the French have been much affected by the activism of the 1920s and 1930s, when the U.S. Supreme Court struck down many state and federal laws aimed at improving the lot of the poor and working classes. The socialist parties in France have a long-standing fear of government by the judiciary. Thus the Constitutional Council can only veto a law before it takes effect. No body can declare a law unconstitutional after it has been enacted. For judges in Germany, judicial activism is a pejorative term, referring to a judge who engages in social engineering. Leftist radicals in Canada are unenthusiastic about the new activism of the Supreme Court, contending that the focus on individual rights has distracted the state from the urgent tasks of checking private power and redistributing private wealth. They fear that the Supreme Court, as its U.S. counterpart did eighty years ago, will block efforts to eliminate inequalities of social and economic power. The inclusion of Section 33's 'opting out' clause in the 1982 Canadian Charter of Rights and Freedoms was in response to the activism of the U.S. Supreme Court. In defense of Section 33, which permits a provincial legislature to reenact a law notwithstanding a Supreme Court declaration of its unconstitutionality, the premier of Alberta called the U.S. constitutional experience which allows judges to make public policy 'not one that has a happy result or that we want to duplicate in Canada.'[6]

THE CONDITIONS CONDUCIVE TO ACTIVISM

Careful readers of the succeeding chapters will ask why does judicial activism arise in some regimes and not in others. Based on our eleven analyses, we can say that certain structural and intellectual conditions seem to make more likely the emergence of an activist judiciary. Among the structural features associated with judicial activism are federalism, a written constitution, judicial independence, a lack of separate administrative courts, a competitive political party system, and generous rules of access to the courts. Certain traditions, doctrines, and ideas also can galvanize the courts: the common law tradition, the concept of limited government, high esteem for judges, and a social consensus on fundamental regime questions.

Structural Conditions

The division of power between the general and special governments found in federal polities compromises parliamentary sovereignty. Note that the four most active judiciaries are found in federations – the United States, Canada, Australia, and Germany. There appears to be a strong correlation between a real division of powers between levels of government and the potency of the national judiciary. The concern to preserve the residual powers of the Australian states gave birth in the 1890s to a powerful judicial branch at the commonwealth level. One of the roles of the Italian Constitutional Court is to protect the constitutional powers of the regions against the central government. The Soviet Union is a federal regime, but the Commission on Constitutional Review there is tasked with countering centrifugal forces being exerted by the secessionist republics. Likewise, the U.S. Supreme Court and Australian High Court in recent decades have altered course and employed their review powers principally in the service of greater centralization, the latter even going so far as to permit the Parliament to strip the states of their concurrent constitutional right to levy income tax. The Canadian Supreme Court, however, continues to limit Parliament's occasional efforts to intrude upon the constitutional powers of the provinces, as was seen in the abortive attempt to unify the civil and criminal courts.[7]

A written constitution including a bill of rights can be another source of parliamentary restraint and of judicial power. The 1982 Charter of Rights and Freedoms has propelled the Canadian Supreme Court from a passive to an activist posture and played an important role in the evolution of the Canadian political system toward the model of the United States.

By contrast, the lack of a bill of rights helps account for the continuing passivity of the English courts. Australian High Court justices acknowledge the limits placed on their policy-making inclinations by the absence of a bill of rights. Opposition of the states to a national bill of rights in Australia illustrates the conflict between two common roles played by activist judiciaries – preserving the rights of the component states and protecting the rights of individuals.

An independent judiciary seems to be a necessary but not sufficient precondition for activism. Judges enjoy life tenure and security of salary in England, a country distinguished by the restraint of its jurists, as well as in the United States, Canada, and Australia, polities marked by a comparatively substantial degree of judicial law-making. Interestingly, President Gorbachev in his efforts to establish a 'state governed by law' has reduced the power of local Communist Party authorities to appoint and remove judges. The independence of judges in the common law nations is related to the absence of a career judiciary. In the English-speaking democracies, judges are recruited from the ranks of distinguished and mature practicing lawyers. Judging is something an attorney does at the end of his career. In the Roman law regimes, by contrast, judges are recruited directly from the class of persons receiving legal education, each of whom must choose before his studies are completed whether to become a private lawyer, a prosecutor, or a judge. The young judge, therefore, unlike his semi-retired common law counterpart, looks forward to a series of career advancements and promotions. Roman law magistrates tend to have the mentality of civil servants rather than that of a superintendent over government. In Japan the Supreme Court controls assignments and promotions, and the court has been suspected of punitively reassigning or failing to reappoint certain young leftist judges. This system was also in effect until recently in Italy. In the Soviet Union the relationship between judges and prosecutors is quite close and friendly, as in Japan.

Separate administrative courts can be found in Italy, Germany, and France. This bifurcation of responsibility between the ordinary and administrative tribunals tends to deprive the judges presiding over criminal and civil trials of opportunities to exercise judicial review over the vast bulk of governmental decision-making. The ability of administrative judges to invoke constitutional norms is severely restricted. In France litigants in general trust the ordinary judges more than their administrative brethren. By contrast, considerable non-constitutional activism exists in England, the United States, Canada, and Australia, where the ordinary appellate courts through review of administrative decisions have provided a

plethora of procedural rights to individuals and limited the discretion of administrators.

The lack of political party competition can impede the emergence of a powerful judiciary, for if the judges belong to the same party as the chief executive and the legislative majority they will be likely to follow the policy lead of the party leadership. The relative passivity of judges in the Soviet Union and Japan is due at least in part to the long-standing lack of party competitiveness. By contrast, the different party affiliations of the High Court justices and the commonwealth government in postwar Australia account for much of the judicial activism that has occurred in that country.

Rarely are courts permitted to be self-starters, searching on their own initiative for social injustices in need of remedy. They rely upon private litigants or political institutions to place policy questions on their docket. Where there is relatively easy and cheap access to the courts, the potential for activism is greater. The availability of the judicial process to groups seeking changes in public policy in the United States, Israel, and Canada, for instance, contrasts sharply with the severe limitations on access to the Constitutional Council in France.

Intellectual Conditions

The common law tradition, with its opportunities for judicial law-making and the rule of precedent, seems to be more fertile ground for the growth of judicial power than that of the Roman law, with its emphasis on the authority and completeness of the legislative code. In the absence of a relevant statute, common law judges are free to fashion principles of law, and, as the Israeli case demonstrates, previous decisions provide a judicially-formulated standard for evaluating legislative and administrative decisions, even though in a direct conflict statutes supersede the decisions of the courts.

The liberal notion of limited government, according to which civil society is a private sphere which government must not touch, also contributes to a climate where the restraining hand of the judiciary frequently will be invoked. Should the Soviet Congress follow Poland's lead by privatizing state-owned enterprises, the courts would likely assume a more important place. The restraint exhibited by the Swedish and Japanese courts is consistent with the more pervasive guidance over private business exercised by the government in those countries, captured in the terms 'Japan, Inc.' and 'state capitalism,' than in the other industrialized democracies. The Australian Labor Party, dedicated to a redistributive

role for government, has sought, largely unsuccessfully, to reduce the scope of judicial power.

Public confidence in the courts can be another potent source of judicial policy-making. In France and Italy, judges are held in relatively low esteem. Consequently, in 1987 Italian jurists lost their immunity to civil suit. In the Soviet Union, the prestige of the procuracy far exceeds that of the judiciary. As a result of the prosecutor's higher standing, during the trial Soviet judges treat defendants as if they are guilty.[8] By contrast in Canada, Australia, and the United States, judges are more highly respected and greater legitimacy is attached in some respects to adjudication as a form of public decision-making than administration and legislation. The rise of the so-called 'new administrative law' in Australia, for instance, in the 1970s was a response to widespread public dissatisfaction with the Parliament and the ministries' perceived lack of sensitivity to individual rights. The general rise in the level of judicial activism observed in the western democracies since the 1960s may be related to the crisis in legitimacy described by, among others, Jürgen Habermas. As the authority of legislatures, presidents, prime ministers, civil servants, and political parties continues to decline, there will be more and more pressure for the political branches of government to rely on the courts to make policy choices. Judicial activism, ironically, makes possible judicial legitimation of polices enacted by the legislature and thus can serve the ends of political stability in liberal regimes. This was important for the Italian divorce law in 1970. Judicial activism, however, raises serious questions about the future health of liberal democracy and responsible government in Japan and the West.

Public trust in the judiciary is also a product of consensus on regime questions, the fundamental constitutional issues. Where questions such as theocracy versus liberalism, or socialism versus capitalism, remain unanswered and there is a political struggle among advocates of competing ways of life, there will be strong opponents of any policy to transfer responsibility for such choices to the judiciary or any other organ of the group presently in power. In the United States, the Republican Party did not permit the Supreme Court to settle the slavery question, and the Court's attempt to do so in the *Dred Scott* case was ignored. The issue was decided in the presidential election of 1860 and the ensuing civil war. After the final settlement, however, the Court's power and prestige grew immensely as it turned to other less basic policy areas. Constitutional review came about in France only after a liberal consensus emerged in the 1970s, marked by the decline of monarchical, neo-fascist, and Communist parties. Activist judiciaries, it seems, rarely reach the truly fundamental social, economic, or political questions.

NOTES

1. 19 Howard 393 (1857).
2. The opponents, of course, contend that the Court's policy of prohibiting abortion is illiberal because it deprives women of an important liberty. Conflicts among the three principal natural rights recognized by liberalism – life, liberty, and property – are bound to arise. Here we have a clash between the fetus' putative right to life and the pregnant woman's claimed freedom of choice.
3. 163 U.S. 537 (1896). The Supreme Court's illiberal views on race relations are echoed today, for instance, by the laws of South Africa. See Walter E. Williams, *South Africa's War Against Capitalism* (New York: Praeger, 1989). For a description of the conflict between racial segregation and economic liberalism in the United States, see Walter E. Williams, *The State Against Blacks* (New York: New Press, 1982).
4. George P. Fletcher, 'In Gorbachev's Courts,' *The New York Review*, 18 May 1989, p. 13.
5. Henry J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France*, 5th edn (New York: Oxford University Press, 1986), p. 323.
6. Peter H. Russell, Rainer Knopff, and Ted Morton, *Federalism and the Charter: Leading Constitutional Decisions* (Ottawa: Carleton University Press, 1989), p. 494.
7. Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), p. 60.
8. Fletcher, 'In Gorbachev's Courts,' p. 14.

1 Judicial Activism in the United States

Kenneth M. Holland

INTRODUCTION

Within two decades of the republic's inception, some two hundred years ago, the Supreme Court of the United States emerged as a powerful political actor. In the 1950s and 1960s, however, the Court boldly undertook a new mission that resulted in judicial policy-making of unprecedented scope and impact. The Court and its controversial policies provoked a political backlash that contributed to five victories for the Republican Party in the next six presidential elections. Yet, despite the efforts of Republican presidents, who since 1968 have replaced seven of the nine Supreme Court justices, the activism of the Court has waned, if at all, only slightly, and, of equal importance, has percolated down the judicial hierarchy to the lower federal and state appellate and trial courts. The proper role of judicial power in a democracy continues to be one of the most contentious contemporary political issues in the United States at the same time that the activism of its courts is emulated by more and more democratic nations throughout the world.

HISTORY OF JUDICIAL ACTIVISM

The Antebellum Period: 1789–1860

Although an unpromising weakling during its very earliest years, a period marked by the subservience of the justices to the executive branch,[1] in 1803 the Court, led by its chief justice, John Marshall, dramatically claimed for itself the power of judicial review – an authority not explicitly bestowed on the judiciary by the Constitution – and invalidated, as repugnant to the basic law, portions of the Judiciary Act of 1789.[2] Although the Supreme Court did not declare another act of Congress unconstitutional until fifty-four years later,[3] the Marshall Court (1801–1835) did exercise

on eighteen occasions judicial review of acts of the state legislatures. Marshall contributed powerfully to the building of the new nation, not only by striking down state intrusions upon federal power but, more importantly, by articulating in his judicial opinions a vision of a polity devoted to economic freedom and growth – the continental 'commercial republic' that Alexander Hamilton had labored to forge at the Constitutional Convention in 1787. The six justices, who 'rode circuit' as individuals for much of the year in order to sit with trial court judges on intermediate courts of appeal, frequently used the opportunity to address large numbers of their fellow citizens called to serve as grand jurors to instruct their audience in the principles of liberal democracy.[4] The Supreme Court, thus, clearly regarded itself as the guardian of the Constitution, against the states wishing to cling to their former sovereign powers and against the masses moved by envy of the propertied classes.

No less astute an observer than the French aristocrat Alexis de Tocqueville noted in the 1830s the great power wielded by the judiciary in the United States, a phenomenon, he remarked, unique to the young American republic. 'Scarcely any political question arises in the United States,' he found, 'that is not resolved, sooner or later, into a judicial question.'[5]

What were the causes of this judicialization of American politics? Why did American judges depart thoroughly from the subservience and passivity of the English judiciary, whose traditions had been imbibed by American lawyers during the long colonial period? Tocqueville focused upon the egalitarian nature of the American polity. The United States, he concluded, was the epitome of modern democracy, marked by universal equality in the conditions of men. Lawyers pullulated, dominating not only courtrooms but legislative chambers as well. The legal profession, unlike the military officer corps or the clergy, was open to anyone, regardless of birth. The law, moreover, embraced all citizens equally, bestowing upon each the same abstract rights. The courts were available to all plaintiffs on an equal basis, who enjoyed a right to have their suits determined by a jury drawn from the general population.

Although slighted by Tocqueville, another contributor to the emergence of a powerful judiciary was the Constitution's commitment to individual freedom. In Abraham Lincoln's words, the United States was not only 'dedicated to the proposition that all men are created equal' but also was 'conceived in liberty.'[6] Lincoln alludes here to the Declaration of Independence, which clearly subordinates democracy, or the principle of majority rule, to liberty. Any government, whether embracing the rule of one, the few, or the many, says Thomas Jefferson, its author,

in order to be legitimate must secure the citizenry's inalienable natural rights, including life, liberty, and the pursuit of happiness. Chief Justice Marshall, thus, regarded the judiciary as one of several checks, provided by the Constitution's framers, against foolish or wicked majorities. The United States political invention – a constitutionally entrenched and judicially enforceable Bill of Rights – has proven so successful in protecting minority rights against hostile majorities that in June 1990 Nelson Mandela, a leader of the African National Congress, told the white minority still in control of South Africa that it would have nothing to fear from an extension of the suffrage to the black majority, for he would promise to protect the minority's property rights by means of an American-style bill of rights enforced by an independent judiciary.[7]

The independence of federal judges is well-provided for in Article III of the Constitution. Judges are nominated by the president and, with the consent of the Senate, appointed for life, removable only by a cumbersome impeachment procedure for commission of 'treason, bribery, or other high crimes and misdemeanors.' Since 1789 only six federal judges have been removed and no Supreme Court justices. Nor can their salary be reduced by a hostile Congress or president.[8] The justices' pride in their independence was manifested very early in the country's history when they refused to follow English practice and provide advice to the executive. The principle of separation of powers, said the Court in 1793 speaking through the Chief Justice, does not permit it to give advisory opinions, which can by definition be ignored by the executive.[9] The separation of the legislative, executive, and judicial powers in the Constitution means that each branch is co-ordinate with the others, is entrenched in the Constitution, can defend itself against encroachments, and can restrain abuses by the other branches. The existence of a written constitution, in sharp contrast to English practice, coupled with the judicial power to invalidate constitutionally repugnant legislative and executive actions also contributed to the emergence of the world's most potent judiciary. Another feature of the American political design, federalism – the dividing of power between the levels of government, regional and national – stimulated the growth in judicial power, for some institution is necessary to arbitrate disputes over the scope of powers under the Constitution not only between the Congress and the president but also between the states and federal government. The Supreme Court thus has been termed the 'balance wheel' of the American political system, a system marked by fragmentation of power among branches and between levels of government.

Thus, the combined influence of certain institutions – a written constitution, federalism, the separation of powers, and judicial review – and

beliefs – egalitarianism, liberalism – had by 1860 brought into being the most powerful judiciary the world had ever known. Nevertheless, the justices, despite the novelty of a written charter, accepted the English conception of the judge's role, seeing themselves as interpreters, not makers, of the law. Chief Justice Roger Taney articulated this traditional conception of the judge's duty as it relates to reading the Constitution, which, he said:

> speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.[10]

What if the words are ambiguous and the framers' intention is not discernible? Chief Justice Marshall responded with another maxim of the traditional approach. Because the Constitution, he explained, was intended to embody the principles of natural law, in cases of doubt the judge must consult the 'constitution behind the Constitution', the law of nature, which he considered was rational, just, immutable, objective, and available to men through the use of their reason alone without the aid of divine revelation.[11]

As influential and controversial as they were, the Marshall and Taney Courts had only begun to explore the full depth of the Supreme Court's powers. There was no significant trend toward judicial activism until after the Civil War, and not until the twentieth century would the term 'judicial activism' be coined to describe the Court's role vis-a-vis the political branches of government.[12]

The Period of Right-Activism: 1865–1937

As Table 1.1 indicates, a dramatic change occurred in the number of state and federal statutes invalidated by the Supreme Court after the Civil War. Between 1870 and 1889 the number of legislative acts found repugnant to the Constitution more than doubled compared to the previous twenty-year period. The most striking growth in exercises of judicial power over legislation occurred between 1910 and 1919 and between 1970 and 1988, when there was a 31 per cent and a 62 per cent increase respectively. Although part of the growth is due to increases in the number of bills enacted by Congress and the state assemblies and the sheer growth in

TABLE 1.1 *U.S. Supreme Court declarations of unconstitutionality of State and Federal statutes, by 20-year periods*[13]

Number of Declarations of Unconstitutionality		
Time Span	*State Acts*	*Acts of U.S. Congress*
1790–1809	1	1
1810–1829	14	0
1830–1849	12	0
1850–1869	30	5
1870–1889	75	14
1890–1909	63	14
1910–1929	231	24
1930–1949	132	16
1950–1969	191	26
1970–1989	324	38
TOTALS	1073	138

government, much of it is due to a new perception by the justices of their role, made possible by a new way of understanding the nature of law.

The work of English legal positivists, such as John Austin and Jeremy Bentham, in the early nineteenth century, succeeded in detaching law from morality and in depicting an unchanging and reasonable natural law as an absurd fiction. Law is entirely conventional, in Austin's definition, 'a command of the sovereign backed by force.' Although the positivists sought to limit judicial power, for example, by codifying the common law, they prepared the way for judicial activism by establishing the principle of utility, 'the greatest good of the greatest number,' as the chief criterion for judging the laws.

The legal realists, in the United States such men as Karl Llewellyn and Jerome Frank, who drew their inspiration from German thought of the late nineteenth century, radicalized the positivistic critique of natural law, characterizing all law as something intrinsically subjective. Rejecting what they termed the theory of 'mechanical jurisprudence,' which they associated with the eighteenth-century English justice, William Blackstone, the realists taught that judges do not find or discover the law but make it, and that judicial interpretation reflects more the personal characteristics of the judge than the facts peculiar to the case and the applicable law.[14] Nevertheless, the pattern of interpretation is not idiosyncratic. The constantly shifting law crafted by judges reflects society's ever changing needs. By definition, say the realists, there can be no conflict between social utility and the law.

The U.S. Supreme Court, whose justices by the 1890s were heavily

influenced by this new 'sociological jurisprudence,' rendered a pattern of decisions, best exemplified by *Lochner v. New York*,[15] in which it invalidated scores of state and federal laws regulating business, such as minimum wage, maximum hour, and child labor laws, on the grounds that they would be bad for the country. The first activist justices were political conservatives, attempting to preserve economic freedom. The justices paid little attention to the language of the Constitution or its framers' intentions. In *Lochner* the Court struck down a New York law setting maximum hours for bakers as a violation of the employer's and baker's 'liberty of contract,' a right nowhere mentioned in the Constitution, thus introducing the idea of 'substantive due process,' the doctrine that permits the Supreme Court to rule on the constitutionality of a statute even if it conflicts with no specific clause of the Constitution. By 1937 the Supreme Court had moved far beyond the tasks of mere statutory and constitutional interpretation and had become, in the minds of both its enemies and friends, a policy-making institution, rivalling Congress and the Executive as participants in the law-making process. The clash between a Court dedicated to laissez-faire economic principles and President Franklin D. Roosevelt, whose New Deal was premised on government intervention in the marketplace, resulted in the president's request to Congress, following his landslide victory in the 1936 election, for authority to appoint immediately six new members to the Supreme Court and the Court's subsequent decision to yield to presidential pressure to sustain the New Deal program. This decision has been called 'the switch in time that saved nine.'

The conventional wisdom that John Marshall was the first activist Supreme Court justice is mistaken. Judicial activism is clearly the product of the doctrines of legal positivism, historicism, and sociological jurisprudence, each of which seized intellectuals in the United States long after Marshall's death and whose seeds cannot be found in the opinions of the Marshall Court.[16] Activism emerges when judges no longer feel restrained by the law, and it has captured the imagination of judges on both the right and the left of the political spectrum.

The Period of Left-Activism: 1938–Present

Soon after the 1937 crisis, which resulted in a temporarily tamed Supreme Court, judicial activism re-emerged, but in a form far more acceptable to the national political leaders. In a footnote to an otherwise unremarkable case, *U.S. v Carolene Products Co.*,[17] the Court announced that, although it would henceforth defer to the legislature's economic policies, it would presume to be unconstitutional laws that infringed upon fundamental

political and personal rights, such as the franchise and freedom of speech, or that discriminated against members of 'discrete and insular' racial or religious minorities. By the 1950s, the Court's new role as champion of the underdog became firmly established, resulting in repeated clashes with the Congress and state legislatures.

The landmark case marking the supplanting of the judicial activism of the right by the activism of the left was *Brown v. Board of Education*,[18] arguably the single most important judicial decision of this century in the United States. *Brown* furnished a model for subsequent courts and encapsulates the most controversial of the political functions assumed by the Court under the activist banner.

In the first place, *Brown* exemplifies the policy-making function. Instead of focusing on the facts of the specific dispute between Linda Brown – a black elementary school pupil barred from the state school nearest her home because of her race – and the school board of Topeka, Kansas, and on the remedy appropriate to rectify the injury to her constitutional rights, the Court focused on the broad social problem of officially-sanctioned racial segregation in the Southern and Border states and crafted a policy to govern race relations in the future, designed to affect millions of people not themselves parties to the law suit. The court was more interested in broad patterns of social behavior and the research findings of social scientists than in Linda Brown. As policy-makers, the justices adopted a prospective as opposed to the retrospective attitude typically associated with adjudication. The prominence of social science research in Chief Justice Earl Warren's opinion for the Court and relative lack of discussion of the Fourteenth Amendment, the legal basis of the plaintiff's suit, supports the conclusion that the Court was making rather than interpreting the law. In the justices' conference on the merits of the case, the chief justice allegedly brushed aside the niceties of constitutional exegesis and attempted to reduce the controversy to the simple question, 'What does justice require us to do?' The Court's adopted policy of national racial desegregation superseded the states' policy, enacted by the legislatures, of racial separation. The Warren Court (1954–1969) went on to formulate a number of additional national policies, which taken together have had a powerful impact on the nature of contemporary American society. These include a ban on prayers in state schools, equal apportionment of legislative districts, and the legalization of interracial marriages, pornography, and contraceptives.[19]

This heightened level of activism since *Brown* has required an expansion in judicial power. If courts are to behave as law-making bodies, judges need many of the same tools and resources employed by legislators. Chief Justice Warren found all that he needed in the equity power, which was employed

by trial courts to implement the *Brown* order to desegregate the schools 'with all deliberate speed.' U.S. District Court judges construed equity, the power to do justice between parties in those cases where monetary damages would give inadequate redress to the plaintiff, as empowering them to fashion detailed plans for the racial integration of the schools, including forced busing of white children into black neighborhoods and vice versa.[20] Faced with frequent non-compliance with judicial orders, some federal judges were forced to dismiss elected school boards and run the schools themselves in order to achieve racial balance among students and faculty. Trial judges became day-to-day managers and administrators of school systems, assigning pupils and teachers, determining curriculum, and drawing up transportation plans.[21] Soon other disadvantaged groups, inspired by the success of black civil rights groups in using the judiciary to redress their grievances, began demanding that federal judges assume management of other state institutions guilty, in their opinion, of systematic violation of the constitutional rights of their clients or inmates. Federal judges, thus, have administered state prisons, mental hospitals, municipalities, and police and fire departments as well as schools.[22] Typically, the systematic violation of rights is due not to sinister motives but to inadequate funding. Thus the professional staff of these institutions, frustrated by an unresponsive legislature and governor, often welcome judicial intervention. Judges have been forced not only to make policy and administrative decisions for these institutions but to impose taxes upon the state's residents in order to finance the institution's amelioration. Thus, in 1990 the Supreme Court sustained a district court's authority to direct a local government body to levy taxes in spite of state law, as a judicial act within the power of a federal court.[23] Alexander Hamilton's comment in *Federalist* #78 that the judiciary is 'the least dangerous branch' because, while the Congress exercises will by making law and commands the public purse through the taxing and spending powers, the courts possess the power merely of judgment, no longer accurately describes the scope of judicial power in the United States. Gary McDowell and other conservative scholars argue that judicial activism under the guise of equity ignores the origin and nature of this power. 'The (Supreme) Court,' he says, 'in using its "historic equitable remedial powers" to impose its politics on society, is often forced to ignore or deny the great tradition of equitable principles and precedents, which had always been viewed as the inherent source of restraint in equitable dispensations.'[24]

In *Brown* not only was the Court making social policy and authorizing trial judges to employ the equity power in order to administer non-compliant school districts, but in a broader sense it was acting as an

instrument of social change. This is the function which many foreigners associate with judicial activism in the United states. Thus, German dictionaries define 'judicial activism' as 'a form of social engineering.' Since 1954 the Supreme Court has attempted to change American society in two ways – by altering public attitudes and values and by redistributing political power and wealth. By forcing black and white children to sit together in the same schoolroom, for instance, activist judges hoped to educate an entire generation of young people in the virtues of racial tolerance.

In other words, the justices assumed that, by institutionalizing the desired behavior, children and, to some extent, their parents would be forced to internalize new attitudes toward other races. The Court was also aware that there was a link between racial segregation in public facilities and the illegal, but successful, exclusion of blacks from the franchise and from holding public office. Through mixing the races in the schools, the expectation was that blacks would receive a better education and be better equipped to demand access to the polls and to run for office. Many observers believe that *Brown* laid the groundwork for congressional enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, which have effected a massive redistribution of political power in the South from whites to blacks. The Court sought not only to help blacks gain a larger share of the political pie but also of the economic pie. By extirpating segregation, the Court sought also to improve both the educational achievement and income of blacks. Consequently, in the wake of *Brown*, there has been a considerable aggrandizement of the black middle class.

Many other subsequent decisions actuated by the activist agenda can be viewed as efforts to effect significant social change. At least in part because of favorable Supreme Court decisions, public attitudes have softened not only toward blacks but toward aliens, illegitimate children, women, political dissidents, and religious minorities – all beneficiaries of Supreme Court decisions. Women, Hispanics, and Asians all enjoy higher relative incomes than they did in the 1950s. Homosexuals comprise one of the groups which most recently have turned to the courts, albeit so far with little success, to improve their position in U.S. society.

JUDICIAL ACTIVISM IN ADMINISTRATIVE LAW

Activist judges not only supervise the legislatures, they also take a keen interest in the decisions of the executive branch, especially those made by

administrators enjoying a wide degree of discretion. For instance, as a result of Supreme Court decisions over the past twenty years, no one can manage a school system today without the constant prospect of being named in a lawsuit, whether by a pupil, a parent, a teacher, or a citizens' group. This fear is shared by virtually all public administrators in the United States, for in the 1970s a revolution occurred in the attitude of federal appellate judges toward administrative decisions. Prior to the switch, judicial review of administrative action was relatively infrequent and limited.[25] In a sharp break from the tradition of judicial deference, however, the Supreme Court, joined by the U.S. Courts of Appeal, declared its will to regulate government administrators in the exercise of their discretionary power.[26] The Court expressed a lack of confidence in the traditional sources of restraint on the misfeasance and malfeasance of civil servants: legislation, such as the Administrative Procedure Act of 1946, congressional oversight, accountability to the chief executive, supervision by other administrative agencies, the media, public opinion, the administrators' professionalism and subservience to professional codes of conduct, and an appointment process that strives to screen out ignorant, dishonest, or incompetent officials. What seemed to provoke the justices most was the perceived influence of special interest groups on government agencies, who, according to Justice William O. Douglas, 'manipulate them through advisory committees, or friendly working relations,'[27] and the fact that, with the expansion of the role of government in U.S. life, administrators were making more and more policies affecting the health and welfare of the community.[28] Only judicial review of administrative decisions could insure, they believed, the security of the public interest.[29] Apologists for judicial activism argue that the Supreme Court is in 'the best position to fill the need of moral and ethical leadership,' for the president, who traditionally performed this role, is restrained by 'Congress and, mainly, the interplay of decentralized interest groups' and 'cannot really control even the executive branch; it is too large, too sprawling, too filled with administrators who see presidents and their aides come and go and are able to outlast them.'[30] Although the judicial turnabout of the 1970s is sometimes referred to as 'the due process revolution,' in most of these cases the court evaluates not just the fairness of the procedures employed by the agency but also the substantive policy made by the agency's chief administrator.[31]

As a consequence, there has been an explosion in both the volume and variety of administrative law cases handled by the federal and state courts. Another effect is that administrative procedures themselves have changed. The courts in a sense have incorporated administrative agencies into the judicial hierarchy, transforming informal processes into formal, adversarial,

trial-like procedures. Accordingly, 'hearing examiners' have been renamed 'administrative law judges.' It is now the case in the United States that very few administrative acts, especially those involving social policy, can escape judicial inspection.

THE LEADING ACTIVISTS

Politically liberal justices have carried the activist banner in the post-*Carolene Products* era, for since 1937 political conservatives have advocated judicial restraint. Prominent among them are Chief Justice Earl Warren and Associate Justices William O. Douglas, William Brennan, Thurgood Marshall, and Harry Blackmun. Brennan, who sat on the Court from 1956 until 1990, was the left-activists' acknowledged intellectual leader, and in his judicial opinions and off-the-bench pronouncements one finds the defining tenets of this approach to the Supreme Court's role in the American political system. Like his activist predecessors on the political right, such as Rufus Peckham, who sat on the Court from 1895–1909, Brennan denies that the Constitution has a fixed meaning that limits a judge's ability to secure the public interest. Brennan's frequently proclaimed touchstone in interpreting the Constitution and the laws is not their plain meaning or the intent of their framers but 'the needs of the people whom they were intended to benefit and protect.'[32]

Brennan is aware, however, of the inadequacy of social utility as a foundation for constitutional rights. As Bentham made clear, the greatest good of the greatest number may require the sacrifice of the interests of the few to the welfare of the many. Thus, a judge could justify condemning an innocent man to the gallows on the grounds that his execution would deter thousands of potential murderers, who will assume him to have been guilty. The principle of utility is incompatible with absolute rights for the individual. Brennan, therefore, chose to base his moral judgments on the idea of progress. History, he believed, was moving inexorably toward the just society – the libertarian welfare state, described most fully by scholar John Rawls.[33] Thus, according to Brennan, capital punishment was not 'cruel and unusual punishment,' when the Eighth Amendment prohibiting it was ratified in 1791, but it is cruel today. Cruelty, in other words, 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'[34] Similarly, he found the statutory rape laws, which extend culpability only to males, unconstitutional because they are based on 'outmoded sexual stereotypes.'[35] He concluded that political patronage, although constitutionally acceptable throughout most of the

nation's history, is now repugnant to the First Amendment's protection of freedom of speech, noting after surveying the practice's history that 'more recent times have witnessed a strong decline in its use, particularly with respect to public employment.'[36] In this analysis, then, 'the basic function of (judicial activism) is to deal with those political issues that are also fundamental moral problems in a way that is faithful to the notion of moral evolution.'[37]

The political unaccountability of federal judges Brennan regarded as a virtue, for life-time tenure allows a judge the freedom to descry the direction in which history is moving and to lead his less enlightened countrymen to fulfill more quickly their destiny. Contemporary activists, accordingly, often play a conscious pedagogical role, enlightening the American public, for instance, on the barbarism of capital punishment and the atavism of legally restraining sexual conduct. The lessons taught, however, stand in sharp contrast to the moral absolutism of the 'republican schoolmasters' who sat on the Supreme Court in its first years. The judge's task, according to Brennan, is to update the Constitution to reflect the on-going evolution in moral principles. The Supreme Court thus becomes a continuously sitting seminar in moral philosophy, and the writings of scholars in this discipline who share the activists' historicism, such as Ronald Dworkin and Rawls, become indispensable sources for constitutional interpretation. Not suprisingly, Brennan refused to defer to the political branches of government, assuming that more likely than not conservative forces dominate their decisions. The activists, moreover, place no special value on stability in the law and the rule of precedent and are willing to overturn earlier decisions of the Court, which inevitably are rendered unfashionable by the march of history. The judicial role is broad enough, say the activists, to encompass law-making and especially the creation of new individual rights, such as the right to burn the national flag, to state-appointed counsel, to terminate pregnancy, and to use contraceptives.

The activist refusal to defer to legislative and administrative judgments is based not only on the failure of legislatures and administrative agencies to act as engines of progress but also on the conviction that minorities have not fared well in the political process. The contemporary Supreme Court, thus, regards itself as having its own constituency, the have-nots and underdogs of American society, the poor and the abominated. It reflects a rejection of the system developed by James Madison, the Constitution's architect, to protect minority interests – a system, as he explains in *Federalist* #10 and #51, that relies upon neither a Bill of Rights nor judicial review. Madison taught that the extensive territory of the United States, coupled

with a commercial economy and representative government would insure that the laws enacted by Congress would consistently 'approximate justice and the general good.'[38]

JUDICIAL SELF-RESTRAINT

Political liberals were not always champions of judicial activism. In fact, they were its first critics. Associate Justices Oliver Wendell Holmes, Jr., Louis Brandeis, and Felix Frankfurter shared Brennan's view that constitutional values, like all moral values, reflect historical processes that are continuously transforming American society.[39] These advocates of judicial restraint were also realists and accepted the ineluctability of progress and the consequent obsolescence of the values of previous generations. They acknowledged, moreover, with Brennan the critical role of elites as the vanguard of change. The dispute between Holmes, Brandeis, and Frankfurter and the activists was over the role of judges in this process of enlightening the masses. The advocates of restraint believe that popularly-elected legislatures are likely to be the most progressive public institution, for in the clash of competing interests represented in the legislative assembly an accommodation will emerge that is much more likely to maximize social utility than any policy choice made by a handful of unaccountable jurists removed from the current of social change. Peckham and his activist colleagues and successors, whom Holmes and Brandeis attempted to restrain during the 1910–1929 activist period, treated the 'progressive' legislatures with contumely, bodies they regarded as dominated by populist demagogues and misguided social reformers. By the 1950s, however, the state legislatures had lost their reputation for progressivism and were regarded by Warren, Brennan, and other progressives as sources of ignorance, repression, and illiberalism.

The advocates of judicial restraint, who oppose activists both of the right and left, are not natural lawyers in the tradition of John Marshall but either legal realists like Chief Justice Charles Hughes, who proclaimed 'the Constitution is whatever the judges say it is', or legal positivists. Holmes, Cardozo, and Frankfurter begin with the premise that because the Constitution does not constrain us the only restraint on abuse of judicial power is self-restraint. For the traditionalist the distinction between judicial activism and restraint makes little sense, because the judge always is restrained by the will of the law-maker. Thus, Chief Justice Rehnquist, the intellectual leader of the political conservatives sitting on the present Supreme Court, and a positivist, believes that the role of the judge is to interpret the law

so as to give effect to the will of the sovereign people. The contemporary advocates of judicial self-restraint, such as David Souter, President Bush's choice to fill the seat vacated by Justice Brennan, are moral skeptics, who refuse to question the ethical judgment of the popular majority. Moral decisions are for the legislature, not the courts, they aver. Like the activists, the advocates of judicial restraint find problematic Chief Justice Marshall's adherence to an immutable and universal higher law standard. Although politically conservative appointees to the bench deny that it is ever right for a judge to substitute his judgment for the intent of the Constitution's framers, they do not share the framers' belief in a higher law which gives the Constitution its meaning and authority.

THE PERSISTENCE OF ACTIVISM

The proper role of the courts, especially since Richard Nixon's presidential campaign in 1968, has been a highly salient and controversial issue in American politics. The activists and advocates of restraint, or 'strict constructionists,' are pitted in what sometimes appears to be mortal combat. The apologists for restraint scored a victory in the elevation of Rehnquist to the chief justiceship in 1986, but the activist camp has scored the more recent victory by defeating President Reagan's nomination of strict constructionist Robert Bork to the Supreme Court in 1988.[40] The activism of the 1950s and 1960s precipitated a battery of scholarly attacks. The two basic criticisms voiced are that judicial policy-making is illegitimate in a democratic regime and that, even if it were proper for judges to formulate social policy, courts as adjudicative institutions lack the organizational capacity to gather data, weigh the costs and benefits of alternative courses of action, and fashion sound public policy. Proponents of the first critique include McDowell, Bork, Nathan Glazer, Lino Graglia, and Raoul Berger.[41] The institutional shortcomings of adjudication as a forum for policy formulation are stressed by Donald Horowitz and Shep Melnick.[42]

The proliferation of books and scholarly articles challenging the legitimacy and wisdom of judicial activism has not rendered the federal courts significantly less committed to social engineering. Policy-making has become such a normal part of what the Supreme Court does that Republican presidents since 1968, elected on pledges to replace judicial law-makers with judges who see their role as confined to interpretation, have not succeeded.[43] Time and again, Supreme Court justices disappoint the appointing president.[44] Some of the most left-activist members of the

Court – Warren, Brennan, Blackmun, John Paul Stevens – were placed on the High Bench by Republican presidents, who lived to regret their choices. One of the Reagan justices, appointed in 1981, Sandra Day O'Connor, although carefully screened, turned out to be unpredictable in her decisions. Thus, the Court under politically conservative Chief Justice Warren Burger (1969–1986) handed down one of the most sweeping and divisive policy decisions of the activist era – the legalization of non-therapeutic abortion.[45] The Court under the even more conservative Rehnquist legalized the burning of the American flag as a form of political protest and outlawed the patronage system for government employees.[46] In the second flag-burning case the Court overturned a congressional statute designed to conform to the first decision protecting flag desecration, thus dramatically underscoring which institution is the paramount policy-maker in the nation. In the patronage decision, the Court majority invalidated one of the principal political traditions in the United States, forcing extensive adjustments in personnel policies throughout the city halls and statehouses of the country and weakening still further political parties.

Moreover, to the extent that Nixon, Ford, Reagan, and Bush appointees have reduced the rate of judicial invalidation of legislation, a new phalanx of activists has emerged among the supreme court justices of the states.[47] A good example is the twelve state supreme courts that have overturned on state constitutional grounds their states' school finance systems, in spite of a U.S. Supreme Court decision that found no constitutional objection to wide disparities in per-pupil expenditures among the school districts in a state due to variations in the tax base.[48] In 1989 the Kentucky Supreme Court ordered the legislature to pass a comprehensive package of reforms not only in school finance but in governance and curriculum as well.[49] How then does one explain the pervasiveness and persistence of this powerful policy-making role played by the judiciary in the United States, in what purports to be a democratic regime? The answer is that strong external demand for activist courts is coupled with a judiciary eager on the whole to assume a political role.

The first explanation for rising demand is a transformation in the political climate brought about by the success of Jehovah's Witnesses, a fringe religious sect, and, especially, of blacks in the Supreme Court in the 1940s and 1950s. The cultural, ethnic, racial, religious, and economic diversity of the United States, coupled with the fragmentation of political power between levels and among branches of government, have generated numerous points within the political system where an interest group can apply pressure to achieve its ends. Nearly every group supplements its political lobbying efforts with a judicial strategy, especially if it considers

itself somehow disadvantaged in the competition for legislative or administrative largesse. Interest groups striving for both material and immaterial gains no longer view the Court as simply a legal institution but perceive it as a policy-making body with the power to redistribute wealth and power from the haves to the have nots. Supreme Court justices in the 1990s, thus, find themselves the object of appeals from dozens of conflicting interests. The justices have been unable to ignore the changed climate in which they operate and return to a narrow adjudicative role. Indeed, the Court itself shares much of the responsibility for this multiplication in the number and types of associations seeking its favor, for in the 1960s and 1970s it altered the rules of standing to sue so as to grant access to citizen and environmental organizations pursuing such abstract goals as 'good government' and 'preservation of the natural environment.'[50] The emergence of such 'public interest' groups is in turn largely a product of a phenomenon of the post-industrial society, the so-called 'New Class,' salaried professionals with high incomes but with left-liberal, anti-business attitudes.[51] The politicization of litigation means that the pool of potential litigants is broad, highly organized, and forensically skilled. The range and nature of issues brought to the courts over the past fifty years have in turn politicized the judiciary, institutionalizing judicial activism and rendering it largely independent of the preferences of individual judges.[52]

A second force increasing demand has been the social transformation which originated in the 1960s. During that momentous decade, the United States lost much of its sense of common purpose. The unity of the 1950s yielded to the individualism of the 1960s, in which the national question was 'What's in it for me?'[53] The breakdown in community was evidenced by the divisions over the Vietnam War, heightened conflict and violence between the races, and an explosion in the rates of crime and divorce. A telling barometer of declining social cohesion is the number of civil cases filed in the U.S. District Courts, which went from 59,284 in 1960 to 168,789 in 1980 to 239,634 in 1988, or a fourfold increase from 1960.[54]

A third trend contributing to the market for judicial activism is the emergence of the professional legislator. The United States Congress and many state legislatures have evolved over the past forty years from part-time bodies comprised of citizen-legislators who make their living outside politics into year-round institutions filled with persons who have made legislative service their life's career. During the 1960s, members of Congress and legislatures in many larger states began to place an unprecedented emphasis on 'casework,' or constituent service, and 'pork barrel' activities in order to ensure their re-election.[55] Since income, level of personal satisfaction, and prospects for advancement depend upon

continuous re-election, the career law-maker has an incentive to avoid taking positions on controversial issues and the consequent alienation of large numbers of voters and campaign contributors. Being right on any one issue pales into insignificance compared with the need to be returned to office. The rise in legislative reluctance to address problematic issues occurred at the same time that government enlarged its role and raised the level of intrusion into what had been the private sphere.[56] There are strong pressures, then, on legislators to avoid making tough choices, which can only estrange the losing interests, and to delegate the policy-making function to the executive and judicial departments of government. This 'buck passing' tendency of Congress is evident in the Gramm-Rudman Balanced Budget Act of 1985, which authorized the Comptroller General, a presidential appointee, to make automatic across-the-board cuts if the Congress and the president failed to agree on spending reductions sufficient to meet that year's deficit-reduction target.[57] It is no coincidence that the rise in the percentage of incumbents victorious in congressional elections, to a level approaching 99 per cent, has been accompanied by a rise in judicial activism at both the state and federal level. The turmoil caused in the state legislatures by the Supreme Court's 1989 ruling permitting states to place some restrictions on abortion[58] is eloquent testimony to the political advantages of transferring such contentious issues to the non-accountable judiciary for resolution.

A final cause of the rising demand for judicial activism is a phenomenon termed by Jürgen Habermas and others 'the crisis of legitimacy.' The post-industrial era has witnessed a disillusionment among the educated classes with traditional political institutions, including political machines, political parties, the bureaucracy, and legislatures. As the level of public trust and confidence in these institutions has waned, they have become desperate for means of restoring their declining authority. The one government institution whose degree of public support has remained steady is the judiciary. In order to maintain or enhance the legitimacy of government policies, there is an incentive to involve the courts in as many policy decisions as possible. Policies are more likely to be obeyed and accepted, it is believed, if they are issued by the courts or gain the judicial imprimatur by means of judicial review. Judicial review of agency actions as well as legislation has become 'absolutely necessary,' according to one observer, 'to preserve the legitimacy and integrity of the administrative process.'[59] If the court, as it usually does, upholds the administrator, it enhances citizens' confidence in the rationality and fairness of the administrative agency. If the judicialization of American politics witnessed by Tocqueville in the 1830s was caused by the egalitarian nature of American society, the judicialization

of politics in the 1990s is due, at least partly, to the lack of public trust in elected officials and the civil service. This combination of rising external demand and the paucity of judges truly committed to either the traditional role of the courts or to a self-imposed posture of restraint, despite the scores of appointments to the federal bench made by Presidents Nixon, Ford, Reagan, and Bush, mean that judicial activism is likely to continue to be a principal institution of the political system of the United States.[60]

NOTES

1. John Jay, the first chief justice (1789–95), served simultaneously as U.S. ambassador to England, and Oliver Ellsworth, the third chief justice (1796–99), for six months was both ambassador to France and chief justice. For a discussion of Jay and Ellsworth's subservience to the executive see Alpheus T. Mason, 'Extra-Judicial Work for Judges: The Views of Chief Justice Stone,' *Harvard Law Review* 67 (1953), 193–216.
2. *Marbury v. Madison*, 1 Cranch 137 (1803).
3. *Dred Scott v. Sandford*, 19 Howard 393 (1857). The Court ruled that Congress had no power to exclude slavery from the territories of the United States.
4. Ralph Lerner, 'The Supreme Court As Republican Schoolmaster,' in Philip B. Kurland (ed.), *Supreme Court Review* (Chicago: University of Chicago Press, 1967).
5. Alexis de Tocqueville, *Democracy in America*, ed. Phillips Bradley (New York: Knopf, 1945), p. 280
6. 'The Gettysburg Address,' November 19 1864.
7. Remer Tyson, 'Mandela Offers More Details of a New South Africa,' *The Detroit Free Press* (19 June 1990), pp. 1A, 4A.
8. See Article III, section 1 (U.S. Constitution).
9. Henry P. Johnston (ed.), *The Correspondence and Public Papers of John Jay* (New York: Putnam's 1890–93), III, pp. 486–9.
10. *Dred Scott v. Sandford*, 19 Howard 393 (1857).
11. See Marshall's opinions in *Fletcher v. Peck*, 6 Crunch 87 (1810) and *Ogden v. Saunders*, 12 Wheaton 213 (1827) and Edward S. Corwin, *The 'Higher Law' Background of American Constitutional Law* (Ithaca, NY: Cornell University Press, 1955).
12. Gregory A. Caldeira and Donald J. McCrone, 'Of Time and Judicial Activism: A study of the U.S. Supreme Court, 1800–1973,' In Stephen C. Halpern and Charles M. Lamb (eds), *Supreme Court Activism and Restraint* (Lexington, MA: D. C. Heath, 1982), pp. 103–27.
13. *The Constitution of the United States of America: Analysis and Interpretation*, Senate Document, 99–16, 99th Congress, 1st session (Washington, DC: GPO, 1987); *1988 Supplement*, Senate Document,

100–43, 100th Congress, 2nd session (Washington, DC: GPO, 1989); Congressional Research Service.

14. Roscoe Pound, 'Mechanical Jurisprudence,' *Columbia Law Review* 8 (December 1908): 605–23.
15. 198 U.S. 45 (1905).
16. Wallace Mendelson, 'Was Chief Justice Marshall an Activist?' in Halpern and Lamb, *Supreme Court Activism and Restraint*, pp. 57–76.
17. 304 U.S. 144, 152–3 (1938).
18. 347 U.S. 483 (1954).
19. *Abington School District v. Schempp*, 374 U.S. 203 (1963) (school prayer); *Reynolds v. Sims*, 377 U.S. 533 (1964) (legislative reapportionment); *Loving v. Virginia*, 388 U.S. 1 (1967) (miscegenation); *Stanley v. Georgia*, 394 U.S. 557 (1969) (obscene literature); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraceptives).
20. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).
21. For an argument that courts should forgo the assumption of such duties, see Nathan Glazer, 'Should Judges Administer Social Services?' *The Public Interest* 50 (Winter 1978): 64–80.
22. Howard Abadinsky, *Law and Justice* (Chicago: Nelson-Hall, 1988), pp. 81–2.
23. *Missouri v. Jenkins*, 109 L. Ed. 2d 31 (1990).
24. Gary L. McDowell, *Equity and the Constitution: The Supreme Court, Equitable Relief, and Public Policy* (Chicago: University of Chicago Press, 1982), p. 4.
25. Prior to 1970, the courts often rebuffed requests for judicial review of the substance of agency decisions by erecting threshold barriers, such as lack of jurisdiction, lack of standing on the part of the plaintiff, plaintiff's failure to exhaust administrative remedies, and failure to meet the 'substantive evidence' rule. These obstacles to gaining review of an administrative decision in court are now largely removed.
26. Especially important are *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F. 2d 583 (D. C. Cir., 1970); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Cervase v. Office of the Federal Register*, 580 F. 2d 1166 (3rd Cir., 1978).
27. *Sierra Club v. Morton*, 405 U.S. 727, 745 (1972), dissenting opinion.
28. *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F. 2d 584, 598 (D. C. Cir., 1971).
29. Donald Horowitz, 'The Courts as Guardians of the Public Interest,' *Public Administration Review* 37 (March–April 1977): 150.
30. Arthur Selwyn Miller, *Toward Increased Judicial Activism: The Political Role of the Supreme Court* (Westport, Conn.: Greenwood Press, 1982), pp. 259–60.
31. Abram Chayes, The Role of the Judge in Public Law Litigation,' *Harvard Law Review* 89 (May 1976): 1281–316.
32. Quoted by Lyle Denniston, 'Justice Brennan Quits Court,' *The Burlington (Vermont) Free Press*, 21 July 1990, p. 1A.

33. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).
34. *Furman v. Georgia*, 408 U.S. 238, 257 (1972).
35. *Michael M. v. Sonoma County Superior Court*, 67 L. Ed. 2d 437, 459 (1981).
36. *Elrod v. Burns*, 427 U.S. 347, 352 (1976).
37. Michael J. Perry, *The Constitution, The Courts, and Human Rights: An Inquiry Into the Legitimacy of Constitutional Policymaking by the Judiciary* (New Haven, Conn.: Yale University Press, 1982), p. 99.
38. James Madison, *Federalist* #51.
39. Richard G. Stevens, 'Felix Frankfurter,' in Morton J. Frisch and Richard G. Stevens (eds), *American Political Thought*, 2nd edn (Itasca, Il.: Peacock Publishers, 1983), pp. 337–60.
40. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990).
41. Nathan Glazer, 'Towards an Imperial Judiciary?' *The Public Interest* 41 (Fall 1975): 104–23; Lino A. Graglia, *Disaster by Decree: The Supreme Court's Decisions on Race and Schools* (Ithaca: Cornell University Press, 1976); Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge: Harvard University Press, 1977).
42. Donald L. Horowitz, *The Courts and Social Policy* (Washington: The Brookings Institution, 1977); R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (Washington, D. C.: The Brookings Institution, 1983).
43. Burton Atkins and William Taggart, 'Substantive Access Doctrines and Conflict Management in the U.S. Supreme Court: Reflections on Activism and Restraint,' in Halpern and Lamb, *Supreme Court Activism and Restraint*, pp. 351–83.
44. Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 2nd edn (New York: Oxford University Press, 1985).
45. *Roe v. Wade*, 410 U.S. 113 (1973).
46. *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (flag burning); *United States v. Haggerty*, 58 LW 4744 (1990) (flag burning); *Rutan v. Republican Party of Illinois*, 58 LW 4872 (1990) (patronage).
47. See G. Alan Tarr, 'Civil Liberties Under State Constitutions,' *The Political Science Teacher* 1 (Fall 1988): 8–9, and G. Alan Tarr and Mary Cornelia Porter, *State Supreme Courts in State and Nation* (New Haven, Conn.: Yale University Press, 1988).
48. *San Antonio Independent School District v., Rodriguez*, 411 U.S. 1 (1973).
49. Mark Trumbull, 'School-Funding Equity Emerges As Key State Constitutional Issue,' *The Christian Science Monitor*, 27 April 1990, pp. 1, 2.
50. The most important of these cases is *United States v. SCRAP*, 412 U.S. 669 (1973), considered by Justice Potter Stewart to be the single most

important decision made by the Supreme Court during his tenure on the Court (1958–81). Interview with the author, January 1980.

51. John McAdams, 'Testing the Theory of the New Class,' unpub. paper, Department of Political Science, Marquette University, Milwaukee, Wisconsin.
52. Marvin Schick, 'Judicial Activism on the Supreme Court,' in Halpern and Lamb, *Supreme Court Activism and Restraint*, pp. 37–55.
53. Roger C. Cramton, 'Judicial Law-making and Administration,' *Public Administration Review* 36 (September–October 1976): 552. Others have concluded that increased judicial activism is related to the decline of 'consensus politics,' an important social factor contributing to increased resort to the courts. See Guy Paul Land, 'Judicial Process and the Decline of Twentieth-Century American Liberalism,' *Harvard Journal of Legislation* 16 (Spring 1979): 283–300 .
54. *Statistical Abstract of the United States 1990* (Washington, DC: GPO, 1989).
55. Morris Fiorina, *Congress: Keystone of the Washington Establishment*, 2nd edn (New Haven, CT: Yale University Press, 1989).
56. George C. Greanias and Duane Windsor, 'Is Judicial Restraint Possible in an Administrative Society? As Government Grows and Congress Shows a Reluctance to Address Difficult Issues, the Courts Have Been Forced to Assume a New and Dangerous Pose.' *Judicature* 64 (April 1981): 400–13.
57. The Supreme Court declared this feature of the act unconstitutional in *Bosher v. Synar*, 106 S.Ct. 3181 (1986).
58. *Webster v. Reproductive Health Services*, 106 L Ed 2d 410 (1989).
59. Cramton, 'Judicial Law-making and Administration,' p. 552.
60. Appointments of conservative judges are having some effect. For instance, in 1985 the Supreme Court, in an opinion by Justice Rehnquist, held that lack of explicit statutory authorization by Congress precludes judicial review of agency refusals to take enforcement actions. *Heckler v. Chaney*, 470 U.S. 821. The revolution of the 1970s, however, has not by any means been reversed.

2 Judicial Activism in England

Jerold L. Waltman

'Judicial activism' is a term that sits uncomfortably with English constitutional theory, political culture, and with the judges themselves.[1] Yet, it is now applied regularly to the behavior of English judges. John Griffith refers to 'a period of judicial activism or intervention which began in the early 1960s and has been growing in strength ever since.[2] While discussing the evolving law of public duties A. J. Harding stressed the importance of 'the winds of the new judicial activism.'[3] Even a senior British judge offered the following assessment in 1985: 'Today it is perhaps commonplace to observe that as a result of a series of judicial decisions since about 1950 . . . there has been a dramatic and indeed a radical change . . . That change has been described – by no means critically – as an upsurge of judicial activism.'[4]

The twenty year period during and after the Second World War, on the other hand, surely represents the low point of judicial influence over public policy, whether through self-restraint or whether flowing from other causes. Textbooks on British politics of this period, for example, usually omitted any discussion of the courts. Beginning with the 1964 case of *Ridge v. Baldwin*,[5] however, the judiciary initiated a slow and often halting penetration into the internal workings of administrative and local government decision-making, spreading in the process a new and lively interest in administrative law. 'If the stock exchange traded in administrative law,' wrote Alan Boyle recently, 'the advice would be to sell ombudsmen, tribunals and inquiries and buy judicial review.'[6] By the late 1980s there was a consensus in the courtroom and beyond that the judicial control of administrative malfeasance was both proper and necessary. 'Given the inevitable weakness of traditional forms of political and administrative control or accountability through Ministers to Parliament, it seems only reasonable to look for some strengthening of the more formal legal checks on the activities of governmental bodies.'[7]

Somewhat curiously, however, judicial activism in administrative law has generated only a muffled echo in other important areas: civil liberties,

criminal procedure, protection of minorities, and economic litigation. These spheres have remained largely the domain of Parliament and the executive. In the hypersensitive area of industrial relations, the courts have been forced to become a political forum and sometimes a political instrument, but this has come primarily as a result of others pulling the courts into the political fray, not a matter of a voluntary judicial march.

It is vital, too, to keep even administrative law activism in perspective. Measured by the standards of other Anglo-American democracies, English activism hardly even approaches a threshold that might bear that name; thrown against the judicial posture of the 1940s and 1950s, though, the drift of judicial holdings is little short of startling.

BARRIERS TO JUDICIAL ACTIVISM

The major barrier to judicial activism is the constitutional system itself, based on the fact of an unwritten constitution and Parliamentary sovereignty. Absent a written statement of fundamental law, there is no standard against which to measure ordinary legislation. The type of activism which eagerly overturns laws enacted by majorities in legislative bodies, much less the kind which finds 'rights' in a constitution and orders government to fulfil them, is simply out of the question.[8]

Even an unwritten constitution, though, could cordon off a sacrosanct sphere for the courts; however, this theoretical possibility is obviated by the doctrine of Parliamentary sovereignty. Traditionally, this doctrine has had two parts: (1) that Parliament may legislate on any subject whatever and (2) that no other public body may challenge the legitimacy of an Act of Parliament.

Reinforcing these constitutional theories have been twentieth century British ideas about democracy.[9] The Labour Party has long been wedded to an ideology which emphasized the concept of a 'mass movement.' The Labour Party would speak for the workers through its manifesto and take power through an election. A highly disciplined party in Parliament would then enact the peoples' will. Conservatives, on the other hand, believed that popular participation served primarily as a check on the actions of the country's leaders. Governments were to have wide latitude in choosing policy, without reference to outside influence or public opinion. The voters' role was merely to have a chance to remove them periodically if they disapproved of their performance. While contrasting sharply, these two ideologies nonetheless converge in vesting enormous authority in the central institutions of government, and leave little scope

for meaningful judicial authority, either as a check on power or an initiator of policy.

Furthermore, strands of the political and legal culture are hostile to judicial activism. Caution and a reverence for tradition have long been deeply embedded in the political culture, militating against radical departures in any area of public life.[10] Judges, moreover, were drawn overwhelmingly, indeed almost exclusively, from segments of society in which these outlooks and habits of mind were even more prevalent than in the population as a whole. Judges were (and are) appointed from successful late middle-aged barristers.[11] Becoming a barrister normally, until very recently, meant 'public school,' university (most often Oxford or Cambridge), study at one of the four Inns of Court (required), and enough independent means to see one through the early years of practice. Building a successful practice depended heavily on cultivating business and professional contacts. Unconventional political views or personal behavior would have sidetracked any possibility of a judicial appointment even if one had by chance risen to become a successful barrister, for the Lord Chancellor (in whose hands the power of appointment lies) sounds out the opinions of senior barristers regarding the 'acceptability' of candidates. English judges, in short, were the least likely people imaginable to go on any sort of change-inducing crusade.

Another obstacle to judicial activism was the legal positivism of John Austin which dominated English jurisprudence.[12] Stressing that law is the specific command of the sovereign, it narrowed significantly the scope for judicial creativity in interpretation. Buttressing this cautious philosophy was the strong attachment to the common law and the decision rule of *stare decisis*. So encrusted was the notion of adherence to precedent that until 1966 the House of Lords could not, by its own rules of procedure, even overrule its own decisions.[13]

None of this is to say that the judges were ever as unimportant as their omission from the politics textbooks implied.[14] Whole areas of the law – contracts, torts, property, wills, criminal procedure – were more or less left to the courts, qualifying Parliamentary policy omnipotence in practice if not in theory, for these matters affect large numbers of people. Additionally, the judges maintained a long tradition of independence, with a lineage from the Crown which in fact predates Parliament. Nevertheless, the generalization that they were at the margins of the political system throughout the 1940s and 1950s, and seemed content to stay there, is valid. By the 1970s, however, the role of judges had expanded significantly, and some of that flowed from judicial activism in administrative law.

THE DEVELOPMENT OF ADMINISTRATIVE LAW

Even when the courts retreated into almost complete passivity they did not extinguish the bases of judicial power. The right to conduct judicial review of administrative actions to determine whether they were within the bounds of the law always lay in reserve.[15] That is, Parliament may enact, according to English constitutional law, any statute it pleases but administrators who carry out the law may not act unlawfully. If they do so, the courts retain the right to hold their action *ultra vires*, outside the law and therefore void.

The chief doctrinal aid to judicial review English style is 'natural justice.'[16] Although it shares philosophical taproots with natural rights, in England it is only an aid to statutory interpretation, not a measure of the validity of the law itself. In general, natural justice is taken to mean procedural 'fairness' and has been held to have three facets: '(1) the right to be heard by an unbiased tribunal; (2) the right to have notice of the charges . . .; (3) the right to be heard in answer to those charges.'[17]

In practice, judicial review based on natural justice gives the courts a good deal of flexibility. Parliamentary acts are usually rather vague, in keeping with most legislative enactments in modern democracies, giving administrators substantial discretion. How closely the courts hold administrators to the actual wording of the statute and how the words are interpreted therefore can make for substantial restraint or activism. How much natural justice is utilized to fill in the inherent gaps in administrative procedures established by Parliament or those acting under its authority is an equally open invitation to restraint or activism.

Parenthetically, a note should be entered regarding the place of remedies in English law. English common law has grown up around remedies rather than rights. That is, a plaintiff must begin a proceeding with a request for a particular remedy and then show how his case fits it; if he can find no applicable remedy he may have no case. The importance of this fact for our purposes is that someone seeking judicial review of an administrative act had only the most cumbersome and daunting remedies at his disposal.[18] Until these writs were reformed, the procedural burden alone would deter any significant increase in legal actions.

During the 1940s and 1950s the judges exercised all these options virtually to close the doors of the courts to those seeking administrative redress. For example, they held that actions of administrators could be classed as either administrative or judicial, with only the latter subject to judicial review.[19] Then, they consistently ruled actions brought before them to be administrative; on the few occasions when judicial status was granted,

the administrator's reading of the law was upheld. In effect, therefore, there was no judicial review.

By the late 1970s this dichotomy had been swept away along with a number of other cobwebs in a wholesale overhaul of administrative law. One distinguished American observer has even argued that developments have gone so far that activist American judges should look across the Atlantic for ideas on how to create expanded administrative law protections in the United States.[20] To what is this dramatic turnaround attributable?

One factor must surely have been the growing disenchantment with bureaucracy which spread across the political spectrum in the 1960s. The Right had always opposed economic regulatory bureaucracies, of course, but the Left had generally held great faith in the social good an activist government and a sprawling state could accomplish. Left-leaning theorists began to have second thoughts, however, as bureaucracies proved not only self-serving and unresponsive but also clumsy and arbitrary. Released from the control of the political process and the rule of law, they appeared to become more and more high-handed. The search for a counterweight to the growing British administrative state opened the way for judicial activism.

Second, the absurdities of an extreme version of ministerial responsibility went against elemental English views of 'fairness', elusive though that concept might be. The principle of ministerial responsibility holds that a minister is responsible to Parliament for everything that happens in his department, thereby being called to account by the representatives of the people. Thus, if a citizen were aggrieved, he went to his M.P., who would force the minister to own up. Political control thus provided a guarantee against arbitrary and capricious executive government. The difficulty, from a practical standpoint, is that M.P.s seldom have time to pursue more than a handful of cases and Parliament certainly cannot entertain a debate on each denial of a license, each cutting off of benefits, each refusal to review a file. More fundamentally, if civil servants take an action and it is upheld by the minister (usually on the advice of other civil servants), is not the minister being a judge in his own case, violating a basic precept of natural justice? Worse yet, what if the decision-makers refuse even to hear the affected party before deciding his case?

Another factor was the influence of certain individuals, especially in this area Lord Denning.[21] He used his position as Master of the Rolls (chief judge of the second highest appeal court) to chide his fellow judges for deferring to administrators and allowing abuses of power to go unchecked. While he was often outvoted, his quotable speeches (opinions) provided intellectual ammunition for those on and off the bench who were arguing for a more activist stance.

Most importantly, though, the political stress that developed during the early 1970s and continued into the 1980s shook the constitutional consensus that had been content with a strong cabinet and executive and a two party system.[22] The desultory performance of the economy was surely the main failing, but a more basic disenchantment seemed to spread through public life. As one commentator put it, the 'old chestnuts' of the political system were no longer so widely accepted.[23] With any serious questioning of the institutions of governance, naturally the issue of the judiciary's role was broached.

Ridge v. Baldwin, as noted earlier, was the first case to indicate that a shift was in the offing. A Chief Constable (police chief) had been charged with conspiracy but acquitted. The supervising police board summarily dismissed him nonetheless. He argued before the courts that his dismissal violated natural justice since he had neither been given notice of the charges nor allowed a chance to present his case. The House of Lords agreed and ordered him reinstated. The major legal significance of *Ridge*, Lord Denning said a few years later, was that it destroyed the archaic distinction between administrative and judicial actions, opening a wider domain to the strictures of natural justice.[24]

Only five years later a bolder step was taken in *Anisminic Ltd. v. Foreign Compensation Commission*.[25] Anisminic had had property taken by the Egyptian government during the Suez crisis. Some years later the Egyptians gave the British government a lump sum to settle all British claims for those years. The Foreign Compensation Commission, established years earlier to handle such matters, duly solicited claims and parceled out the monies. Anisminic was dissatisfied with its allotment and appealed to the courts. The important point is that the statute creating the Commission said that its determinations 'shall not be called in question in any court of law.' The courts held nonetheless that such a preclusion clause could not stop the courts from inquiring into the legality of the holdings. In effect, therefore, preclusion clauses are pointless.

The courts went even further in *Secretary of State for Education v. Thameside Metropolitan Borough Council*.[26] The Thameside Council attempted to resist implementing a directive from the minister that they adopt comprehensive secondary schools. Consequently, the minister sought a court order to force their compliance. The statute under which the minister issued the directive empowered him to do so when he was 'satisfied . . . that any local education authority (has) acted unreasonably with respect to . . . any power . . . conferred . . . under this Act.' Could judicial review proceed, therefore, about how the minister satisfied himself? Lord Wilberforce's speech stated the court's position succinctly:

> This section is framed in a 'subjective' form – if the Secretary of State 'is satisfied.' This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge.

The court held that the minister had not met that test and cancelled the directive. What made this case especially critical was that it involved an important issue of public policy, not essentially a private action affecting only the parties.

At the same time *Thameside* was being litigated, developments were proceeding on another front, that of remedies. The Law Commission had issued a report in 1976 advocating the merging of the five traditional writs in administrative law into a simplified 'application for judicial review.'[27] The judges themselves adopted this recommendation in 1977 by amending their own rules of procedure. Although there were some questions regarding the legality of this move, itself perhaps an indication of judicial activism, Parliament gave it statutory standing in 1981. The road to judicial activism via judicial review was thus considerably broadened.

A host of other cases gave the courts the opportunity to apply the principles developed in *Ridge*, *Anisminic*, and *Thameside* to other situations, in the process holding civil servants, locally elected bodies, public institutions of all sorts, and even ministers acting under statutory powers to a rather higher level of procedural fairness. Even when the actions of public authorities were upheld, the courts seemed careful to state their claim to jurisdiction. To take but one example, in a case flowing from the politically charged area of housing, the courts sided with a minister who was trying to rein in a recalcitrant local government, but stressed that they were doing so only because he had adequate reasons for his actions and had adhered to proper procedures.[28] Echoing *Thamside*, the judges stated clearly that had he acted without those conditions they would have voided his directives.

In addition to these intrusions into decisions taken under statutory authority, the courts were busy on other fronts as well. Crown privilege

and crown prerogative were being brought within the scope of judicial review and standing was broadened substantially.

Crown privilege most often relates to the claim that certain documents may be kept secret on the judgment of the executive alone, that to make known the crown's reasons would undermine the reasons for keeping the papers secret. In an action involving police reports, the House of Lords erased the absolute right of crown privilege from English constitutional law.[29] Lord Reid said convincingly:

> In this field it is more than ever necessary that in a doubtful case the alleged public interest in concealment should be balanced against the public interest that the administration of justice not be frustrated . . . If the Minister . . . says no more than that in his opinion the public interest requires concealment, and if that is to be accepted as conclusive . . . it seems to me not only that very serious injustice may be done to the parties, but also that the due administration of justice may be gravely impaired for quite inadequate reasons . . . I would therefore propose that the House (*of Lords) ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by the Minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice.

Crown prerogative is the executive power to act in certain areas, usually related to foreign policy, unfettered even by Parliament. In 1984, following a series of work stoppages, the Prime Minister, acting under the prerogative, suspended a staff trade union at the Government Communications Headquarters, a supersecret code breaking agency. The union sought an application for judicial review, arguing that the Prime Minister's action violated an obligation to consult.[30] Few court cases in modern Britain have generated so much press coverage and public discussion. A trial court ruled for the unions, sending constitutional lawyers scurrying. The Court of Appeal overturned the decision on the merits but left standing the important holding that crown prerogative was subject to judicial review. The trial judge, the justices said, had given inadequate weight to national security when he balanced the interests involved. The House of Lords unanimously upheld the Court of Appeal, but stressed again that the prerogative was subject to judicial review and that the Prime Minister's action was only being sanctioned as a result of a balancing test. Bernard Schwartz has called this case 'the culmination so far of judicial activism in administrative law, for the opinions subjected

to review a power that had been considered largely immune from judicial control.'[31]

Standing has a direct relation to activism, for judges know that if they widen access to the courts it will surely bring more cases to their doors. Formerly, the matter of standing in England was tied to each of the writs; each differed in who could bring a case under its purview. In 1967, the courts broadened standing considerably, almost granting a blanket right to citizens to bring suits against all public authorities.[32] In 1978, however, they seemed to retreat, although the case at issue involved a declaratory judgment, not an application for judicial review; specifically, the plaintiff was trying to force the Attorney General to institute criminal proceedings against another person, rather than have a positive decision reviewed.[33] In 1982, nonetheless, the judges so broadened standing that Professor Wade was moved to call it a 'revolution in *locus standi*.'[34] Inland Revenue officials had discovered casual newspaper employees who evaded the income tax by signing fictitious names to their pay packets.[35] In return for an agreement with the unions to supply proper identification in the future, the government cancelled the obligation of the men to pay their past taxes. Outraged, an association of small business people brought a suit challenging the agreement. Although the House of Lords upheld the tax authorities, it granted standing to the plaintiffs, establishing new guidelines that will make citizen suits much easier.

Judicial activism has begun to cast a shadow of anticipation over decision-making in public agencies and local governments. Legal arguments are now advanced within bureaucracies and councils; reportedly, attorneys are now consulted regularly.

> A resounding confirmation that the law is now more significant for local authorities . . . has been the increased reliance on counsel's opinions to resolve problems about the legality of proposed courses of action to be taken by councils . . . The use of legal opinions as a resource in the political battles which occur within town halls may be of considerable significance in terms of the role which law and lawyers then begin to play in the day-to-day decision-making processes of local government.[36]

One authority contends that, as a result, the most important areas of local politics have all become 'judicialized.'[37]

At the national level, too, the courts have become involved in the stream of policy-making in several contentious areas. For example, a distressed mother filed a suit against the National Health Service

challenging its policy regarding abortions for minors, which required no parental consent.[38] The courts vindicated the right of her sixteen year old daughter to the procedure, but with speeches which meandered back and forth between procedural and substantive issues. As Carol Harlow argued, 'There is a wider issue. The substantive opinions of the judges, though couched in legal terminology, amount to no more than nine men's opinions on a controversial question of social policy.'[39] After the decision, as a result of the furor it brought on, the NHS issued a new circular limiting minors' access to abortions.

JUDICIAL ACTIVISM CONTAINED

As gratifying as these developments are to advocates of judicial activism, if attention is turned to other areas, there have been only the most minimal movements to assert judicial control over governmental activity. To take one crucial aspect of public law, civil liberties, the protection of which has been a staple of activist decisions in the United States and elsewhere, is almost a blank judicial tableau. Having no Bill of Rights, of course, limits the range of judicial activism, but there is still latitude for more or less approval to be granted to a variety of government undertakings. The most celebrated recent civil liberties case involved the book *Spycatcher*, which seemed ripe for a statement endorsing freedom of speech. The facts are familiar: an ex-spy's memoirs were not supposed to be published, according to the terms of his employment, without the approval of the government. Breaking the agreement, he published the book in the U.S.A. The government immediately moved to block publication in the U.K. and sought an injunction to prohibit newspapers from publishing excerpts or even stories covering the government's legal maneuvering to stop the book's distribution abroad.[40] That the government's policy soon became a farce – British tourists returning from the U.S. were waving the book before customs agents and entrepreneurs were selling imported copies on London streets under the nose of the police – does not detract from the seriousness of the injunction and the threatened prosecution of the newspapers. When the case reached the House of Lords, even those justices who voted against the government retreated into a sterile discussion of the private law of confidence; further, the asides were usually critical of the author. There were no flourishes on the value of free speech, although some had been penned at the Court of Appeal. In sum, the nation's highest court showed little inclination to serve as a check on governmental power.

The Warren Court in the United States was probably criticized more

vehemently for its decisions in the area of criminal law than any other. In England, by contrast, the courts have not pursued the same line, which stands starkly against the stricter standards applied to most public officials discussed above. The introduction of evidence at trials is one cogent example. The Police and Criminal Evidence Act of 1984, Section 78, reiterated the traditional English approach, that the role of courts is to determine guilt or innocence, not to police the police.[41] Nevertheless, there is room for discretion and occasionally evidence is thrown out when police engage in particularly reprehensible conduct. In one 1988 case, for instance, a person in police custody was refused access to a solicitor and later confessed;[42] in another, the police told the accused and his solicitor that his prints were found on a bottle (which they knew was not true), whereupon the solicitor advised a confession.[43] Both these confessions were thrown out. However, in that same year, the courts allowed introduction at trial of evidence (as opposed to a confession) given when police denied the accused access to a solicitor.[44] A survey of other areas of criminal procedure would yield a similarly low level of judicial fastidiousness; the consensus of most commentators is that the judges' view 'fairness' as being evenhanded with both parties, that the interests of the prosecution are to be weighed equally with those of the accused.[45] Thus, there has been no sustained attempt to gut the stricter approach followed by Parliament during the 1980s.

Protection of minorities is another fertile field for judicial activism in many countries. They are particularly vulnerable to majority imposed deprivations, and must look to the courts for vindication of their rights.[46] Responding to disturbing evidence of discrimination, Parliament established the Commission for Racial Equality in 1976, vesting it with both investigatory and hearing powers. In general, the courts have treated it merely as another administrative agency and held it to strict standards of fair procedure, at times blocking its efforts to root out discrimination.[47] Here, therefore, even if the courts were strongly inclined toward the protection of minorities, administrative activism would collide with aiding minorities. In some cases, though, the courts have taken stances favoring minorities. In *Mandla v. Dowell Lee*,[48] a Sikh student refused to remove his turban to comply with a school dress code. The school was private but fell under the legal strictures of the Race Relations Act, which made it illegal to discriminate against people for reasons of their belonging to a 'racial group.' Later in the Act 'racial' was defined to include 'ethnic or national origins.' The court held that Sikhs fit that definition, despite plausible grounds for classifying them as a purely religious group. Moreover, the courts have been fairly rigid in overseeing the immigration authorities, a type of oversight which often aids minorities more than others.[49]

Judicial activism, of course, need not be confined to 'progressive' causes. In the nineteenth century English courts went through a period that roughly parallels the laissez-faire court in the United States, its high point perhaps being the *Taff Vale* case (1901), holding trade unions monetarily liable for business damages occurring as a result of strikes. Professor John Griffith has argued that a touch of this brand of activism survives in that the judges are more diligent in protecting property than personal rights, and that the courts have displayed hostility to trade unions and Labour governments.[50] Most students have taken sharp issue with his contentions, however.[51] It may be that trade unions and Labour governments' policies have run more afoul of the courts' rulings than other institutions and Conservative governments', but that does not prove that it resulted from a slanted judicial activism. Moreover, it is not beyond argument that protecting property occupies any special place in current judicial thinking. A fair comparison between land use planning and immigration cases, for instance, seems to indicate no more stringent standards being applied by the courts in one field than the other. Property rights may end up being actively protected by the courts, but the reason may be rooted in administrative law activism, not ideological activism. In any event, the evidence for economic activism of any type is slim.

CONCLUSIONS

Administrative law, without question, is the scene of a growing judicial activism in England. The courts continue to probe deeper into public administration, and doctrinal evolution has not abated. For example, the courts have held that there are three grounds for judicial review of administrative decisions; legality, procedural regularity, and rationality. They have hinted, though, that something called 'proportionality' may constitute a fourth, the idea basically being whether the decision truly balances all the relevant elements.[52] If this approach is taken it will effectively undermine the *Wednesbury* rule which has guided courts in this area, a formulation which holds that a decision will be voided only if no rational person could possibly have reached that conclusion.[53] Some writers have advocated that the English courts should transcend even proportionality, and adopt what they call a 'hard look' doctrine.[54] Such a move would almost, in effect, shift the burden to the minister or council to prove he or they acted properly.

The revolution in administrative law has, furthermore, picked up a momentum of its own. In 1986, for example, an Administrative Law

Bar Association was formed. In that same year, a Committee of Inquiry into the Conduct of Local Authority Business recommended that public funds should be available to individuals challenging local governments in court.[55] Undoubtedly, such a policy would dramatically increase the amount of litigation. At the same time, legal scholars continue to argue for the expansion of administrative law's frontiers, contending that more organizations and more issues should be brought within the scope of judicial review.[56] 'The next ten years of administrative law,' predicts David Pannick, 'will be interesting for lawyers, governors and the governed.'[57]

The incipient judicial activism has not, so far, unleashed the tirade of criticism often vented at American courts. Perhaps this is because there is a political consensus that more involvement of the courts is called for in administrative matters; or, perhaps, the issues are too obscure. Whatever the cause, Parliament has either tacitly approved or occasionally even ratified the judicial activism. For instance, after *Anisminic*, the statute was expressly changed to allow appeals to the courts.

Judicial activism has, though, been part of a broader trend towards politicization of the courts. In the politically contentious 1980s any number of cases with important public policy overtones ended up in court; often a political decision was inevitable whichever way the courts decided. In the celebrated 'fares fair' battle, for example, both sides sought judicial confirmation of their schemes. The Labour Party won an election for control of the Greater London Council with a promise to lower fares on London buses and underground and increase property taxes to make up the shortfall. A local borough council immediately brought a suit challenging the policy, the resolution of which turned on the interpretation of the word 'economic' in the statute creating London Transport.[58] Did it mean that the operation had to strive to break even? All concerned were aware that the case was part of a tug of war between Mrs. Thatcher and the political forces controlling the GLC. Soon after the case (which the GLC lost), she felt in a sufficiently strong position to abolish the council altogether. On the industrial relations front, Mrs. Thatcher's struggle to circumscribe trade union power pulled the courts into the political fray. In the early 1970s Edward Heath's attempt to establish an Industrial Relations Court to tame the unions failed, at least in the short run. The bellicosity of strikers aroused public ire throughout the 1970s and set the stage for Mrs. Thatcher's confrontations. While she avoided setting up special courts for employer-employee disputes, she did not hesitate to employ the courts as one tactic in her overall strategy, although statutory changes were the central feature of her plan. Particularly in the bitter coal miner's strike

of 1984–5, the government instituted several criminal and civil cases to hamstring the National Union of Mineworkers, moves which proved quite effective, but which also increased union animosity toward the courts.

These types of cases have melded with administrative law activism to bring the courts squarely into the political arena. The absolute and relative levels of judicial power have thus risen; but with power can only come politicization. It is unclear at the moment how these trends will work themselves out. Certainly the process of selecting judges will be affected.[59] For the last half century or so, political party affiliation and political activity counted for little in judicial appointments. However, political interests of all shadings can hardly be expected to sit by idly in the future if courts are going to be making decisions that affect them. If courts are going to wade or be pulled into politically controversial areas, pressure will undoubtedly build to secure judges with 'acceptable' views, the definition of 'acceptable' varying widely, naturally, among M.P.s and various interest groups. Perhaps, also, the removal process will merit revision.[60] The public eye, or at least the political eye, will turn more directly and constantly on the courts, bringing more press coverage and public discussion. This trend is already far advanced, in fact, as more newspaper space is now regularly devoted to court decisions. Recently, the Lord Chancellor has even agreed to allow journalists to interview judges, something almost unthinkable to their predecessors of only a generation ago.[61]

What all this may mean for judicial activism is uncertain. Logically, it could lead to a further upsurge in activism. That is, if more politically oriented judges are appointed, people who have political experience and political passions, it seems likely they would be less reticent to use the bench to advance policy goals, consciously or unconsciously. Subtly, if not overtly, the tendency to judicial activism would increase and spread to other areas of the law. Much would then depend on how significant the subsequent decisions were to the majority at Westminster, as well as their timing. If, for instance, Parliament acquiesced in several activist decisions and judicial power became more legitimate, it would be harder for a subsequent Parliament to overturn decisions they did not like. Such is the way British constitutional evolution has normally occurred. If a major decision were to stir quick Parliamentary retaliation before the judiciary completely consolidated its legitimacy, however, it could have the obverse effect.

The controversies surrounding privatization are also germane in this connection. If the policy should succeed in reducing the size of the British state, then the number and significance of administrative conflicts would diminish. The evidence so far, though, is that this initiative has not shrunk

the state at all; as portions of the government have been removed from the public sector new regulatory bodies have been hatched. The ensuing complexities of regulation may well result in more litigation, not less. The recent moves to privatize and restructure broadcasting, for example, are being greeted on all sides with expectations of a flood of litigation.[62]

Should the British go so far as to draft a written constitution, of course, the current trickle toward judicial activism could become a stream, if not a full-fledged river. Discussions about this point are now heard in all respectable quarters, the latest indication of which was the production of Charter '88, a document signed by some 250 prominent politicians, academics, and other public figures representing a diversity of political outlooks.[63]. Among its provisions were calls to 'enshrine, by means of a Bill or Rights, such civil liberties as the right to peaceful assembly, to freedom of association, to freedom from discrimination, to freedom of detention without trial, to trial by jury, to privacy and to freedom of expression; subject executive powers and prerogatives, by whosoever exercised, to the rule of law; place . . . all agencies of the state under the rule of law; ensure the independence of a reformed judiciary; and provide legal remedies for all abuses of power by the state and the officials of central and local government.' While drafting a written constitution seems only a remote possibility at the moment, a consensus appears to be gathering to adopt some kind of entrenched Bill of Rights.[64] If an activist-leaning judiciary were in place, even one limited to administrative law, adoption of any of these reforms would surely broaden the scope and importance of that activism.

Nonetheless, it is most important to keep present and possible future developments in perspective. Judicial activism, even in a field of administrative law, may not always serve to check abuse of power by governmental authorities. Often, the disputes are between different segments of the state itself, using the courts to settle their jurisdictional and policy disputes. 'An increasing number of cases involving regulatory agencies,' concluded one study, 'arise out of disputes with other branches of government.'[65] At other times, it is the government that cites lack of procedural propriety. For instance, in *R. v. Oxford Regional Health Review Tribunal*,[66] the Home Secretary filed the suit in protest of the fact that his representatives were not allowed to testify at a hearing on the release of a patient.

Two further matters are of even more fundamental importance, though. First, judicial activism may appear dramatic when the focus is solely the evolution of administrative law. However, from the view point of the entire political system what the judges are doing is to be sure above trivial but still lies far below the major preoccupations of public debate.

For example, the three critical issues in recent Parliaments have been local government finance, education reform, and economic policy. In none of these spheres are the courts of even marginal importance. Tocqueville's oft-quoted aphorism about all political issues becoming legal issues in the United States is still far from applicable to England. The judges have penetrated the political arena, but still sit at the outer edges; they are but bit players in the main drama.

Second, despite evidence of a shift towards populism in the political culture,[67] England remains a country in which caution is almost a given. On any kind of comparative measure the English public remains remarkably committed to slow change. The long-awaited Marre Report on the legal profession, to cite but one example, turned away from all but the most timid reforms in spite of the obvious and festering problems of having a divided profession.[68] In countless other ways English political culture is rooted in slow accommodation. The judges, too, in spite of a (slight) broadening of their class base and rather more openness, are quite unlike their American counterparts. The bulk of their caseload still involves private law; as a percentage of cases decided, in fact, administrative litigation has not increased much since 1960.[69] Most important of all, however, are the working assumptions they bring to their tasks, their conceptions of judicial role, if you will. Even at their most activist, the judges have not challenged Parliament's judgment on any important issue, much less considered that they have some kind of roving writ to correct injustices not addressed by Parliament. The enduring attitudes of those who dispense Her Majesty's justice are a strong barrier to the type of activism found in the United States, or even in Canada or Australia.

Nonetheless, the spark of judicial activism in administrative law is a significant development in English law and politics. Lord Diplock, a venerated jurist, recently said that the reassertion of judicial control over arbitrary administration was 'the greatest achievement of the English courts in my judicial lifetime.'[70]

NOTES

1. The United Kingdom consists of England, Wales, Scotland, and Northern Ireland. In this essay the focus is solely on England. The judicial institutions of England and Wales are distinct from those of Scotland and Northern Ireland. The three systems join at the apex, the House of Lords.
2. John Griffith, *The Politics of the Judiciary* (3rd edn; London: Fontana, 1985), 230.

3. A. J. Harding, *Public Duties and Public Law* (Oxford: Oxford University Press, 1989), p. 278.
4. Lord Roskill in *Council of Civil Service Unions v. Minister for Civil Service* (1985) 1 A.C. 374.
5. (1964) A.C. 40.
6. Alan Boyle, Review essay of three books, *Public Law* (Spring 1987): 130.
7. Nevil Johnson, 'Accountability, Control and Complexity: Moving Beyond Ministerial Responsibility,' in Anthony Barker (ed.), *Quangos in Britain* (London: Macmillan, 1982), p. 215.
8. For instance, the framework developed by Bradly Canon is all but inapplicable to England. 'A Framework for the Analysis of Judicial Activism,' in Stephen Halpern and Charles Lamb (eds), *Supreme Court Activism and Restraint* (Lexington, Mass.: D. C. Heath, 1982), Ch. 15.
9. The most complete discussion of democratic theory in England is Samuel Beer, *Modern British Politics* (New York: Norton, 1982).
10. The classic work on the political culture of the immediate postwar period is Gabriel Almond and Sidney Verba, *The Civic Culture* (Princeton: Princeton University Press, 1963). See also the subsequent analysis by Dennis Kavanaugh, 'Political Culture in Great Britain: The Decline of the Civic Culture,' in Gabriel Almond and Sidney Verba (eds), *The Civic Culture Revisited* (Boston: Little, Brown, 1980), Ch. 5.
11. The legal profession in England is divided into barristers and solicitors. The latter handle all matters except courtroom representation, which is reserved for barristers. There are some recent exceptions to this bifurcation of functions, however. See Michael Zander, *A Matter of Justice: The Legal System in Ferment* (London: I. B. Tauris, 1988) for a discussion.
12. See John Austin *Lectures on Jurisprudence*, 3 vols (New York: Burt Franklin, 1970; originally published 1861).
13. The House of Lords is both the upper house of Parliament and the highest court for the United Kingdom. In practice, a special group, the Law Lords, perform the judicial function. For structural details on the judicial system, see Jerold Waltman, 'The Courts in England,' in Jerold Waltman and Kenneth Holland (eds), *The Political Role of Law Courts in Modern Democracies* (London: Macmillan, 1988), Ch. 6. A good portrait of the judiciary can be found in David Pannick, *Judges* (Oxford: Oxford University Press, 1988).
14. See Lawrence Baum, 'Research on the English Judicial Process,' *British Journal of Political Science* 7 (October 1977): 511–27.
15. For a survey of the principles of administrative law, see E. C. S. Wade and A. W. Bradley, *Constitutional and Administrative Law* (10th edn, London: Longmans 1985), pp. 626–54.
16. See Paul Jackson, *Natural Justice* (2nd edn; London: Sweet and Maxwell, 1979).
17. Lord Hodson in *Ridge v. Baldwin* (1964) A.C. 132.

18. There were five writs available: certiorari, prohibition, mandamus, declaration, and injunction. The first three were prerogative writs, emanating from the crown. Certiorari orders an inferior body (either a court or another body) to send forth a certified copy of the proceedings so that an inquiry may be held concerning their legality; prohibition orders a court or other body not to proceed outside its jurisdiction; mandamus orders a public official to do his legal duty. The declaration and the injunction, on the other hand, are equitable remedies. For a fuller discussion see Law Commission, *Report On Remedies In Administration*, cmnd 6407 (London, HMSO, 1976).
19. *Liversidge v. Anderson* (1942) A.C. 206.
20. Bernard Schwartz, *Lions Over The Throne: The Judicial Revolution In English Administrative Law* (New York: New York University Press, 1987).
21. See Peter Robson and Paul Watchman, *Justice, Lord Denning and the Constitution* (London: Gower, 1981). Denning's thoughts upon retirement are gathered in his *The Closing Chapter* (London: Butterworths, 1983).
22. See Nevil Johnson, *In Search Of The Constitution* (New York: Pergammon Press, 1977) and Philip Norton, *The Constitution In Flux* (Oxford: Martin Robertson, 1982).
23. Dennis Kavanaugh, 'New Bottles for New Wines: Changing Assumptions about British Politics,' *Parliamentary Affairs* 31 (Winter, 1978): 6–21.
24. Schwartz, *Lions*, Ch. 1.
25. (1969) 2 A.C. 147.
26. (1977) A.C. 1014.
27. Schwartz, *Lions*, Ch. 3 contains a thorough discussion.
28. *R. v. Secretary of State for the Environment, ex parte Norwich City Council* (1982) Q.B. 808.
29. *Conway v. Rimnmer* (1968) A.C. 910.
30. *Council of Civil Service Unions v. Minister for Civil Service* (1984) 3 All E.R. 935.
31. Schwartz *Lions*, 178. See Clive Walker, 'Review of the Prerogative: The Remaining Issues,' *Public Law* (Spring 1987): 62–84.
32. *R. v. Greater London Council, ex parte Blackburn* (1976) 1 W.L.R. 550.
33. *Gouriet v. Union of Post Office Workers* (1978) A.C. 435.
34. Note, *Law Quarterly Review* 99 (1983): 167.
35. *R. v. Inland Revenue Commissioners, ex parte National Federation of Self-Employed* (1982) A.C. 617.
36. Lee Bridges, *Legality And Local Politics* (Aldershot, Eng.: Avebury, 1987), pp. 97 and 100.
37. Martin Loughlin, *Local Government, The Law And The Constitution* (London: Local Government Legal Society Trust, 1983).
38. *Gillick v. West Norfolk and Wisbeck Area Health Authority* (1985) 3 W.L.R. 830.

39. Carol Harlow, '*Gillick*: A Comedy of Errors,' *Modern Law Review* (November 1986): 776. For some general comments see Dawn Oliver, 'The Courts and the Policy Making process,' in Jeffrey Jowell and Dawn Oliver (eds), *New Directions In Judicial Review* (London: Stevens and Sons, 1988), pp. 73–91.
40. *Attorney General v. Guardian Newspapers Ltd. and Others* (No. 2) (1988) 3 All E.R. 545.
41. See Richard May, 'Fair Play at Trial: An Interim assessment of Section 78 of the Police and Criminal Evidence Act 1984,' *Criminal Law Review* (November 1988): 722–30.
42. *Samuel* (1988) 2 W.L.R. 920.
43. *Mason* (1988) 86 Cr. App. R. 349.
44. *Aladice Times Law Report*, May 11 1988.
45. See Andrew Sanders, 'Rights, Remedies, and the Police and Criminal Evidence Act,' *Criminal Law Review* (December 1988): 802–12.
46. The traditional American approach is nowhere better stated than in Chief Justice Stone's famous footnote in *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938).
47. See *R. v. Commission for Racial Equality, ex parte Hillingdon Borough Council* (1982) A.C. 779.
48. (1983) 2 W.L.R. 620.
49. See, for instance, *R. v. Immigration Appeal Tribunal, ex parte Khan* (1983) Q.B. 790 and *R. v. Diggines, ex parte Rahmain* (1985) 1 Q.B. 1109.
50. Griffith, *Politics Of The Judiciary* 3rd edn. It is interesting to note that the shrillness of his critique has declined considerably since the first edition of this book in 1977. In fact, he now attributes judicial conduct more to activism than suspicion of any particular party. Yet, he still contends that the judges' views of the public interest, which happen to coincide with those of the better off, mold their approach to the law.
51. See, for example, Simon Lee, *Judging Judges* (London: Faber and Faber, 1988).
52. Jeffrey Jowell and Anthony Lester, 'Proportionality: Neither Novel nor Dangerous,' in Jowell and Oliver (eds), *New Directions*, pp. 51–72.
53. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) 1 K.B. 223.
54. Ian Harden and Norman Lewis, *The Noble Lie: The British Constitution And The Rule of Law* (London: Hutcheson, 1986), Ch. 9.
55. Robert Baldwin and Christopher McCrudden, *Regulation and Public Law* (London: Weidenfeld and Nicolson, 1987), p. 67.
56. See Harry Woolf, 'Public Law–Private Law: Why the Divide?' *Public Law* (Summer 1986): 220–38 and Gwyneth Pitt, 'Dismissal at Common Law: The Relevance in Britain of American Developments,' *Modern Law Review* 52 (May 1989): 22–41.
57. David Pannick, 'What is a Public Authority for the Purposes of Judicial Review?' in Jowell and Oliver (eds), *New Directions*, p. 34.

58. *Bromley London Borough Council v. Greater London Council (1982) 1 A.C. 768.*
59. For an argument that the House of Commons should participate in some fashion, see A. W. Bradley, 'Constitutional Change and the Lord Chancellor,' *Public Law* (Summer 1988): 165–9.
60. In 1986 the Lord Chancellor suggested establishing a commission to study judicial dismissal, which can now be done only by joint action of both Houses of Parliament. No judge has actually been so removed since 1830. See Zander, *Ferment*, 129ff.
61. *The Times*, November 4 1987.
62. See Timothy Jones, 'Report: The Deregulation of Broadcasting,' *Modern Law Review* 52 (May 1989): 380–8. Generally, see Baldwin and McCrudden, *Passim.*
63. *New Statesman and Society*, December 1988.
64. 'Entrenchment' could be accomplished by passing an act with either a special override clause or a supermajority requirement for amendment or repeal attached. Although this would not prohibit any simple majority from overriding or repealing the act (the supermajority clause itself would be subject to majority vote), the political embarrassment of doing so, it is hoped, would prevent it. See J. R. Jaconelli, *Enacting A Bill Of Rights* (Oxford: Clarendon Press, 1980). Alternatively, the European Convention on Human Rights, to which the United Kingdom is a signatory, could be made actionable in domestic courts. For a report on support for civil liberties among politicians, see David Barnum and John L. Sullivan, 'The Elusive Foundations of Political Freedom in Britain and the United States,' *Journal Of Politics* 52 (August 1990): 719–39.
65. Baldwin and McCrudden, *Regulation and Public Law*, p. 59.
66. (1988) A.C. 120.
67. See Samuel Beer, *Britain Against Itself* (New York: Norton, 1982).
68. *The Times*, July 14 1988. See also Richard Abel, 'Between Market and State: The Legal Profession in Turmoil,' *Modern Law Review* (May 1989): 285–325.
69. Jerold Waltman and Priscilla Machado, 'Administrative Litigation in Britain, 1960–85: Case Volume and Type,' Paper presented at the 1990 meetings of the American Political Science Association.
70. Quoted in Michael Beloff, 'The Boundaries of Judicial Review,' in Jowell and Oliver (eds), *New Directions*, p. 17.

3 Judicial Activism in Canada

Carl Baar

The judiciary played an important but largely invisible role in the Canadian political system for over a century. From the founding of the country in 1867 to the 'patriation' of the constitution and adoption of an entrenched Charter of Rights and Freedoms in 1982, Canadian judicial behavior reflected the conservatism of its English role model. Judicial restraint was a dominant feature of court work, with only a few notable exceptions that had no lasting impact on how the judiciary saw itself or saw the world around it.

Since 1982, the courts have gained a new visibility and prominence. They have been thrust – and have thrust themselves – into the center of a variety of political disputes. While certain continuities are likely to emerge by the end of the century and link the pre–1982 Canadian courts with their post–Charter counterparts, current debates still focus on the differences: how over 100 years of judicial restraint have given way to an era of judicial activism, how an American-style rights consciousness has eroded traditional principles of parliamentary government, how a constitutional instrument based on nineteenth century theories of the individual's rights against the state has distracted an activist state from dealing with the most pressing social and economic consequences of concentrated and unchecked private power.[1]

This chapter will examine the past decade's changes in the Canadian judiciary, but from a perspective sometimes quite different from that of most commentators. It will first survey the status and role of the judiciary before 1982, when judicial power was real but restrained, and courts played a largely passive and conservative role. It will then examine the work of the courts since the Charter, both in quantitative and qualitative terms. The third section will focus on the ideological and institutional impact of the Charter. The final section will consider the future of judicial activism in a passive judicial culture.

The central theme of the chapter is that Canada's newly active judiciary remains embedded in its deferential and conservative institutional culture.

The liberal legal ideology that has emerged in the Charter era will generate a distinctive synthesis of activism and deference which is likely to emphasize procedural rights more than substantive rights. An important result could be the renewal of parliamentary institutions so they can meet the need for legislation that confines official discretion.

THE DETERMINANTS AND FUNCTIONS OF JUDICIAL RESTRAINT

The traditional role of the Canadian judiciary in the political system flows from the two defining characteristics of Canadian political institutions: parliamentary supremacy and a federal system. Parliamentary government on the Westminster model makes parliament supreme; official action is governed by statutes enacted in parliament, and officials are accountable to parliament through cabinet ministers responsible for their designated portfolios and for their collective conduct of government. The courts share responsibility for ensuring that official conduct is within the law, but cannot question whether parliament has exceeded its constitutional authority. A federal system divides power between a national government and authoritative state or provincial governments. In a federal system, the courts commonly serve as umpires, deciding whether a statute enacted by a state or federal legislative body falls within the constitutional authority of that level of government.

The Canadian courts have had authority and responsibility consistent with the role of the judiciary in a federal parliamentary system. They cannot invalidate statutes – either federal or provincial – unless the federal parliament or a provincial legislature has overstepped its sphere of constitutional authority. The traditional theory has been that parliaments remain supreme, but the complete authority of parliament in the British model is divided in Canada between legislative bodies of two 'orders' of government. Within each sphere, legislative authority is complete. The courts' job remains: whose sphere is it? Is it in section 91 (spelling out the heads of authority of the federal parliament) or in section 92 (spelling out the heads of authority of provincial legislative assemblies)?

These principles dominated Canadian constitutional law from enactment of the first constitutional document in 1867 (as an act of the British parliament called the British North America Act). Thus the constitutional changes proclaimed in 1982 were indeed fundamental. For the first time, a wide range of individual rights and freedoms would be entrenched in the constitution, beyond the reach of ordinary federal or provincial legislation.

The judiciary would not only draw the line between federal and provincial authorities, but place constitutional constraints on both.

In the years before the Charter, a number of characteristics of the Canadian legal and political system combined to strengthen the conservatism and restraint of the courts. Consider the Supreme Court of Canada itself. Not part of the 1867 constitution, it was created by a statute of the federal parliament in 1875 – hardly a firm base for institutional leadership of a third branch of government.[2] Its enabling act provided for 'reference cases,' by which the federal government could refer a matter to the Court for its judgment – the sort of advisory opinions rejected almost 200 years ago by the United States Supreme Court as a function more befitting a government legal adviser than a country's highest court. Most important, the Supreme Court of Canada was not in fact the court of last resort until 1949. Prior to 1949, appeals could go to the Judicial Committee of the Privy Council in England, the tribunal responsible for hearing matters brought from the colonies (and even the former colonies). Some of the most famous constitutional cases in Canadian history were in fact judgments of the Judicial Committee – often reversing the conclusions of the Supreme Court. Pre-1949 procedure even allowed *per saltum* appeals to the Judicial Committee – appeals taken directly from a provincial court of appeal, bypassing the Supreme Court.

Canadian constitutional history reflects the subordinate position of the Supreme Court. Early decisions that signalled support of a strong national government were modified as the Judicial Committee carved out more space for provincial authority. In turn, the courts, anticipating review by the JCPC, would sustain provincial authority; in one case, a British Columbia judgment was reversed in England, the Judicial Committee decision was subsequently applied by the B. C. court to invalidate another provincial law, and that decision was also reversed by the Judicial Committee.[3]

A classic example of Canadian judicial restraint was the 'Persons' Case in 1929, a reference case in which the federal cabinet asked the Supreme Court of Canada whether the British North America Act allowed women to be appointed to the Senate when its section 24 authorized the Governor General to 'summon qualified persons' to that body. The Supreme Court decided in the negative, excluding women in a close reading of English and Canadian precedents. A further appeal to the Judicial Committee vindicated the five women litigants in a rare innovative judgment that saw Lord Sankey declare the Canadian constitution 'a living tree capable of growth and expansion within its natural limits.'[4]

In the 1930s, the JCPC fell into controversies that hastened its demise as final arbiter of Canadian law. Federal efforts to deal with the depression

were declared *ultra vires* (beyond the authority of) the federal parliament. A widening range of critics saw the Judicial Committee as remote and unresponsive to Canadian needs, and they successfully pressed for Canadian autonomy.[5] The Supreme Court, at last a court of last resort, responded with a flourish of activity in the 1950s, centred most dramatically around actions of the Quebec government that were held to violate individual rights.[6] By the 1960s and 1970s, the signs of activism had waned. Even though the Canadian parliament passed a statutory Bill of Rights, and Supreme Court Chief Justice Bora Laskin labelled it a 'quasi-constitutional' instrument rather than a simple statute, judicial intervention was rare. All but one appeal under the Bill of Rights was rejected by the Supreme Court.[7] In 1978, the Court majority substantially undercut the development of other constitutional doctrines that showed promise as bases for judicial intervention on behalf of civil liberties.[8]

The relatively restrained behaviour of the Supreme Court of Canada in constitutional matters throughout the 1950s and 1960s is graphically illustrated in the following tabular comparison with the United States Supreme Court. Not only was the U.S. Supreme Court twice as likely to invalidate government action as its Canadian counterpart (56 per cent of U.S. constitutional cases struck down public action, contrasted with 26 per cent of Canadian constitutional cases), but the volume of American cases was substantially higher (30 per year, compared with less than four per year in Canada).[9]

The restraint shown in the Canadian judiciary's traditional approach to constitutional matters was mirrored in other areas of the law as well. For

TABLE 3.1 *Judicial activism in the United States and Canadian Supreme Courts: invalidating public action in constitutional cases*

U.S.*			**Canada***	
Ruling on Public Action	*Number*	*Percent of Applicable Cases*	*Number*	*Percent of Applicable Cases*
Valid	249	43.2	55	67.9
Part valid/ part invalid	3	0.5	5	6.2
Invalid	324	56.3	21	25.9
Not Applicable	0	–	2	–

* U.S. cases extend from October 1950 through June 1969. Canadian cases extend from January 1950 through July 1972.

example, common law principles were applied to procedure in criminal matters, resulting in the explicit rejection of an exclusionary rule. In the leading case, *The Queen v. Wray*, portions of a confession obtained through trickery, coercion and refusal of access to counsel were held admissible at common law because they were subsequently corroborated by fact.[10] Broad statutory delegations of law enforcement authority were not generally confined by court decisions. Even when the common law was used creatively in a particular case, legal rules were enunciated too narrowly to have broader impact. For example, the Supreme Court of Canada invalidated racially restrictive covenants in 1950, during the same period that the U.S. Supreme Court took similar action in *Shelley v Kraemer*, but the Canadian action followed from the common law of contract, with the Supreme Court holding that racial categories in the covenant were void for vagueness; the Court never addressed broader arguments that the covenant was void on public policy grounds.[11]

The deference to official authority shown in Canadian judicial decisions parallels the isolation of Canadian judges from public affairs. Canadian judges are much less likely to make public appearances than their American (or English or even Indian) counterparts, and almost universally avoid commenting on current issues.[12] They have often been called upon to head royal commissions and similar inquiries, but once their report is written and they return to the bench, they never comment publicly on their findings – or on the adequacy of the government's response to their recommendations. Administration of the courts has traditionally been in the hands of executive officials in provincial ministries that are also responsible for prosecuting criminal matters, leading the judiciary either to distance itself from administration or to build backstage relationships with ministers and senior officials.[13] And Canadian judges have even been denied the right to vote, due to prohibitions in federal and provincial Election Acts that are premised on preserving the objectivity of a judge who may be called upon to hear a contested election matter.

The circumstances discussed in this section – constitutional supremacy of parliament, maintenance of appeals to the Judicial Committee in England, judicial deference to official authority, and the isolation of judges from the public and public debates – have combined to create a passive judicial culture in Canada. Judges are expected to be neither seen nor heard, except when called upon to do specialized tasks required for the resolution of private disputes and the administration of public law. Activism, intervention, visibility are all foreign to the normal working lives of trial and appeal judges. Ironically, their less visible role has still been significant for Canadian politics and society, reinforcing official

discretion and authority, legitimating the coercive power of the state and marginalizing injustice.

THE EMERGENCE OF JUDICIAL ACTIVISM

Critics of the Supreme Court of Canada approached the new Charter of Rights and Freedoms with deep skepticism. While traditionalists lamented that the Court would be thrust into policy matters that were better kept within the sphere of parliament, liberal critics feared that the Charter would have little meaning and would be trivialized in a manner similar to the Canadian Bill of Rights two decades earlier. Radicals expressed their own fears: that judicial conservatives would use the Charter to intervene to limit economic regulation and redistribution by the state. By 1990, the Canadian judiciary, led by the Supreme Court, had carved out an unprecedented active role in defining and enforcing fundamental constitutional rights, and did so with sufficient care to avoid the worst excesses predicted by critics from the right and the left.

While the Charter of Rights came into force on April 17, 1982, the Supreme Court's Charter judgments did not begin to emerge until 1984, and it was April 1985 before they began to flow steadily. This did not prevent provincial trial and appellate courts from hearing hundreds of Charter Claims, and upholding them in large numbers, principally on issues under the legal rights sections (ss. 7–14) dealing with procedure in criminal matters. And the Supreme Court's first 15 Charter cases (May 1984–February 1986) went decisively against the positions of both federal and provincial governments. Quebec language law provisions limiting access to English-language education for persons coming from other provinces were struck down.[14] Broad federal search powers under antimonopoly legislation were held invalid.[15] Refugee claimants were given access to a hearing.[16] The 79-year-old federal Lord's Day Act was ruled an infringement of religious freedom.[17] A peace group was given standing to challenge federal cabinet orders in matters of national defence.[18] Notification of a person's right to counsel was required before police could administer a breathalyzer test to suspected drunk drivers.[19] An absolute liability offence with a term of imprisonment was declared a violation of broad principles of fundamental justice.[20] Reverse onus provisions in the federal Narcotics Control Act were invalidated despite growing concern about drug trafficking.[21]

By the end of 1986, the Supreme Court had shifted toward more frequent support of governments arguing against Charter claims. Provincial Sunday

closing laws were held to be a reasonable limit to freedom of religion.[22] The right to strike was excluded from protection under freedom of association guarantees.[23] Court orders were found not to be government action, and were therefore beyond the scope of the Charter.[24] The 'habitual criminal' statute was upheld.[25] Reverse onus provisions in the federal Criminal Code applying to the care and control of a motor vehicle while drunk were held to be a reasonable limitation on the right to be presumed innocent.[26]

At the decade's end, the Supreme Court was hearing some 25 Charter cases a year (close to one-fourth of its caseload). Charter claimants were succeeding in only one out of three cases, but among this minority were some of the Court's most important and highly controversial judgments. Federal Criminal Code provisions limiting abortion were struck down.[27] Quebec language laws prohibiting the use of languages other than French on commercial signs were held to constitute unjustifiable limits on freedom of expression.[28] Citizenship requirements for practice of law were struck down in a decision that accepted a broad definition of equality rights under section 15 of the Charter.[29] 'Constructive murder' provisions were found contrary to principles of fundamental justice.[30]

By the close of 1989, the Supreme Court of Canada had heard exactly 100 Charter cases. The Charter claim had been upheld in 36 cases, and had failed in 60 (four cases were inconclusive).[31] The Supreme Court was more likely to favour Charter claimants than were provincial courts of appeal; in 29 of the 100 Supreme Court cases, a provincial court of appeal decision was reversed – 18 times in favour of the Charter claim and nine times in favour of the state (two cases were inconclusive). Eleven criminal appeals had resulted in the exclusion of evidence obtained in violation of the Charter, a sharp change from the practice at common law. Eighteen statutory provisions had been invalidated.

In quantitative terms, the Supreme Court of Canada still appears somewhat more restrained than the Supreme Court of the United States (refer back to Table 3.1 above). However, the differences are not as pronounced as in the past. In fact, it appears that new patterns of judicial activism are emerging in post-Charter Canada. For example, the U.S. Supreme Court's activism in the 1950s and 1960s was directed primarily at the states rather than the federal government: 405 American cases contested state and local action, and 65 per cent were won by the individual; this compares with 171 cases contesting federal government action in which 35 per cent were won by the individual.[32] In Canada, the Supreme Court's treatment of federal and provincial statutes in its first 100 Charter appeals shows less difference in both volume and outcome: 48 statutory provisions were contested – 24 federal and 24 provincial. Federal statutes survived only slightly more

frequently: 16 times (67 per cent) compared with 14 times (62.5 per cent) for provincial statutes.[33]

In qualitative terms, it is also difficult to conclude that either the U.S. or Canadian Supreme Court showed more judicial activism. The Canadian abortion decision left more room for legislative intervention than its American counterpart, *Roe v. Wade*; and Canadian use of exclusionary rule has provided greater room for prosecution arguments that evidence be admitted. On the other hand, the Supreme Court of Canada has been more liberal in granting standing,[34] has explicitly rejected an American-style 'political question' doctrine, [35] has extended more protection to commercial speech,[36] and has grappled with a much wider variety of language rights issues.[37] What is most interesting in comparing the Canadian and U.S. Supreme Courts is not so much their levels of activism but the quite different ways in which constitutional law surrounding individual rights is developing in the two countries. Whether this branch of constitutional law will diverge as sharply as the two courts' approaches to federal division-of-powers questions seems unlikely, but the emerging differences on individual rights are likely to become a more fruitful focus of analysis in the coming years than the current focus on whether the expansion of judicial review has 'americanized' Canadian politics.

THE IMPACT OF JUDICIAL ACTIVISM

Because the growth of judicial activism in Canada has centred on the entrenchment of fundamental rights in the constitution, it is difficult to separate the impact of the two developments. They could have occurred separately; thus it could have been possible for the Canadian judiciary to become more active without the advent of constitutionally entrenched rights, just as the advent of constitutional rights would not ensure an activist response from the judiciary. The United States Bill of Rights, for example, was constitutionally entrenched for over a century before it emerged as a basis for judicial activism, suggesting that judicial activism as we know it today is a twentieth century phenomenon responding to political imperatives in twentieth century nation states.

While the impact of judicial activism in Canada must necessarily be assessed in combination with the entrenchment of constitutional rights in 1982, the assessment still provides important lessons on the role of courts. In the first place, an active judiciary and a wide range of newly-entrenched rights have produced a significant ideological shift in the way courts reach decisions. The shift has been from a small-c conservative

to small-l liberal approach to the law and the politics of constitutional jurisprudence.

Judicial conservatism in public law gives wide latitude to officials exercising their discretion under statute and at common law. An executive department, agency or board that can anchor its work in a broad statutory authorization is thus able to conduct its business free from judicial intervention, but well within the formal framework of parliamentary supremacy. As long as officials do not flagrantly abuse their power, or use it for purposes demonstrably remote from their broad statutory authority,[38] they are free to act – even under statutory mandates that could be subject to potential abuse. Under this approach, a wide variety of processes and outcomes have been tolerated by the Canadian courts, even when their chilling or discriminatory effects have been asserted by litigants. A statute requiring cabinet approval for the purchase of land by a communal religious group was upheld when the courts had no evidence that approvals were being arbitrarily withheld.[39] A military court martial was found to be an independent tribunal, allowing the Supreme Court to avoid examining a traditional and established process.[40] Police were given wide latitude by the judiciary to enforce criminal law, with the implicit assumption that crown attorneys, as independent law officers of the crown rather than partisan prosecutors, would perform the screening function necessary to maintain responsible conduct and the rule of law.

The 'rule by gentlemen' assumptions of judicial conservatism have given way under the Charter to a judicial liberalism that focuses on whether statutes have properly confined and structured the discretion of officials. Executive officials and law enforcement officers are not only allowed less latitude, but the latitude they are allowed can be subject to rigorous tests to ensure that rights are minimally impaired for only the most compelling reasons. Thus the warrant under which antimonopoly officials searched the business premises of a Western Canadian newspaper was invalidated as overbroad even though the officials never took advantage of its broad terms.[41] Limitations on the availability of a consent defence in sexual assault cases were held to violate the Charter in a case in which evidence of violence rendered the defence irrelevant.[42]

The judiciary's use of the traditional liberal focus on legally defined fairness has meant that the courts have become much more rigorous in their demands that statutes operate within fixed terms that either do not limit entrenched rights, or limit those rights only by means necessary and proportional to the problem whose seriousness has given rise to the statutory regime. Thus have concepts of limited government under law, long dominant in democratic political theory, emerged with a new vitality in the

day-to-day work of Canadian judges who no longer feel bound to accept parliament's much more broadly stated limitations on official action.

The shift in legal ideology from conservatism to liberalism carries with it new opportunities for judicial activism, particularly in enforcing procedural rights. In fact, the procedural emphasis helps explain why federal statutes have been nullified by the courts as frequently as provincial statutes. A survey early in 1989 of statutory provisions nullified by all twelve courts of appeal (including the Supreme Court of Canada, its ten provincial counterparts, and the Federal Court of Appeal) showed that only six of thirty-two nullified federal statutes were struck down on substantive grounds rather than on a purely procedural basis. In contrast, nineteen of thirty-three nullified provincial statutes were struck down on substantive rather than purely procedural grounds.[43]

While the shift in legal ideology has given rise to judicial activism, it should also be clear why it has engendered so little enthusiasm on the intellectual left. It is far from radical, but rather represents the judiciary's absorption of a liberal ideology already the subject of widespread rethinking. Judicial activism based on legal liberalism will find it difficult to deal with inequalities of social and economic power, with policies that redistribute wealth, or with a private sector where power is exercised as surely and strongly as by government officials. Concern remains among Charter critics that legislative efforts to check private power or redistribute private wealth could be stymied by judicial activism more reminiscent of the American judiciary's *Lochner* era than its more recent history under the Warren Court.[44]

One of the most important political impacts of this ideological change could be the re-emergence of parliament as a central law-making body. If broad (and vague) legislative mandates are struck down, official action can only follow from more tightly written statutes. New official initiatives will require new legislation, not the creative expansion of old mandates to act in the public interest. Thus an abortion law that operated arbitrarily must go before parliament anew for consideration. Criminal laws that alter the presumption of innocence or impose cruel and unusual punishment must be written with greater care and sharper focus if they are to survive judicial scrutiny. Rather than ousting parliament from areas of past legislative authority, Canadian judicial activism under the Charter is placing new and more detailed tasks before the country's legislative bodies.

Ironically, then, the advent of entrenched rights that in theory limit the supremacy of parliament may have a contrary effect. By fostering the development of a liberal legal ideology that more actively constrains official behaviour, the post-charter judiciary has begun to check the

executive supremacy that has become a fact of modern Canadian politics. Once executive discretion is subject to tighter constitutional constraints, parliament must become more involved in spelling out grants of legislative authority. If, as a result of judicial activism, parliament is called upon to legislate more frequently and with greater detail and precision, legislative institutions are likely to be strengthened. Parliament and provincial legislatures are more likely, over time, to play a renewed legislative role: to participate actively in drafting statutory language, to conduct their business on a full-time basis, to expand their professional staff support, and to seek out techniques for monitoring official implementation of new statutes.

As a further irony, the distinctive features of the Canadian Charter of Rights that were designed to limit judicial supremacy by providing a basis for legislative intervention may have encouraged judicial activism. The Charter has two clauses unknown in the American Bill of Rights; the Canadian Charter, in the words of one American legal scholar, is the only constitutional rights document with two trap doors. First is the limitation clause, section one, that spells out the conditions under which entrenched rights can be limited. That clause follows the format and language of contemporary international conventions, on the assumption that absolute language in rights documents would be subject to unstated, potentially broader, limitations in practice. Second is the notwithstanding clause, section 33, that allows legislative bodies to enact statutes contrary to the most frequently invoked constitutional rights, as long as a resolution (effective for a maximum of five years) has been approved by that body.

While the limitation clause restricts the potential impact of Charter rights, it has already encouraged judicial activism. Section one has developed an extensive jurisprudence of its own, since Canadian courts need not argue, for example, whether a particular form of words or type of material constitutes 'expression' rather than 'fighting words' or 'obscenity'. The material can be deemed to fall within the Charter, its prohibition or regulation deemed a violation of guarantees of free expression, but its limitation justified under section one. As a result, Canadian judges have tended to give a broader meaning than their American counterparts to concepts such as 'expression' and 'arrest or detention', since a broad definition of the right does not preclude its limitation. Thus extending expression to include commercial speech faces less criticism, since a wide range of legislative regulation of commercial speech can still be justified under section one. The main challenge for judicial activists then becomes to develop section one jurisprudence that reinforces liberal values of fairness and limited government, rather than providing a means to reintroduce broad executive discretion.[45]

Even if an active judiciary strikes down statutes as violations of the Charter, and develops stringent section one tests that legislative bodies find difficult to meet, the override clause in section 33 can come into play, allowing a legislature to enact a statute notwithstanding any violation of Charter rights. Even at this early time in Charter history, two provincial legislatures have invoked section 33, despite predictions that legislative bodies would be extremely reticent to use it.

The impact of section 33 on judicial activism is not yet clear. Some argue that the override will encourage the judiciary to show restraint lest the weakness of Charter rights be revealed. At the same time, however, the need for restraint does not flow from judicial supremacy. No legislative body can claim that the courts are overstepping their constitutional boundaries and restricting parliamentary freedom of action, since section 33 is available if a statute that passes the section one tests cannot be crafted. The judiciary can be active and principled on its own terms without facing accusations of undermining the popular will. Section 33 could as easily embolden the courts at the same time that it limits the force and effect of a particular decision.

In summary, the 1982 Charter of Rights has shifted the Canadian judiciary from a position as an umpire, subordinate to legislative authorities, to a position as an active player with a continuing role in the development of constitutionally legitimate public policy. The judiciary has played that role by adopting a liberal legal ideology that stresses procedural fairness and limitations on official discretion rather than distributive justice and substantive rights. As a result, legislative authorities are placed in a new setting that promises to invigorate parliamentary processes in the years to come.

THE FUTURE OF JUDICIAL ACTIVISM AND A PASSIVE JUDICIAL CULTURE

What happens to the passive judicial culture in Canada following the rise of judicial activism since 1982? There are signs of change. An unprecedented royal commission in Nova Scotia, consisting of three judges drawn from outside the province, condemned the abuse of prosecutorial discretion, beginning with the conviction and imprisonment of a native man for a murder he did not commit, but ranging far beyond that case to issues of political influence, government organization, and the need for an autonomous native justice system.[46] Judges appear less isolated; they are quoted more frequently in the media, have pressed more actively for

a role in administration of the courts, and are on the way to securing the right to vote. Social science evidence has begun to appear in appellate court proceedings and judgments after long being considered illegitimate, another sign that the narrow legalism of the traditional judicial culture is changing.

Yet, while many of the conditions that gave rise to a passive judicial culture no longer exist, that culture (like its counterparts in other institutions) persists in the daily rituals, let alone the hearts and minds, of those who live within it. Canadian judges will remain more reserved than their counterparts in other common law countries where judicial activism is prevalent; they will acquire the right to vote but not the status of public figures. Peer pressure will still calm the colleague prepared to make a public statement or send a letter to a newspaper. Judges may be more outspoken in their reports as royal commissioners, but they are likely to continue taking up those commissions and remaining silent after their reports are completed.

While judicial activism in Canada springs from many of the same conditions that have given rise to active courts in other countries, its form, content and impact are likely to be different. What may emerge is a distinctive Canadian synthesis of liberal legalism and conservative traditions, of deferential judicial culture and interventionist judicial decisions, of judicial activism that occurs frequently but rarely reaches fundamental social and political questions.

The shape of this synthesis is not preordained. The initial activism of the post-Charter judiciary took its shape from the role played by Supreme Court of Canada Chief Justice Brian Dickson. Following his retirement on June 30 1990, the senior puisne (i.e. associate) justice, Antonio Lamer of Quebec, has been appointed his successor. Lamer has been a strong supporter of Dickson's constitutional initiatives, and has a record of supporting Charter claims even more frequently than Dickson. Yet the shape and direction of the Lamer Court in the 1990s are not clear. The new Chief Justice's most important judgments have focused on criminal law, where procedural questions predominate, creative remedies are less common, and the development of positive rights not at issue. As a number of new Supreme Court appointees, characteristically intelligent and moderate, mature on the bench, peer pressure for new constitutional initiatives may decline, and the court may enter a period where it hears many Charter matters and often rules against the government, but infrequently strikes out in new directions.

One of the most important figures in developing the Supreme Court's judicial activism during Dickson's chief justiceship was Madame Justice Bertha Wilson. She wrote substantial and wide-ranging judgments in support of Charter claims, searching out fundamental issues when other

colleagues preferred deciding on narrower grounds.[47] Wilson articulated the broadest view on the Supreme Court of women's autonomy as a basis for invalidating Canadian abortion law[48] and was the most prominent Canadian judge to call for increased sensitivity by the courts to issues of gender bias.[49]

Following Lamer's elevation, Wilson, formerly a member of the Ontario Court of Appeal and the first of three women appointed to the Supreme Court of Canada, became the Court's senior puisne justice. Just as Lamer was able to write major judgments that reinforced Dickson's judicial activism, Wilson may have the opportunity to play a similar role on the court in the 1990s. If she does, the Supreme Court may be able to address in a creative way some of the major issues that a new generation of Canadian legal scholars are raising about positive rights and expanded remedies.[50] If her colleagues opt for a more traditional view of the law, and emphasize a narrower role for the judiciary in shaping Canadian society, judicial activism will survive – but without the excitement that marked the advent of the Charter of Rights in the 1980s.

NOTES

An earlier formulation of this chapter was presented to a seminar in the Politics Department at Brock University in October 1989. I am indebted to participants for their comments, and to Professor Ellen Baar for reading and criticizing the penultimate draft.

1. See among others Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall and Thomson, 1989) *Socialist Studies* 2 (1984), theme issue on 'Critical Perspectives on the Constitution'; David Frum, 'Who's Running This Country, Anyway?' *Saturday Night* 103 (October 1988): 56. For two useful assessments of the Charter in light of these arguments, see Peter H. Russell, 'The First Three Years in Charterland,' *Canadian Public Administration* 28 (Fall 1985): 367 and Ian Greene, *The Charter of Rights* (Toronto: James Lorimer, 1989).
2. The best comprehensive analysis is Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto McGraw-Hill Ryerson, 1987), Ch. 14.
3. See *Union Colliery v Bryden* (1899) A.C. 580, and *Cunningham v. Tomey Homma* (1903) A.C. 151, both dealing with anti-oriental legislation.
4. *Henrietta Muir Edwards v. Attorney-General for Canada* (1930) A.C. 124 at 136.
5. Alan C. Cairns, 'The Judicial Committee and its Critics,' *Canadian*

Journal of Political Science 3 (1971): 301.

6. The best known are *Saumur v. Quebec and Attorney General of Quebec*, (1953) 2 S.C.R. 299; *Switzman v. Elbling and Attorney General of Quebec* (1957) 2 S.C.R. 285; and *Roncarelli v. Duplessis* (1959) S.C.R. 121.
7. The exception was *The Queen v. Drybones* (1970) S.C.R. 282.
8. See *Nova Scotia Board of Censors v. McNeil* (1978) 2 S.C.R. 662, and *Attorney General of Canada and Dupond v. Montreal* (1978) 2 S.C.R. 770
9. Carl Baar, 'Judicial Behavior and Comparative Rights Policy,' in Richard Claude (ed.), *Comparative Human Rights* (Baltimore: Johns Hopkins University Press, 1976), Ch. 14 at p. 362.
10. *The Queen v. Wray* (1971) S.C.R. 272. See background discussion in Carl Baar, 'Using Process Theory to Explain Judicial Decision Making,' *Canadian Journal of Law and Society* 1 (1986): 57 at 69–71.
11. *Noble and Wolf v. Alley* (1951) S.C.R. 64.
12. An exception was Justice Thomas R. Berger of the Supreme Court of British Columbia, but his principled intervention led to an official inquiry, which – while not recommending his removal – was followed a year later by his resignation. See the discussion of the 'Berger Affair' in Russell, *The Judiciary in Canada: The Third Branch of Government*, pp. 85–9.
13. See Carl Baar, 'Patterns and Strategies of Court Administration in Canada and the United States,' *Canadian Public Administration* 20 (1977): 242, and Jules Deschenes, *Masters in Their Own House* (Ottawa: Canadian Judicial Council, 1981), pp. 97–9.
14. *Attorney-General of Quebec v. Quebec Association of Protestant School Boards* (1984) 2 S.C.R. 66.
15. *Hunter v. Southam, Inc.* (1984) 2 S.C.R. 145.
16. *Singh et al. v. Minister of Employment and Immigration* (1985) 1 S.C.R. 177.
17. *The Queen v. Big M Drug Mart Ltd.* (1985) 1 S.C.R. 295.
18. *Operation Dismantle Inc. v. The Queen* (1985) 1 S.C.R. 441.
19. *The Queen v. Therens* (1985) 1 S.C.R. 613.
20. British Columbia Motor Vehicle Reference (1985) 2 S.C.R. 486.
21. *The Queen v. Oakes* (1986) 1 S.C.R. 103.
22. *Edwards Books and Art Ltd. v. The Queen* (1986) 2 S.C.R. 713.
23. *Public Service Alliance of Canada v. The Queen* (1987) 1 S.C.R. 424; *Government of Saskatchewan v. Retail, Wholesale and Department Store Union* (1987) 1 S.C.R. 460.
24. *RWDSU v. Dolphin Delivery* (1986) 2 S.C.R. 573.
25. *Lyons v. The Queen* (1987) 2 S.C.R. 309.
26. *Whyte v. The Queen* (1988) 2 S.C.R. 3.
27. *Morgentaler v. The Queen* (1988) 1 S.C.R. 30.
28. *Attorney-General of Quebec v. Ford et al.* (1988) 2 S.C.R. 712.
29. *Law Society of British Columbia v. Andrews* (1989) 1 S.C.R. 143.

30. *Vaillancourt v. The Queen* (1987) 2 S.C.R. 636.
31. Data in this paragraph drawn from F. L. Morton, Peter H. Russell and M. J. Withey, 'The Supreme Court's First One Hundred Charter Decisions: A Statistical Analysis,' paper prepared for delivery at the 1990 Annual Meeting of the Canadian Political Science Association, Victoria British Columbia, 27–9 May 1990.
32. Carl Baar, 'Judicial Behavior and Comparative Rights Policy,' (note 9 above), Table Two at p. 364.
33. Morton *et al.*, 'The Supreme Court's First One Hundred Charter Decisions: A Statistical Analysis' (note 31 above), Table 7.
34. *Thorson v. Attorney General of Canada* (1975) 1 S.C.R. 138; *McNeil v. Nova Scotia Board of Censors* (1976) 2 S.C.R. 265; and *Borowski v. Minister of Justice of Canada* (1981) 2 S.C.R. 575.
35. *Operation Dismantle Inc. v. The Queen* (1985) 1 S.C.R. 441
36. *Attorney-General of Quebec v. Ford et al.* (1988) 2 S.C.R. 712.
37. See for example *Société des Acadiens v. Association of Parents* (1986) 1 S.C.R. 549, and *Attorney-General of Quebec v. Quebec Association of Protestant School Boards* (1984) 2 S.C.R. 66.
38. *Roncarelli v. Duplessis* (1959) S.C.R. 121.
39. *Walter v. Attorney General of Alberta* (1969) S.C.R. 383.
40. *MacKay v. The Queen* (1980) S.C.R. 370.
41. *Hunter v. Southam, Inc.* (1984) 2 S.C.R. 145.
42. *The Queen v. Wald* (Alberta Court of Appeal, 23 February 1989), 47 C.C.C. (3d) 315.
43. From data presented by F. L. Morton at Annual Meeting of the Canadian Political Science Association, Quebec City, June 1989.
44. See for example Robert Martin, 'The Judges and the Charter,' *Socialist Studies* 2 (1984) 66; Andrew Petter, 'Immaculate Deception: The Charter's Hidden Agenda,' *Socialist Studies* 2 (1984): 66; *The Advocate* 45 (1987): 857, and Harry J. Glasbeek, 'A No-Frills Look at the Charter of Rights and Freedoms or How Politicians and Lawyers Hide Reality,' *Windsor Yearbook of Access to Justice* 9 (1989): 293.
45. See Lorraine Weinrib, 'The Supreme Court of Canada and Section One of the Charter,' *Supreme Court Law Review* 10 (1988): 469. The key case on section one is *The Queen v. Oakes* (1986) 1 S.C.R. 103.
46. Royal Commission on the Donald Marshall, Jr., Prosecution, *Volume 1: Findings and Recommendations* (Halifax, Nova Scotia, December 1989).
47. Bertha Wilson, 'Decision-Making in the Supreme Court,' *University of Toronto Law Journal* 36 (1986): 227.
48. See her judgment in *Morgentaler v. The Queen* (1988) 1 S.C.R. 30.
49. Bertha Wilson, 'Courts Need Women's Perspective Madame Justice Wilson Says,' *Canadian Human Rights Advocate* 6 (Feb. 1990): 1–5.
50. See for example: Martha Jackman, 'The Protection of Welfare Rights Under the Charter,' *Ottawa Law Review* 20 (1988): 257; and three papers prepared for the panel on 'Positive Rights, Participation and

the Charter' at the Annual Meeting of the Canadian Law and Society Association, Victoria, British Columbia, 30 May 1990: Martha Jackman, 'The Right to Participate in Regulatory Decisions Affecting Charter Protected Interests'; Kent Roach, 'Remedial Implications of Positive Rights'; and Patrick Macklem, 'Comment: The Limits and Possibilities of Judicial Review.'

4 Judicial Activism in Australia

Brian Galligan

Judicial activism, understood as control or influence by the judiciary over political or administrative institutions, processes and outcomes, is a central and robust part of Australian governance. At the highest level, the judiciary has been institutionalized within the Constitution as a branch of government along with the legislature and the executive. The High Court of Australia was broadly modelled on the American Supreme Court by the framers of the Australian Constitution and given the key role of exercising judicial review which it has performed with relative ease and distinction for almost a century of federation.[1] The High Court remains active in performing that role and in recent years has made major decisions in reshaping the constitutional powers of government. The Australian case should be of interest to students of comparative judicial review because it shows how an astute judiciary has engaged in judicial activism on a grand scale, but largely sheltered from public scrutiny behind the professional disguise of formal legalism. That disguise is currently being removed, however, by leading judicial spokesmen as well as by critical scholarship, so there is increasing public discussion of the character and legitimacy of judicial law-making and the appropriate role for the judiciary.

Judicial activism has also been prominent in other areas of Australian public life. Because of the constraints of space, only two of these can be briefly referred to in this chapter. The first was Australia's rather unique development of a judicial system of industrial arbitration during the first half century of federation. The second is the establishment in the 1970s of an elaborate system of administrative law for judicial review of Commonwealth administrative decisions. The establishment of the former was described by H. B. Higgins, an early President of the Arbitration Court and architect of judicial activism in this 'new province for Law and order,' as 'testimony to the confidence of the people in the courts of Australia. By bringing economic disputes within the ambit of law, a new province was added to the realms of law – widening the area of light, and making the bounds of darkness narrower.'[2] Of more recent origin, the 'New Administrative Law' that entails a fairly comprehensive system of judicial review of Commonwealth administrative decisions has been described as

'one of the most complete systems for external review of administrative decisions in any country.'[3]

JUDICIAL REVIEW

Judicial review is by its very nature an activist function since it involves the judiciary in performing a number of key functions that directly affect the institutional shape and powers of the branches and levels of government. For Australia, this has entailed adjudicating high-level disputes involving the federal division of powers between the Commonwealth and State governments, determining the institutional structure and powers of the legislative, executive and judicial branches of the Commonwealth government, and in general, authoritatively interpreting the constitution which defines all of these.

In its adjudicative role, the Court is involved in deciding disputes about whether a particular action or policy initiative by one or other branch or level of government comes within its constitutional powers or not. Such decisions can have enormous political and policy consequences. For example, in the 1940s the High Court struck down the Chifley Labor Government's attempts to nationalize banking and airlines, and severely curtailed its attempts at putting in place a national health system. As a result, the Labor Government was forced to abandon its nationalization plank and moderate its preference for a centralized welfare system. Thus the Court played a major part in taming the Labor Party and in shaping Australia's post-war economy and restricting the scale of its welfare state. Over a longer sweep of political history from 1920 to the present day, and in such leading decisions as *Engineers* (1920),[4] *Uniform Tax* (1942),[5] and the *Tasmanian Dam* Case (1983),[6] the Court has sanctioned a steady increase of central power that has at least partly accommodated the Labor Party and, arguably, has adjusted the constitutional system to fit the development of the nation.[7] More recently, the Court has made key decisions awarding jurisdiction over the offshore to the Commonwealth, sanctioning Commonwealth legislation protecting the environment and outlawing racial discrimination that trumps competing State development and land title policies, and severely restricting the ability of the States to levy indirect taxes.

On the other hand, the Court has not given free rein to the Commonwealth, and in 1990 denied it power to legislate for the incorporation of trading companies under its corporations power.[8] This forced the Hawke Government to abandon key parts of its proposed national companies and

securities legislation, and to return to a co-operative arrangement with the States that retain power over the incorporation of companies. Thus, in its adjudicative role the Court has had the determining say over a range of major political questions throughout Australian political history.

Even more significant than adjudication, from a political perspective, is the interpretive role of the Court in exercising judicial review. That is because in authoritatively interpreting the constitution, the Court determines the powers of the national and state governments on the one hand, and the shape and interrelationships among the branches of national government on the other hand. In adjudication the Court is a direct player, albeit the authoritative one, in the big political league; whereas in its complementary role of constitutional interpretation the Court has a meta-political function of shaping the very institutions of government and their powers. Hence the Court's leading decisions referred to above had high political salience not only because of the particular controversy that was decided, but more especially because of their definition of political jurisdictions and policy domains for Commonwealth and State governments, or disallowance of categories of policy initiatives.

ORIGINS AND INSTITUTIONAL DESIGN

In view of Australia's strong traits of majoritarian democracy and preference for Westminster-style parliamentary government,[9] it is perhaps surprising that judicial review is such an integral part of the constitutional system and judicial activism so much taken for granted as part of the ongoing process of federal government. In part, at least, that is because the High Court and judicial review were integral parts of the original design of the constitution, even though judicial review was not spelt out in as many words in the constitutional text. The Australian constitution is a hybrid combination of traditional parliamentary responsible government and constitutional federalism, or as one commentator has termed it 'a Washminster mutation'.[10] The Australian founding fathers who were leading politicians from established Colonies wanted to form only a limited national union for specific purposes, so they readily adopted American-style federalism when framing the Australian constitution in the 1890s. As an institutional means of protecting the States within the national legislature, the Australian founders copied fairly closely the American model of dividing powers between the two levels of government by enumerating those of the national government and guaranteeing the residual to the States. Moreover, they also adopted American style bicameralism with a strong Senate elected by State

constituencies and a powerful judicial branch of government exercising judicial review.[11]

The Australian Colonies were not unfamiliar with judicial review of colonial legislation by the courts. In fact, there had been a decade of stormy confrontation between the imperious Judge Boothby of South Australia who advocated and sought to implement an enormous scope for judicial review of legislative actions by the newly created South Australian legislature. This led directly to the passage of the Colonial Laws Validity Act of 1865 that was meant to bolster the authority of colonial legislatures such as that of South Australia. Nevertheless, the immediate model for an Australian federal court exercising judicial review, as for the Senate and the federal division of powers, was the American one.[12]

Because the Australian founders saw the Court exercising the pivotal role of judicial review within the federal system, they designed it accordingly. The Court's basic structure, tenure and jurisdiction were all entrenched in the Constitution after discussion and endorsement during the founding Conventions in the 1890s. The purpose of the federal court, according to Barton who was to become the first Prime Minister of Australia, was to adjudicate disputes between states and the national government which would inevitably arise under a federal constitution. The court would be 'a continuous tribunal of arbitration' and 'one of the strongest guarantees for the continuance and indestructibility of the Federation.'[13] The most important questions for the Court, said Barton's deputy O'Connor, would be deciding 'between the States and the Commonwealth, the validity of state laws, and the validity of Commonwealth laws which may overlap or override them.' Barton and O'Connor were to become two of the three first appointees to the High Court when it was established in 1903 and, with Chief Justice Griffith, would establish its pragmatic approach of balancing Commonwealth and State powers that was dominant until the *Engineers* case in 1920.

The Australian founders had a more even-handed view of the federal system they were creating than either the Americans or Canadians before them. Whereas the Americans saw the main threat coming from states and the Canadians preferred a strong national union, the Australian founders envisaged a more balanced federation with the Court keeping both levels of government in check. As one delegate explained, the Court was a necessary backup for states' rights which were otherwise protected by the Senate, and would guarantee states all the powers that were not given specifically to the Commonwealth. The Court was to be the 'strong and dignified custodian of the Constitution,' with its judges made 'irremovable,' because, as the sole Labor delegate to the 1897–98 Convention argued, 'The High

Court in its position should be equal to, if not above, the Parliament and Executive.'

The Court needed to be strong enough to overrule Parliament when it exceeded its powers, Barton insisted: 'The Federal Judiciary must be the bulwark of the Constitution. It must be the supreme interpreter of the Constitution.' Isaacs, another prominent founding father who was appointed to the High Court in 1905 and masterminded the *Engineers* interpretive revolution in 1920, predicted that, as had been the case in the United States, 'the makers of the Constitution' would be the judges as much as the founding conventions. Symon, chairman of the judiciary committee, rejected the Privy Council's 'spirit of strictness and literality' as though 'they were interpreting simply an Act of Parliament' as being inappropriate for a constitutional court, and endorsed instead the broad constitutional jurisprudence of America's Chief Justice Marshall. According to Downer, the third member of the main constitutional drafting committee along with Barton and O'Connor, the judges would have 'the greatest part in forming this Commonwealth' because they would give substance to its form, interpreting the intentions of those who framed it and applying those principles to cases which had not been thought of. The Court was to be the 'keystone of the federal arch,' said Attorney-General Deakin, introducing into Parliament in 1902 the Judiciary Bill to establish the High Court, because 'the federation is constituted by distribution of powers, and it is this court which decides the orbit and boundary of every power.' The fact that the Australian founders were so concerned with devising and entrenching such a powerful judicial branch of government in the constitution, and the leading founding fathers were the first appointees to its bench, helped ensure that judicial activism became a core function in Australian government and politics from the beginning of federation.

OPERATION: ENHANCING CENTRAL POWERS

The ever-increasing centralisation of power at the national level of government is a common theme among commentators on Australian federalism. Certainly compared with Canada which has moved in a decentralist direction despite the intentions of its founding fathers, Australia has become more centralist. The reasons are complex and have to do with national historical peculiarities as well as different cultural and geographic factors, especially Australia's homogeneous population dispersed around an island continent.[14] The contribution to these national trends of a superior court exercising judicial review is partly as a contributor to,

and partly as a legitimator of broad national developments. Whatever the precise causal contribution of the High Court, the overall centralisation of power that has occurred in Australian federalism has been brought about by intergovernmental politics and judicial review, and not by referendum which requires a 'double' majority of electors overall and majorities in four of the six states. Despite more than a hundred proposals for amending the constitution that have been introduced into Parliament and forty-two that have actually been put to the people, only eight have passed, and most of those have not been of major significance.[15]

It should also be noted that the centralist interpretation of Australian federalism has been somewhat exaggerated. The enhancement of national power has not always been at the expense of the States because relative proportions of real power exercised by governments in a federal system are not necessarily interrelated as in a zero-sum game. Nor does influence over policy depend solely on fiscal primacy. The Australian states have retained substantial power in political and policy areas and in intergovernmental relations.[16] In other words, centralism is not as pervasive for Australian federalism overall as constitutional lawyers and fiscal economists who study its more formal aspects have suggested, but it has certainly been the dominant pattern for judicial review since 1920.

Before 1920, the 'founders' court' had a more even-handed approach that relied on a co-ordinate view of federalism. Invoking the doctrine of 'implied immunity' that had been developed by the American Supreme Court in the nineteenth century, Australia's first High Court judges held that both the Commonwealth and the States should each be free from the interference or control of the other. That requirement was an integral part of a federal system, they thought, and hence was implied in the constitution. For example, the early Court held that the States could not tax Commonwealth employees, and the Commonwealth could not determine industrial conditions for State railway employees using its industrial relations power. The doctrine of implied immunity meant that the Commonwealth's enumerated powers were interpreted in a restricted way to respect 'reserved' State powers.

The *Engineers* revolution, that came after the triumvirate of original judges had departed from the bench, changed the direction of judicial review by changing the interpretive method of the High Court. Ironically, the new method purported to be the more literal and legally conservative one of reading the constitutional text without concern for federal implications or practical consequences. Such a method of interpretation favoured the consolidation of national powers because now the Commonwealth's enumerated powers were to be read in a full and plenary sense regardless,

with some minimal restrictions, of their impact on the States. A couple of notable cases can serve to illustrate the extent to which the *Engineers* logic of interpretation has been taken and how this and other interpretative devices used by the High Court have produced, and continue to produce, a centralising impact on the formal distribution of powers within Australian federalism.

Income Tax Monopoly

Australia's fiscal federal system that is characterised by extreme vertical imbalance was sanctioned by the High Court in the *Uniform tax* case (1942)[17] that upheld the Commonwealth's monopolisation of income tax. The Court's decision was based on technical consideration of four separate Acts that made up a bold initiative of the wartime Curtin Labor Government. It allowed the Commonwealth to impose a high uniform tax, to reimburse States for the equivalent amount of revenue foregone provided they refrained from levying their own income tax, to require taxpayers to pay Commonwealth income tax before State tax, and to take over State taxation offices. Since only the last measure relied on the defence power, the monopoly was easily extended after the war. Even when the Court subsequently struck down the third measure giving primacy to the payment of Commonwealth taxes in the *Second Uniform Tax* case (1957),[18] the monopoly was sustained by means of the first two measures. Although the States argued strongly that the four Acts constituted a scheme whose purpose and effect was to strip them of their concurrent constitutional right to levy income tax, the Court would neither hear evidence regarding the policy purpose and implications of the legislation nor accept that there was any larger federal principle at stake.

Ironically, in making this momentous policy decision, the judges eschewed policy considerations in the name of legal purity. The matter before the Court was strictly 'a legal controversy, not a political controversy,' asserted Chief Justice Latham, and it was 'not for this or any other court to prescribe policy or to seek to give effect to any views or opinions upon policy.'[19] Latham even went so far as to suggest that by tying conditions to section 96 grants, the Commonwealth could destroy entirely the independence of the States:

> Thus, if the Commonwealth Parliament were prepared to pass such legislation, all State powers would be controlled by the Commonwealth – a result which would mean the end of the political independence of the States. Such a result cannot be prevented by any legal decision.[20]

The External Affairs Power

During almost half a century uniform taxation and the fiscal dependence of the states have remained settled, albeit controversial, features of Australian federalism. The Commonwealth's more recent incursions into the traditional policy domains of the States by means of the 'external affairs' power are currently causing major controversy. In the High Court's expansive interpretation of this enumerated Commonwealth power, section 51(xxix), we can see just how pervasive is the centralising reach of the *Engineers* interpretive method.

In the *Koowarta* case (1982)[21] the Court upheld the validity of the Commonwealth Racial Discrimination Act, passed by the reforming Whitlam Labor Government in 1975, in outlawing discriminatory Queensland practices with respect to transferring land title to an Aborigine. The Commonwealth legislation implemented an international convention that Australia had ratified. For three of the four majority judges, section 51(xxix) was satisfied by any matter that became the subject of an international treaty, while for the fourth some inherent attribute of 'international concern' was required.

In the landmark *Tasmanian Dam* case (1983), after two changes to the bench, a new majority of four judges consolidated and expanded the scope of both the external affairs and corporations powers of the Commonwealth. According to the Court, any subject of a bona fide treaty could be brought under Commonwealth jurisdiction, and even a treaty might not be necessary if the matter were one of genuine international concern for the national government. In this instance, the Court upheld legislation of the Hawke Labor Government, elected in early 1983 with strong endorsement from the environmental lobby, preventing the State of Tasmania from building a hydroelectric dam on a wild river in wilderness country. The area had been listed on the World Heritage List maintained under the World Heritage Convention to which Australia is a party.

In this case the majority judges went out of their way to reaffirm the *Engineers* orthodoxy of no implied restrictions to the reach of Commonwealth powers regardless of the extent of their invasion of State jurisdiction. Mason, the senior majority judge who has subsequently been appointed Chief Justice, affirmed 'that there are virtually no limits to the topics which may hereafter become the subject of international co-operation and international treaties or conventions.' In dissent, Chief Justice Gibbs expressed alarm that: 'The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the Federal Government could, by entering

into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of Parliament so that they embraced literally all fields of activity.' Also in the majority, Justice Brennan philosophically summed up the inevitable consequences of the Court's interpretive method combined with the increasing internationalization of domestic policy issues: 'the position of the Commonwealth . . . has waxed; and that of the states has waned.'[22]

The national government has since expanded its role in environmental protection, relying on the external affairs power to protect rainforests in Queensland, and on its power over exports to block a huge pulp mill in Northern Tasmania that was not designed to stringent environmental standards. Successive national Labor Governments, of Whitlam and Hawke, have also attempted to bring in statutory bills of rights, modelled on the United Nations Convention on Civil and Political Rights, that purported to bind the States under the external affairs power. While it is probable that these would have been upheld by the High Court, the issue was never tested since they were aborted in the Senate.[23]

LIFTING THE VEIL OF LEGALISM

Traditionally the study of the Australian constitution and its development through judicial review by the High Court has been almost exclusively the preserve of lawyers. Their purpose has been to say what the law is, or perhaps at times what it ought to be, and their method has been mainly the exegesis and synthesis of relevant texts and opinions. Australian constitutional lawyers have typically digested what judges do, while judges for their part have got on with the busy task of hearing cases and writing opinions. The basis of judicial activism has been assumed to be unproblematic, and the policy aspects and implications of its exercise as pretty much accidental byproducts. Occasionally, leading judges have referred to the basis of judicial review in the Australian constitution, but usually have claimed that it is self-evident or axiomatic, relying on such ploys as James Bryce's simplistic analogy of a stream not being able to rise above its source, or John Marshall's flawed argument in *Marbury v. Madison*.[24]

Of course, Australian lawyers and judges do admit the centralising pattern of judicial review that was discussed earlier, but legalists and realists are increasingly divided over an appropriate explanation of such judicial activism. For example, one comprehensive account of Australian constitutional law by a leading constitutional scholar documents 'the

ever-growing hegemony of the Commonwealth over the States from *Engineers* on,' and establishes moreover that this has not been the result of literal interpretation of the constitutional text.[25] But critical discussion of where the extra-legal considerations come from and how they operate is absent from this and most other writing on constitutional interpretation.

The contrary legalist view has been the orthodoxy of the High Court throughout the post-war period until quite recently. At his swearing in as Chief Justice in 1952, Sir Owen Dixon endorsed legalism in these often-quoted terms: 'It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.'[26] Dixon's successor as Chief Justice, Sir Garfield Barwick (1964 to 1981), propounded a similar line. While acknowledging the dominant 'centripetal impulse' and increasing Commonwealth influence referred to above, Barwick insisted that judges have brought this about through the technical practice of legal midwifery:

> The meaning remains as it was when the constitutional text was promulgated. There can be no judicial warrant for changing it . . . In deciding, the Court educes what was always present, though perhaps latent, in the constitutional text. As new federal legislation is found to be covered by the constitutional text, State powers, because of the terms of the text, appear to recede, though again in truth that power was from the outset no larger than by the Court's decision it has proved to be. [27]

Not surprisingly, protagonists of a strictly legalist orthodoxy such as Barwick have eschewed the more free-wheeling constitutional jurisprudence of the United States Supreme Court. In a speech to the National Press Club in 1976 – a rare event for a senior Australian judge – Barwick distinguished the Australian High Court from the American Supreme Court on the grounds that the High Court did not make bill-of-rights decisions. He acknowledged that such decisions were clearly political and questioned whether an unelected body such as the Court could continue for long to exercise such a function. Barwick claimed that the Australian Court's work was 'strictly legal' because it had no bill of rights to interpret: 'We have no general Bill of Rights situation in which we can go beyond the law, and as in the case of decisions about the Bill of Rights make what really are political decisions.'[28]

The legalist view of interpretation is underpinned by a model of judging as a technical act of syllogistic reasoning in which judges apply laws to facts. This view was neatly put by Justice Kitto in 1970: 'the process to be

followed must generally be an enquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined.'[29] Justice Kitto's formulation of the judicial function was endorsed by Justice Brennan in warning of the risks entailed in using judges for extra-judicial functions: 'The judicial function is essentially syllogistic. The applicable principles – "the law as it is" – provide the major premise; "the facts as they are" provide the minor premise; the judgment follows inexorably by applying "the law as determined to the facts as determined."'[30]

If 'adherence to the "high techniques" of legal argument' remains 'the official gospel in Australia,' as Justice Michael Kirby claimed in his 1983 Boyer Lectures on 'The Judges,' there is an increasing challenge not only from realist critics and publicists but also from judges themselves. Not least among them is Justice Kirby himself who stresses that 'there is no inevitable objectively right decision in much judicial work, particularly in the highest courts,' and hence judges rely on their individual discretion or policy choice. According to Kirby, Australia's 'antipodean backwater' of formal legalism is under challenge: 'The demise of the civil jury, the growth of judicial discretion and the growing realisation of the importance of judicial policy have tended to cast the Judges adrift from their calm harbour of strict and complete legalism.'[31]

On the High Court itself in recent times (1975 to 1986) there has been a frankly activist and 'deliberate innovator' in Justice Lionel Murphy.[32] Murphy openly admitted that judges of superior courts were law-makers. In a National Press Club address in 1980 Murphy said: 'One part of the role of a judge, especially a judge in the higher courts, is that he not only applies the law, he often makes or helps make it . . . Judges used to pretend that they only interpreted the law, never made it. But the law-making role of judges is now openly accepted all around the world.' He made no bones about the personal discretion of the judge: judge-made law represented the 'judge's idea of what is appropriate, ideas fashioned on the wisdom of their predecessors and adapted to meet changing conditions.'[33] Murphy's judicial opinions were notable for their appeal to American precedents.[34] For example, in the case that upheld Commonwealth grants to Catholic schools and gave a narrow interpretation of the section 116 prohibition against 'establishing any religion,' Murphy was the sole dissenter and based his opinion on the United States Supreme Court's doctrines of strict separation of church and state.[35]

Judges like Kirby and Murphy, however, are not representative of Australian judicial opinion: Murphy was a maverick on the High Court, and Kirby is an unusual appellate court judge, having been previously a

high-profile Law Reform Commissioner. But indicative of the change that is occurring are recent articles by the present Chief Justice of the High Court, Sir Anthony Mason, and Justice Michael McHugh, appointed to the High Court in 1988 and previously of the New South Wales Court of Appeal, affirming an activist law-making function for courts. According to Mason, the role of a constitutional court in a federation is a broad discretionary one that flows from the character of the instrument it interprets: 'Constitutions are documents framed in general terms to accommodate the changing course of events, so that courts interpreting them must take account of community values.' According to Mason, the Constitution is not so much a detailed blueprint as a set of principles designed as a broad framework for national government, and hence should be interpreted as an organic and flexible instrument rather than by ordinary rules of statutory interpretation that had previously been favoured.[36]

McHugh argues that there is a legitimate law-making function for the judiciary in appellate courts despite the expanded role of modern legislatures. Giving an accurate account of judging is a necessary prerequisite for legitimating the law-making function of the judiciary, he suggested: 'If the real process by which judges reach decisions is unveiled the effect will be that the courts will be more accountable for their choices.' McHugh proposes an 'Incremental Law-making Model' that recognises the incremental nature of judicial law-making, the considerable constraints on the process, the discipline of providing public reasons for decisions and peer review.[37] His article, and that of Sir Anthony Mason on the role of a constitutional court, indicate that Australian discussion of the judicial function among the judiciary itself has moved to a more realistic plane. Law professors are also giving more explanatory force to social influences and policy considerations in the exercise of judicial review,[38] although some still resist removing the veil.[39]

A public rhetoric of 'strict and complete' legalism has been the official line of Australian judicial spokesmen until fairly recently, and has proved an effective strategy for legitimating judicial review. As has been argued elsewhere, the public rhetoric of legalism effectively disguised the Court's judicial activism and its key policy decision-making, hence facilitating their exercise and acceptance.[40] Australia has a hybrid political system and culture with strong traditions of parliamentary responsible government and majoritarian democracy that are antithetical to judicial review. As well, for much of its political history the Australian Labor Party has contested both the federal constitutional system and the liberal political economy it was designed to protect. Unable, therefore, to appeal to substantive principles in adjudicating great political disputes and interpreting the constitution,

the High Court used legalism as both a public rhetoric and an interpretive method. And because of the structural logic of the constitution, such a strategy inevitably brought about a centralisation of power. Broadly speaking, that meant that constitutional development kept pace with the evolution of the nation and, to a modified extent, the centralist demands of the Labor Party.

Even if this was a satisfactory solution for broad practical purposes, the grand policy-making role of the Court was covert. On rare occasions judges were more open, such as Justice Windeyer reflecting on the *Engineers* case when as he put it, 'the Constitution was read in a new light, a light reflective from events that had, over the years, led to a growing realization that Australians were now one people and Australia one country and that national laws must meet national needs.'[41] Making national laws meet national needs for a nation growing in unity and national awareness has been the real guiding principle of High Court judges from Issacs who engineered the 1920 revolution to the present. The twin forces of legal realism among constitutional lawyers and judges and policy evaluation and analysis among political scientists are now bringing that out into the open without, it seems, jeopardising the continuing activist role of the High Court.

JUDICIAL ARBITRATION

The expectation that industrial arbitration and the determination of working conditions and national wages could be brought within 'a new province of law and order' informed Australian industrial relations during the first half century of federation. At the pinnacle of the national system was the Court of Conciliation and Arbitration established in 1904 under the Commonwealth's power, spelt out in section 51 (xxxv) of the constitution, to make laws with respect to 'Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.' The growth of national trade unions after federation ensured that industrial disputes could be readily extended beyond State limits, and provided the scope for the Commonwealth Court to become the main instrument of national wage determination. The Court was headed by a President appointed from the Justices of the High Court and authorised to settle interstate industrial disputes through conciliation and arbitration, with the power to incorporate its settlements in awards and make orders penalising a delinquent party to an award.

Under the strong leadership of Justice Higgins, the early Court forged a creative systhesis of judicial form with economic and social welfare principles. In his famous *Harvester* judgment, Higgins developed the standard of 'a fair and reasonable wage' defined in terms of the need of the average employee regarded as a human being living in a civilized community.'[42] From this the Court developed the key notion of a 'basic wage' as well as other progressive innovations such as comparative wage justice that were core elements of Australia's wages system for decades. Until the introduction of a modern welfare state in the 1940s, this national Court-based system of arbitration had an important social welfare purpose that was integrated with its economic and industrial functions.[43]

It has been argued that the success of the earlier Court, like that of its successor the Conciliation and Arbitration Commission, was due more to its non-judicial attributes and skills as arbitrator and conciliator rather than its judicial ones: that it was 'essentially a facilitator rather than a prime mover or an innovator, reactive rather than proactive, in the formulation and application of industrial principles.'[44] Certainly, since World War II, the judicial attributes of the Commission have virtually disappeared in several major restructurings, although its senior members retain the prized judicial title of 'Justice' and quasi-court procedures of hearings, advocacy and issuing written decisions are followed.

Ironically, the earlier system, which was based on the Conciliation and Arbitration Court's exercising joint arbitral and judicial functions, was struck down by the High Court in the 1956 *Boilermakers* case.[45] The High Court ruled, despite fifty years of entrenched practice, that the Constitution required a strict separation of powers such that Parliament could not invest judicial power in any body other than a court created under the judiciary sections of the constitution. The Commonwealth government of the day responded by passing new legislation that split the arbitral and judicial functions and vesting them in a separate Conciliation and Arbitration Commission and new Commonwealth Industrial Court consisting of judges with tenure as required by section 72 of the constitution. With the establishment of the Federal Court in Australia in 1976, the Arbitration Court was wound up and its jurisdiction transferred to the Industrial Division of the Federal Court. In 1989, after the Hancock Inquiry, the Conciliation and Arbitration Commission was reconstituted as the Industrial Relations commission.[46]

These institutional changes reflected the fading of Higgins' vision for the judicialization of industrial relations as a new province for law and order. Given the volatility of dispute settling in this area and the primary economic significance of national wage setting, that was hardly

surprising.[47] Nevertheless, the experiment indicates the novel purposes to which judicial activism has been put in Australia.

ADMINISTRATIVE LAW

The most significant Australian development in judicial activism in recent years is the Commonwealth's new administrative law that was put in place in the 1970s with the establishment of the Administrative Appeals Tribunal (AAT) and judicial review of administrative decisions. The package of legislation,[48] that also included establishment of a Commonwealth ombudsman, has given Australia a fairly comprehensive administrative law system at the national level (except for the office of ombudsman this has not been copied generally by the States). The Commonwealth's 'new administrative law' was a response to widespread dissatisfaction with traditional parliamentary review and ministerial responsibility for protecting individual rights, and reflected confidence in alternative judicial tribunals and procedures.

Ambitious claims are made by leading Australian judicial spokesmen for this extension of judicial review. The Chief Justice, Sir Anthony Mason, has said:

> Truth, impartiality, rationality and fairness are the qualities which our present federal system of judicial and tribunal review offers to the administrative process. Fair-minded observers of that system agree that our system is one of the most enlightened and comprehensive in the common law world and that it has enhanced the quality of the administrative process in terms of its justice, rationality and fairness. The fable that the individual citizen is fully protected from administrative error by parliamentary review and ministerial responsibility has been consigned to the dustbin of history.[49]

Mason sees court decisions as 'a strong catalyst in shaping or reinforcing public opinion' and claims that there is a growing recognition among citizens that they must look to courts rather than political institutions for the protection of individual rights.

This is disputed by some senior ministers and bureaucrats. Senator Peter Walsh, when Minister for Finance, claimed that Australia had 'got it wrong' in giving the legal system 'de facto control over spending a good deal of public money' for reviewing administrative decisions.

The prescription that quasi-legal appeal and review processes produced a better outcome was unfounded, he claimed, and the elected government must retain ultimate responsibility for spending public money. Other influential ministers have also been of the view that the AAT obstructs government policy, and in recent years there have been restrictive moves to curtail judicial review and citizen access through such means as budget restrictions and 'user pays' charges for Freedom of Information requests.[50]

Provision for review by the AAT 'on the merits' of administrative decisions made under specific laws now extends to some 240 Commonwealth Acts. To service this expanding jurisdiction the Tribunal has grown to a President and 87 members at June 1989 and consists of 23 presidential members, 14 senior members (3 part-time) and 50 part-time members with 9 members being judges of the Federal Court and 4 judges of the Family Court. Despite such growth, the Tribunal is barely able to cope with its increasing workload in such extensive areas as social security and veteran entitlements and compensation claims, which account for 83 per cent of applications in its non-taxation jurisdictions, although it has made substantial inroads into an enormous backlog of taxation cases inherited from the previous Taxation Board of Review in 1986–87.[51]

Provision for external review by the AAT and, if required, judicial review by the Federal Court has now been extended to most Commonwealth 'client' departments. Senior administrators, after initial reservations and some hostility, now generally acknowledge that this has led to improved administration, although there are reservations from some about how far judges and quasi-legal tribunals ought to go in second-guessing the substantive policy decisions of administrators.[52] The present system has been consolidated on a somewhat uneasy accommodation of review by external tribunals and courts and the policy independence of administrators within the executive branch of government. Ultimately, as Justice Brennan, first President of the AAT and now a High Court judge, has pointed out:

> The political legitimacy of judicial review depends, in the ultimate analysis, on the assignment to the courts of that function by the general consent of the community. The efficacy of judicial review depends, in the ultimate analysis, on the confidence of the general community in the way in which the courts perform the function assigned to them. Judicial review has no support other than public confidence.[53]

So far, it seems, such public confidence continues to sustain judicial review of administrative decisions, as it does judicial review of constitutional matters by the High Court.

NOTES

1. B. Galligan, *Politics of the High Court* (St. Lucia, Queensland: University of Queensland Press, 1987).
2. J. Rickard *H. B. Higgins: the Rebel as Judge* (Sydney: George Allen & Unwin, 1984), p. 171.
3. D. Pearce, 'The Fading of the Vision Splendid? Administrative Law: Retrospect and Prospect,' *Canberra Bulletin of Public Administration*, No. 58 (April 1989): 24.
4. *Amalgamated Society of Engineering v. Adelaide Steamships Co. Ltd.* (1920) 28 CLR 129.
5. *South Australia v. Commonwealth* (1942) 65 CLR 373.
6. *Commonwealth v. Tasmania* (1983) 158 CLR 1.
7. For a classic review, G. Sawer, *Australian Federalism in the Courts* (Melbourne: Melbourne University Press, 1967); Labor's uneasy accommodation with the constitution is evident in E. G. Whitlam, *On Australia's Constitution* (Camberwell, Vic.: Widescope 1977), and G. Evans (ed.), *Labor and the Constitution 1972–1975* (Melbourne: Hienemann, 1977).
8. *New South Wales v. Commonwealth* (1990 unreported); and 'Companies bill scuttled', *Financial Review* 9 February 1990.
9. See H. Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society,' *Daedalus* 114 (1985).
10. E. Thompson, 'The "Washminster" Mutation,' in P. Weller and D. Jaensch (eds), *Responsible Government in Australia* (Richmond, Vic.: Drummond, 1980).
11. J. A. La Nauze, *The Making of the Australian Constitution* (Melbourne: Melbourne University Press, 1972); and G. Craven (ed.), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (Sydney: Legal Books, 1986).
12. J. A. Thomson, Judicial Review in Australia: The Courts and Constitution. S. J. D. Thesis (Harvard University, 1979); B. Galligan, 'Judicial Review in the Australian Federal System: its Origin and Function', *Federal Law Review* 10 (1979); and G. Lindell, 'Duty to Exercise Judicial Review', in L. Zines (ed.), *Commentaries on the Australian Constitution* (Sydney: Butterworths, 1977).
13. This and the following quotations of the Australian founders are from the more extensive discussion in B. Calligan, *Politics of the High Court*, Ch. 2. They come originally from the voluminous Federal Convention Debates, recently re-published as the *Official Record of the Debates of the Australian Federal Convention*, 5 Vols (Sydney: Legal Books, 1986).

14. B. W. Hodgins, J. J. Eddy, S.J., S. D. Grant and J. Struthers (eds), *Federalism in Canada and Australia: Historical Perspectives 1920–88* (Peterborough, Ont.: The Frost Centre for Canadian Heritage and Development Studies, Trent University, 1989).
15. The most recent referendum was in 1988 but this failed dismally: B. Calligan and J. R. Nethercote (eds), *The Constitutional Commission and the 1988 Referendums* (Canberra: Centre for Research on Federal Financial Relations, Australian National University, 1989).
16. B. Galligan (ed.) *Comparative State Policies* (Melbourne: Longman Cheshire, 1988); and B. Galligan, O. Hughes and C. Walsh (eds), *Intergovernmental Relations and Public Policy* (Sydney: Allen & Unwin, 1990).
17. *Uniform Tax* case: *South Australia v. Commonwealth* (1942) 65 CLR 383.
18. *Victoria v. Commonwealth* (1957) 99 CLR 575.
19. *Uniform Tax* case, p. 409.
20. Ibid. p. 249.
21. *Koowarta* case: *Koowarta v. Bjelke-Petersen* (1982) 53 CLR 168.
22. *Tasmanian Dam* Case: *Commonwealth v. Tasmania* (1983) 158 CLR 486, 475, 528.
23. B. Galligan, 'Australia's Rejection of a Bill of Rights,' *Journal of Commonwealth and Comparative Politics* 28 (1990).
24. For example, Fullager J's assertion that 'in our system the principle of *Marbury v. Madison* is accepted as axiomatic.' *Australian Communist Party v. Commonwealth* (1951) 83 CLR 262; and Dixon J. 'An exercise of a power, whether legislative or administrative, cannot rise higher than its source,' *Shrimptom v. Commonwealth* (1945) 69 CLR 630. James Bryce's *The American Commonwealth* (1888) was the 'bible' of the Australian founders.
25. P. H. Lane, *Commentary on the Australian Constitution* (Sydney: Law Book Company, 1986), p. ix.
26. O. Dixon, Address upon Taking the Oath as Chief Justice, Sydney, 21 April 1952, in *Jesting Pilate and Other Papers and Addresses*, collected by Judge Woinarski (Melbourne: Law Book Company, 1965), p. 247.
27. Foreword in P. H. Lane, *Commentary on the Australian Constitution*, pp. vii–viii.
28. Speech reported *Australian Law Journal* 50 (1976): 434.
29. *The Queen v. Trade practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 374.
30. F. G. Brennan, 'Limits on the Use of Judges,' *Federal Law Review* 1 (1978): 3.
31. M. Kirby, *The Judges*, Boyer Lectures 1983 (Sydney: Australian Broadcasting Corporation, 1983), pp. 38–9, 42.
32. Murphy was a highly controversial judge who was plagued in later years by accusations of improper conduct and died of cancer while charges

against him were being investigated. For a critical view, P. Bickovskii, 'No Deliberrate Innovators: Mr Justice Murphy and the Australian Constitution,' *Federal Law Review* 8 (1977); and for an approving account, N. Bolkus, 'Murphy's Law: A Radical on the Bench,' *Labor Forum* 1 (1978).

33. L. Murphy, transcript of National Press Club address, 22 May 1980, Parliamentary Library, Current Information Service, pp. 4–5.
34. For a selection of his judgments, J. and R. Ely (eds), *Lionel Murphy: the rule of law* (Sydney: Akron Press, 1986).
35. *Attorney General Vic. ex rel. Black v. Commonwealth* (1981) 146 CLR 559.
36. A. Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience,' *Federal Law Review*, 16 (1986): 5, 23.
37. M. McHugh, 'The Law-Making Function of the Judicial Process,' *Australian Law Journal*, 16 (1988): I, 15–31 and II, 116–27.
38. L. Zines, *The High Court and the Constitution*, Second Edn (Sydney: Butterworths, 1987), Ch. 16.
39. J. Goldsworthy, 'Realism About the High Court,' *Federal Law Review* 18 (1989); and B. Galligan 'Realistic "Realism" and the High Court's Political Role,' *Federal Law Review* 18 (1989).
40. B. Galligan, *Politics of the High Court* (St. Lucia, Qld: University of Queensland Press, 1987).
41. *Payroll Tax* case: *Victoria v. Commonwealth* (1971) 122 CLR 396.
42. *Ex Parte H. V. McKay* (1906), 2 Commonwealth Arbitration Reports, 1.
43. See D. Aitken and F. Castles, 'Democracy Untrammelled: The Australian Political Experience Since Federation,' in K. Hancock (ed.), *Australian Society* (Sydney: Cambridge University Press, 1989).
44. J. E. Issac, 'The Arbitration Commission: Prime Mover or Facilitator?', *Journal of Industrial Relations* 31 (1989): 407.
45. *R. v. Kirby; ex parte Boilermakers' Society of Australia* (1956), 94 CLR 254.
46. Hancock Report: *The Report of the Committee of Review into Australian Industrial Relations Law and Systems* (Canberra: Australian Government Publishing Service, 1985); and *Industrial Relations Act* 1988 (Cth).
47. For current accounts of the system, G. W. Ford, J. M. Hearn and R. D. Lansbury (eds), *Australian Labour Relations Readings*, 4th edn. (Melbourne: Macmillan, 1987); and B. Dabscheck, *Australian Industrial Relations in the 1980s* (Melbourne: Oxford University Press, 1989).
48. Administrative Appeals Tribunal Act 1975; Ombudsman Act 1976; Administrative Decisions (Judicial Review) Act 1977. For a fairly comprehensive account, M. Aronsen and N. Franklin, *Review of Administrative Action* (Sydney: Law Book Company, 1987).
49. Sir Anthony Mason, 'That Twentieth Century Growth Industry, Judicial or Tribunal Review,' *Canberra Bulletin of Public Administration* 58 (1989): 26.

50. Senator Peter Walsh, 'Equities and Inequities in Administrative Law,' *Canberra Bulletin of Public Administration* 58 (1989): 29, 32.
51. See P. Bayne, 'Administrative Law: The Problem of Policy,' in R. Wettenhall and J. R. Nethercote (eds), *Hawke's Second Government: Australian Commonwealth Administration 1984–1987* (Canberra: Canberra College of Advanced Education, 1988), Ch. 6.
52. Details from Attorney-General's Department, *Annual Report 1988–89* (Canberra: Australian Government Publishing Service, 1989).
53. See D. Volker, 'The effect of Administrative Law Reforms on Primary Level Decision-Making,' *Canberra Bulletin of Public Administration* 58 (1989): 112; and D. Rose, 'Judicial Review and Public Policy: A Comment,' ibid., 75. Also J. Sharpe, *The Administrative Appeals Tribunal and Policy Review* (Sydney: Law Book Company, 1986).
54. F. G. Brennan, 'The Purpose and Scope of Judicial Review', in M. Taggart (ed.), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Auckland: Oxford University Press, 1986), p. 18.

5 Judicial Activism in Israel

Gary J. Jacobsohn

Judicial activism has become increasingly significant to law and politics in Israel. The evolution of Israeli jurisprudence since the establishment of the State in 1948 includes an expanding role for the judiciary in determining the shape and content of the law. In this chapter I will discuss this phenomenon in relation to another frequently observed development – the growing use by Israeli judges of American legal precedents and scholarship. The purpose is not to suggest a causal relationship between the two, but to provide a point of reference with which to discuss some aspects of the character and implications of judicial activism in Israel. Also, while legal transplantation has figured prominently in many of the activist decisions of the Israeli Supreme Court, my focus will not be on the specific doctrinal importations that have been applied in these cases, but on the broader theory that has, in the United States, and to a lesser (but growing) extent in Israel provided jurisprudential support for judicial activism. The concern of the chapter is judicial activism in Israel; the approach will be to examine the fit between constitutional theory and constitutional adjudication where the two have evolved in separate and different political contexts.

Three dimensions of activist constitutional jurisprudence are of particular importance to judicial activism in Israel. (1) The prescription for an aspirational judicial role in which the Supreme Court pursues just, coherent constitutional outcomes expressive of the best that is within a people as a community of principle. (2) The priority within the aspirational agenda of strengthening and expanding the constitutional protections surrounding individual rights. (3) The adoption by the Supreme Court of a pedagogic stance toward the body politic. These dimensions need to be examined in the context of two salient features of the Israeli legal system – (1) the communal, group-oriented nature of the pluralist political context in which it is situated; and (2) the absence of a comprehensive written constitution, and relatedly, the minimal authority possessed by the Supreme Court to exercise judicial review over legislation enacted by the Knesset.

PRELIMINARY OBSERVATIONS

Israeli Trends

The role of the courts – particularly the Supreme Court – in American politics has been debated for as long as there have been courts in American politics. The institution of judicial review made this debate inevitable, for it meant that among the branches of the national government, one was destined to stand out as 'deviant,' at variance with the accountability principle of republican government, the regime's ultimate legitimating principle. Thus the Court's legitimacy required that its policy-making activity be circumscribed (while seen as an awkward, if necessary, consequence of judicial review) or, on the other had, unapologetically defended as an essential counter-majoritarian guarantor of individual liberties. The history of American constitutional jurisprudence consists in large measure of an ongoing intellectual struggle between these two contending positions.

In Israel, which has not as yet institutionalized judicial review over legislation, there is also much debate over the role of the Supreme Court. Here, however, the controversy focuses very little on the question of legitimacy, but very much on the issue of institutional quality, namely whether the Court should be granted the authority to exercise constitutional review over legislative enactments. Indeed, it is in great degree to avoid the divisiveness of a dispute over legitimacy, that some who are opposed to the adoption of the American practice have keyed their arguments. However, in the absence of judicial review the Israeli Supreme Court has embraced a role not altogether dissimilar to that of its American counterpart. Thus it has aggressively pursued a rights-oriented agenda that occasionally places it at odds with the Knesset. In fact, this role appears to be played with greater consistency than in the United States, where the activity of the Court is more subject to the vicissitudes of national politics.

This was not always the case, as the early history of the Israeli Court reveals an institution much less venturesome in its pursuit of an independent role. This is in large part accounted for by the unique legal circumstances attendant the origins of the State, in which various layers of different law – Ottoman, Mandatory, British common law, and religious (Jewish, Muslim, and Christian) – continued, in varying degrees, to remain in force. The Law and Administration Ordinance of 1948 incorporated Palestinian law in effect on the date of independence. One of the main consequences of this was the heavy reliance by judges in the early years upon English common law.[1] In time, however, the need to establish an indigenous

Israeli law was increasingly felt, leading to a loosening of the binding nature of British precedents, a displacement of many pre-State laws with new Knesset-passed legislation, and, perhaps most important for the long term, a gradual departure from the relatively passive judicial role characteristic of judges in the British common law tradition. Thus in 1958, for example, Justice Agranat seemed to be encouraging judicial activism with his emphasis on language in the Law and Administration Ordinance that stipulated that pre-State law would apply in the new regime 'subject to such qualifications as local circumstances render necessary.'[2] 'The court must use the English law definition only to glean therefrom the underlying principle but, having done that it must apply the principle to the special conditions prevailing in Israel and in accordance with the concepts and views of Israeli society.'[3] It is worth noting in this regard that Israeli judges are much more likely than their English counterparts to resolve legal questions in accordance with principles of natural justice.

In some areas of the law – particularly public law and administration – American legal precedents were held to be very relevant to the special conditions prevailing in Israel. An Israeli scholar noted in 1966 'the marked and growing predilection of our Supreme Court for the transatlantic version of the common law.'[4] He demonstrated the increasing reliance of the Court on American authorities and the corollary decline in British influence. 'Apart from the courts of the United States, the Israel Supreme Court possibly makes more frequent use of American jurisprudence than any other court in the common law world.'[5] This trend has accelerated, in spite of the fact that Israel's 'unwritten constitution' bears a much greater similarity to the British system than to the American. The reason is quite simple: American law and jurisprudence provide a richer and more highly developed model of a legal system committed to the enforcement of individual rights, and a more fully articulated judicial philosophy devoted to the support of that commitment. Thus, as A. M. Apelbom has suggested, the very freedom to draw upon American sources finds legitimation in a tradition whose commitment to binding precedent is, in contrast to other common law experience, more qualified.[6] American law provided attractive alternatives when the application of an English rule seemed undesirable, while also providing jurisprudential grounds for departing from the rule.

Constitutional Theory

Another attraction of the American system for Israeli judges is its hospitality to legal scholarship. Unlike judiciaries where the local legal culture does not encourage the use of academic writings in the adjudication of

cases, judicial opinions in the United States and Israel are often liberally sprinkled with such references. Typical citations will involve analyses of technical legal questions, but frequently one encounters works of broader theoretical import. For example, the most important free speech case in Israel, *Kol Ha'am v. Minister of Interior*, decided in 1953, is well known for its extensive reliance upon Zechariah Chafee's writings. Recent opinions make it clear that for at least some Israeli judges, especially those with activist leanings, the extensive American literature in constitutional theory is a subject of more than casual interest.

While it would be misleading to write in the singular about a subject such as American constitutional jurisprudence, I would argue that over the last twenty years or so a dominant school has existed in the United States, one advancing a model of the Supreme Court as a critical agent for principled social change of the sort that is measurable in terms of an expanding domain of individual rights. Although some within this school, most notably Ronald Dworkin, resist the activist label, objectively the judicial implications that flow from their analyses place them well within the activist side of the traditional activism/self-restraint dichotomy.[7]

There are very different kinds of activists; what serves as a common thread is an interpretive stance that views the Constitution as an instrument through which the courts have a responsibility to realize the nation's highest aspirations. For Arthur S. Miller, a prolific defender of the activist view, 'The Constitution is always in a state of "becoming", always being brought up to date to meet the successive exigencies faced by the American people.'[8] For Dworkin, the recommended approach for judges is 'constructive interpretation,' the obligation 'to make the object or practice being interpreted the best it can be.'[9] The interpretive ideal of 'integrity' requires that one locate 'some coherent set of principles about people's rights and duties' for the purpose of providing the political community with its best possible constitutional outcome.[10] To be sure, these principles must have at least some 'purchase in American history and culture;'[11] but this apparent constraint will not likely convince Dworkin's critics that he has, as he insists, avoided judicial discretion. For example, Justice Aharon Barak, an Israeli Supreme Court justice whose general jurisprudential orientation has many Dworkinian features, is totally unpersuaded by Dworkin's claim about discretion.[12]

The aspirational dimension is also present in the work of other contemporary constitutional theorists, for example, Michael Perry, Sotirios Barber, Sanford Levinson, and David Richards.[13] Perry's observation is illustrative: 'What the constitutional text means to us (in addition to the original meaning), are certain basic constitutive aspirations or principles or ideals

of the American political community and tradition.'[14] As the institution best situated and constituted to express these aspirations, the Supreme Court, in the view of these theorists, should assume principal responsibility for facilitating their realization. To perform this task, however, presumes the existence of an 'interpretive community.' Again Perry: 'In what sense and to what extent is American society a true political community, a "judging community," notwithstanding its morally pluralistic character? In the sense and to the extent the various moral communities that together constitute the pluralistic society share certain basic aspirations as to how the collective life, the life in common, should be lived. There *are* such shared aspirations: for example, the freedoms of speech, press, and religion, due process of law, and equal protection of the laws.'[15]

The aspirations that are shared by members of this pluralistic community describe very well what Michael Sandel has referred to as the 'procedural republic,' embracing 'a public life animated by the rights-based liberal ethic.'[16] It is the ethic extending from the moral supposition that all people are entitled to be treated with equal concern and respect, and is a hallmark of much contemporary constitutionalist understanding. While there is a substantive component that can be readily associated with these collective aspirations, in practice they find their fulfillment in a public authority that is to be officially neutral with respect to competing social visions and goals, that is, in the language of the First Amendment doctrine implicit within them, content-neutral.

This liberal, individualist constitutionalist perspective contrasts with an alternative pluralist model that is more communitarian in nature, and that speaks more directly to the Israeli situation.[17] The communitarian oriented pluralism of Israel connotes much more than an alternative political strategy for the realization of individual rights. It represents, as Charles S. Liebman has suggested, the idea of an extended community in which collective needs and visions take precedence over individual ones.[18] Political democracy in Israel depends, to be sure, upon the guarantee of civil rights to all Israelis, but it also entails the acceptance of the right of non-assimilating groups to a separate identity.[19] The contrast with the United States is highlighted by Dworkin, who observes that 'Interpretive theories are by their nature addressed to a particular legal culture, generally the culture to which their authors belong.'[20] It makes sense, therefore, that when *he* addresses the issue of community and its relation to the problem of interpretation, he argues that 'The idea of special communal responsibilities holding within a large, anonymous community smacks of nationalism, or even racism, both of which have been sources of very great suffering and injustice.'[21] For Dworkin, such organic variables as religion, language,

and ethnicity are peripheral factors that require vigilant attention by those who understand the latent potential for injustice within these necessarily exclusivist categories.

Constitutionalism in Israel must take more seriously these troublesome aspects of community. The United States was founded to pursue the liberal ideal of political freedom; the establishment of Israel, on the other hand, cannot be separated from the goal of realizing the national aspirations of the Jewish people. Whereas the opening line of the American Declaration of Independence speaks in universalistic terms and in the abstract language of natural rights, the Israeli Declaration begins with a simple affirmation that Israel is the birthplace of the Jewish people. While the latter document also affirms the 'social and political equality of all of its citizens,' it is clear in a way that simply does not pertain in the American case, that the rights of individuals are in important and perhaps contradictory ways bound up with the organic nature of the political community and its constituent parts. Thus, it has always been established Israeli policy to recognize and support the independent authority of its various ethnic and religious groups in several important domains of social organization.[22] In matters of marriage and divorce, for example, the policy-making autonomy of the orthodox Jewish establishment will prevail even if it produces results (for the majority in the state who are Jews) that contravene the right to sexual equality.

What sets the context, then, for constitutional adjudication in Israel are the dual, and occasionally conflicting, aspirations represented in its founding document. That document also explicitly called for the immediate adoption of a written constitution, a goal that, in large part because of the irreconcilable tensions produced by the regime's founding principles, has yet to be attained. Instead, the Knesset passed a compromise resolution that prescribes a process of incremental accumulation of individual chapters, or basic laws, which when completed will be the State Constitution. To date there are nine such Basic Laws, laws that would appear to possess superior status to ordinary law, but which co-exist uneasily with the Israeli commitment to parliamentary supremacy. Perhaps most important, this evolving constitution does not include a basic law on individual rights, although as I will make clear very shortly, the Supreme Court has to a significant extent used its powers of interpretation to provide the nation with a bill of rights.

In the next section I will address the question of judicial activism within the context of a specific case. It has been chosen not because of any claim that it represents the prevailing thrust of Israeli adjudication, but because it invites commentary upon the political and jurisprudential implications of activist constitutional theory in Israel.

THE ISRAELI CONSTITUTION: JURISPRUDENCE AND ACCESS TO THE POLITICAL PROCESS

In 1984 the Israeli Supreme Court reversed two decisions of the Central Elections Committee for the Eleventh Knesset. It invalidated rulings by that body to exclude the right-wing 'Kach' list (headed by the controversial Rabbi Kahane) and the left-wing 'Progressive Peace List' from participation in the elections to the Knesset. The exclusions had been based on the following grounds: in the case of the Kach list, its racist and anti-democratic principles were seen as contravening the Declaration of Independence by denying the 'basic foundations of the democratic regime in Israel'; and in the case of the Progressive Peace list, its principles (as propounded by people, some of whom allegedly identified with enemies of the state) were also seen to conflict with the Declaration, in that they threatened the existence of Israel as a Jewish state. The various opinions of the Court focused on two key issues, the authority of the Committee to exclude lists under the Knesset Elections Law, and the import of a crucial precedent of the Court handed down twenty years ago in a similar exclusion case, in this instance of an illegal radical Arab list.

An examination of the 1984 case (*Neiman and Avneri v. Chairman of the Central Elections Committee for the Eleventh Knesset*)[23] is both revealing in terms of the insights it provides into the methods and theories of constitutional adjudication in Israel, and the ways in which the jurisprudential concerns of American constitutional theory intersect with the special features of the Israeli system. I will use it to argue that the context for constitutional adjudication in Israel renders judicial activism less vulnerable to the arguments made by American critics of the activist position.

The Silence of the Legislature

If the power of judicial review were to disappear from the American political scene, it would not reduce the Supreme Court to impotence. The Court would still retain the policy-making potential of statutory interpretation, and the chances are that it would develop more imaginative ways to exploit this power. This has certainly been the case in Israel, where the Court is widely recognized as an important player in domestic politics.

In *Neiman*, the statute under which the Elections Committee (chaired, incidentally, by a member of the Supreme Court) exercised its power to exclude the two lists, made no explicit provision for exclusion based upon a list's platform or objectives. This was the main point of contention in

the earlier case (*Yardor v. Chairman of the Control Election Committee for the Sixth Knesset*[24]), in which the majority (Justices Agranat and Sussman) found nothing improper in the Committee's reliance upon an implicit statutory authorization, and the minority opinion of Justice Cohn insisted that in the absence of any express language, the Committee was limited in its confirmation power to reviewing only the formal qualifying conditions laid out in the statute. Therefore, much of the focus in *Neiman* was on the outcome in the earlier case.

The Chairman of the Elections Committee in 1964 was Justice Landau, who has since become the most outspoken opponent of adopting judicial review and a bill of rights. In his ruling banning the Arab list, many of whose members belonged to an illegal organization that denied the very existence of the state of Israel, he argued that '[W]e may read into the Elections Law an implied condition that an illegal organization cannot be confirmed as a list.'[25] Justice Cohn's dissent in *Yardor* presented a positivistic defense of individual rights, in which he insisted that the deprivation of a right could only result from specific legislation passed by the legislature. The opinion recalls John Marshall's observation that '[W]hen rights are infringed, when fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness.'[26] Justice Cohn went on to repudiate any 'natural law' approach that might be used to fill the silence of the legislature, claiming that 'Those are not the ways of the State of Israel . . .'[27]

Justice Sussman's view was different. He too posed the question of 'whether the Committee may inquire into the qualification of the list according to an unwritten principle of law (the right of self-defense).'[28] His judgment that it did have this prerogative was emphasized in comparative terms: 'If it is so in a country with a written constitution (the specific reference was to the Federal Republic of Germany), it is so, *a fortiori*, in a country which does not have a written constitution.'[29] Why should this difference matter? Justice Sussman's opinion does not make this very clear, but elsewhere he provides an answer. '[The] supremacy of the Israeli legislature, which is not constrained by a formal written constitution, justifies, in my view, this conclusion regarding the work of the courts: the judicial restraint in favor of which Justices of the United States Supreme Court preached, lest the national patterns be determined by people whom the public did not choose, and the Congress be powerless, this restraint is unnecessary in Israel, whose legislature is all-powerful.'[30] The inference that follows from these statements is that a judicial appeal to 'supra-constitutional rules' has greater justification in a legal system where the final judgment as to the operative constitutional rules resides in the

legislature, than in a system where, practically speaking, the decisions of the Supreme Court in constitutional matters possess the attribute of finality. There is, then, this paradox: that the constraints imposed on the courts by the constitutional principle of parliamentary supremacy legitimates a more active role for the courts in construing the law. Thus, even in regard to a principle of natural law, the Knesset can eliminate unwritten law as a source for judicial decisions by the simple act of legislation, in the case at hand, by expressly delineating the jurisdiction of the Elections Committee. In the United States, where the First or Fourteenth Amendments would control the question of electoral access to the political system, the Supreme Court, so the argument might go, would (or should) have less freedom to maneuver within the interstices or silences of the (written constitutional) law.

In the two decades between *Yardor* and *Neiman* the Knesset did nothing in legislative response to the 1964 decision to uphold the Elections Committee. A unanimous Court invalidated the Committee's 1984 rulings, with a majority of the five justices who participated deciding that, absent any specific legislative authorization, the only permissible substantive ground for disqualifying a list by the Committee was if, as in *Yardor*, the list advocated the cessation of the existence of the State. As the President of the Court, Justice Shamgar, wrote, '[O]nly an extreme situation permits judicial quasi-legislation beyond the written text . . .'[31] Because the two lists in question, as reprehensible as their platforms might be, did not go this far, they could not be prevented from participating in the election. The precedent, in other words, was to be limited to the specific extreme circumstances confronted by the earlier Court.

However, those extreme circumstances are also a matter of interpretation. It is possible, for example, to read Justice Agranat's opinion in *Yardor* as giving somewhat broader authority to the Committee than the Court suggested in *Neiman*. Justice Agranat had argued that the case was controlled by a specific 'constitutional postulate,' which, to be sure, involved the principle of self-defense, but appeared to extend beyond the fact of bare preservation. 'There can be no doubt – and this is clearly learnt from the statements made in the Declaration of the Establishment of the State – that Israel is not only a sovereign, independent and peace-loving state characterized by a regime of the people's government, but was also established as 'a Jewish State in Eretz-Israel,' for the act of its establishment was effected first and foremost by virtue of 'the natural and historic right of the Jewish people to live as any independent nation in its own sovereign state, and that act was a realization of the aspirations of generations to the redemption of Israel.'[32] As we shall see, it is quite routine for the Court, particularly in recent years, to appeal to the Declaration of Independence

as an aid in statutory construction; generally, however, it is to the paragraph that addresses the subject of individual rights. Here Justice Agranat appeals to an alternative section of the Declaration, one that, as pointed out earlier, exists in some tension with the more frequently adverted to paragraph. Why, one might ask, did the *Neiman* Court gloss over the issue of the Jewishness of the State, and focus instead on the question of its existence? Was it simply that the existence of the State naturally presumed its Jewish character?

The answer is perhaps suggested in the opinion of Justice Barak, who is commonly viewed as the most activist-oriented of Israeli Supreme Court justices. Justice Barak proposed a much more expansive interpretation of the Committee's discretionary authority than anyone else. Not only does the Committee have the right to refuse to confirm a list because its platform denies the existence of the State, but, according to the Justice, it may also disqualify a list that denies the democratic character of the State – as long as there is a 'reasonable possibility' that its ideas will be realized.[33] Thus, the Court may either narrow or broaden the statutory language, its choice in this regard being dictated by its assessment of what is required in the individual case to 'realize the principles of our legal system.'[34]

Justice Barak arrived at this determination by way of the American Constitution, which has been held by a line of judges from Marshall to Holmes to Frankfurter to demand a 'spacious interpretation.'[35] The laws regulating Knesset elections in Israel should be viewed as fundamental constitutional provisions subject to similar interpretive rules. Statutory silence is no bar to the Court's construing the law 'in light of the Declaration of Independence, which expresses "the vision and creed of the people".'[36] Moreover, it seems clear from Justice Barak's discussion that this interpretive source is available to the Court both in the instance where the statutory language is ambiguous and inconclusive, as well as in the situation at hand, where the silence of the statute is quite clear in its meaning.

To make sense of all of this requires first appreciating that, in spite of whatever disagreements they might have had, all the justices decided to uphold the right of the lists to participate in the electoral process. In this case, both narrow and broad statutory construction led to a rights-orientated result, although a different judge applying Justice Barak's approach could easily have withheld the right to electoral participation. (Indeed, one justice, Justice Beisky, indicated that the correct application of his colleague's interpretive stance should result in the exclusion of the Kach list). This is not likely to happen, however, because in most cases the effect of a 'spacious interpretation' that opens up the 'democratic' paragraph of

the Declaration as a source for judicial application is to expand the protections for individual rights. On the other hand, opening up those parts that affirm the Jewishness of the State could endanger individual rights. It is therefore not surprising that a majority, abjuring in this instance the temptation to engage in an expansive statutory interpretation, would avoid characterization of the State's existence in terms that are potentially in tension with what many consider to be the primary role of the contemporary Israeli Court – serving as guardian of the democratic component of Israeli democracy. Judicial activism in Israel means pursuing the rights-oriented implications of the Declaration of Independence; as a result, American constitutional theory suggests attractive possibilities.

The Derivation of Constitutional Principles

'A statutory provision or judicial rule that limits a right is not interpreted broadly but rather, to the contrary, their proper interpretation is restrictive and pedantic.'[37] Such is the interpretive orthodoxy as expressed in *Neiman* by the President of the Court, Justice Shamgar. On the other hand, the derivation of fundamental rights, such as the right to take part in elections, demands broad interpretive power. 'Our conception of the law in effect in Israel is that it encompasses fundamental rules as regards the existence and protection of personal liberties, even if the bill of Basic Law: Civil and Personal Rights has not yet been enacted.'[38] Thus, the silence of the legislator may not lead to the curtailment of rights; a similar silence need not prevent the judicial assertion of rights.

Israeli judges tend to take rights seriously. Indeed, it is fitting that President Shamgar begins his inquiry into the question of whether the Committee may impose additional restrictions on the right to participate in Knesset elections by appealing to constitutional principles, specifically by quoting Ronald Dworkin: 'Judicial decisions, even in hard cases, should be generated by principles not policy.'[39] This is a distinction that lies at the core of Dworkin's prescriptions for an active judiciary. Policies establish goals to be reached by the community; they tend to follow from utilitarian calculations of aggregate good. Principles are different in that their validation depends not on popular approval but in their consistency with a coherent theory of political justice; as such they tend to be protective of the rights of the minority. President Shamgar wisely does not commit himself to a blanket endorsement of the Dworkin approach, recognizing no doubt that such an embrace will at some point have to confront the tradition of parliamentary superiority. But his approach, at least in this case, is consistent in all important respects with Dworkin's.

President Shamgar has been an outspoken advocate for a written constitution, whose 'absence in our system is conspicuous each time a constitutional issue arises in a legal proceeding.'[40] Thus it would be preferable if 'the *constitutional* principles defining . . . fundamental rights be given explicit expression . . .'[41] However, in the absence of such express provision a judge must still do the right thing. Here that involves establishing the right to participate in elections as a *fundamental* political right expressing the idea of equality, the essence of a democratic society. As a fundamental right, it possesses 'superior legal status,' which is why in the Israeli system any restriction of the right is contingent upon explicit statutory language. In the American system such statutory language would (except in extreme circumstances) be trumped when confronted with a right of this elevated standing.[42] Therefore, to a much greater extent than in the United States, judicial activism in defense of the superior legal status of particular rights is a matter of creative statutory interpretation.

One can well imagine that this state of affairs would lead Israeli judges to look with envy upon their American counterparts. But the American judge, especially one following Dworkin's principled approach, might respond in the following way. 'My job is both easier and more difficult than yours. We agree in the supremacy of constitutional principles – in their critical importance for resolving hard cases in the law. We also agree that equal concern and respect is the background assumption of the political system and therefore the principal source for deriving the content of our constitutional principles. Unfortunately for me, a Herculean effort is necessary to demonstrate that these principles are actually in the Constitution. The text of the document is rarely conclusive, and I can always count on someone to provide evidence revealing a contrary intent behind the language. I can usually come up with strong counter arguments, but believe me, it's a struggle. How nice it would be if I could invent the Constitution as I went along, appealing to those moral and political principles that best comport with our contemporary sensibilities about democracy.'

The Israeli judge would no doubt resist the notion that he or she was free to invent the Constitution; but there is a sense in which the idea is hardly preposterous. For example, Israelis occasionally speak of a 'judicial bill of rights,' referring by that term to those liberties enjoying legal status by virtue of their recognition through judicial interpretation. A more general way of putting this is to suggest that in important ways Supreme Court justices in Israel are the co-authors of the text that they are interpreting. An American judge can go through all sorts of elaborate jurisprudential contortions to discover a right to privacy in a Constitution that makes no explicit provision for it. Critics will then have a field day condemning the

judge for an improper act of judicial legislation, for in effect rewriting the Constitution. It will also be noted that this action is rendered even more problematic by the fact that the Court is presumed (rightly or wrongly) to speak with finality in constitutional matters. In the face of a similar act of judicial legislation in Israel, the critic's task will be more complicated. The judge there cannot be accused of rewriting a text (in the case of rights) that does not exist. And to the inevitable charge that the Court in creating such a right is usurping the authority of the Knesset, it can simply be pointed out that it is a strange, or at any rate benign, usurpation that can last only so long as the victimized body accepts through its own inaction the act perpetrated against it. There may be very good reasons for legislative passage of a bill of rights; it is by no means clear that enhancing the authority of the Court is one of them.

Balancing

'Would the State of Israel without the Declaration of Independence be the same State of Israel?'[43] Justice Barak raises this question at the outset of his effort to demonstrate why the Committee should have the authority to disqualify a list that threatens the democratic character of the State. It is the sort of question that has been raised in many contexts since at least as far back as Aristotle. In the judicial context it inevitably leads to a heightened political profile for the judge willing to pursue all of its implications.

One can readily understand the Court majority's reluctance to confront a question – the character of Israeli democracy – that is potentially so politically devisive. Confining the inquiry to the existence of the State is clearly a safer strategy as far as the institutional prestige of the Court is concerned. This is not to say that such a confinement is a guarantee against controversy; the Court must still evaluate the Committee's ruling against its own assessment of the actual threat to the State's existence posed by the participation of a particular list, and of course many people may differ with its assessment. Moreover, they may differ as well with the standard that the Court applies to its judgments of the facts. President Shamgar, for example, adopted the standard of *proximate certainty* (following an opinion of Justice Barak in an earlier case) to evaluate the situation in *Neiman*. In his own evaluation, Justice Barak adopts instead the less strict test of *reasonable probability*, arguing that his colleague's choice is more appropriate in the context of a specific event rather than in the context of a comprehensive social system.

The process involved here, of balancing a variety of rights and interests, is one that has come to be identified in Israel with Justice Barak, who, in a

series of opinions, has elaborated at length upon the judicial considerations involved in this approach.[44] Actually for Justice Barak it is probably more accurate to view balancing less as an approach (implying choice) than as an unavoidable adjudicatory task.[45] It is a task, however, which he has shown little evidence of shying away from. 'When the judge encounters contradictory fundamental principles of his system – for example, the existence of the State and freedom of expression and vote – he must take them all into account. The judge must pose the principles together and give each its proper weight, and having done so he must balance the various principles.'[46]

While the act of balancing may be viewed as a natural extension of the judicial function, it has understandably raised concerns about the subjective factor in judicial decision-making. For example, Louis Henkin has written: '[B]alancing has its dangers . . . It requires judges to find, define, articulate, and justify the weights given to interests and values out of very few straws. Balancing expands judicial discretion, frees it substantially from the need to justify and persuade.'[47] Another familiar criticism is that 'It appears to transfer to the judicial branch a method of decision making more properly reserved for the legislative branch.'[48] Interestingly, the earliest critiques of balancing had judicial self-restraint as their target, often singling out Justice Frankfurter for his practice of deferring to the balancing done by the legislature.[49] They also found the balancing test weighted against individual rights; constitutional protections were diminished as a result of the tendentious way in which competing interests were often defined. In time, however, the criticisms changed direction; thus the balancing that was at the heart of the Warren Court's equal protection approach, in which the Court identified certain fundamental interests and measured them against competing state interests, became the focus of those who were alarmed at the accretion of power to the Court in recent decades.

The fact that balancing is typically presented in the language of moderation and reasonableness cannot belie the fact that it has become one of the principal instruments of judicial power. The more occasions a judge finds to choose, weight, and balance interests, the more significant he or she becomes in the policy-making process of a given society. But the nature of the society – especially the form of its constitution – is highly relevant to an evaluation of that policy-making. Again Henkin: 'In all its forms (balancing) is essentially unrelated to text; in the case of the first amendment it runs into language that has to be accommodated. As substantive doctrine it further attenuates the links between judicial review and the text of the Constitution and erodes the assumption that the Court, if not tied by, at least works with and within the sacred text, on which its

legitimacy and its acceptability still largely rest.'[50] Justice Barak might take comfort in these words. While the legitimacy of his position as a Supreme Court justice is unquestionably related to his projection of an image of objectivity, its connection to the language of a particular text is less clear than in the American case. The principles he has chosen to balance derive from the Declaration of Independence, a document that enjoys at best a kind of quasi-constitutional status, analogous in some ways to the American Preamble. In insisting that 'every law must be interpreted in light of the Declaration of Independence,'[51] Justice Barak creates the best possible environment for judicial balancing. The Declaration is a charter that lists some rather general principles to which the regime is committed, which is different from a document such as the American Constitution, where it can more accurately be said that its language is itself in part the product of a balancing process undertaken by its framers.

Following the decision in *Neiman* the Knesset acted to amend the Basic Law: The Knesset by providing:

> A candidates list shall not participate in elections to the Knesset if its objectives or actions entail, explicitly or implicitly, one of the following: (1) a denial of the existence of the State of Israel as the state of the Jewish nation; (2) a denial of the democratic character of the state; (3) incitement to racism.[52]

There is no language in the amendment that addresses the question of standards, for example, 'reasonable probability' or 'proximate certainty'; in effect, the Knesset has itself undertaken to balance the various contending interests. The new constitutional provision does not eliminate all possibilities for judicial discretion, but through its preemption of one of the critical balancing judgments, it clearly reduces considerably the scope of possibilities. And again it suggests that a move to a comprehensive written constitution would not necessarily enhance the power of the judiciary.

THE 'REPUBLICAN SCHOOLMASTER' REVISITED AND TRANSPOSED

Judging and teaching

Justice Barak's opinion was sharply criticized by Justice Beisky, who argued that the matter before the Court was 'an essentially political subject that lies primarily in the field of the legislature.'[53] By this he

meant that it was a subject suffused with the sort of partisan ingredients that should be resolved elsewhere. Had there been a rejoinder to this criticism it might very well have taken this form: that while there is no denying that (Barak's) interpretation will have implications of some importance to the current political scene (which is not to say the majority's view will differ in this respect), the justification for this rather expansive exercise of judicial discretion is that it directly addressed the broader 'political subject' – the nature of the regime. Behind this rationale lies a further assumption, which is that the Court does not function only to resolve particular legal disputes, but also plays a critical role in political education.

The pedagogical mission of the Supreme Court is a theme occasionally appearing in American constitutional scholarship. Thus the Court has been observed conducting 'a vital national seminar,'[54] and its earliest justices have been described as 'republican schoolmasters.'[55] Ralph Lerner demonstrated that these judges made a self-conscious effort to provide Americans with a political education. '[T]he national judiciary from the very beginning acted as "teachers to the citizenry".'[56] They did this by expounding (often through their charges to grand juries) upon the principles underlying the Constitution. It is not a coincidence that this early period was also the time when many of the justices made frequent references in their judicial opinions to the principles of natural law that they felt illuminated the specific language of the constitutional text.[57] These references became increasingly rare after roughly the first three decades of constitutional adjudication, a development that might be understood in part, at least, as resulting from the judicial perception that the vital connections between the written and unwritten law had been made and widely absorbed into the political culture. Henceforth the Court could dispense with philosophical reflection, confining itself to interpretation of the written Constitution.

This pattern contrasts interestingly with the Israeli situation. There the adoption of a constitution was postponed to a date uncertain, and as it became increasingly apparent that this event would at best occur in the distant future, the Court has displayed an increasing proclivity for more expansive interpretive judgments based upon general principles of democracy. For example, the first Court held that the Declaration of Independence 'contains no element of constitutional law which determines the validity of various ordinances and laws, or their repeal.'[58] In another case the Court said, in response to the suggestion that 'we must interpret the expression "justice" by reference to philosophical, religious and moral sources,' that '[w]e are not prepared to adopt this system of interpretation which is completely unlimited in scope and obscures the limits of judicial power.'[59] While it is still technically the case that the Declaration cannot

be employed to invalidate a law, it (and the philosophical network of ideas it embodies) has, as we have seen, become a major source for judicial policy-making and judicial instruction in the principles of the polity.

In short, the 'republican schoolmaster' role fits the present constitutional situation in Israel. Thus the Court, one might argue, has a special obligation to articulate and explain political principles that in the United States enjoy a kind of privileged status by virtue of their having been constitutionalized in a single, comprehensive document that is the object of worship and study. But there is more. Israel lacks a democratic tradition. Most of its people come from societies with little or no experience in the ways of constitutional government. 'Democracy is not in the blood.'[60] As a result, justices must consider with the utmost seriousness the connections between judging and teaching.

An Activist's Judicial Instruction

'The judge does not merely adjudicate. He also has an educational role.'[61] Justice Barak, a former law professor and attorney general, has been the most outspoken Israeli jurist expressing an activist (a term *he* would not use in reference to his work) judicial philosophy. In his understanding of the judicial task, the pedagogical dimension is self-consciously integrated into his writings, both on and off of the court. This involves the activities of teaching *and* learning. For example, when asked in an interview why he frequently cites American cases and scholarship in his judicial opinions, he responded by explaining that democratic evolution in Israel should be informed by examples of what works in other nations possessing similar political values.[62] Of course it is necessary, he added, to adapt those solutions to the Israeli context; the important thing is to discover the legitimate range of possibilities reflected in the constitutional environments of comparable polities. In the remainder of this chapter I will briefly address myself to two areas of instructional concern, democratic theory and judicial power, that speak directly to the question of constitutional transplantation.

Democratic theory

'In the United States the history of political theory since the founding of the Republic has resided in the Supreme Court.'[63] One measure of judicial activism is the extent to which the political theory reflected in the Court's decisions at any given time goes beyond simply expressing the prevailing political wisdom of the times. To what extent, in other words, does the Court (or individual justices) play a creative role in the evolution of its society's political theory?

In considering the educative function of the Court, Justice Barak has suggested that it is necessary to advance the legitimacy of fundamental principles that enjoy at best a tenuous hold on popular belief. 'It is important to establish the principles, and then if necessary to retreat from them.'[64] By this he means that a bold assertion of principle is justifiable in pedagogical terms (that is, providing general and understandable guidelines) even if later it makes sense to modify it. In another case involving Rabbi Kahane, Justice Barak wrote: 'The question before us is not one of tactics but rather of principle. We are not concerned with theory of probability but with political theory. Judicial decisionmaking in constitutional matters cannot be confined to the narrow parameters of the concrete instance, but must consider the whole picture and the entire range of possibilities.'[65] The case was a particularly sensitive one concerning an internal Knesset ruling by the Speaker denying a one-member party faction the right to submit a proposal of non-confidence in the Government. The political theory at issue here related to 'the essential values of our constitutional regime,'[66] which needed to be given extended affirmation even though this challenged the prerogative of the Knesset.

Justice Barak frequently goes beyond 'the narrow parameters of the concrete instance' to deliver extended commentaries on the theoretical issue involved in a case before the Court. In yet another Kahane case, this time involving the Broadcasting Authority's decision to exclude the rabbi from the airwaves, Justice Barak provided a lengthy lesson in free speech theory. '[F]reedom of speech should be founded on a "broad ideological basis".'[67] Following in the tradition of Justice Agranat's landmark *Kol Ha'am*[68] opinion, Justice Barak drew extensively upon American ideological sources. In the process he revealed why one must be cautious in educating Israelis with lessons derived from the American experience.

A critical statement in the opinion reads as follows. 'Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means.'[69] Many in Israel would doubtless question this assertion, believing that the final end of the state was the creation of a Jewish homeland (which might or might not value liberty as both means and end). The statement, however, is part of a lengthier passage quoted by Justice Barak from Justice Brandeis' famous opinion in *Whitney v. California*.[70] It is an eloquent articulation of the individualist aspirations implicit in the American Declaration of Independence. But as we have seen, the Israeli Declaration is a more complex document that announces both communal

and individualist aspirations. In emphasizing the liberal democratic strain in the Israeli Declaration, Justice Barak is not engaged in distortion of the document, but he is, as he readily acknowledges, making selective use of it.[71] It is for this reason that he attempts to find independent grounds to support the democratic argument, because the presence of the Declaration's other sections tends to weaken an argument that is exclusively tied to the Western oriented paragraph.[72]

Thus being a teacher to the citizenry means education in democracy and judicial activism. It is worth noting in this context that Justice Barak advocates judicial *restraint* in regard to divisive social issues pertaining to the Jewishness of the State. 'The judge must aspire to a solution that is compatible with the societal agreement or that at least does not contradict it. I think it is advisable to avoid choosing an option that sharply contradicts the public's fundamental conception. Thus, for example, judicial restraint is justified in Israel in the entire area of "civil marriage," for this matter is the subject of bitter public controversy.'[73] This, however, does not tell the entire story, for on many issues of individual rights in Israel a societal consensus is also clearly lacking.[74] In these matters the judge must engage in 'instructional activity.'[75] He must 'raise the level of the society in which he lives.'[76] The consensus that needs support and elaboration by the Court is one 'that reflects the basic principles and the articles of faith of the enlightened public of the society in which (the judge) lives.'[77] A more complete story, then, is one in which enlightened judges (as children of the Enlightenment) seek *to create* a broad societal consensus by educating the public in the ways of democracy.

Judicial power

There are different ways to instruct. Often a teacher provides lessons through example. A judge wishing to emphasize the importance of individual restraint in a democratic society might convey this message through the example of his or her own judicial restraint. What are commonly viewed as 'technicalities' – limitations such as standing and justiciability – have a pedagogic potential that, under the right set of circumstances, may be exploited to good effect by the judge who takes seriously the role of educator.

But this orientation is perhaps too subtle for some political cultures, especially, one might hypothesize, a system in which a consensus on the value of individual rights may be lacking. In these settings the judge might prefer a more direct approach, in which case procedural rules governing the consideration of substantive constitutional claims will be less strictly observed. And where, in addition, the judicial role in the creation of

constitutional rights is seen as both necessary and proper, there is even less incentive to observe the proprieties of self-restraint.

All of this is evident in the work of Justice Barak. 'There is a difference between a judge whose judicial philosophy is based solely on the conception that the judge's function is to resolve disputes between holders of existing rights, and a judge whose judicial philosophy is rooted in the consciousness that the judge's function is to create rights and maintain the rule of law.'[78] This argues for extreme judicial latitude in applying the rule of standing. Judges according to this view must not have their responsibility to enact and establish rights that reflect the fundamental values of the regime undermined by adherence to procedural formulations more appropriate to a system in which such rights are firmly entrenched.[79] In a succinct statement of this jurisprudential commitment, Justice Barak has argued that 'Adjudication is not only declarative but also constitutive.'[80] This constitutive act also serves the instructional purposes of the Court; that is, adjudication is not only declarative but also educative. Every occurrence of judicial creativity must be accompanied by an explanation that situates the newly established right within an evolving framework of fundamental values. To understand what this entails, imagine the American Supreme Court in an interpretive context that did not include the Bill of Rights or the Fourteenth Amendment but did include (in a way that currently does not exist) the Preamble to the Constitution. In effect one would be imagining a situation not unlike what was originally developed by the framers. As guardians of the Constitution, the justices would know that their task was an important one that had much to do with establishing Justice and securing the Blessings of Liberty. They would also know that their constituency, the American people, would possess only the vaguest idea of the specifics of those aspirations. As a result, their gradual enunciation of the rights and responsibilities associated with the concepts of justice and liberty would have to *demonstrate* these connections in such a way that citizens could see how their enjoyment of these guarantees fulfilled the promise of the Constitution.

The precondition for effective instruction is a school that commands the respect of both its students and other institutional actors. It is not surprising that John Marshall's oft-quoted observation ('It is emphatically the province and duty of the judicial department to say what the law is.') should recommend itself to Justice Barak.[81] As we have seen, saying 'what the law is' encompasses an educative function closely tied to the work of developing a constitution. This work is commonly perceived to be within the jurisdiction of the Knesset, the legislative source of basic law in Israel. But the decisions of the Court may influence the substance of the basic

laws (for example, *Neiman*), and the judicial review of administrative acts creates what can with ample justification be described as constitutional guarantees.

In the *'Kach' Party Faction* case, the justices, speaking through Justice Barak, sought to legitimate the institutional equality of the Supreme Court in regard to constitutional interpretation. They analogized the case to *Powell v. McCormack*, the American decision that involved a similar assertion by the legislature of exclusive authority over its internal affairs. In *Powell*, the House of Representatives had claimed that there was a textually demonstrable constitutional commitment in Art. I, sec. 5 to the House to determine the qualifications of its own members, and that this precluded judicial intervention in its exclusion of Congressman Powell. In a passage from Chief Justice Warren's opinion quoted by Justice Barak, the Court said: 'Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts avoiding their constitutional responsibility . . . it is the responsibility of this Court to act as the ultimate interpreter of the Constitution.'[82] Justice Barak then comments: 'These words are not special to a legal system in which there is a formal constitution, and which recognizes judicial review of the lawfulness of legislation. These words are fundamental truths in every legal system in which there is an independent judicial branch.'[83]

In this instance an elementary lesson in 'political theory' reveals that the Knesset erroneously interpreted its own procedures, and acting as 'ultimate interpreter,' the Court invalidated the legislature's decision. The specific outcome, however, is less important than the jurisprudential implications of the opinion. While there may not be a formal constitution in Israel, there surely is an evolving one that the Court has participated in structuring. The application of Chief Justice Warren's 'fundamental truth' to the constitutional question in Israel suggests that some members of the Court view the judiciary as at least on a par with the legislature in the critical function of providing authoritative meaning to the principles underlying the constitutional polity.

CONCLUSION

Ronald Dworkin has compared the task of judging in hard cases to the writing of a chain novel. The latter activity involves the creation of a novel *seriatim*, where each novelist in the chain contributes a chapter with the

intent of producing a coherent piece of work that could be construed as the achievement of a single author. As in the model of law as integrity, each contributor seeks to make the novel the best it can be by adopting an interpretive stance that places a premium on textual coherence. Whatever creative departures are undertaken by one of the authors must demonstrate continuity with the preceding chapters, as well as 'fit' with the concept of the work as a whole. 'The distinction between author and interpreter is more a matter of different aspects of the same process.'[84]

Justice Barak has found this comparison quite appealing. 'The judicial creation is a book written by a number of authors, with each writer contributing one chapter to the joint creation.'[85] For him too, judicial creativity (which he, unlike Dworkin, sees as involving considerable discretion) needs to be constrained by the obligation to preserve the coherence of the legal system as a whole. 'Like the writing of a book in serial installments,' this creative activity 'has no beginning and no end and is all continuity.'[86]

The literary analogy serves a role similar to the concept / conception of Dworkin's earlier work.[87] A concept is a specific moral-constitutional principle (such as equality) – specific, that is, in the minds of its authors – the application of which may yield different results, or conceptions, depending on the circumstances and context in which it occurs. The conceptions that are derived from concepts represent the particular application of modernized principles. Elsewhere I have criticized Dworkin's use of this distinction because of the way in which it permits the injection of one's own moral philosophy into the Constitution without abandoning the claim of textual fidelity.[88] The result is often a transvaluation of the document, in which the interpreter manages to supplant constitutional meanings under the guise of faithful adherence to the choices made by his or her predecessors. Similarly, in the chain novel metaphor, the interpreter may easily define the narrative's plot, for example, at such a high level of abstraction that the authors of succeeding chapters are largely unconstrained in their creative efforts to produce the best possible novel.

As we have seen, the Israeli constitution is perhaps unique in the sense that, by design, it is *in fact* evolving chapter by chapter. Under these circumstances it is more reasonable to claim on behalf of Israeli judges, as opposed to their American counterparts, a position of co-authorship of the constitutional text. They are directly engaged in a serial creation. Justice Barak's use of Ronald Dworkin's analogy provides a more satisfactory jurisprudential result in Israel than Dworkin himself achieves in the American constitutional setting. But as we have also seen, there are risks. The Israeli interpreter confronts a narrative with a very complex

story line involving intriguing subplots. To develop one subplot at the expense of the other may produce a failed novel, and may even provoke a hostile reaction from the reading public. So while the opportunities for visionary creative achievement are ample, so are the possibilities for dangerous misadventure.

NOTES

1. Article 46 of the Palestine Order-in-Council of 1922 had assumed that local statute law was incomplete and thus in need of fortification from external law, namely English common law and equity. This provision was retained in the 1948 law. See in this regard G. Tedeschi and Y. S. Zemach, 'Codification and Case Law in Israel,' in Joseph Dainow (ed.), *The Role of Judicial Decisions and Doctrine in Civil and Mixed Jurisdictions* (Baton Rouge: Louisiana State University Press, 1974).
2. Jordan B. Cherrick, '"Constitutional" Adjudication in Israel? The High Court Speaks Out for Prisoner's Rights,' *International and Comparative Law Quarterly* 30 (1981): 839.
3. *Stern* v. *Shamir*, 12 P. D. 421, 427 (1958), as quoted in Daniel Friedmann 'Independent Development of Israeli Law', *Israel Law Review* (1975): 519.
4. A. M. Apelbom, 'Common Law A L'Americaine,' *Israel Law Review* 1 (1966): 565. See also U. Yadin, 'Judicial Lawmaking in Israel,' in Joseph Dainow (ed.), *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions*, p. 298. Yadin points out that the leading Israeli case in which judicial independence was proclaimed, *Cohavi* v. *Beker*, 11 P. D. 225, (1959), referred extensively to the corresponding development, in its time, in the United States.
5. Ibid., p. 565. Apelbom was unable to find one instance where the Palestine Court, the Mandatory predecessor of the Supreme Court, had cited an American authority. In the first years of its existence the new Court cited American sources in approximately 2 per cent of its cases, a figure that has steadily increased in subsequent years. Of course English case law, on the whole, is still cited more frequently than American case law.
6. Ibid., p. 576.
7. See for example, Bradley C. Canon, 'A Framework for the Analysis of Judicial Activism,' in Stephen C. Halpern and Charles M. Lamb (eds), *Supreme Court Activism and Restraint* (Lexington: D. C. Heath and Company, 1982). Canon enumerates six dimensions for the assessment of judicial activism that, when applied to Dworkin's work, reveal an unmistakable pattern of judicial activism.
8. Arthur S. Miller, 'In Defense of Judicial Activism,' in Halpern and Lamb (eds), *Supreme Court Activism and Restraint*, p. 169. This notion that the Constitution is a document to be shaped by judges in light of social needs,

suggests a legislative and discretionary assignment distasteful to theorists such as Dworkin, whose denial of judicial discretion is predicated on the assumption that judicial statesmanship is a matter of discerning the contemporary implications of a principled and determinate Constitution. The emphatic rejection of judicial activism is more pronounced in Dworkin's recent writing than in his earlier work. Thus, despite the fact that on matters of *stare decisis*, original intent, and deference to popularly created law, Dworkin fits unambiguously within the activist tradition, he nevertheless views 'activism as a virulent form of legal pragmatism.' Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), p. 378.

9. Ibid., p. 77.
10. Ibid.
11. Ibid., p. 377.
12. Aharon Barak, *Judicial Discretion* (New Haven: Yale University Press, 1989), p. 30.
13. Michael J. Perry, *Morality, Politics, and Law: A Bicentennial Essay* (Oxford: Oxford University Press, 1988); Sotirios A. Barber, *On What the Constitution Means* (Baltimore: Johns Hopkins University Press, 1984); Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988); David A. J. Richards, *Toleration and the Constitution* (Oxford: Oxford University Press, 1986).
14. Michael J. Perry, *Morality, Politics, and Law*, p. 133.
15. Ibid., p. 154.
16. Michael Sandel, 'The Political Theory of the Procedural Republic,' in Gary C. Bryner and Noel B. Reynolds (eds), *Constitutionalism and Rights* (Provo, Utah: Brigham Young University Press), p. 141.
17. I have discussed this comparison in detail elsewhere. See Gary J. Jacobsohn, 'Alternative Pluralisms: Israeli and American Constitutionalism In Comparative Perspective,' *The Review of Politics* 51 (1989).
18. Charles S. Liebman, 'Conception of "State of Israel" in Israeli Society,' *Jerusalem Quarterly* 47 (1988). See also, Daniel J. Elazar, *Israel: Building a New Society* (Bloomington: Indiana University Press, 1986); Moshe Lissack, 'Pluralism in Israeli Society,' in Michael Curtis and Mordechai Chertoff (eds), *Israel: Social Structure and Change* (New Brunswick, N.J.: Transaction Books, 1973); and David K. Shipler, *Arab and Jew: Wounded Spirits In A Promised Land* (New York: Penguin Books, 1986).
19. Sammy Smooha, *Israel: Pluralism and Conflict* (Berkeley: University of California Press, 1978). In Israel, ethno-religious groups compete with the State for the right to exercise coercive authority over individuals whom the group views as its members and whom the State recognizes as citizens of one polity. No such competition is permitted within the pluralism of the United States, where the ethnic or religious group is required to function in the much more limited fashion of the voluntary association.

20. Ronald Dworkin, *Law's Empire*, p. 102.
21. Ibid., p. 196.
22. The best discussion of this subject is found in S. Zalmon Abramov, *Perpetual Dilemma: Jewish Religion in the Jewish State* (Rutherford, N.J.: Fairleigh Dickinson University Press, 1976).
23. 39 P. D. 225 (1984).
24. 19 P. D. 265 (1965).
25. *Yardor v. Chairman of the Control Election Committee for the Sixth Knesset*, in A. Barak, J. Goldstein, and B. Marshall, *Limits of Law*, (unpublished casebook), Vol. 1, p. 6. Unless otherwise indicated, all references to Israeli Supreme Court cases are from this text.
26. *United States v. Fisher*, 6 U.S. (2 Cranch) 358 at 390, 1805.
27. *Yardor v. Chairman of the Control Election Committee*, Vol. 1, p. 17.
28. Ibid., Vol. 1, p. 25
29. Ibid., Vol. 1, p. 25.
30. Quoted in Aharon Barak, *Judicial Discretion*, p. 194.
31. *Neiman and Avneri v. Chairman of the Central Elections Committee of the Eleventh Knesset*, Vol. 1, p. 34.
32. *Yardor v. Chairman of the Control Election Committee for the Sixth Knesset*, Vol. 1, p. 21.
33. *Neiman and Avneri v. Chairman of the Central Elections Committee of the Eleventh Knesset*. Vol. 1, p. 80.
34. Ibid., Vol. 1, p. 62.
35. Ibid., Vol. 1, p. 63.
36. Ibid., Vol. 1, p. 65.
37. Ibid., Vol. 1, p. 39.
38. Ibid., Vol. 1, p. 45.
39. Ibid., Vol. 1, p. 42.
40. Ibid., Vol. 1, p. 46.
41. Ibid., Vol. 1, p. 46.
42. President Shamgar does use language that could be interpreted to carry an implicit threat of judicial review. 'It is clear that this Court will not intrude into the area of the legislature, but it is proper to stress again the caution that is required in this matter, lest any potential legislation makes a change in directions in a manner that we do not intend.' Ibid., Vol. 1, p. 55.
43. Ibid., Vol. 1, p. 78.
44. See, for example, his opinions in these cases: *Kahane v. Broadcasting Authority*, 41 P. D. 255 (1986); *Laor v. Film and Play Supervisory Board*, 41 P. D. 421 (1986); *Sa'ar v. Minister of Interior*, 34 P. D. 169 (1980); and *Barzilai v. Government of Israel*, 40 P. D. 505 (1986).
45. *Neiman and Avneri v. Chairman of the Central Elections Committee of the Eleventh Knesset*, Vol. 1, p. 68.
46. Ibid., Vol. 1, p. 67
47. Louis Henkin, 'Infallibility Under Law: Constitutional Balancing,' *Columbia Law Review* 78 (1978): 1047–8,

48. Patrick M. McFadden, 'The Balancing Test,' *Boston College Law Review* 29 (1988): 641.
49. 'Ad hoc balancing gained its dismal first amendment reputation in large part because its chief proponent, Justice Frankfurter, held as well a theory of great deference to legislative determination. The two need not necessarily be conjoined.' Frederick Schauer, 'Categories and the First Amendment: A Play in Three Acts,' *Vanderbilt Law Review* 34 (1981): 303. In Israel, of course, deference is mandated by the absence of a formal written constitution; but judges still retain considerable power through their statutory interpretation. Apropos Justice Frankfurter, in *Neiman* Justice Barak quotes from one of the Justice's most frequently criticized balancing efforts – *Dennis v United States*, Vol. 1, p. 70.
50. Louis Henkin, 'Infallibility Under Law,' p. 1048.
51. *Neiman and Avneri v. Chairman of the Central Elections Committee of the Eleventh Knesset*, Vol. 1, p. 65.
52. Barak, *et. al.*, *The Limits of Law*, Vol. 1, p. 115.
53. *Neiman and Avneri v. Chairman of the Central Elections Committee of the Eleventh Knesset*, Vol. 1, p. 103.
54. Eugene Rostow, *The Sovereign Prerogative: The Supreme Court and the Quest For Law* (New Haven: Yale University Press, 1962), pp. 167–8; and Richard Funston, *A Vital National Seminar: The Supreme Court in American Political Life* (Palo Alto: Mayfield Publishing Company, 1978).
55. Ralph Lerner, 'The Supreme Court as Republican Schoolmaster,' in Philip B. Kurland (ed.), *Supreme Court Review* (Chicago: University of Chicago Press, 1967).
56. Ibid., p. 129.
57. See for example, Suzanna Sherry, 'The Founders' "Unwritten Constitution,"' *University of Chicago Law Review* 54 (1987).
58. *Zeev v. Gubernik*, 1 P. D. 85 (19488). The decision is to be found in E. David Gotein (ed.), *Selected Judgments of the Supreme Court of Israel, Vol. 1* (Jerusalem: The Ministry of Justice, 1962), p. 72.
59. *Jabotinsky v. Weizman*, 5 P. D. 801 (1951), *Selected Judgments*, p. 86.
60. Interview with the author, Jerusalem, Dec. 4 1988.
61. Aharon Barak, *Judicial Discretion*, p. 221.
62. Interview with the author, Jerusalem, Dec. 4 1988.
63. Theodore J. Lowi, *The End of Liberalism Ideology, Policy, and the Crisis of Public Authority* (New York: W. W. Norton & Co., 1969), p. 314.
64. Interview with the author, Jerusalem, Dec. 4 1988.
65. *'Kach' Party Faction v. Hillel, Chairman of the Knesset*, (1985), p. 111–48.
66. Ibid., p. 111–47
67. *Kahane v. Broadcasting Authority*, p. 111–89.
68. *'Kol Ha'am' Co. Ltd. v. Minister of Interior*, 7 P. D. 871 (1953). For an interesting discussion of this case see Pnina Lahav, 'American Influence on Israel's Jurisprudence of Free Speech,' *Hastings Constitutional Law*

Quarterly 9 (1981). Lahav argues that *Kol Ha'am* was decided upon a jurisprudential foundation creatively transplanted to the Israeli constitutional scene by the American born and educated Justice Agranat. She finds that his opinion exemplifies the 'Grand Style' in interpretation, one, that is, 'which allows for policy oriented, sometimes radical, results, while retaining conservative judicial tactics.' p. 34.

69. *Kahane v. Broadcasting Authority*, p. 111–89.
70. 274 U.S. 357 (1972), at 375.
71. Interview with the author, Jerusalem, Dec. 4 1988.
72. For example, in a recent case, Justice Barak, after citing the Declaration of Independence as an expression of the nation's fundamental values, says: 'The fundamental values have an existence that is external to this or that statute or document . . .They stem from the very essence of the democratic regime, and from the very essence of the individual as a free person.' *Labor Party Faction in Tel Aviv – Yaffo Municipality v. Tel Aviv – Yaffo Municipal Council* (1988) p. Supp. 14.
73. Aharon Barak, *Judicial Discretion*, p. 214.
74. On this point, see Michal Shamir and John L. Sullivan, 'The Political Context of Tolerance: The United States and Israel,' *American Political Science Review* 77 (1983).
75. Aharon Barak, *Judicial Discretion*, p. 130.
76. Ibid., p. 130.
77. Ibid., p. 215.
78. *Ressler v. Minister of Defense* (1986), 2nd Supp., p. 8.
79. An even greater latitude is called for with respect to the question of institutional non-justiciability, where, according to Justice Barak, 'There is justiciability.' Ibid., p. 59.
80. Ibid., p. 20.
81. *'Kach' Party Faction v. Hillel*, p. 111–26.
82. Ibid., p. 111–28.
83. Ibid.
84. Ronald Dworkin, *Law's Empire*, p. 229.
85. Aharon Barak, *Judicial Discretion*, p. 164.
86. Ibid., p. 165.
87. Specifically in *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977). Justice Barak has used the same distinction in his work. 'What we seek is the fundamental perception rather than the individual application – the abstraction, the principle, the policy and purpose. We are interested in the Legislature's *concept* as to the purpose of the Law, and not in its *conception* as to the resolution of the specific dispute before the court.' From Justice Barak's opinion in *Of Ha-Emek v Ramat Yishai Local Council*, 40 (1) P.D. 113, at 144.
88. Gary J. Jacobsohn, 'Modern Jurisprudence and the Transvaluation of Liberal Constitutionalism,' *Journal of Politics* 47 (1985): 414.

7 Judicial Activism in Italy

Mary L. Volcansek

'*Activismo*' is a term that has been attached to the judiciary in Italy only recently, and, as usually the case elsewhere, carries a pejorative connotation and lacks a coherent definition. Judicial activism, in the Italian case, generally is linked to policy-making by the judiciary, through judicial review or judicial interpretation. Critics of the judiciary point to decisions they view as undesirable as evidence of activism, while supporters of judicial policies applaud the independence displayed by judges. The task of clarifying the constitutionally acceptable limits of judicial authority is colored by the political persuasion of the observer and muddled by the different stances assumed by the various types of courts in Italy.

The post-war Italian Constitution maintained the divisions in the judiciary between ordinary and administrative bodies that had been perpetuated since the Napoleonic occupation early in the nineteenth century. Administrative courts, unlike their counterparts in France, are able to annul an administrative action as it relates to the specific case, but not to award damages, and have, as a result, operated largely out of public view and are rarely involved in political controversy. The nature of the cases they hear is such that the negative label of activism has not attached to administrative judges.

The ordinary courts that handle regular civil and criminal litigation, on the other hand, are often in the center of controversy. Under the fascist regime, judges on the ordinary courts were criticized for their timidity in confronting unjust actions and for their lack of independence. The postwar constitution placed a premium on judicial independence by creating the Superior Council of the Magistrature to oversee recruitment, transfers, promotions, and discipline of judges and public ministers. The new body was not implemented for a decade, though, because of the reluctance of governments and parliaments to grant total autonomy to the courts. Seniority, in the 1970s, replaced merit for advancement, thereby guaranteeing almost total insularity for Italian judges. The independence of the ordinary judiciary has encouraged judges often to conjure novel interpretations of the laws to fit their own views of the proper political order or to remedy some perceived problem.

The Italian postwar Constitution, unlike its predecessor *Statuto Albertino*, is a rigid document that requires an umpire to control for constitutionality of laws. A desire for a strict separation of powers and a fear of the views of hold-over judges from the fascist era on the ordinary courts, prompted creation of a new institution, the Constitutional Court, with a monopoly on the power of judicial review. This court is also empowered to rule on disputes over power between Parliament and the government and between the central government and the regions, as well as to try the President of the Republic or government ministers and to rule on the admissibility of referenda. The Constitutional Court has been criticized most often for exceeding its authority in the exercise of judicial review, not for refereeing among the powers of government.

Perceptions of judicial activism in Italy must be measured in the context of postwar Italian politics and of the civil law tradition. The postwar Italian Constitution is an outgrowth of Italian experiences with failed liberalism in the nineteenth century that led to the fascist regime in the first half of this century.[1] The Constitution is a product of a plural political society and fosters the continuance of political diversity. More than a dozen political parties regularly seek and win seats in Parliament, parties ranging from the Democratic Proletarians on the left to the Italian Social Movement on the extreme right. Neo-fascist, conservative, liberal, Catholic, lay, socialist, and Marxist positions are reflected in all aspects of political life, including law schools and courts. The governmental system of Italy is, like other postwar European systems, 'a compromise among the classes.'[2]

LEGAL THEORY AND LEGAL EDUCATION

Italy was the birthplace of Roman law and the civil law tradition,[3] and, although affected by Napoleonic innovations and German legal scholarship, has remained firmly grounded in civil law concepts. Only in the last year has an aspect of common law practice in criminal procedure been grafted onto the Italian legal system. Post-war European courts have been noted for their aggressiveness in asserting their power of judicial review, because of their view of separation of powers and because of the character of civil law, with its approach to judicial decision-making that is not based on pure interpretation.[4] Italian legal training belongs to the positivist school[5] and teaches 'law is a science and, because it is such, has its own method and a research technique that is scientific.'[6] Legal science is pursued, not by judges, but by legal scholars, who construct abstract and scientific models of law.[7] The legal codes are, at least theoretically, complete and

self-explanatory, such that all the judge must do is consult the codes and the writings of the legal scholars to find the correct answer in any case; the aim is to perfect knowledge, not to solve practical disputes. Judicial interpretation, therefore, follows a logic and relies on authorities wholly different from those relied upon by judges in the common law tradition.

Constitutional interpretation often is based on a distinction between the material constitution, or political structures, and the formal constitution, which takes into account the political and social forces regulated by the material constitution.[8] Alternatively, interpretation may be based on subjective versus objective approaches, historical or evolutionary, literal, conceptual, or teleological concerns.[9] Policy distinctions overtly enter the picture once a judge recognizes the existence of a value or values higher than the Constitution and laws that may have their basis in Christianity, in ethical humanism, or nihilism. Since seniority was introduced as the sole criterion for advancement in the ordinary judiciary, from which at least some of the judges on the Constitutional Court are chosen, judges have tended to follow one of three lines of interpretation: (1) the political, involving a political motivation and deviating from logic and legal science; (2) the logical automatic, engendered by the former merit system, based on logic and legal science; and (3) the humanistic, that recognizes higher values. Judges in almost any legal culture probably make decisions in accord with one or more of these approaches, but decisions of Italian judges are sometimes transparent in their acceptance of higher values and a scientific approach to jurisprudence. The debate in the United States over constitutional interpretation in the light of the intention of the framers versus the position that the constitution should be read in a contemporary light is but one example of a similar debate in a common law country.

JUDICIAL REVIEW AND THE CONSTITUTIONAL COURT

When the postwar Italian Constitution was written in 1947, the leftist parties (Socialists and Communists) opposed creation of a Constitutional Court exercising judicial review as violating the principle of popular sovereignty in Parliament, creating a 'democracy of the judges.' The Christian Democrats and the lay parties, on the other hand, supported the proposed institution as a bulwark against the arbitrary exercise of power.[10] As is often the case with fate and Italian politics, when the Christian Democrats and lay parties assumed power and the leftist parties entered the opposition, their respective positions reversed.

The Constitution in Article 134 describes the powers of the Constitutional Court and states that the Court may decide 'controversies concerning the constitutional legitimacy of laws and of acts having the force of laws emanating from the State and the regions,' and has the power to arbitrate disputes between the various organs of the central government and between the national government and the regions. The Court, though clearly prescribed, was not implemented upon promulgation of the Constitution in 1948, for Article 137 had left to Parliament the task of making other provisions 'necessary for the constitution and functioning of the Court.' No steps were taken in that direction until 1953, and the Court was not staffed and functioning until 1956, because of political bickering over how to name the judges. The 1953 law provided that the judges selected by Parliament must win a three-fifths majority to be named, a process that required twenty-five months of compromises between the parties of the majority and those of the opposition. A second obstacle was the issue of who controlled the selection of the five judges named by the President of the Republic. The Council of Ministers contended that the President's role was one of ratifying its recommendations, whereas President Einaudi claimed the responsibility was his alone. Einaudi ultimately won.

The Court held its first session in April 1956, and its first decision was one that would be viewed as 'activist' by critics and as adhering to the spirit of the Constitution by supporters. The case involved a conflict between Article 21 of the Constitution (freedom of expression and press) and a public security law of fascist vintage. The State argued that the Court could not invalidate any law that preceded the Court's implementation in 1956, a position that would have maintained the whole of the fascist civil and criminal codes and any other laws passed before the Court's creation. The Court invalidated the security law in question and emphatically asserted its authority to declare illegitimate any law that contradicted the Constitution: 'The relative questions of the compatibility of a legislative act with a constitutional norm are questions of constitutional legitimacy, of the exclusive competence of this court, regardless of the fact that the law is anterior to the constitution . . . once the vigor of the constitution is established.'[11]

The Court's aggressive action, though hailed by some as 'the celebration of the Resistance' and as a 'victory of anti-fascist ideals,' was also met with criticism and too often with governmental inertia. The executive branch repeatedly failed to enforce Constitutional Court decisions, prompting the first President of the Court, Enrico DeNicola, to resign in protest, and his successor, Gaetona Azzariti, to voice the same complaint. Not only the executive, but also the ordinary courts were reluctant to acknowledge the authority of the Constitutional Court. Their co-operation is crucial

for the Court's proper operation, since cases involving constitutionality only can reach the Court through indirect access (referral by an ordinary or administrative court) or direct access in the limiting case of a controversy between the governmental branches of the State or between the State and a region. According to the implementing legislation of 1953, when the constitutional legitimacy of a government action is alleged in a case, the ordinary court judge is to ascertain the relevancy of the claim to the case and, if pertinent, refer the case to the Constitutional Court. Ordinary court judges are not to determine independently the constitutional issue.[12] The ordinary court judges, therefore, are expected to be the filter through which cases must flow, and if they refuse to find constitutional claims relevant, issues cannot reach the Constitutional Court for decision.

In the first year of the Court's existence, slightly less than four hundred cases reached it through indirect access, and the Court accepted and acted on 231 of those. The importance of referrals from the ordinary courts is most obvious when those numbers are compared to cases reaching the Court by direct access, only fifteen of which were received in 1955 and none decided.[13] Eventually the hostility and distrust of judges on ordinary and administrative courts waned and the flow of cases through indirect access regularly exceeded six to seven hundred by 1975. Since many cases reaching the Court were ones that could be decided strictly on succession (the most recent law stands, if contradicted by an earlier law), in 1985, the Constitutional Court ruled that ordinary and administrative courts could abrogate laws based on succession, but refused to allow other courts to rule on constitutionality.[14]

The Constitutional Court has been dubbed critically as the 'third Chamber' or the 'omnipotent legislature,'[15] labels that have stuck and are repeated by detractors of the Court. The question of the Court's serving as a substitute for Parliament or as a 'third deliberative chamber' was raised in the debates on the Constitutional Court in the Constituent Assembly in 1947. The argument that prevailed then was that the Court would not make laws but would guarantee that laws 'respected and observed the constitutional law.'[16] These negative terms have been used most commonly when the Court has determined that Parliament, in passing legislation, has exceeded its powers. The 1953 enabling legislation that established the Court had removed explicitly from the Court's purview review of parliamentary actions of a political nature, those acts that fall under the discretionary power of Parliament.[17] The Court has devised its own criteria for determining if Parliament has exceeded its powers: if the law is absolutely illogical, incoherent, or arbitrary; if it is irrational in the sense of its intended effects; or if there is no consistency

between the law as written and the end results.[18] Judicial determinations of 'arbitrariness,' 'reasonableness,' or 'common sense' in determining the constitutional legitimacy of a law are categorized as the natural law approach to constitutional interpretation. What is arbitrary, unreasonable, or nonsensical often is known only by reference to a higher law, and in Italy that may mean Catholic canon law and Christian teachings, secular humanism, nihilism, or Marxism.

The Constitutional Court, though, has developed methods for balancing allegiance to higher laws and surviving in the Italian political milieu. The Court regularly reinterprets laws that are offensive to the Constitution so as to bring the legislation into line. This is accomplished through decisions that are adaptive, reductive, additive, equivalent, or manipulative, in which the Court rejects the interpretation offered in the reference and substitutes, adds, or manipulates an interpretation of the law that is consistent with the Constitution. When this strategy fails, the Court will try to invalidate, if possible, only part of the legislative act.[19]

The Court has, despite these interpretive strategies that constitute a rough form of 'judicial restraint,' declared a number of laws or acts having the force of law unconstitutional and invalid. The first period of the Court's history (roughly 1956 to 1968) is regarded generally by civil libertarians as its most valuable era, because during that period the Court acted when Parliament and the government would not to dismantle a series of fascist provisions in the Penal Code and the Civil Code, to recognize constitutional guarantees of civil liberties in the political, religious, and social spheres and to make realities of the constitutional pledges of equality. This was not always accomplished through confrontation, but often through moderation and prudence, because of the unsteady political equilibrium of the country.

The Constitutional Court, nonetheless, did invalidate a substantial number of laws. A catalogue of thirty years of decisions is not possible, nor desirable, but a synopsis of some illustrative cases may demonstrate the directions that the Court has followed. The most controversial decisions of the Court have tended to lie in its constitutional interpretation of Church-State relations, particularly in the area of the family, civil liberties, economic relationships, and the relationship of the regions to the national government. The Court's first foray into the field of family law proved to be ill-fated and would be revisited within a few years. A fascist-era law making a criminal offense of adultery on the part of the wife but not the husband was alleged in 1961 to conflict with Article 29. The Court focused on that section of Article 29 that stresses family unity and concluded that such unity was threatened by the infidelity of the wife.[20] When the issue was raised

seven years later, the Court altered its original interpretation, choosing to emphasize the portion of Article 29 that states 'marriage is based on the moral and legal equality of a husband and wife,' and invalidating the offending provision of the penal code.[21] Divorce and annulments were largely governed by the Lateran Pacts, negotiated between Mussolini and the Holy See in 1929 and recognized in Article 7 of the Constitution. When the Fortuna-Baslini law, legalizing divorce for the first time in Italy, was passed in 1970, the Court upheld the law against constitutional challenges.[22] The Court, however, wavered several times on the issue of abortion, which had carried a criminal sanction. Abortion was not legalized in Italy until 1976, by a legislative act and upheld in a referendum in 1981.

The Court was also active in the area of civil liberties, striking down several security laws as violative of the guarantees of Article 13 of the Constitution, which begins by stating 'personal liberty is inviolable,' recognizing only minimal exceptions.[23] Laws allowing accused persons to be incarcerated without procedures to protect the defendant from malicious or unwarranted imprisonment were also invalidated as contrary to Article 13.[24] Defendants were assured the right to be represented during interrogations and other phases of investigation.[25] The direction of the Court in protection of the rights of the criminally accused was reversed largely by events – the advent of indiscriminate terrorism in the 1970s. Two public security laws and a number of decree laws overturned decisions of the Court and were upheld by public referenda. The Reale Law on Public Order was upheld by 76.5 per cent of the voters in a 1978 referendum, as was the Cossiga Law on Public Order in 1981 by a margin of 85.1 per cent.

Economic relationships were affected significantly by a series of decisions by the Court involving the right to strike, as Constitution Article 39 guarantees the right to organize labor unions, and Article 40 provides 'the right to strike is exercised within the laws which regulate it.' Strikes by public service workers were guaranteed by the Court in 1969,[26] and the penal code regulation that outlawed all political strikes was invalidated by the Court five years later.[27] The right of workers to strike to force the government, at any level, to take action was also upheld by the Constitutional Court under the authority of Article 40.[28]

Article 41 of the Constitution guarantees freedom of private enterprise, but with the limitation that it cannot be 'in conflict with social utility or with safety, freedom, and human dignity.' Regulations on private economic enterprise were, under that constitutional section, upheld in a series of decisions in the decade of the 1960s and also used to validate nationalization of electrical utilities under Article 43.[29] Questions of urban reform, indemnities for confiscated property, and the national or local

power to expropriate private property were decided under Article 44, which recognizes 'obligations on and limitations to private land ownership,' for the purpose of securing 'a rational utilization of the soil and to establish equitable and rational social relations.' Much of that debate evolved into a near confrontation between the Court and Parliament over the agricultural pacts that permitted sharecropping. The Court invalidated the agricultural pacts, originally passed in 1947 and continued through the 1960s.[30]

The Constitution provided for devolution of a number of powers to autonomous regions, but for reasons similar to the retarded implementation of the Constitutional Court, the regions were not functional until 1970. Conflicts between the national government and the regions have been frequent, and the Constitutional Court initially favored the national government in these disputes. Before the regions even were given life, the Court ruled that they were limited in their competence because sovereignty was vested in the national government.[31] That anti-region sentiment persisted in the Court's rulings until the 1980s, when a number of national decree laws were invalidated as violating the relationship between the two levels of government.[32] Subsequently, the Court has adopted a quite literal reading of Article 117 of the Constitution, enumerating the authority of the regions, and has decided in favor of the regional governments in the areas of health service, agriculture, and forestry.

JUDICIAL INTERPRETATION AND THE ORDINARY COURTS

The judicial activism that has drawn the greatest and the most consistent public ire is that of the ordinary court judges who, through the process of judicial interpretation, have affected dramatically politics and public policy in Italy. Judicial independence, largely undermined during the fascist era, was accorded an esteemed position in the post-war Constitution, clearly protected in Articles 101, 104, and 105. That independence has been so thoroughly guarded, particularly since the 1960s, that Henry Ehrmann concluded that the 'self-administration of the judiciary in Italy is now greater than in any other European country.'[33] Absolute autonomy for the courts was deemed necessary to insure judicial impartiality, and there is the rub. Objectivity was designed to be the corollary of independence, but ordinary judges are viewed often as deciding cases not according to law but in keeping with their own notions of solutions to social, political, or economic problems. The Constitutional Court was led to assert in a 1963 decision that judicial independence in the ordinary courts did not extend solely to impartiality but also meant that magistrates owed obedience to

the law, an obedience that demands political neutrality and allegiance to the proper interpretation of law without reference to one's ideology or view of the state of mankind.[34] The intrusion of an individual judge's political ideology, even if only an isolated case, implies that all judges are politically motivated and engenders negative public perceptions of judicial activism.[35]

Separating judicial decisions that are politically motivated from those that are strictly determined by the bounds of the law is no easier in Italy than it is in common law countries, but the myths about how legal decisions ought to be made may be more durable and more complicated in Italy than elsewhere. The law in Italy is based theoretically on self-contained codes, and any ambiguities in those codes may be clarified by resort to legal science or the doctrines of legal scholars. The judge, according to the myth, does little more than consult the legal science to reach the correct conclusion. If two judges, deciding virtually identical cases, reach different conclusions, the judges were mistaken, the code was faulty, or the doctrine was flawed.[36] Put differently, judges are technicians, mere bureaucrats, and not professionals. Judges are presumed, at least according to the folklore, to have no discretion and no latitude.

Parallel to this rigid view of judges as mechanics is the stark reality that hardly a norm in the civil code has escaped the need for interpretation by the courts and that resort to 'higher values' to interpret laws has considerable philosophical underpinning in Italian jurisprudence. The Constituent Assembly that wrote the post-war Constitution referred to judicial independence as meaning that 'magistrates depend solely on the law, interpreted and applied according to their consciences.'[37] Once conscience is introduced into the formula for interpretation, judicial discretion is recognized, and values other than the written code become operative. The role of higher law or natural justice enters the equation, at least to resolve 'exceptional situations.' Simultaneously judges are warned, by those who recognize natural justice, to avoid 'dangerous politicization' of the judicial role.[38] Without forgoing concerns of conscience or higher values, judges are to maintain impartiality with respect to the parties to the controversy and also to issues of free will, politics, and political or individual liberties. The folklore and the jurisprudence surrounding expectations of Italian judges present a double-bind, for the judge is a mere automaton from the perspective of legal mythology, but is the Solomonic ideal who can maintain total impartiality without ignoring the dictates of higher law, according to jurisprudential scholars. The seven thousand or so judges and public ministers with adjudicative responsibilities in Italy have, not surprisingly, on the whole failed to meet societal expectations.

Judicial activism has been alleged against judges in both the civil and criminal systems, but the causes and manifestations vary between the two legal systems. In civil trials, there is a critical distinction in who runs the trial and who makes the decision; the parties to the case hold complete control over determination of facts, while the judge, by resort to formal logic, has total authority over the decision. The power of ultimate decision rests in the highest appellate court, the *Corte di Cassazione*, from which uniform interpretations are expected. Because that court now has a caseload exceeding 7,000 cases each year, absolute consistency of decision (and, thereby, credibility) has been lost. The 1942 Civil Code remains controlling for civil litigation, but many special statutes and a complicated hierarchy of laws, as well as legislative powers of the regions, have all intervened to undermine the single code and, therefore, have created inconsistencies and contradictions within civil law that have increased the power of the judge who must choose among the various statutes and regulations.[39]

Judicial activism becomes apparent in the actions of civil jurists when the judges begin to reach beyond the code and to choose among various possible laws and interpretations. As more and more issues arise in civil litigation, ones that have not yet been addressed by the legislative branch, some civil jurists have turned to the Constitution to seek norms to govern environmental protection, rights of consumers, a right to health, and a right to privacy. The judge, in these cases, acts 'as a substitute for other powers.'[40] Decisions, though, remain cloaked in the same formal logic, appeal to doctrines, and reference to codes and statutes to mask the creative interpretations. The judge becomes caught between his service to justice and his obligation to interpret the law.

The criminal law system, though, has been the one where activism, in its most negative sense, is regularly alleged. A term, *pretore d'assalto*, or assault judge, has even been coined to refer to judges who tackle what they see as problems, which may be a person, an institution, or a condition. Whereas the press often treated these judges as heroes, their actions were the most likely to be blatantly political or overtly self-serving. The criminal court judges were disinclined to rewrite laws or to usurp the prerogatives of other branches of government. The major charge against criminal court judges was that they abused powers lawfully granted to them. Too often the authority of the criminal magistrates was believed to be politically motivated and used to protect the guilty or to persecute the innocent.

Independence and impartiality on the part of criminal court jurists were regularly questioned on several grounds: independence from external control, independence from internal control, and the problem of judicial objectivity. Independence from external influences is an issue because of

the partisan loyalties and partisan ties of judges, perceived as motivating or thwarting criminal investigations. The political parties coopted individual judges or groups of magistrates by offering rewards such as political offices, including seats in Parliament, public financing of 'cultural activities' sponsored by groups of magistrates, and career advancement.[41] Internal control was of greater importance in the period before 1973, when promotions and transfers were the prerogative of judges on higher courts, who could block advancement of junior magistrates for making undesirable decisions.[42] The system was reformed; promotions now are governed almost exclusively by seniority, and little internal supervision exists. These inroads into judicial autonomy applied equally to civil jurists, but were most apparent in how criminal cases were managed. Judicial impartiality, though, was compromised in the criminal process by the very nature of the inquisitorial system of trial, in which the judge at the lowest levels of the judicial ladder was both prosecutor and judge. The *pretore*, who decided criminal cases carrying penalties up to four years imprisonment, was both the investigating magistrate and the judge. Preliminary phases of investigation, moreover, were conducted in secret.

The rise of terrorism and expanded activity by organized crime syndicates in the 1970s prompted the government to increase the power of magistrates to combat these threats to social order. As indiscriminate violence increased, security laws were passed and upheld in public referenda. Magistrates were empowered to place accused in preventive detention for seemingly unlimited periods, while investigating crimes, and to try individuals for the ambiguous crime of 'mafia association.' Significant inducements to *pentiti*, or repenters, to turn state's evidence were authorized, not the least of which was release from indeterminate preventive detention. Convictions won under such circumstances were suspect, not uncommonly reversed on appeal, and, consequently, damaging to the credibility of magistrates.

Civil jurists were labeled as 'activist' through their use of judicial interpretation to create legal norms in the absence of legislative action; criminal judges won the tag of 'activist' by using their coercive powers to effect a redistribution of political power. In both cases, allegations of political influence were pervasive. Some saw the magistrates as being in the pocket of the perennial opposition party, the Communists, while others believed that the judges acted to protect the interests of the dominant Christian Democrats and their allies. Regardless of the source of the influence, politics, not allegiance to higher values or natural law, were seen as the incentive for judges to extend themselves beyond the bounds prescribed by separation of powers. Judges on the ordinary courts, having

thrust themselves into the political milieu, became the center of political controversy.

POLITICAL IMPLICATIONS

Judicial activism, as a label, usually attaches itself to courts holding the power of judicial review, but, in the Italian case, the term has been equally applied to courts lacking that authority. The Constitutional Court, though, has not escaped criticism for acting in an activist mode, for usurping the authority of the legislative branch and for creating public policy through constitutional interpretation. Though judicial review is viewed generally as having common law origins, the authority for its exercise by the Italian Constitutional Court owes, according to legal scholars, to the writings on constitutional justice by Hans Kelsen and Carl Schmitt.[43] The language of discussion and analysis of judicial review, though, is taken generally in untranslated form directly from the United States. The nature of civil law opinions is such that precedents are rarely cited as authority, so that Italian jurists do not cite U.S. Supreme Court opinions in their decisions, although Italian judges and lawyers tend to be well-versed in U.S. constitutional law, particularly decisions of the Marshall Court (1801–1835). 'Judicial restraint' and 'political questions' are debated and Italian constitutional practices analyzed from the perspective of phases of the U.S. Supreme Court.[44]

Early decisions of the Constitutional Court which the other powers of government viewed as activist, at best, and illegitimate, at worst, were met with stubborn silence. Decisions were not enforced by the executive, and cases were not referred by ordinary and administrative courts. Resistance grew more muted, though, as the Court established its legitimacy in the Italian power structure, a feat accomplished largely by finding methods that avoided direct confrontations. That did not mean that the Court did not draw political fire. The most dramatic anti-Court action was the passage, in 1967, of a constitutional law that reduced the terms of judges on the Court from twelve to nine years. The intent was clearly to reduce the independence of the jurists by limiting their tenure.[45]

The ordinary courts enjoyed a degree of public respect at the time that the Constitutional Court was developing its place in Italian life, though they were deemed even then as excessively slow and expensive. In early skirmishes with terrorists and mafia organizations in the 1970s, magistrates, who were often targets of violence themselves, gained the admiration of the public. That praise quickly soured when judges became characterized as

overly zealous, politically motivated, and rapacious. The avarice of judges was highlighted by a 1984 strike by magistrates for higher salaries. Public disapproval of the ordinary courts, though, reached a crescendo in 1986, when 700,000 signatures were collected calling for a referendum to remove the shield against civil liability for magistrates who commit 'grave errors.' The referendum was held in November 1987, and the magistrates lost by a margin of four to one.

The referendum was a resounding vote of no confidence in the ordinary judiciary, and one that was heard by the cabinet minister with responsibility for the courts. Under his direction a new code of criminal procedure, a reform recognized as necessary since 1953, went into force in 1989, and more serious discussions of reforming the 1942 Civil Code began. The 1989 code is accusatorial rather than inquisitorial in nature and borrows heavily from the United States model, so much so that the press dubbed it '*Processo* Perry Mason.' Though the new criminal code was opposed vigorously by both magistrates and defense lawyers, both groups of which called a two-day strike to protest, it has been hailed in the brief time it has been effective as far more expedient than its predecessor. Whether the new code will be more protective of individual rights, as its proponents envisioned, is not yet clear. The new criminal code does, however, resolve one of the charges against criminal judges, by clearly separating the functions of judge and prosecutor at all levels of the judiciary.

The new criminal code and a possible new civil code do not, however, directly address judicial activism on Italian ordinary courts. New codes and an end to the protection from civil liability for magistrates are designed to solve a set of problems that are distinct from the question of judicial activism. The new provisions are really manifestations of public displeasure with abuse of power by the judiciary. The distinction between activism and unethical conduct, in this case, is not absolutely clear. Judicial activism was a catalyst for changes in the system only in the sense that judges were seen as exercising their power for crude, raw purposes. Civil court decisions that created policies to govern consumer and environmental protection did not rankle the public nor prompt calls for new codes and revocation of judicial protection from civil liability. Public reaction, in other words, was directed at a peculiar form of judicial activism, one that used the coercive power of the state for overtly political advantage. Government reaction, though, may have facilitated desirable reforms that will enhance public satisfaction with the administration of justice.

Judicial independence is a hallmark of liberal democracies, a trait particularly prized in civil law jurisdictions influenced by Napoleonic traditions of separation of powers. Judicial activism is often a natural

companion to judicial independence for the latter insulates judges from political retaliation. Activism, though, has more than one face. Often only the motivating forces behind a decision clarify whether a given judicial policy is aimed at furthering some higher good or designed to benefit a particular political party. Hence, the term 'activism' retains its negative implication, for detractors always will attribute the more crass motive to undesired judicial policies. The Italian case makes the task of discriminating a bit simpler, since some self-serving political actions by judges on criminal courts were barely camouflaged. Many intrusions of the judiciary into parliamentary prerogatives were likely welcomed, even by legislators, in light of the abysmally slow pace of Parliament in tackling certain issues. Evaluating all instances of judicial policy-making is complicated and predicting future trends risky, but Italian judges, on both the Constitutional Court and the ordinary courts, will likely proceed to make policy by filling the lacunae in the law and interpreting ambiguous norms creatively. Public reaction against blatant manipulations of judicial decisions for partisan political ends, though, has probably tempered and checked, if only for a time, some of the most overt forms of self-serving activism.

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8 Judicial Activism in France

F. L. Morton

In the past fifteen years the *Conseil Constitutionnel*, or Constitutional Council, has risen from a politically obscure and insignificant institution to a central player in the governing process of France. Its primary function is to review legislation made by Parliament, the national legislature, for conformity to the French Constitution. Initially, the Council's jurisdiction was limited to separation of powers issues. Recently it has assumed the added function of protecting individual rights and liberties, a jurisdiction that is not explicitly conferred on the Council by the Constitution. In exercising a form of judicial review over the acts of its legislative counterpart, the Council has come to occupy a position similar in function – but quite different in detail – to that of the American Supreme Court. Unlike its American counterpart, the Council has achieved its new role in the context of a two-hundred-year-old political tradition of popular sovereignty that has been hostile toward any judicial control of the political branches of government. This paper analyzes the remarkable political development of the Constitutional Council in recent French politics and compares it to relevant American and Canadian experiences.[1]

POPULAR SOVEREIGNTY AND THE ILLEGITIMACY OF JUDICIAL POWER

Modern France traces its birth to the summer of 1789 and the *Declaration of the Rights of Man*. This was the same year that the First Congress of the United States drafted the *American Bill of Rights*. Not surprisingly, there is a striking symmetry between these two founding documents. Both affirm the natural equality and liberty of all men.[2] Both proclaim the first and foremost freedom of the dawning modern age – freedom of religion and thought. Both assert the seminal political rights that have become the hallmarks of democratic self-government: the freedoms of speech, press, and association. Both affirm the right of all individuals to life, liberty and property, and the full array of legal rights that protect the citizen and his interests from the coercive powers of the state. In sum, both documents are seminal statements of the principles

and practices of the modern liberal democracies that they helped to found.

Here the similarity ends. For while the *Declaration of the Rights of Man* was subsequently placed at the head of France's first Constitution (1791), it was never institutionalized. Unlike subsequent American development, no court was ever given jurisdiction to apply these constitutional standards to statutes enacted by the National Assembly. In France, it has never been possible for an individual to go to a court of law and argue that his constitutional rights have been violated by a statute and that the statute is therefore invalid. In short, the *Declaration of the Rights of Man* was never made operational through the process of judicial review. It was understood as a declaratory document, applicable in principle to the first and all subsequent French republics, but without any enforcable legal consequence.

The exclusion of judicial review from French political practice was intentional. As early as August, 1790, the National Assembly enacted a law stating, 'The courts cannot take any part, directly or indirectly, in the exercise of the legislative power nor prevent or postpone the execution of the decrees of the legislative body . . .'[3] Two hundred years later, both the regular and the administrative courts still faithfully observe this denial of any power of judicial review.

The longstanding French aversion to judicial review stems from two principal sources. First, the French revolutionaries of 1789 associated judges and courts with royalty and corruption, a legacy of the *ancien régime*. In rejecting the *ancien régime*, the Revolution also rejected any significant political role for courts. This instinctive distrust of courts and judges contrasts sharply with the British common law tradition that animated the American and later the Canadian (1867) foundings. Within these common law societies, the 'rule of law' was perceived as a principal source of individual liberty and judges occupied a place of honour.

By contrast, the thrust of European codification was to make the law 'judge proof' – that is, to make the law so comprehensive, so consistent, and so clear as to eliminate any and all need for judicial interpretation. The civil law ideal of the judge is more akin to the 'expert clerk' than the defender of individual liberty.[4] This relative lack of esteem for the judiciary in the French political tradition has carried down to the present. It is manifest in the relative lack of administrative independence for the judiciary[5] and even the lower social status (and salaries) enjoyed by French magistrates.[6]

There is a second and more fundamental reason for the French rejection of judicial review: the popular triumph of the concept of the *volonté*

générale, and the unchallenged authority of the 'sovereignty of the people' in French politics. Just as John Locke is widely considered to be the philosopher of the American Revolution, so Jean-Jacques Rousseau provided the animating *geist* to the French Revolution. For judicial review, this made all the difference. In revolutionary France, there was little fear of 'majority faction' and correspondingly little interest in the 'separation of powers.' Rousseau's teaching on the *volonté générale* was understood (incorrectly) to vest all legitimate authority in 'the people' – or its representatives, the National Assembly. Any check on the Assembly was thus a check on the people – suspect, illegitimate, indeed unconstitutional.

The historic French distrust of restrictions on the legislative power was given a specifically anti-judicial focus by a book published in 1921 entitled, *Le Gouvernment des juges aux Etats Unis.*[7] Written by Edouard Lambert, the founder of the study of comparative law in France, this extremely influential book chronicled the fight of the American courts against progressive social and labor legislation. Lambert's message was clear and fell on an already sympathetic readership: the American experiment with judicial review was undesirable and should not be imitated in France. The extent of Lambert's influence is measured by the fact that his phrase – *le gouvernment des juges* – has become an artifact of French political speech. Until the 1970s, the phrase alone was a self-contained and irrebuttable argument against anything resembling judicial review. More recently, critics of the Council's decisions still invoke the phrase to emphasize their disapproval.

Historically, the popular attachment to the sovereignty of the people has been so strong that it precluded not only an independent judicial power but even an independent executive power. The legislative dominance of the executive was a source of chronic instability in French politics until 1958. The Constitution of the Fifth Republic, written by and for Charles deGaulle, created for the first time an independently elected executive and limited – also for the first time – the powers of the legislature to those enumerated in the new constitution. The Gaullist constitution distinguished the domain of law (enumerated in article 34) and the domain of regulation – 'matters other than those which fall within the domain of law' (article 37). Parliament was free to legislate within the confines of the former. The latter was the preserve of executive decree. The role of the Constitutional Council was to police the boundary. It was in this new and more receptive constitutional environment that the constitutional council has gone on to prosper.

THE EMERGENCE OF JUDICIAL REVIEW

The original role of the Constitutional Council was much more modest than the one it has recently assumed.[8] It was intended primarily to protect the newly created executive power from parliamentary usurpations. It also was charged with the responsibility to investigate cases of alleged voting irregularities. From its creation in 1958 until the 1970s, the Council's work was limited to 'separation of powers' issues and disputed elections. While both functions helped to stabilize French politics after the tumultuous experiences of the Fourth Republic, the Constitutional Council kept a low profile and was not considered an important institution.

In the 1970s, two events transformed the Constitutional Council from a secondary and relatively unimportant institution to a central partner in the governing process.[9] Prior to 1971, the Constitutional Council had almost no role in protecting civil liberties and individual rights. In a 1971 decision dubbed by some as the '*Marbury vs. Madison* of France,' the Constitutional Council struck down a government bill that seriously restricted freedom of political association. To support their ruling, the Council interpreted the Preamble of the 1958 Constitution as incorporating all the rights enumerated in the 1789 Declaration of the Rights of Man and the Preamble of the Constitution of the Fourth Republic. While both these documents are mentioned in the 1958 Preamble, they had never been considered to have legal force.[10] By this bold judicial stroke, Parliament's freedom to legislate was suddenly fenced in by the full panoply of liberal rights and freedoms. Subsequent decisions incorporated additional rights declared in previous French laws and constitutions. By 1987, 'fundamental rights' accounted for forty per cent of the Council's nullifications of ordinary laws.[11]

The second catalyst of the Council's rise to political prominence was the 1974 reform that extended its authority to rule on the constitutionality of a law upon petition by either sixty members of the National Assembly or the Senate. Prior to this, a law could be referred to the Constitutional Council by only four officials: the President of the Republic, the Prime Minister, the President of the National Assembly, and the President of the Senate.[12] Since all four were usually members of the governing majority party/coalition, they were unlikely to challenge the validity of their own legislation. The 1974 reform conferred this power of reference on opposition parties (providing they could muster sixty signatures), who immediately seized this opportunity as a way to obstruct, at least temporarily, new government policies. It was used almost immediately, in January 1975, to challenge – unsuccessfully – the government's new, more permissive abortion law. By 1987, parliamentary references accounted for

eighty per cent of all decisions dealing with ordinary laws. Even more striking – since 1979, forty-six of the forty-eight decisions nullifying laws have been initiated by members of Parliament.[13]

The net effect of the two events described above has been a dramatic increase in the number and political significance of the laws brought before the Constitutional Council. From 1958 to 1974, there were only nine references to the Council. From 1974 to May, 1981, the number leaped to 47. While they had originally opposed the 1974 reform, the Socialist opposition was now happy to use it against the Center-Right government of Giscard d'Estaing. After Mitterand and the Socialists swept to power in 1981, it was the Conservatives' turn. Notwithstanding their earlier criticism of the Socialist 'abuse' of the power of reference, the number of laws challenged between 1981 and 1986 rose to 66, almost all at the initiative of the Conservatives. The Socialists bitterly denounced the Constitutional Council for its decisions nullifying important socialist legislation in 1982 and 1983. But when they lost control of the Parliament in March of 1986, they quickly forgot their earlier criticisms, and referred nine different laws to the Constitutional Council during their first year in opposition.[14]

It is now common practice for major government bills to be challenged in this manner by the opposition. The more important the bill, the more likely the challenge. Combined with the expanded scope of constitutional restrictions imposed by the Declaration of the Rights of Man and other implied liberties, this new procedure has thrust the Constitutional Council to the center of the policy-making process. It is now a 'hurdle' that every major piece of legislation must clear before becoming law.[15]

L'ALTERNANCE AND THE COURT CRISIS OF THE 1980s

The most significant recent event in the development of the Constitutional Council was its 1982 confrontation with the then recently elected Socialist government of Francois Mitterand, a judicial-legislative confrontation that can be profitably compared to the American 'New Deal court crisis' of the 1930s.[16]

In 1981 the right-wing Gaullist political coalition of the Right, which had governed France since 1958, was swept from power by a coalition of the Left, Socialist leader Francois Mitterand was elected President, and his Socialist Party, with the support of the French Communists, gained a majority in the National Assembly. The *alternance*, as the French dubbed it, promised or threatened (depending on one's perspective) a radical

rupture with past politics and policies. The French left, excluded from power for a quarter of a century, was more radical than other European social democrats.[17] The political ascendancy of the Left coincided with the Council's growing role as the protector of the constitutional rights of individuals. Some commentators predicted a collision between the new individualistic jurisprudence of the Constitutional Council and the collectivist, interventionist reforms of the new Leftist government.[18]

Initial events supported the pessimists' scenario. Between May 1981 and January 1982 the Constitutional Council ruled five of ten Socialist reforms partially unconstitutional. Of particular importance were the rulings of *annulation partielle* (invalid in part) in the *Nationalizations Case*[19] and the *Decentralization Case*.[20] Both laws were centerpieces of Socialist Party policy, and both had been vehemently opposed by the Conservative opposition in Parliament, who referred them to the Council as a tactic of last resort. The Nationalization Law initiated the process of transferring certain financial and industrial institutions from private to public ownership. The second was the first attempt since the French Revolution to decentralize the topheavy French state. In both instances, it appeared that the Right was able to block through reference to the Constitutional Council what they had failed to achieve in Parliament.

The reaction from the governing Leftist coalition was predictably hostile. A chorus of condemnations filled the press. Most of the criticism focussed on the anti-democratic character of the Council's decisions. 'We represent the people,' declared one Socialist deputy. '*They* represent the majority of an earlier time.'[21] Another Socialist Deputy's denunciation of the Council's decisions was even more blunt: '*Vous avez juridiquement tort, parce que vous êtes politiquement minoritaire.*'[22] Socialist Deputy André Labarrere directed a thinly veiled threat at the Constitutional Council: '*A force de nous assasiner, il va finir par se suicider.*'[23]

Conservative leaders rose to the defense of the Constitutional Council with equally inflammatory rhetoric. The conservative daily *La Croix* declared that the Constitutional Council was '*le dernier rempart [face au] gouvernment socialo-communiste.*'[24] Gaullist leader Jacques Chirac declared that '*le clivage politique en France n'était plus entre gauche et droite mais entre républicaines et marxistes.*'[25]

Contrary to the heated rhetoric of the Winter of 1982, a final confrontation between the Mitterand government and the Constitutional Council was averted. In the end, the Council was careful not to obstruct completely the government's reform agenda. More constitutional challenges were rejected than sustained.[26] Even in those challenges that were accepted, the Council nullified the entire law only once.[27] In the all important *Nationalizations*

Case, a refurbished version of the bill was adopted within a month of the Council's original declaration of unconstitutionality. The offending section, which dealt with procedures for reimbursing private stockholders, was rewritten to guarantee a fair market value for the stock – about 30 per cent higher than the initial compensation plan. When this reformed version of the bill was again attacked by the conservative opposition as unconstitutional, the Constitutional Council upheld it. The net effect of the Council's decisions was thus to slow the pace of reform, to force bills to be rewritten and presented to Parliament a second time. Perhaps these decisions also deterred more radical reforms from ever being tabled.[28]

INSTITUTIONAL CHARACTERISTICS OF THE CONSTITUTIONAL COUNCIL

While the Constitutional Council has come to exercise a power of constitutional control that is functionally similar to the judicial review exercised by the American Supreme Court, there remain significant procedural and institutional differences between the two. The common denominator of these differences is the Council's lack of the judicial attributes that common law observers associate with a 'true' court.

The most important difference is that the Constitutional Council is not a part of either the regular or administrative judicial systems. France has a hierarchical system of civil and criminal law courts that culminates in a final court of appeal, the *Cour de Cassation*. In a strict legal sense, the Court of Cassation is the true 'Supreme Court' of France. However, it does not have the authority to consider the constitutional validity of the codes that it enforces. In a recent decision, the Court of Cassation observed: 'Rules of statutory value are compulsory for the courts, which are not judges of their constitutionality.'[29] Consistent with the civil law tradition, the Court of Cassation faithfully interprets the various codes in a purely administrative fashion. There is no appeal from its decisions to the Constitutional Council, and the latter's decisions do not have any precedential value in the regular courts. Unlike the Constitutional Council, the Court of Cassation has absolutely no role as a quasi-independent political actor.

France also has a separate and extensive system of administrative law courts, superintended by yet another final court of appeal, the *Conseil d'Etat*. The Council of State is one of the most powerful and prestigious institutions within the executive branch of the French government. It is divided into five different sections, four of which exercise important

functions other than sitting as a final court of appeal for 23 lower administrative tribunals.[30] Here we are concerned only with the judicial section, the '*section des contentieux*.' Despite its considerable power and prestige, the Council of State has no authority to enforce constitutional norms against administrative decisions or regulations. As it recently observed, 'in the present state of French law, the claim of unconstitutionality cannot be examined by the Council of State.'[31] Like the Court of Cassation, it is in no way bound by the decisions of the Constitutional Council, nor can its decisions be appealed to the Constitutional Council.

While the Council of State cannot enforce constitutional norms, it does adjudicate individual complaints against the bureaucracy. This role dates back to the Revolution, when, in keeping with the strict notion of separation of powers, the regular courts were denied any jurisdiction over administrative decisions. This oversight function was vested in the newly created Council of State, part of the executive branch. Over the course of almost two centuries, the Council has earned a reputation for 'integrity, impartiality and independence.'[32] Within France it has been described as, 'the great protector of the rights of property and of the rights of the individual against the State; the great redresser of wrongs committed by the state.'[33]

The Council of State primarly hears cases involving '*excés de pouvoir*,' actions by public officials that exceed their authority and harm individual interests.[34] These fall into four primary categories: lack of jurisdiction, failure to follow required procedures, 'abuse of power,' and violation of the law.[35] While this form of judicial review of administrative action provides important protection for individuals, the law itself remains supreme and is completely outside the jurisdiction of the administrative courts. While the government is obliged to obey their decisions, it also has the option to change the law.

In theory there is a complete and impenetrable barrier between the Constitutional Council and the French judiciaries. But in 1985, for the first time ever, both the *Conseil d'Etat* and the *Cour de Cassation* applied constitutional norms, as interpreted by the Council, to their own decisions. Favoreu, a strong supporter of the Constitutional Council, has observed that the extension of constitutional norms to the administrative, civil and criminal courts is potentially very significant. It could greatly enhance the authority of both the Council and its two judicial counterparts.[36] It is still too early to say whether this was an isolated incident or the beginning of a new trend.

The jurisdiction of the Constitutional Council is limited to references that come before it from one of these five sources. There is no way for

individuals, interest groups or departmental governments to unilaterally challenge the constitutionality of a law. There are other limitations. Only bills approved by the Parliament can be referred to the Constitutional Council, and the reference must be made before the bill is promulgated by the President, normally within fifteen days of passage. There is thus no way to bring an administrative regulation or executive order before the Council nor a statute that has already been enacted. Thus the constitutional review exercised by the Constitutional Council can be characterized as abstract, *a priori* and preventative, rather than concrete, *a posteriori* and remedial. [37]

Once a bill has been properly referred to the Council, the constitution requires that it hand down its decision within one month, so extensive preparation of arguments is not possible. However, Favoreu reports that it is becoming common to have a *prédébat* in Parliament in anticipation of a constitutional challenge.[38] There are no public hearings, no oral argument, no lawyers and no written briefs after the American practice. There is no right of reply, although the Council sometimes asks the government to provide information. There is no allowance for interveners or *amicus curiae*. The Council has its own research arm, and even conducts interviews. Its decisions are made in a collegial fashion and are secret. Any divisions remain secret, and dissenting opinions are not permitted.[39]

The Constitution specifies that the Constitutional Council shall consist of nine appointed members.[40] Three are appointed by the President of the Republic, three by the president of the Senate, and three by the President of the National Assembly. While there is no requirement of prior legal training, all appointed judges have had it. Almost all appointees have also had significant prior political experience. Favoreu suggests this political experience has enhanced their understanding of the policies and politics that are implicit in their cases.[41]

Each *Conseilleur* serves one nine-year non-renewable term. The terms of the nine members are staggered so that every third year three retire and three new members are appointed, one by each of the appointing authorities. The President of the Council is named by the President of the Republic, and has always been one of his own appointments. President Mitterand, for example, appointed his Minister of Justice and close political advisor, Robert Badinter. This is standard, as all appointments are made along party lines. By 1985, all the major political parties had been 'represented' on the Council except the Communists. The combined effect of the constant turnover in personnel and the partisan nature of the appointments guarantees that the Council cannot resist for long a major political realignment. By 1987, for example, four of the nine *conseilleurs* were socialists. Prolonged confrontations between an appointed court and elected governments – such

as occurred during the American 'New Deal' – are much less likely in France.

The non-judicial characteristics of the Constitutional Council have sparked an ongoing debate over whether it is a 'true court' and thus whether it 'really' exercises judicial review. This ethnocentric approach begs the prior question of 'why' the Council should be a court at all. Or to pose the question in a more technically accurate form: Why should the function of constitutional control be vested in a judicial institution?

I have argued at greater length elsewhere that the American – and more recently the Canadian – approach of vesting this function with the ordinary courts renders it more legitimate and thus more effective by suppressing – or at least camouflaging – the political discretion of those who exercise it.[42] Since the common law judges who exercise judicial review are usually appointed, not elected, and enjoy tenure 'for good behaviour,' their power is more independent of the political branches and public opinion in general. Depending on the circumstances, this may be judged either a vice (*Dred Scott*, the New Deal cases) or a virtue (*Brown v. Board of Education*). The French approach follows the general tendency in post-war European democracies to vest this function with special constitutional courts that are more closely tied to partisan politics. Such courts are less able to resist 'majority tyranny' but are also less likely to block 'progressive' legislation enacted by political majorities. In sum, both approaches to implementing constitutional control have their respective virtues and vices.

COMPARATIVE PERSPECTIVES ON THE CONSTITUTIONAL COUNCIL

What larger institutional and societal factors have contributed to the dramatic growth of the Council powers and authority since its modest inception in 1958? It seems certain that the more effective separation of powers effected under the Fifth Republic was a necessary condition for this development. As long as the French devotion to the 'absolute sovereignty of the people' was so strong as not even to tolerate an executive power independent of the legislature, there was no possibility for an independent judiciary exercising the power of constitutional control. In 1958 – for the first time since the Revolution – the powers of Parliament were limited to those explicitly enumerated in the constitution. The initial function of the Council was primarily to help defend the jurisdiction of the newly created Presidency against encroachments by the historically omnipotent

legislature. The acceptance and legitimization of this independent executive has in turn created a political environment conducive to the growth of other 'checks and balances' on the legislative power.

Parallel American experiences would support the theory that the development of an independent form of constitutional review – judicial or otherwise – presupposes a political culture that embraces the 'separation of powers' principle. The first American state constitutions written after the revolution of 1776 featured dominant legislatures and weak, subordinate executives and courts. *The Federalist Papers*, published in 1788 to defend the proposed new federal constitution, is a litany of the complaints against the 'evils' produced under these legislative dominant systems. What *The Federalist* proposed instead was the most systematic and vigorous separation of powers regime yet imagined – in which 'ambition [is] made to counteract ambition,' and 'the interest of the man [is] connected with the constitutional rights of the [office].'[43] The Federalist Constitution of 1787 fenced in the legislative power by providing not just for an independent executive but an independent national judiciary as well. Could the latter have been thinkable without the former? In the two hundred years since, the political development of the American Supreme Court has closely followed the political ascendancy of the American presidency.

A second social factor that has contributed to the development of the Constitutional Council has been the growth of political consensus within the French polity and the increasingly centralist character of French politics. Fundamental social disagreement over 'regime questions' does not create an environment conducive to constitutional law. The latter presupposes a consensus on the great constitutional questions of 'who should govern' and 'for what ends,' and the disappearance of the 'great parties' that agitate these questions.

It is not by accident that the ascendancy of the Council parallels the equally dramatic decline of the French Communist Party (PCF) and the 'bourgeoisification' of the Socialist Party in the 1980s. The decline of the French Communist Party has been called 'the most important development in French politics in the 1980s.'[44] From a post-war high of 26 per cent of the popular vote in 1946, support for the PCF has dwindled steadily to 21 per cent in 1978, 16 per cent in 1981 and 9.8 per cent in 1986. The obvious beneficiary of the Communist collapse has been Francois Mitterand and his Socialists. 'Until the Communist Party lost its dominant position on the left, the left as a whole was unelectable . . . Communist decline served to deradicalize the image of the left and thereby break the traditional advantage enjoyed by the right in French politics . . .'[45] The less obvious beneficiary has been the Constitutional Council.

The electoral collapse of the Communists has allowed the Socialists to move, or at least appear to move, to the previously non-existent center of French politics. The ideological reforms of 1981–82 gave way to a more pragmatic style of government by mid-decade.[46] By the 1986 parliamentary elections, the Socialists had become '*la gauche respectueuse*.' Unlike previous elections – where the spectre of a socialist victory was always seen as portending a radical break with past policies, in the 1986 election, 'the French were being offered a marginal choice within the consensus, as are the Americans, the British and the Germans.'[47] The French voters responded in a characteristically American – but for France, unprecedented – fashion: they hedged their bets by voting in a conservative majority led by Jacques Chirac, who then had to 'co-habitate' with the socialist President, Mitterand. While the socialists regained control of the National Assembly by a slim margin in 1989, this newly centralist character of French politics was the most remarkable legacy of the 1980s. The next most important development was the ascent – and acceptance – of the Constitutional Council.[48]

Political moderation may be an effect as well as a cause of the Council's ascent to power. Favoreu has persuasively argued that during *l'Alternanance*, the Constitutional Council served to restrain but at the same time to legitimate the policy initiatives of the new Socialist majority.[49] This apparent paradox is consistent with American constitutional development. On more than one occasion in American history, new public policy initiatives that have been bitterly (but unsuccessfully) opposed in the political-legislative forum have been subsequently legitimized by the Supreme Court's constitutional 'stamp of approval.' The most dramatic example was the U.S. Supreme Court's famous 'switch in time that saved nine' in 1937. By the end of the Roosevelt presidency, the *unwritten* American constitution – that is, political practice – had undergone a veritable revolution. Yet the same written Constitution endured, conferring legitimacy on the changes by providing continuity with the past. As Charles Black has written, the Supreme Court ultimately placed its 'stamp of legitimacy' not just on the Roosevelt New Deal but a 'whole new conception of government in America.'[50] A more recent example of this legitimating function occurred when the Supreme Court upheld the 1964 and 1965 Civil Rights Acts passed by President Lyndon Johnson and the Democratic Congress.[51]

Experiences such as these have led leading American scholars such as Charles Black and Alexander Bickel to suggest that the Supreme Court's power to approve and thereby legitimate government policy is as important as its power to nullify legislation.[52] More recently, comparative politics

scholars have remarked on this same ability of constitutional courts to legitimate government policy at a time of declining public confidence in elected legislatures.[53] The same trend has appeared in Canada since 1982, the year Canada added a new, written 'Charter of Rights and Freedoms' to its constitution. Since then, some provincial governments have sought to create greater acceptance of their own policy initiatives by first referring them to the provincial court of appeal for 'constitutional approval.[54]

Favoreu's interpretation of the role of the Constitutional Council during the *Alternance* – both the phenomenon of *une auto-limitation de la majorité gouvernementale* (the majority's self-restraint) and *l'authentification du changement* (legitimization of change) – is consistent with these comparative developments. Indeed, one could draw an even broader conclusion than those of Favoreu: that the new role of the Constitutional Council will contribute to the regime stability of the Fifth Republic. First, as Favoreu suggests, the Council's exercise of constitutional control serves to moderate policy change. But in addition, the Council's tendency to follow sustained electoral realignments – because of the guaranteed addition of three new judges every three years – means that, sooner or later, even radical political change is likely to receive the 'constitutional stamp of approval.' As in the case of the American New Deal, such constitutional flexibility confers legitimacy on change by providing practical and symbolic continuity with the past.

These parallels with American and Canadian developments do not mean that the Constitutional Council is likely to become as politically influential as its North American counterparts. There are no instances – indeed, there is no possibility – of the judicial administration of public institutions such as schools or prisons in the name of protecting constitutional rights. Nor is there any example or likelihood of the Constitutional Council taking a leading role in political reform movements. Structural and cultural factors seem to ensure that the Council will be limited to a reactive and restraining function, and not a force for positive policy change.

Structurally, access to the Constitutional Council is limited to the leaders of political parties. While party leaders may try to use the Council to block the legislative initiatives of their political opponents, they cannot use the reference procedure to initiate policy change. The corollary to this is that there is no way for interest groups to do 'end runs' around legislatures and political parties to pursue their reform agendas through the courts. The development of the courts as independent forces for political change in the U.S. and now Canada are largely the result of expanded rules of standing[55] and interest groups' creative use of systematic litigation strategies.[56] In the U.S., and increasingly in Canada, it is only a slight exaggeration to

say that the politics of 'post materialism' have transformed the courts and administrative agencies into a shadow or parallel government, which can check and sometimes even lead the elected, accountable branches of government. This is simply not possible in France, where only the elected political parties control access to the Constitutional Council.

The idea of the 'structural injunction,' the legal technique through which American courts have taken over the administration of schools and prisons to vindicate rights, is likewise unknown to the Constitutional Council.[57] The Council has essentially a declaratory power. What happens after it has spoken is beyond its control.

More diffuse but equally important is the radically democratic character of French political and legal culture, and its corollary distrust of judges. Notwithstanding the Council's rapid ascent to power in the past two decades, both public and elite opinion is still much too imbued with the spirit of Rousseau and the doctrine of *la souverainété du peuple* to accept an American style *gouvernment des juges.*

This democratic impulse is as strong within the Constitutional Council as it is in the broader political culture. Unlike the Warren Court in the U.S. or the current regime of 'Charter activism' in Canada, the Council review of legislation is guided by the presumption of constitutional validity. The Council has developed a standard of *erreur manifeste* to guide its review of statutes. This standard of *erreur manifeste* is similar to James Bradley Thayer's 'rule of the clear mistake' in American constitutional jurisprudence. Both formulations are intended to support judicial self-restraint and deference to legislative judgement. While the Council's critics may correctly claim that it has not always limited its power of nullification to instances of 'manifest errors,' the standard evinces a sense of self-restraint that is supported by the record.

The restraining effect of French political culture can be highlighted by comparison to recent Canadian experience. Like France, Canada has long been governed by the tradition of parliamentary supremacy. Like France, Canada has recently amended this tradition with a new, constitutionally entrenched *Charter of Rights* and judicial review. Since it was proclaimed in 1982, the Canadian *Charter of Rights* has served as a catalyst for a new era of judicial activism unparalleled in Canadian history and rivaling that of its American counterpart.[58] Within only eight years, the Supreme Court of Canada had already decided one hundred Charter cases, nullified nineteen statutes, developed an American-style 'exclusionary rule,' struck down Canada's abortion law, and asserted itself squarely into the explosive issue of language politics.[59]

Unlike France, there has been hardly a whisper of criticism of this new

judicial power. Indeed, the main criticism has been of the 'notwithstanding' clause, a provision of the Charter that allows a government to override a judicial nullification of a statute if it thinks the Court has made a mistake in interpretation or a politically unacceptable decision. The leaders of all three national political parties, plus the overwhelming majority of academic commentators,[60] have called for the abolition of this legislative check on judicial review.[61] The Canadians have become almost more American than the Americans about the 'sanctity' of judicial review.

The contrast between the Canadian and French experience with judicial activism during the decade of the Eighties could hardly be sharper. Why has Canadian democracy so readily embraced judicial activism while acceptance in France has been tentative, qualified and cautious? No doubt the answer is in part the spill-over effect of American culture on Canada. But beyond this are the intangible but important forces of political and legal culture. The habits of mind and practice that have inhibited the development of judicial activism in France support it in Canada. Common law Canada cherishes the 'rule of law' and exalts judges as the custodians of this tradition of freedom. The separation of powers – both through the institution of the Crown and the federal division of powers – has deep roots in Canada. Most importantly, Canada has never embraced the theory or the practice of 'popular sovereignty.'[62] To the contrary, the 'counter revolutionary' Canadian mind has always distrusted 'republican' democracy and preferred elite management of politically divisive issues. Described by some as 'consociational democracy,' the Canadian preference has been to exclude politically divisive issues from public debate and electoral competition in preference to elite accommodation.[63] Needless to say, such a political environment is much more receptive to the growth of judicial activism – a form of elite politics *par excellence* – than the radically majoritarian democratic tradition of France. In sum, not all systems of parliamentary democracy are created equal. Beneath the facade of parliamentary institutions are deep and powerful political *moeurs* that can either inhibit or encourage the development of judicial activism.

CONCLUSION

The new status of the Constitutional Council in French politics was accurately reflected in the proceedings of a 1987 Paris conference of leading French political and constitutional scholars.[64] The conference was organized to discuss the growing role of the Constitutional Council in French politics, and was symbolically held within the very walls of the

National Assembly buildings. In addition to political and legal scholars, representatives from all of France's five major political parties were invited to address the following question: Did the political parties recognize the authority of the Council to nullify legislation that it finds unconstitutional? The answer was a resounding *oui* from each party except the Communists, who refused to acknowledge any limitations whatsoever on the 'absolute sovereignty of the people.' Public opinion mirrors this elite acceptance of the Council. A SOFRES poll in 1986 found that 59 per cent of the French electorate approved of the expanded influence of the Council.[65]

This 1987 conference demonstrated that the legitimacy of the Council's role as the guardian of constitutional values is now widely accepted. But while each spokesman (except the communist) affirmed his party's support for the Council, each also expressed second thoughts on the potential for abuse of this new power. M. Alain Richard, the socialist deputy, was sceptical about the Conseil's 'commitment to social and economic rights.' M. Jacques Toubon, the government (Gaullist) deputy, speculated that too broad an interpretation of individual freedoms could frustrate government efforts to deal effectively with social problems such as AIDS. There seemed to be general agreement that in cases where the constitutional text is open to several equally plausible interpretations, the Council should defer to the government's interpretation. And all party representatives were unanimous in condemning the spectre of an American-style *gouvernment des juges.*[66]

On 14 July 1989, the bicentennial of the French Revolution, President François Mitterand announced his intention to amend the constitution to give ordinary citizens access to the Constitutional Council. This amendment would allow citizens to challenge the constitutional validity of legislation during the course of normal litigation in either the ordinary or administrative courts. If litigants thought that a statute violated one of their constitutional rights, they could challenge the validity of the statute. This question would then be passed along to the Constitutional Council for a ruling. The socialist government of Michel Rocard introduced this amendment in March 1990. After several months of heated debate, it was passed by the National Assembly but defeated by the Senate. Supporters argued that this reform would further strengthen 'the state of law' (*l'État de droit*) and better guarantee 'the fundamental rights of all citizens.' Opponents – an unusual coalition of Communists, the Right, and the extreme Right – denounced the amendment as 'totally absurd' and 'a betrayal of our constitution.' Most commentators think that supporters of the reform will try again. If adopted, this amendment has the potential to significantly expand the influence of the Constitutional Council, since access would no longer be solely in the hands of the Parliamentary parties.

The acceptance of the Constitutional Council as guardian of constitutional rights against Parliament marks an historic break with France's past. French political leadership has rejected the practice of unrestricted parliamentary supremacy. At the same time, there is an equally strong aversion to what is perceived as the judicial over-reaching of the American Supreme Court. These elite perceptions will both support and limit the development of the Council's power in the years ahead. The degree of judicial activism will likely remain modest compared to the influence of the American and Canadian Supreme Courts. But the exercise of the power of constitutional control by a politically independent body, considered unthinkable only a generation earlier, will continue to play an important role in contemporary French politics.[67]

NOTES

1. Different versions of this analysis may be found in F. L. Morton, 'Judicial Review in France: A Comparative Analysis,' *American Journal of Comparative Law*, 36 (Winter, 1988) 1: 89–110; and 'Point de vue d'outre–Atlantlique sur le Conseil Constitutionnel,' *Pouvoirs: Revue Francaise D'Etudes Constitutionennelles et Politiques* 46 (1988): 127–45. For a criticism of this work, see John T. S. Keeler, 'En reponse aux analyses de F. L. Morton: Perspectives nord-Américaines sur le Conseil constitutionnel.' *Pouvoirs* 47 (1988): 145–9.
2. I am here following Lincolnian practice of reading the *U.S. Bill of Rights* in conjunction with the earlier (1776) *Declaration of Independence*.
3. Tallon, 'The Constitution and the Courts in France,' *American Journal of Comparative Law* (1979): 567–575, at 567.
4. John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press, 1985), pp. 28–29.
5. Dallis Radamaker, 'The Courts in France,' in Jerold L. Waltman and Kenneth M. Holland, *The Political Role of Law Courts in Modern Democracies* (Macmillan Press, 1987), pp. 129–151, at 143–145.
6. Daniel Soulex Lariviere, 'Faut-il faire un proces des juges?' *L'Express*, 3–9 avril, 1987, pp. 98–105. This is an abridgement of Lariviere's book-length study of dissatisfaction with and within the French judiciary, *Les juges dans la balance* (1987).
7. Translation *Government by Judiciary in the United States*.
8. The most recent and comprehensive overview of the Conseil Constitutionnel and its work is by Louis Favoreu, 'La Justice constitutionnelle en France,' *Les Cahiers de Droit* (Laval University, Quebec) 26 (juin, 1985) 2: 299–337. The best monograph (120 pp.) on the subject is by Louis Favoreu and Loic Phillip. *Le Conseil Constitutionnel.*

3e edn PUF (Que sais-je?) (Paris, 1985). The principal book length study (435 pp.) is Francois Luchaire, *Le Conseil Constitutionnel* (Paris: Economica, 1980). Other important works include *Pouvoirs: Revue Francaise d'Etudes Constitutionnelles et Politiques*. 2e edn 1986, no. 13: 'Le Conseil constitutionnel.' Presses Universitaires de France; and Jean Rivero, *Le Conseil constitutionnel et les libertes* (Economica: Paris, 1984; 178 pp.). For English language articles dealing with the Conseil Constitutionnel, see fn. 10 below.

9. I do not intend to recount the details of these developments here, since they are described in several very good articles already available in English. These include: Beardsley, 'Constitutional Review in France,' 1975 *Sup. Ct. Rev.* 189; and also 'The Constitutional Council and Constitutional Liberties in France,' *American Journal of Comparative Law*, 20 (1972): 431; Richard J. Cummins 'Constitutional Protection of Civil Liberties in France,' *American Journal of Comparative Law*, 33 (1985) 4: 721–732; Michael H. Davis, 'The Law-Politics Distinction, the French Conseil Constitutionnel, and the U.S. Supreme Court,' *The American Journal of Comparative Law*, 1 (Winter, 1986): 45–92; John T. S. Keeler, 'Toward a Government of Judges? The Constitutional Council as an Obstacle to Reform in Mitterand's France,' *French Politics and Society*, Issue 11 (October 1985): 12–24; Neuborne, Burt. 'Judicial Review and Separation of Powers in France and the United States.' *New York University Law Review* 57 (June 1982) 3: 363–442; Nicholas, 'Fundamental Rights and Judicial Review in France,' (pts. 1 & 2) *Public Law* 82 (1978): 155.
10. 'The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty that were proclaimed in the Declaration of 1789, and affirmed and completed by the Constitution of 1946.' (my translation).
11. L. Favoreu, 'Les Cent Premieres Annulations Prononcées par le Conseil Constitutionnel,' *Revue du Droit Public et de la Science Politique* (1987): 442–454, at 451.
12. The term in French for this power to send a law to the Conseil Constitutionnel for a ruling on its constitutional validity is 'saisine' (verb: saisir). I have translated it as 'reference,' (refer) since it resembles the 'reference' procedure in Canadian constitutional law whereby a government can 'refer' a law to a court of appeal for a similar ruling. American constitutional practice views such requests as 'advisory opinions,' and thus prohibited by the 'case and controversy' requirement of Article III of the Constitution.
13. Favoreu (1987), 'Les Cents Premières Annulations,' p. 447.
14. Ibid.
15. For a very good and very recent account, see Alec Stone, 'Legal Constraints to Policy-Making,' in Paul Godt (ed.), *Policy-Making in France: From de Gaulle to Mitterand* (New York and London: Pinter Publishers, 1989), pp. 28–41. Also Alex Stone, 'In the Shadow of the

Constitutional Council: The 'Juridicisation' of the Legislative Process in France,' in *West European Politics* 12 (April 1989) 2: 12–34.

16. An earlier North American commentator, John Keeler, drew the same comparison, but reached different conclusions. 'Confrontations juridico-politiques: Les Conseil constitutionnel face au gouvernement socialiste comparé a la Cour Suprème face au New Deal' *Pouvoirs*, no. 35 (1985): 133–148. This interpretation is elaborated in a subsequent article by John T. S. Keeler and Alex Stone, 'The Emergence of the Constitutional Council as a Major-Actor in the Policy-Making Process.' in George Ross, Stanley Hoffman, and Sylvia Malzacher (eds), *The Mitterand Experiment: Continuity and Change in Modern France* (London: Polity Press, 1987), pp. 161–184.
17. See Ross, *et al.*, *The Mitterand Experiment*, p. 7.
18. Cf. Francois Luchaire, a former member of the Conseil Constitutionnel and one of the then leaders of the 'Mouvement des radicaux de gauche': 'The Conseil Constitutionnel, will it become a minefield protecting property and individual rights against the "common program" of the new government?' (my translation). Quoted in Louis Favoreu, 'Le Conseil Constitutionnel et l'alternance,' *Revue Française de Science Politique*, v. 34 (août–sept. 1984): 1002–29, at 1003.
19. Loi de Nationalisation, no. 81–132 DC, 16 January 1982.
20. Loi de Decentralization, no. 81–137, 25 February 1982.
21. Davis (1986), 'The Law-Politics Distinction,' p. 58.
22. 'You are wrong in law because you are a minority in politics.' (my translation).
23. 'By trying to destroy us, the Conseil Constitutionnel is going to end up destroying itself.' Keeler, pp. 137, 143.
24. 'the last barrier holding back the socialist-communist government.'
25. 'The political cleavage in France is no longer between Right and Left, but between republicans and marxists.'
26. Of the 36 cases reported by Favoreu (1984) between May 1981 and January 1984, 20 were upheld.
27. Statut des D.O.M., no. 81–147 DC, 23 November 1982. The other 15 were 'annulation partielle,' a finding of a constitutional violation in a part of the challenged statute, but not sufficient to void the entire statute. In the most important of all these cases – the Nationalization law – the Conseil added the finding of 'inséperabilité' (non-severable), meaning that the law as a whole had to be rewritten.
28. These are Favoreu's conclusions. (1984), 'L'Alternance,' pp. 1013–14.
29. Tallon, 'The Constitution and the Courts,' p. 569.
30. One of the primary functions of the Council of State is to provide the Government with legal advice on its proposed bills and regulations. This legal advice includes advice as to constitutionality, but is offered as 'in house' advice, not as a 'judgement.' The Government is not legally obliged to follow this advice, but failure to do so may incur political costs. For the best discussion of this aspect of the Council of State's work,

see Alec Stone, 'Legal Constraints to Policy-Making,' in Paul Godt (ed.), *Policy-Making in France: From de Gaulle to Mitterand* (New York and London: Pinter Publishers, 1989), pp. 28–41.

31. Tallon, 'The Constitution and the Courts,' p. 569.
32. Dorothy Pickles, *The Government and Politics of France: Institutions and Parties*, v.1 (Methuen, 1972), p. 295.
33. Joseph Barthélemy, *Le Gouvernement de la France* (Paris: Payot 1930), p. 206.
34. William Safran, *The French Polity* (New York: David McKay Co., 1977), p. 217.
35. Ibid.
36. See Louis Favoreu, 'La Cour de cassation, le Conseil constitutionnel and l'article 66 de la Constitution: A Propos des arrêts de la Chambre Criminelle du 25 avril, 1985.' *Recueil Dalloz Sirey* 23e cahier chronique (1986): 169–178.
37. There is one way in which a law can be brought before the Constitutional Council after its promulgation. If the Prime Minister thinks that the Parlement has passed a law that invades the administrative jurisdiction (set forth in articles 34–37), he can refer this question to the Conseil. The Conseil is restricted to declaring whether or not the legislature has exceeded its jurisdiction. If it has, then the conflicting executive order overrides the law.
38. Favoreu, 'La Justice Constitutionnelle,' p. 308.
39. The practice of not permitting dissents was followed by the Judicial Committee of the Privy Council in its supervisory role under the Colonial Laws Validity Act. Significantly, the justification for this departure from common law practice was that the JCPC served in an advisory capacity to the Crown, not as a true judicial body. This parallel provides further evidence for the argument that the Conseil Constitutionnel is not a 'true' court.
40. All former Presidents of the Republic are entitled to sit as 'honorary members,' but none have participated in the work of the Conseil.
41. Favoreu, 'La Justice Constitutionnelle,' p. 305.
42. F. L. Morton, 'Judicial Review in France,' pp. 106–110.
43. *Federalist No. 51.*
44. D. S. Bell and Byron Criddle, 'The Communist Party: Out of the Frying Pan,' in Patrick McCarthy (ed.), *The French Socialists in Power, 1981–1986* (New York: Greenwood, 1987), pp. 155–69.
45. Ibid, p. 155.
46. Ross, *et al.*, *The Mitterand Experiment*, p. 3.
47. Daniel Singer, *Is Socialism Doomed: The Meaning of Mitterand* (New York: Oxford University Press, 1988), p. 5.
48. Keeler and Stone, 'The Emergence of the Consitutional Council.'
49. Favoreu, 'Le Conseil constitutionnel et l'alternance.'
50. Black, *The People and the Court: Judicial Review in a Democracy* (1960), p. 64, and Ch. 3 generally.

51. Katzenbach v. McLung, 379 U.S. 294 (1966); Heart of Atlanta Motel v. U. S., 379 U.S. 241 (1965).
52. Black, fn. 50, above. Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).
53. See Holland, 'Emerging Trends in the Political Role of Courts in Modern Democracies: Courts and the Enhancement of Legitimacy,' Paper pre-sented at the Interim Meeting of the Research Committee on Comparative Judicial Studies, International Political Science Association, Center for the Study of Law and Society, Berkeley, California, 14–15 December 1986.
54. See F. L. Morton, 'The Political Impact of the Charter of Rights and Freedoms,' 47–51.
55. Justice Potter Stewart is alleged to have said that the most important decision he made was *United States v. SCRAP*, 412 U.S. 669 (1973), which opened the doors of the Court to groups to challenge government decisions that did not affect them directly. The Court in this instance granted standing to a group of law students ('Students Challenging Regulatory Agency Procedures') in Washington, D.C. to challenge a new federal surcharge on railroad freight. The students alleged the surcharge would discourage recycling and thus pollute the environment.
56. See K. O'Conner and L. Epstein, 'The Role of Interest Groups in Supreme Court Policy-Formation,' in R. Eyestone (ed.), *Public Policy Formation* (JAI Press, 1984), pp. 101–145.
57. Although note the extensive power of the Conseil d'Etat to review and overturn administrative decisions. See Radamaker, 'The Courts in France,' p. 139.
58. See F. L. Morton, 'The Political Impact of the Charter of Rights and Freedoms,' *Canadian Journal of Political Science* 20 (March 1987): 31–55, at 47–51. Also, F. L. Morton, *et al.*, 'Judicial Nullification of Statutes under the Charter of Rights and Freedoms, 1982–1988.' *Constitutional Studies 1989*. Special Issue of the *Alberta Law Review*, 28 (1990) 2: 396–426.
59. See F. L. Morton and Peter Russell, 'The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis.' Paper delivered at the 1990 annual meeting of the Canadian Political Science Association, Victoria, British Columbia; May 27–29 1990. More generally see Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall and Thompson, 1989).
60. See John D. Whyte, 'On Not Standing for Notwithstanding,' *Constitutional Studies 1989*. Special issue of the *Alberta Law Review*, 28 (1990) 2: 347–357.
61. See Mandel, *The Legalization of Politics*, pp. 75, 79–81.
62. See generally, Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (C. D. Howe Institute (Canada) and National Planning Association (U.S.), 1989); 'Revolution and Counter-Revolution,' pp. 1–19.
63. See K. D. McRae, *Consociational Democracy: Political Accommodation in Segmented Societies* (McClellan and Stewart, 1974). McRae defines

consociational democracy as a society 'with subcultural cleavages tending towards immobilism and instability but which is deliberately turned into a stable society by the leaders of the major subcultures.'

64. Association Françaises des Constitutionnalistes, Journée d'études du 13 mars 1987.
65. SOFRES, 'L'Etat de l'opinon publique-Clés pour 1987,' p. 215.
66. Ibid.
67. This is also the judgement of Keeler and Stone, 'The Emergence of the Constitutional Council.'

11 Judicial Activism in Germany

H. G. Peter Wallach

A Constitutional Court politically imposed on a Codified Law System has inherent features of activism. Somewhat free of the specialization expressed by most Roman Law System appeals courts, the Court is responsible for determining theoretical questions and superintending a hierarchy of laws that have recognizable political content. With the judges more often promoted to the court for political reasons, than by the bureaucratic standards evident elsewhere in the system, activism can be expected to be especially prevalent.

Yet the West German Constitutional Court has only been activist on distinct occasions. Whatever the political potential, the Court is limited by demands for legitimacy, shaped by the politics and socialization of judges, and responsive to historical values and questions of social consistency. Constraint promoted by the expectation of detailed consistency throughout all aspects of Codified Law can overcome the activist inclinations of appointees, and pressures from political constituencies. Yet when activism occurs it is also couched in expressions of legal consistency.

After all the Constitutional Court of the Federal Republic follows on a tradition of German constitutionalism, traced to the Frankfurt Assembly of 1848, which provided for interpretations of consistency, but did not allow for judicial review of the political branches. In the unification of 1871 the Emperor and his 'Reichs Chancellor' had effective authority over constitutional decisions, and the Weimar Republic of the 1920s relied on popular and parliamentary authority to the near exclusion of judicial naysaying. In a Codified Legal System consistency has required that as few bodies as possible should be involved in the formation of law. This worked to the advantage of Hitler's state.

However the occupation powers gave the courts a limited authority to challenge governmental decisions, and urged the writers of the constitutions in both West Germany and Italy to include a court with review authority.

THE CONSTITUTIONAL COURT WITHIN THE CONSTITUTIONAL FRAMEWORK

The Constitutional Court that was thus established in West Germany is somewhat outside the usual legal system. Members are chosen by the two legislative branches, and may include non-judges; the constitution (Basic Law), rather than statutes, determines interpretations; other high federal courts are effectively inferior to it on constitutional issues; and the Court has specific responsibility for determining the constitutionality of governmental action at all levels.[1] Unlike American practice, when a lower court finds it necessary to make a constitutional determination relevant to a decision the Basic Law requires proceedings be stayed until the Constitutional Court has ruled.[2]

Such specific adjudication of authority negated the need for a *Marbury v. Madison* proclamation of power by the court, but did not define exactly how far the court could go. As a result the two-chambered tribunal, sitting in Karlsruhe, has slowly developed its own rules of activism and restraint. When the Court was established the Second Chamber was given responsibility for decisions concerning federalism and the authority of the government, and the First Chamber had jurisdiction over other issues. This arrangement had to be changed after five years because the Second Chamber had decided only sixty conflict of authority cases, in comparison to the more than 2000 cases that came before the First Chamber. Now the Second Chamber hears most procedural cases, in addition to those it was originally responsible for, while the First Chamber decides other issues of substantive law. But all judges regularly meet together, and there is one President of the whole court. This has helped maintain consistency.

In terms of the definition of judicial activism used in this volume, the relative lack of judicially resolved differences on the distribution of power is one reason to suggest that Court has been restrained. The German Constitutional Court, however, has encountered the same kinds of demands for confining governmental interference with individual rights that have flooded the United States Supreme Court since its decision in the free-speech case *Schenck v. United States*.[3] For the real measure of the West German court is also in the area of individual rights. Of the 270 Federal Laws and 121 State Laws that Donald Kommers, in his seminal work *The Constitutional Jurisprudence of the Federal Republic of Germany*, identifies as invalidated between the first Constitutional Court Decision in 1951 and 1987,[4] approximately two-thirds arose out of individual rights complaints.

Compared to the 115 federal laws Henry J. Abraham identifies as invalidated in the 200-year history of the United States Supreme Court[5] the 270 figure for West Germany seems exceptionally high. But when the more specific codified system of West Germany is taken into account, and the narrowness and selectivity of the German court decisions is recognized, judgements of relative restraint are sustainable.

Within the German vocabulary of law judicial restraint is an established concept, while judicial activism is not. There are terms denoting self-restraint by courts and judges, as well as limitations on decision-making. But the leading English-German *Dictionary of Legal and Commercial Terms* defines judicial activism as *Richter als Sozialingenieure*, which translates to, judge as social engineer.[6] This is more of a definition than provided by the absence of the term in *Black's Law Dictionary*,[7] but hardly appropriate to the widely recognized perspective of courts negating decisions of other governmental authorities.

One reason for the difference lies in the role of judicial institutions within the two political systems. In the United States the assumption of a 'checks and balance' system infers competition; whereas the European hierarchy of law highlights statutory consistency. As the cases described below will indicate, German constitutional interpretation prefers to regard governmental institutions as balanced and integrated rather than as conflictual and separate. German judges concentrate on the appropriate place of each law, and of each division of governance, so that guiding principles are more important than the particular issues of a case, and the facts of an occurrence are secondary to the maintenance of the judicially perceived intent of the legislature or constitution writers. As a result, justice concerns the incompatibility of legislation with constitutional law, rather than the unconstitutionality of the application of legislation to a particular case. Issues of narrowness or breadth are thus considered in the light of law rather than the definition of cases, and even when the court determines unconstitutionality it defines the limits of stated laws (whether constitutional or legislative). So such activist decisions as the *Southwest* and abortion decisions, noted below, are couched in constitutional language that preserves consistency of purpose, no matter which legislative decisions are overruled.

The Constitutional Court of West Germany often determines aspects of laws as unconstitutional, but exercises restraint in negating them. With *Appellentscheidungen* the Court admonishes the legislature that a provision is unconstitutional, but does not declare it void. Under some circumstances, if the legislature does not then act the Court sustains the law but warns the legislature that unless certain requirements are met the act may be declared

unconsitutional. Kommers places 106 of the 270 federal cases noted above, in one of these two categories.[8]

Analysis of activism thus involves how cases are disposed of, as well as the theories that are applied. It is the investigation of curtailments of legislative and executive power, as it is in the United States; but also of the acceptable hierarchy of law the decision maintains. For a system that does not see power in terms of competition is one that cannot be analysed in simple competitive terms. In German terms the issue is whether the Court has usurped authority, and is supported in imposing a philosophy of consistency.[9]

The Southwest State Case

The first important decision of the Karlsruhe Court declared a portion of a constitutional article unconstitutional and overruled a series of federal determinations. Thus the 1951 *Southwest State* decision can be perceived as activist, though it set standards of restraint for future challenges to democratic principles.

The case arose when the *Land* (State) of Baden challenged Federal Government suspension of *Land* elections and the reorganization of election districts in order to facilitate the unification of the three states of Baden, Württemmberg-Baden, and Württemmberg-Hohenzollern. Baden objected to the imposition of Article 118, which states:

> The reorganization of the territory comprising the 'Länder' Baden, Württemberg-Baden and Württemberg-Hohenzollern may be effected by agreement between the 'Länder' concerned, in a manner deviating from the provisions of Article 29. Failing agreement the reorganization shall be regulated by federal legislation which must provide for a referendum.[10]

The Imposition of this Article, even though it specifically provides for an exception to Article 29, Baden argued, overruled the principles of federalism and democratic procedure outlined in the earlier Article.

In the interest of maintaining a hierarchy of values within the Constitution, and some basic principles of democracy and federalism, the Constitutional Court agreed that suspension of elections within established states, even if special rights are given the federal government under Article 118, are unconstitutional. But the reorganization of the states and election districts, if the appropriate democratic procedures and principles have been

upheld by the federal whole, are constitutional under Article 118, Article 29, and the intent of the Constitution.[11]

The important points of the decision establish the principle that the total constitution is superior to any particular article, identify a hierarchy of articles, define democratic procedures and the sovereignty of the states, and clarify the power of the national government to change the structure of the states. All of this would have been an expression of restraint if the Court had simply allowed each article of the Basic Law to stand as written and had supported the two reorganization acts passed by the national government. But by upholding the principles of democratic choice inherent in the whole document, and the primacy of state sovereignty expressed in Article 29, it was activist, since it negated a national law, and restricted application of a Constitutional Article, for the first time. There is thus a *Marbury v. Madison*[12] character to the case. It not only establishes the dominance of the constitution, but an interpretation of the constitution which requires wholistic, rather than particularistic, application. In doing so the Court partly recognized Baden's claim, and set the stage for future cases where the more evident inconsistencies between articles of the constitution and the overall intent of the document could be considered.

WHOLISTIC APPROACHES, PARTICULARISTIC APPROACHES, AND THE ISSUE OF FEDERALISM

The decisional framework of the *Southwest Case* is regularly repeated, with like reasons for cheer or dismay to supporters of both restraint and activism. As the arbiter between wholistic and particularistic interpretations the Court became the stage for differences on federalism. Seemingly restrained by the words of the Basic Law the Court has generally explained how choices of interpretations are based on the document. But it has also had to go beyond the Constitution, in a tradition established early in the eighteenth century by the U.S. Supreme Court, to provide a basis for the differences between articles favoring national and state governmments.

Influenced by the occupation powers[13] and academic refugees returning from the United States, the writers of the Basic Law had tried to anticipate many of the problems created by the Tenth Amendment, commerce clause, and 'necessary and proper' clause cases raised in the U.S. Supreme Court by including a series of specific Articles.

> *Article 70*: (1) The 'Länder' have the power to legislate insofar as this Basic Law does not vest legislative powers in the Federation.

(2) The delimitation of competence between the Federation and 'Länder' is determined in accordance with the provisions of this Basic Law concerning exclusive and concurrent legislation.

Article 71: In the field of exclusive legislation of the Federation, the 'Länder' have the power to legislate only if, and insofar as, they are expressly so empowered by federal law.

Article 72: (1) In the field of concurrent legislation, the Länder have the power to legislate as long as, and insofar as the Federation makes no use of its legislative power.

(2) The Federation has legislative power in this field insofar as a need for regulation by federal law exists because: 1. a matter cannot be effectively regulated by the legislation of individual 'Länder,' or 2. the regulation of a matter by a 'Land' law might prejudice the interest of other 'Länder' or of the community at large, or 3. the preservation of legal or economic unity demands it, in particular the preservation of uniformity of living conditions beyond the territory of an individual 'Land.'

All of which created new problems, especially when considered together with the definitions of exclusive and concurrent legislation provided in later articles.

To resolve the problems a theory of comity was first developed in a 1952 Housing case,[14] and in a later case challenging the power of the national government to establish a television network. The television network case began with a review of the specific powers pertaining to the issue, stated in the Constitution. The court pointed out that there is a presumption of state power in Article 70 and no necessity of expanding postal and radio telegraph powers given to the Federal government beyond technical questions of standards. To resolve disputes such as this the court thus reiterated the comity concepts of courts of the last century[15] and noted that assumptions of ability to resolve problems must be recognized by the states and the federation in regard to each other when either is competent and striving to resolve a problem. Thus the federal government should not have tried to impose a television network when the states, which had the appropriate ability to decide on creating an additional network, were meeting to reach a conclusion.[16]

The imposition of a theory of comity, and the resulting mutual respect for decision-making competence, could be interpreted as activist by those who oppose the creation of any standard not established in the constitution. But to those Americans who see activism as a means to increase the power of the court, the standard could be explained as one of restraint. For it

encourages non-judicial means for resolving differences. This became especially evident when the Court rebuked the state of Hesse, in 1958, for allowing local referenda on atomic weapons to take place. The Court took the position that the federal government had primary authority on armed forces issues, that comity was thus not respected by Hesse, and that the Court need not consider the substance of Hesse's concerns (about dominance of public opinion by the federal government) because comity is important to the mutual respect units must have for each other.[17]

Where differences have become so focused that comity cannot be applied easily, the Court generally takes a position on behalf of the states, if infringement of authority can be constitutionally recognized. In a 1975 case challenging federal strings that were attached to a federal subsidy the court sided with Bavaria's claim that housing is a state prerogative, so even a federal grant did not give the Federal government regulatory power.[18] When the Federal government pursued a Vatican request to challenge Lower Saxony's creation of non-denominational schools in direct opposition to a 1933 treaty of the Nazi regime to guarantee religious education, the Court pointed out that education is under the control of the states.[19] But a case where the court laid out guidelines for state control vis-a-vis Federal control of bureaucratic salary scales demonstrates that it strives to balance interests when possible.[20]

LIMITED ACTIVISM AND THE SEPARATION OF POWERS

The restraint evident in the attempt of the Court to devolve differences on federalism to the responsible parties is seemingly activist when compared with decisions on the separation of powers. This is partly predetermined because Article 93, Section 1, paragraph 1 of the Basic Law emphasizes the power to interpret the constitution, not to invalidate action, in the case of disputes among governmental units. But in other cases the Court has also let events remain as they would have been without judicial involvement.

In the famous 1984 parliamentary dissolution case, for instance, the Court decided the President, Chancellor, and Bundestag could determine the political necessity of voting 'no confidence' in order to call a special election even if the Basic Law provides specific criteria for such a vote, which others might judge prevent such a vote under the circumstances. The Court thus sanctified political events, though two dissenters thought that since Chancellor Kohl could obviously have commanded the majority to support his decisions, the 'no confidence' vote was contrived and thus unconstitutional.[21]

The Pershing II and Cruise Missile Case of 1983

Restraint is especially notable in an area where activism could have profound effect beyond the borders of the Federal Republic, that of foreign affairs. In the Missile Case of 1983 the Court had the opportunity to overrule the deployment decision of the national government in the interest of one of the most fundamental of constitutional guarantees, the protection of life. The complainants claimed deployment of missile defenses would challenge the Soviet Union to such an extent that lives of citizens would be threatened by possible retaliation.

The Court refused to recognize the complaint due to a lack of legally manageable criteria. Like the similar U.S. doctrine,[22] the German determination rests on the ability of the court to gain appropriately verifiable information, and to consider the full range of international criteria. The Court was especially convinced that estimates of Soviet response were only conjecture. The Court was also concerned that, even if it could evaluate the response of the Soviet government, it could not evaluate whether this response would be sufficiently different from that taken if the missiles were not deployed.[23]

Restraint on Technical Grounds in Separation of Powers Cases

The Court's general approach to separation-of-powers disputes is to resolve them on narrow, technical grounds. In a case concerning a commercial treaty with France it was decided that since the treaty did not have significant political effect it did not need approval by the parliament.[24] When a lower court ruled that a farmer living near a breeder reactor was justified in demanding the legislature take responsibility for damages within the atomic energy act, the Constitutional Court reversed on the principle that the legislature always has political responsibility.[25] A 1981 case challenging the parliament's refusal to impose increasingly strict noise abatement standards at the Dusseldorf airport resulted in no Constitutional Court orders because there was insufficient scientific evidence requiring such changes under the Basic Law.[26]

All three of the above cases, and numerous others, demonstrate the court's hesitancy to invade the powers of other branches. But they also provide guidelines for future court action. In the commercial treaty case political treaties were described, and the noise abatement decision involved discussion of case by case determinations. In effect the court exercises restraint in imposing itself on other branches, but provides indicators for self-control on the part of those branches.

INDIVIDUAL RIGHTS

Though restraint predominates in separation and division of powers cases, it is only a balancing factor when individual freedoms are brought to the court. For a constitution that begins with the outline of individual rights – but states them as a declaration of the 'dignity' of personhood, which it shall be the 'duty of all state authority,' to 'respect and protect'[27] – rather than prohibitions on the actions of government, leaves much to the determination of courts. The role of the courts becomes additionally evident with those sections of the Basic Law that justify abridgements of rights in the interest of the community. The involvement thus provided has not only contributed to development of a balancing test, but occasional expressions of strong activism on the part of the Constitutional Court.

As in the United States, an example of how judicial involvement in individual rights issues has developed is evident with an analysis of freedom of speech cases. They rest on the Fifth Article of the Basic Law which starts with a section stating:

> Everyone has the right to freely express and to disseminate his opinion through speech, writing and pictures and, without hindrance, to instruct himself from generally accessible sources. Freedom of press and freedom of radio and motion-picture reporting are guaranteed. There is no censorship.

This is followed by the second section statement that:

> These rights are limited by the provisions of the general laws, the legal regulations for the protection of juveniles and by the right to personal honor.

The possibilities for creative adjudication when applying both sections and for considering differences on their applicability to civil or criminal law have become a major feature of constitutional determination.

The Lüth Case

Because of the clarity it contributes to Article Five, and the mode of thinking about individual rights it promotes, the *Lüth* Case is comparable to the U.S. decision of *Schenck v. United States*.[28] The case establishes

the protection of rights in civil cases, the meaning of the 'general law' limits on the protection of rights, and guidelines for drawing distinctions between infringements and justifiable expressions of rights.

The case arose in 1959 when the producer of a film by a director once popular with the Nazis brought suit against the Hamburg Director of Information, Erich Lüth, for promoting a boycott. The Constitutional Court became involved after a lower court had decided Lüth had to pay damages because of a civil code requiring such payment when intentional wrong is done another. The obvious conflict between the two paragraphs of Article Five was the major topic of the decision by the First Chamber, and established that the right to speech has primacy and that the general law limitation only applies when speech interferes with the rights of another. Even then political opinion has preference over opinion expressed for economic gain. And since courts must enforce private law they must apply constitutional law in civil, as well as in criminal, cases.[29]

Though the resounding phrases of this decision reflect philosophical priorities rather than an example of 'falsely yelling fire in a crowded theatre', it clarifies the fundamental need for free speech and sets standards to be followed if constitutionally prescribed limitations are to be imposed. Thus the court confined legal and bureaucratic imposition of the second part of the Fifth Article, while reaffirming constitutional priorities. The case demonstrates more activism than many of those described above, by establishing the role of constitutional priorities in the negation of bureaucratic proclivities.

Decisions that Balance Individual Rights and State Powers

The standard conundrum of line drawing, faced by all constitutional courts, has provided unique decisions in Karlsruhe. While balancing the seemingly necessary interests of the state with the demands for individual rights, it has provided philosophical explanations of the 'human dignity' and citizen protection articles of the Basic Law, while demarcating very specific limits on administrative action. This has the result of giving governmental agencies relatively free rein within the guidelines set by the court.

The Census Act Case of 1983 is an especially interesting example of such balancing. It met the complaint of over a hundred citizens that the 1983 census was asking questions of too personal and too extensive a nature, with a relatively long exegesis on the 'freedom of an individual's self development,' unimpeded by the state. The conclusion of the Court was that so long as the government could not use the statistical information or

individual returns to identify specific households or persons, the questions asked were valid if their need could be established by the government. So those parts of the procedure which provided the possibility of the identification of individuals were negated by the Court, as were a few questions where need had not been established. The collection of nearly all the governmentally desired information was allowed to go forward.[30]

Former Justice Ernst Benda, who presided over the First Chamber during the time of the *Census Act Case* provided an explanation of the logic of the decision in a 1987 Washington, D.C. speech. He juxtaposed the need for information by individuals, with their individual privacy, and stated,

> What does freedom of information mean when not censorship or other means of restricting the flow of information are the reality, but rather the over-burdening of the individual with more information than he can possibly understand or digest? What does freedom from the state's interference mean when the individual, for his personal well-being, depends more than ever before on the state's activities? [31]

The question of which state activities are legitimate was especially relevant in a case challenging the authority of the Parliament of Lower Saxony to reorganize the governance structure of universities so that students, assistants, and non-academic employees could potentially out-vote the professors on the Academic Council. Recognizing the protection of academic freedom provided by Article 5, the Court, in the 1973 *University Case*, differentiated between governmental interests in light of social and financial demands, vis-a-vis the interests of professors. It determined that research is so specialized that professors must have the deciding vote concerning it; in questions of teaching at least fifty per cent of the vote is appropriate; but on other matters of governance the legislature has sufficient interest to structure academic councils as it deems appropriate.[32]

A case that had an activist result couched within balancing standards was the *Apothecary Act Case* of 1958. It declared a Bavarian law that allowed the state to limit the number of pharmacies in a community to protect established operations to be unconstitutional on the grounds of infringement of a choice of professions. But it established a balance between the interest of demonstrated protection of the general welfare with regard to the choice of a profession. Thus the court introduced the idea that choice of a profession can hardly be regulated, though exercise of the profession can.[33] The result is that the succeeding years saw cases upholding the power of legislatures to control the selling of drugs by

licensed pharmacists,[34] restrictions on advertisements by physicians,[35] and the hours when goods could be sold or produced.[36]

The Growth of Activism Concerning Freedom of Speech and Press

During the 1960s the Constitutional Court took increasingly active positions on the freedoms of speech and press. The much discussed 1966 *Spiegel Case* resulted in an evenly split court (meaning governmental officials were not overruled on constitutional grounds) striving to balance claims of suspected treason with those of a free press;[37] but three years later, in the *Blinkfluer* case the Constitutional Court overruled the Federal High Court of Justice, which absent a constitutional court would have been the court of last appeal, to reestablish a suit against the powerful Springer press organization. The court differentiated between a call to readers to boycott the litigant's publications, from a threat by the Springer organization to refuse to continue delivery of their publications to newsdealers who continued to carry those of the litigant. The court took the position that access to the formation of public opinion is a superior value that must be protected, and cannot be curtailed, even if allowed under ordinary law, by economic threat. The case is not just activist because it overruled the High Court, but because it differentiates between freedom of expression for purposes of intellectual influence, and the freedom of expression by Springer, which involved distribution of a threatening notice to news dealers.[38]

In 1980, in a case concerning Nobel prizewinner Heinrich Böll, the Constitutional Court not only overruled the Federal High Court of Justice, it united the free press proclamation of Article Five with the human dignity aspects of Article Two. The Court determined that Böll had the right to sue when a television commentator quoted him out of context and provided an allegedly false interpretation of his work, because the human dignity portion of the constitution gives authors rights over their own words. In a decision that goes beyond the U.S. *New York Times v. Sullivan* statements on 'reckless disregard for the truth' and 'malicious intent,'[39] the West German Constitutional Court affirmed the rights of bearers to their own words and to social recognition. The Court distinguished between the precise words of an author and the reporting of more general facts by the media. In such a balance it is up to broadcasters to strive to be as true as possible to stated wordage, though the rush of time may provide difficulties. This means the Court places more emphasis on efforts to maintain objective truth when allusions are made about individuals, than when events are described or the rush of newsgathering allows for

discrepancies. The balance between limits on free speech allowed under general law, to which the Court referred in most of the above cases, is thus remolded to give somewhat higher priority to the guarantees of dignity in the Articles which precede those referring to free speech.[40]

ACTIVISM AND THE PROTECTION OF THE DIGNITY OF MAN

The first words of the first Article are, 'The dignity of man is inviolable. To respect and protect it is the duty of all state authority.' And as the Böll case demonstrates, this article is fundamental to the hierarchy of values recognized by the Court. As a result it is probably not surprising that the Court has found this dignity relevant when taking the most activist of stands.

The Abortion Case of 1975

An especially notable expression of Constitutional Court activism was in the Abortion Case of 1975. Life was defined as beginning at conception and the abortion reform section of the 'Fifth Criminal Law Reform Act' was overturned when the petition of 193 federal legislators and the governments of five states brought the case to Karlsruhe. Under a provision whereby legislators and state governments can refer to the controversy about the constitutionality of a law without bringing a case, the First Senate of the Court began considering the issues on 21 June 1974, immediately after the law was passed.

It first established the primacy of life with reference to history, the effort at a 'final solution,' and the repeal of the death penalty in Article 102 of the *Basic Law* (Constitution). However, the constitutional analysis focused on Article 2, Section 2, which states:

> Everyone shall have the right to life and to inviolability of his person. The liberty of the individual shall be inviolable. These rights may only be encroached upon pursuant to law.[41]

Not only does the placement of this guarantee in Article 2 secure the primacy of the values expressed, the judges determined that life is considered fundamental to political order when linked with the Article 1, Section 1 'dignity of man' statement. In this context Article 2, Section 1 provides for the discussion of when life begins.

> Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.

It is because 'free development of his personality' is the standard, rather than the *Roe v. Wade* focus on legal standing or right of protection by the state,[42] that the Court is able to define life to a point near conception. The Court not only points out that the 'dignity of man' phrase in Article 1 means dignity whether the bearer is aware of it or not, but indicates that the discussion of the framers includes reference to unborn life.

The point the Court makes is that the tradition of German law protects the 'free development' of a life from four weeks after conception. Thus the extension of the right of abortion without medical consultation to the first three months of pregnancy, extended by the criminal law reform, is unconstitutional. For to allow the mother or other third parties to interfere with 'free development of life' irresponsibly without criminal sanction, limits the life of the fetus. The Court then went on to reimpose the fetal protection of the second trimester, similar to that established in *Roe v. Wade*,[43] to the first trimester following the four weeks after conception. This had the effect of reinstating nineteenth century German abortion standards.[44] Not only was it activist to correct the legislature in defining the point at which protection of life must begin, it was also activist to extend the criminal code provisions for the second trimester to the first. On these issues the dissenters accused the majority of legislating.[45]

In effect the German case, like the American, resulted in similar accusations for dissimilar results. What may make the German example seem more activist, however, is the path the Court took in negating a section of a federal law. Not only did the court 'establish constitutional consistency' by defining the necessity and the point of protection for the privileges of life, it usurped the legislative role in applying the protections accorded the fetus in the second trimester to the first. The court also provided instruction to the legislature and prospective mothers on protecting lives. This included requirements that counselling boards made up of knowledgeable officials, who were not necessarily physicians, advise mothers on the values inherent in considering abortion. The dissenters expressed exceptionally strong dismay that the Court here extended the penal authority of the state into a domain the legislature had exempted, when the role of constitutional courts should be to protect citizens from extensions of state authority by other branches. Part of their presentation differentiated between fundamental defensive rights and 'objective values' defined by the Court.[46] In effect the dissenters express a philosophy of restraint and the majority indicates support for the law as a vehicle of social instruction to the population. Fifteen years later the court would be able to restrain itself from revisiting the issues by dismissing an abortion funding case on highly technical grounds.[47]

ACTIVISM AND RESTRAINT AS SYSTEMIC ISSUES

Whatever the implicit aspects of activism for a constitutional court that stands outside the normal hierarchy of tribunals, it is not the only source of activism. Administrative courts, courts of justice, and even labor and family courts have opportunities to reverse the decisions of bureaucrats and bureaucracies. Their authority to do so on constitutional grounds is limited, however, by the requirement that those issues be referred to the Constitutional Court. Rather, their activism negates decisions on statutory grounds, or the theories on which statutory justification is based. Asked to correct an administrative decision, these courts apply a law, sometimes a conflicting law, which the administrator had not considered or interpret the applicable law differently. The major role of administrative courts is to determine if just such action is necessary.

Since courts are a safeguard against bureaucratic overzealousness they are expected to overturn decisions appellees and citizens perceive negatively. And when the society is especially divided, such demands on courts will increase. One such era was the 1950s, as the Federal Republic was becoming established. Another occurred during the student rebellions of the late 1960s when the bureaucracies and legal institutions, especially the courts, were regularly pressured to make decisions rejecting aspects of the established order. During this period a local court was flooded by students wearing pig masks, other courts were disrupted with staged laughter, and the later President of the First Chamber of the Constitutional Court, Ernst Benda, then the Federal Minister of Justice, strove to speak of the necessity of order in a Cologne University auditorium disrupted by students wearing what seemed to be Nazi uniforms.[48]

From the legal community the pressure of this period stemmed from law students and recent law students. They established the 'Young Jurists' organization to challenge the conservatism of other groups of lawyers, and proclaimed that judges and law should be for the purpose of right decisions, even if these overturned older standards, rather than the stability of the system. Those able to enter the judicial career track sometimes seemed to practice this ideal from lower court benches. And when the author questioned one of them who, because of the quality of her decisions, had been promoted to the highest state court by the late 1970s, he was told that was still the ideal. She, however, admitted that her court was hardly activist, and pointed out that only the most sociologically substantiated facts of injustice could persuade sufficient judges to deviate from narrow decision-making. In the meantime she, and two Bonn officials, have observed that the cases coming to the courts have become narrower

as some of the major difficulties of establishing the new republic have become settled. Many of the expressions of activism evident today are on very specialized legal issues.

But a factor that confines the opinions of independently minded judges, even on the Constitutional Court, is that decisions are anonymously presented, and only since 1971 have Constitutional Court dissenters been publicly identified. Even the judges who report a decision are expected to reflect the joint opinions of the majority, in spite of their own possible disagreement. The result is a unified effort to provide as united a judicial front as possible.

The resulting perspective becomes evident if Ernst Benda's career is examined carefully. Though a law professor who had felt it his responsibility to educate the public on the utility of a legally bound society, he had been more broad-minded as Minister of Justice than some of his cabinet colleagues desired. He had a special concern for social justice. So when he was appointed to the Constitutional Court there was some expectation increased activism would result. Yet when he was asked by the author, on 10 April 1989, after his retirement, whether the Court had become more active, he pointed out that the role of the Court has always been relatively active, but it is forced to maintain philosophical support for the law, and to balance decisions in terms of acceptable social stability. This corroborates his view in *Handbuch des Verfassungsrechts der Bundesrepublic Deutschland*[49] that the Court must establish the moral tone and provide democratic guidelines, rather than present heroic decisions.

CONCLUSION: THE BASICS OF ACTIVISM AND RESTRAINT

The abortion decision seems to be an aberration of court activism, and careful analysis indicates total restraint is also not standard. Court expression of restraint through technical reasons for refusing complaints, or a modified activism couched in explanations of democratic theory and constitutional priorities, is more usual. When facing issues of federalism or the balance of authority, the Court tends toward self-restraint; when considering issues of individual rights, by contrast, the Court occasionally displays activism.

In a Roman Law tradition of particularization and consistency the Constitutional Court, sitting outside the normal court structure, has acted with care for the status it is building and the institutions it can influence. When individual rights cases are referred to it by other courts, or brought by citizens who feel constitutional issues have not been sufficiently recognized by such courts, it firmly establishes guidelines based on a priority of

values derived from the Basic Law. When it must answer to such courts, protesting legislators, or dissatisfied governmental units the guidelines do not take the form of directives, so much as suggestions for co-operation. But since the German court cannot easily reject cases, and thus lacks some of the mechanisms of restraint available to the American court, it is often forced into potentially activist decisions. Responsible for advisory decisions, and not a part of case law tradition where 'ripeness' is a possible excuse for hesitancy, the Constitutional Court has developed mechanisms of suggestion and guidance that meet the needs of a new republic.

Some of the aspects of restraint evident in this approach are a result of the governmental conditions. While the Constitutional Court can declare a law unconstitutional, even to the point of not allowing the parliament to write another law on the same topic,[50] it cannot always expect full compliance with suggestions it makes for rewriting laws. For instance the declaration of unconstitutionality in the abortion decision had the effect of reinstating past law (which outlawed most abortions), and it instructed the legislature on what law would be acceptable. Ultimately the legislature thus passed a law that was acceptable, though it failed to incorporate all the recommendations. This is the effect of a system where the legislature must be the ultimate lawgiver: a situation which would have bound the Constitutional Court if past law had not favored the position expressed. Had it had the power of the U.S. Court it would not have faced a law so detailed in explanations of what kinds of panels can consider requests to have abortion, and thus it would have, in the tradition of 'judge made law,' been more freely able to dictate standards.

The limited use of precedents in the codified tradition also limits the impact of court decisions. In effect litigants can appeal directly to the Court if lower tribunals seem to ignore past decisions, but this opens the door to new considerations of old theory, based on the facts of the particular case. Neither the lower courts nor the Constitutional Court are bound by precedents. With the need for consistency the court uses precedent and others expect it to be followed, but without the expectation of 'binding precedents' case by case analysis takes on a particularist meaning.

The major responsibility of the Constitutional Court is to confirm, or explain consistency within, the Basic Law and between that constitution and other laws of the land. Since the codified tradition demands detailed consistency, as opposed to the consistency born of experience and precedents evident in the common law tradition, the Court develops theories that explain seeming inconsistencies, or it legitimizes hierarchies of values, constitutional principles, or statutes. Using the extensive materials from other national courts, available in its law library, or referring to the last

three centuries of German law, and a variety of philosophies, the Court is often explainer and persuader, as much as the institution of determination. In the *Southwest Case* the setting of hierarchies was all important. The missile case provided a theory of balance between the responsibility and the capability of the branches as they face the constitutional requirement that life be protected. The Böll case considered the meaning of intellectual identity.

The success of the Constitutional Court's development and legitimation of the 1949 Basic Law was demonstrated dramatically during the 1990 reunification. The framers of the Basic Law, or *Grundgesetz*, regarded it as a transitional document, which, as they provided for in Article 146, would be scrapped upon reunification and replaced by a Constitution, or *Verfassung*, fashioned by a constituent assembly representing the states of both East and West Germany. In the end, however, the governments of the Democratic and the Federal Republics agreed not to reunify under Article 146 but under the terms of Article 23, which permits the East German states one at a time to join the existing federation, thus obviating the need to forge a new constitution. The Constitutional Court was, however, a stumbling block to reunification in one important respect. East German women objected to the loss of the right to non-therapeutic abortions which they enjoyed under the Communist regime. This impediment was overcome when the Court pragmatically permitted the Parliament to limit its restrictive abortion law to the former West German states. Yet, in the years ahead, the Court undoubtedly will play a significant role in the training of those Germans educated behind the Iron Curtain in the principles of liberalism.

NOTES

1. Articles 92–101.
2. Article 100.
3. 149 U.S. 47 (1919).
4. Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press: Durham, 1989), p. 60.
5. *Judicial Process* (Oxford University Press: New York and London, 1986).
6. Alfred Romain (Butterworth: London, 1989) Vol. 1, p. 403.
7. *Dictionary of Legal and Commercial Terms* (West Publishing: St. Paul, 1968).
8. Kommers, *Constitutional Jurisprudence*.
9. In a 1971 article Donald Kommers examines the surveys of elite and public opinion on the Constitutional Court, *Jahrbuch des Offentlichen Rechts* Vol. 20: 124–130.

10. The translation is the official one distributed by the German Federal Government.
11. 1 BVerfGE 14.
12. 1 Cranch 137.
13. Peter H. Merkl, *The Origin of the West German Republic* (Oxford University Press: New York and London, 1963).
14. 1 BVerfGE 299.
15. Kommers, *Constitutional Jurisprudence*, p. 84.
16. 12 BVerfGE 205.
17. 8 BVerfGE 124.
18. 39 BVerfGE 96.
19. 6 BVerfGE 309.
20. 4 BVerfGE 115.
21. 62 BVerfGE 1.
22. See H. G. Peter Wallach, 'Restraint and Self Restraint, The Presidency in the Courts', *Capitol University Law Review* V (1978) VII.
23. 66 BVerfGE 39.
24. 1 BVerfGE 372.
25. 49 BVerfGE 89.
26. 56 BVerfGE 54.
27. Article 1, Section 1.
28. 149 U.S. 47 (1919)
29. 7 BVerfGE 197.
30. 65 BVerfGE 1.
31. 'Fundamental Rights: A Comparative Analysis' (Lecture presented at the Center for Contemporary German Studies, John Hopkins University, Washington, D.C.) as reported in Kommers, *Constitutional Jurisprudence*, p. 336.
32. 35 BVerfGE 79.
33. 7 BVerfGE 77.
34. 9 BVerfGE 73.
35. 9 BVerfGE 213.
36. 23 BVerfGE 50, 59 BVerfGE 336.
37. 20 BVerfGE 162.
38. 25 BVerfGE 256.
39. 376 U.S. 265.
40. 54 BVerfGE 208.
41. All of the translations of the *Basic Law* used here are provided in a booklet issued by the Press and Information Office of the Federal Republic of Germany.
42. 410 U.S. 113 (1973).
43. Op. cit.
44. 39 BVerfGB 1. The library of Congress has published a translation by Edmund C. Jann entitled *The Abortion Decision of February 25, 1975 of the Federal Constitutional Court, Federal Republic of Germany* (Washington D.C., 1975).

45. 39 BVerfGBI, at 61–90.
46. 39 BVerfGBI, at 65–79.
47. Kommers, *Constitutional Jurisprudence*, p. 360.
48. The author was present.
49. Walter de Gruyter, *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland* (Berlin and New York, 1983).
50. *Southwest Case*, 1 BVerfGB 1.

11 Judicial Activism in Sweden

Joseph B. Board

What follows is less a description of judicial activism in Sweden than an attempt to explain its absence. The picture is further complicated by the presence, in Sweden, of an institutional capability for judicial activism, but, despite periodic demands from various groups for a vigorous exercise of judicial review, the capability has remained largely untapped. For a variety of reasons, judges in Sweden have been looked upon more as administrators than as legislators – rule-enforcers rather than rule-makers – and there is a deeply laid fear of judicial involvement on the wrong side of that elusive line which separates political from legal matters. The political implications of a recent *New York Times* headline, 'Judges Void New York City Government,' would, even after due allowance was made for headline-writers' hyperbole, have sent a *frisson* down the collective back of the Swedish body politic.[1] Even if the Swedish practice is one of inactivism, it is nevertheless useful to examine it in some detail for what the absence itself tells us about judicial activism's failure to take root in what would in many respects appear to be fertile soil.

There are a number of ways in which judicial activism can be defined. Glendon Schubert, for instance, has suggested a functional approach, which regards a court as 'activist' when its decisions conflict with those of other political decision-making bodies, and 'restrained' when it accepts without question the policies of other decision-making bodies.[2] Herbert Jacob makes a distinction between the dual role of courts in enforcing existing community norms, a passive role, and making new norms, an active role.[3] A more legalistic definition, one which would be familiar to most European jurists, would have activism hinge on the degree to which judges might see themselves in relation to the legislator or legal scholar as creators, or at the very least as the authoritative interpreters, of laws.[4]

ANOMALIES OF THE SWEDISH POLITICO-LEGAL SYSTEM

The Swedish politico-legal system is one that is bristling with anomalies, one which defies any and all attempts to fit it within the more traditional pigeonholes of comparative politics or comparative law. The Swedish state

and laws are those of a unitary system, with no elements of federalism, but mixed with a long tradition of local self-government. The present constitution, a product of a sustained re-drafting process that has taken place over the past three decades, is one that can be characterized as written, semi-rigid (the Constitution can be amended by two votes of the parliament separated by an intervening general election), and incorporating a written bill of rights. The present Riksdag, or parliament, is a unicameral body of 349 members; it was preceded by a bi-cameral parliament from 1866 to 1969 which itself had replaced a four-estate body that dated from the Middle Ages. The system is one of parliamentary supremacy based on the British model. The executive branch is controlled by the prime minister and the cabinet, the monarch having been reduced to a figurehead role in the course of the twentieth century. While the cabinet retains policy-making power, the actual administration is steered by a number of semi-autonomous central administrative agencies.

The judiciary is independent of the cabinet and the administration, and its work cannot be interfered with by any other body. The system of courts is somewhat reminiscent of the French model, with two major hierarchies – the ordinary courts, at the apex of which sits the Supreme Court (*Högsta Domstol*) and a separate system of administrative courts, capped by a Supreme Administrative Court (*Regeringsrätt*) – along with several specialized judicial bodies, for example, the Labor Court, which has the power to make definitive interpretations of collective bargaining contracts. To add to the complexity and anomalous character of the Swedish system, the courts expressly have been granted the power of judicial review by the constitution – even if they do not use it – and there is a constitutionally empowered body with the power of judicial pre-view.[5]

The tradition of constitutionalism in Sweden is an old one, dating back to at least the mid-fourteenth century. Democracy has been a more recent addition, largely a product of the twentieth century, but when it did break through it was with a thoroughness which had few parallels elsewhere in the world. The electoral system calls for frequent elections, every three years at least, and is characterized by a multi-party system – with one party, the Social Democrats, more or less dominant – multi-member electoral districts, and proportional representation in the Riksdag. Political pressure groups are numerous, highly centralized, and generally include most of the major interests in the society.

Since the 1930s the political economy of Sweden has attracted the curiosity and admiration of outsiders, especially those who are interested in finding a compromise form somewhere between the pure forms of

capitalism and socialism. Although the Swedish balance may be peculiar to Sweden, and hence not readily transferable, the attraction is still a compelling one, most recently among Eastern Europeans and Soviets who are looking for economic renewal but with something short of a complete adoption of laissez-faire capitalism. Whatever the degree of transferability, it is true that the equally balanced combination of an economic system dominated by private enterprise and a political system dominated by moderate socialists is bound to be an appealing one.

The Swedish legal system also exhibits its share of anomalous traits. It is largely indigenous, and for those with an urge to classify, it does not fit comfortably within either the Civilian or the Common Law families. In matters of conceptualization, the Swedish law is closer to Civilian thinking, but in matters of procedure, it has moved in recent years closer to the immediacy, concentration, and orality of the Anglo-American approach.[6]

THE INSTITUTIONS OF ACTIVISM

Whatever the peculiarities of the Swedish legal and political systems may be, it is clear that the institutional prerequisites to activism are present in Sweden, and that Swedish judges face no formal impediments to assuming a more activist posture. There is an inchoate doctrine of judicial precedent, even if it does not attain anywhere near the sway that *stare decisis* has had in the Anglo-Saxon tradition. There is, as we have already had occasion to see, a written constitution, a bill of rights, and a judicial pre-view mechanism available in the Law Council (*Lagradet*). There is a tradition of legal reasoning which clearly recognizes a hierarchy of norms, which could easily lead judges to consider the normative validity of a statute when measured against the higher normative standard of the constitution. There is a Supreme Court and a Supreme Administrative Court with powers of judicial review that are explicitly acknowledged in the constitution, more explicitly, it might be added, than is the case with the United States constitution.[7]

By the 1950s, after more than a half-century of gradual political change, it had become apparent that the written constitution, based as it was on separation of powers, was no longer in accord with political practice, which by then had evolved into a *de facto* parliamentary model. In the effort to bring formality closer to reality, Swedes began a process of reform that took almost twenty-five years and which resulted in thoroughgoing changes in the written constitution. It began in the way that most reforms are accomplished in Sweden, with the appointment of

a parliamentary commission in 1954. Such commissions are selected with an eye not only for thorough research of the issues but as a way of capturing the involvement of the major social forces interested in a specific area of legislation. The reports of such commissions are commonly farmed out for comment to all the relevant interest groups in a practice that the Swedes refer to as 'remiss,' so that by the time a draft of any proposed reform bill reaches the Riksdag, there is a good chance that a supportive consensus already will have been reached among politically influential groups.[8]

The Commission on the Constitution, the first of several such commissions, issued its report in 1963.[9] On a number of important issues, however, the Commission failed to reach a consensus. Among these was the change to a unicameral parliament and a modification of the system of proportional representation, as well as some increased protection for civil rights. A second commission therefore was struck. Partial constitutional reforms, the unicameral legislature and the national system of proportional representation, were passed in 1969. The Commission also prepared drafts for a largely new constitution which were adopted by the Riksdag in 1973 and 1974, with a national election intervening. This new Instrument of Government, which replaced its obsolete counterpart, the constitution of 1809, represented nothing very novel, but was instead simply a reflection of practices which already had evolved. In the debate surrounding the adoption of this 'new' constitution, a number of questions was raised about the adequacy of constitutional guarantees for civil liberties. A new commission prepared a new bill of rights, which was published in report form in 1975 and passed twice by the Riksdag, before and after the 1976 elections. This expanded bill of rights included more specific reference to freedoms of expression, information, and association.

Because there were those who demanded more rigid requirements as conditions for any legislation that might in the future impinge on civil rights, yet another commission was formed and its report was adopted as a constitutional amendment in 1979. Any restriction on constitutionally protected rights requires two decisions of the Riksdag with an intervening year: 'This procedure shall, however, apply only if a group of not less than ten members ask for it and the Riksdag Committee on the Constitution considers that the bill really would affect one of the freedoms concerned. If so, the Riksdag nevertheless can take its decision immediately if at least 5/6 of those voting are in agreement with the decision.'[10]

For our purposes, the most important aspect of this episode of constitution-making was the treatment of the institution of judicial review. As early as 1963, the Swedish Supreme Court already had declared that the courts possessed such a power but that it should be used only with great

restraint. Initially, judicial review was not written into the 1974 Instrument of Government. It was proposed by the parliamentary Commission in 1975, but this proposal was rejected by the Government and by the Riksdag. Another such proposal was drafted by the new Commission in 1978, and it was adopted in 1979, in the form of Instrument of Government, Chapter 11, Article 14:

> If a court, or any other public organ, considers that a provision is in conflict with a provision of a fundamental law or with a provision of any other superior statute, or that the procedure prescribed has been set aside in any important respect when the provision was inaugurated, then such provision may not be applied. However, if the provision has been decided by the Riksdag or by the Government, the provision may be set aside only if the inaccuracy is obvious and apparent.

As a result of this provision, it is now clearly and expressly stated in the constitution that neither a court nor any administrative agency charged with the application of law may use as the basis of its decision any law that is flawed either as to substance or form. However, and the reservation here is of considerable importance, if the provision under constitutional scrutiny is one that has been passed by the Riksdag or decided by the Government, its application will be refused only if the flaw is obvious.[11]

JUDICIAL ACTIVISM: POLITICAL OBSTACLES

We have seen that there are ample powers available to the Swedish judiciary, abundant enough to support a posture of judicial activism, especially in the area of civil rights and liberties, which have been expanded and made more manifestly a part of the constitution in the past two decades; yet, any examination of the record of Swedish courts in the actual exercise of judicial power would suggest that they simply have been unable or unwilling to realize their potential. The record of flexings of judicial muscle is indeed meager and modest. There are few cases where the constitutional power of judicial review has been used in any way, even alluded to, much less having served as the basis for declaring acts of parliament or the executive unconstitutional. Almost no cases involve statutes of parliament or executive orders; the small handful that exists deals largely with low-level administrative regulations or local ordinances. The largest group of cases has involved taxation and questions of administrative law, and more norms have been examined (to revert to

the Swedish expression) by the Supreme Administrative Court than by the Supreme Court. In fact, the Supreme Court has yet to declare anything to be unconstitutional. Altogether, the record is scarcely impressive.[12]

The Swedish case is a splendid example of questions that invariably occur in discussions concerning transferability of institutions from one country to another. It does not mean that all admiration, or even some emulation, of foreign institutions is so unrealistic that we ought to dismiss them as total fantasies. The matter, never quite simply 'academic' has, of course, taken on enhanced importance in the wake of the institutional renewal, and consequent search for foreign models, currently taking place in the USSR and Eastern Europe. Sweden is one of the countries most frequently cited by former Marxist-Leninists looking for a system that seems to meld the virtues of democracy with those of socialism. Institutions rooted in one culture, however, can seldom successfully be transposed into another cultural setting, and when such transference takes place, it is usually accompanied by quite substantial modifications in those institutions.

It is true that the institutional possibilities for judicial activism in Sweden did not originate in the United States, but the point is that, even if they had, the political and legal cultures of Sweden are such as to inhibit any efforts to transform courts into independent policy-makers, even in the field of civil rights. The most firmly established elements of the Swedish tradition militate against activism of the kind commonly encountered in the United States, the homeland *par excellence* of judicial activism. The political culture of Sweden is characterized by a number of ideas and conditions which are not conducive to an expanded role for the courts. Among these are a devotion to parliamentary supremacy, democracy, popular sovereignty, and legal positivism; a distinctly non-liberal notion of the state; a deeply rooted political paternalism; the dominance of the Social Democratic party during the twentieth century; and an ingrained deference to a European style of separation of powers that receives added reinforcement from wider social norms. Let us examine in order each of these limiting cultural conditions.

At the heart of twentieth century Swedish political culture are beliefs in popular sovereignty, political democracy, and parliamentary supremacy. These are all essentially institutions whose breakthrough has come in the past eighty years, and it is hardly surprising that the first words of the first article of the first chapter of the Swedish Instrument of Government should express their meaning:

Chapter 1. *The Basic Principles of the Constitution*

Art. 1. All public power in Sweden emanates from the people. The

> Swedish democracy is founded on freedom of opinion and on universal and equal suffrage and shall be realized through a representative and parliamentary polity and through local self-government. Public power shall be exercised under the laws.

Article 4 reinforces the same preferences: 'The Riksdag is the principal representative of the people. The Riksdag enacts the laws.' It is obvious that any attempt to introduce an activistic conception of judicial review through the medium of courts, which do not rest on popular election and which are elitist, non-representative, and non-democratic, would face an impossible uphill struggle in the face of these constitutionally expressed precepts of Swedish political culture.

Another factor which contributes to the Swedish reluctance to entertain an aggressive use of judicial review is the absence of a natural rights tradition in the philosophical underpinnings of the Swedish political culture. Sweden typically has been a more congenial place for the rival doctrine of state positivism. If there generally is acknowledged to be no command superior to that of the sovereign – and there are in Sweden no theories of natural rights which antedate the establishment of the state – then the chances are not very likely that a court will be able, on the grounds that some traditional rights has been infringed, to supersede the state's control and protection of that right, as expressed in an act of parliament.

Another element of the Swedish political culture that must be taken into account is the dominance of the conception of a powerful state. The British version of liberalism, with its notion of the state as an ever-present threat to the freedom of the individual and suspicion of concentrated state power, never really had as strong an impact in Sweden as it did in the United States. Limits there might be to this or that office of government, but very few restraints ordinarily were placed on the power of the state *per se* and the sharp distinction made in the United States between state and society was not drawn in Sweden.[13] It was the idea of majoritarianism that gradually gained the ascendancy to such an extent that, even today, the state is seen not as a threat but as a powerful engine to be placed at the disposal of those forces that manage to be victorious at the polls. The limits that exist are thus part of the democratic tradition but do not really derive from the legal or constitutional traditions. Wedded to this notion of the powerful state is the related tradition, strong in Sweden, of paternalism – the belief that father knows best. This paternalistic inclination, with its probable origins in the small factories (*bruk*) which grew up on country estates, reinforced by the *noblesse oblige* of the Conservatives who ruled Sweden before the

advent of full-fledged democracy, has been inherited, *mutatis mutandis*, by the Social Democrats and trade union leaders who have set much of the Swedish political agenda in the twentieth century.[14]

The Social Democrats, in fact, never have been completely comfortable with the idea of judicial review, and they accepted the constitutional reforms of 1976 and 1979 only with grudging reluctance. There are several reasons for their hesitation.[15] For one thing, Swedish Social Democracy, which began as a Marxist movement but quickly evolved into a moderate, reformist, democratic socialism – was from its inception egalitarian rather than libertarian. It believed in political, not individual, freedom. How else could it attain power? The economic freedom, individualism, and legalism prized by bourgeois liberals never ranked high on their list of esteemed goods.[16] The appeal of judicial review to the non-socialist groups in Sweden was a response to their fear that the majority might submerge the minority unless there were constitutional guarantees and an official body to watch over their application. The Social Democratic approach, on the other hand, is that the one who is in greatest need of protection is the little man (not the property owner) and he is best protected by social legislation passed by a powerful government. It is not too surprising that the Social Democrats should harbor a traditional skepticism towards the judiciary, a body whose members were appointed rather than elected and those members were more likely than not to be drawn from non-working-class strata of society.

The wider norms of Swedish society may also play a part in Swedish attitudes towards courts as policy-makers. One of the most pronounced traits of Swedes, at least traditionally, has been a deference to expertise or at least to the idea that some people are more fit than others to do some things and the rest of us should respect their qualifications. One need not create a full-scale model of Plato's *Republic* to detect at least some of the origins of the Swedish belief that it is only fitting for a legislature to make laws, for courts to apply them, and for each to respect the special province of the other.

JUDICIAL ACTIVISM: LEGAL AND CULTURAL OBSTACLES

The obstacles to judicial activism presented by the political culture are reinforced by elements of the Swedish legal culture.[17] This is true whether one is dealing with the internal legal culture – the attitudes of legal elites – or external legal culture – attitudes towards law and the legal system held by the population at large. It is quite clear that Swedish

judges see their role as one calling for considerable restraint. They regard themselves largely as engaged in the technical examination of laws, and vigorously would eschew any role as policy-makers. One searches in vain through the pages of Swedish judicial history for a Coke, a Mansfield, or a Marshall. The fact of the matter is that Swedes have not been inclined to make heroes of their judges for the simple reason that judges have not done much that seemed heroic.

Swedish judges are, of course, not alone in their unwillingness to grasp the war hammer of judicial review with a firm grip and brandish it about with militant fervor. Judges in many other countries agree with the decision of the founders of the modern Swedish constitution to incorporate in it the language of restraint, namely, that a law of parliament was to be refused application only when the constitutional defects were obvious.[18] This same restraint characterizes most Civilian court systems, and where the judiciary has been able to assert an activist constitutional role, it has usually occurred only within the context of specially established, centralized constitutional courts which exist solely for the purpose of ruling on questions of constitutionality.[19] One of the recurring themes in Sweden is the expression of a fear that if the courts become too involved in policy-making, they will become too politicized and thereby lose the political impartiality which is so highly prized. By the same token, it was also thought by many that political discussion in parliament on matters of substance should not be burdened with legalistic quibbling and juridical disputes.[20]

And, of course, politics is in some sense at the bottom of the renewed discussion surrounding judicial review in the post World War II period, especially in the context of civil rights. Generally speaking, civil rights are observed by the government in Sweden as scrupulously as anywhere else in the world, but the main agency of enforcement has not been the judicial system. Calls for some kind of constitutional protection of civil liberties, in the form both of a constitutionally entrenched bill of rights and judicial review, emerged in the 1970s for a variety of reasons. Most of these derived in some measure from fears awakened in the Swedish Center and Right that the long period of Social Democratic hegemony might be placing in jeopardy some of the basic principles of the rule of law. Until the 1970s, the Social Democrats had adhered tacitly to the rules of an informal game which allowed them to tax, regulate, and spend for the social welfare, but the sacred cow of private ownership of property was to be left untouched. By the 1970s, taxes had risen to among the highest in the world, laws providing for workplace democracy had been passed which diluted the power of management, and the Social Democrats proposed and enacted an

employee wage fund program, the ultimate effect of which was intended to be the transfer of control over major corporations from private shareholders to trade-union organized groups. Property owners grew fearful and, as has been the case in other countries, looked towards increasing the power of the courts as a way of protecting property rights and, in general, of maintaining the rule of law against these putative threats.[21]

JUDICIAL ACTIVISM AND JUDICIAL PRE-VIEW

When discussing the power of courts in Sweden and the institution of judicial review, it is impossible to avoid considering their interaction with judicial pre-view and the Law Council (*lagradet*).[22] The Supreme Court was established in 1789, in the time of Gustavian absolutism. Its position was strengthened in the 1809 constitution, when it was assured independence, albeit without law-making power.[23] Under Gustav III, the Supreme Court had met jointly with the Council of State (*Statsradet*, the progenitor of the modern cabinet) acting together as a co-ordinating body to advise the king on legal matters. Even after it achieved total independence, however, the Supreme Court would examine issues only from a juridical standpoint. One reason for this was that the Supreme Court had experienced difficulties in maintaining its position vis-a-vis Gustav III; one way to protect its newly gained independence was to de-emphasize any political pretensions.

Until 1909, pre-vision was exercised by a special section of the Supreme Court. In that year, the powers were transferred to the newly formed Law Council, composed of a number of members of the Supreme Court and of the Supreme Administrative Court. In 1971, at the urging of the Social Democrats, pre-vision was made optional. The Government could choose the bills to be scrutinized. The 1976 non-Socialist Government modified this arrangement and required the Government to give special reasons if the Law Council does not intend to examine a bill.[24] The non-socialist parties (chiefly the Moderate, Liberal, and Center Parties) are more inclined than the Socialists to see judicial power as a protector of individual personal and property rights. Thus, the 1976 change represents an attempt to reverse the presumption introduced in 1971 by the Socialists.

The interaction between the Supreme Court and the Law Council, that is, between re-vision and pre-vision, creates some interesting situations in Sweden. For one thing, if the Law Council approves a legislative proposal's constitutionality in advance, it will later, or so one would think, be quite difficult for any court, including the Supreme Court, to declare such a law

unconstitutional, because the defect hardly could be said to have been 'apparent,' as required by the constitution. On the other hand, should the Law Council reject a proposal at the pre-vision stage, it would be quite risky for the Government to persist in enacting the bill since such a law very easily could be struck down later by the courts.[25] In general, the Law Council will reject an entire law only if technical changes will not rescue it from constitutional objection. Nor does the Law Council use its powers to become involved in the policy-making business. Generally its work is one of technical scrutiny, and it is decidedly non-political.[26]

Another peculiarity of the Swedish legal culture stands as an impediment to a more activist judiciary. This is the tendency in Sweden to blur the distinction between judges and administrators. In a very real sense, administrators in Sweden are trained to act as judges, that is, to decide each dispute according to the law, and the judges tend to see themselves as administrators, who apply rather than make the law. Both careers are in the bureaucracy, and there is even some interchangeability between judges and administrators.[27] The organization of the Swedish constitution confirms this overlap of the judicial and administrative functions. The title of Chapter 11 is instructive: 'Judicial and Other Administration.' Article 14 of that chapter states that it is not only a court which may not apply unconstitutional provisions but 'a court, or any other public organ.' Substantially the same juxtaposition appears in Chapter 1, Article 8: 'For the administration of justice there are courts of law and for the public administration there are state and municipal administrative authorities,' and in Article 9: 'Courts and public authorities as well as others who carry out functions *within the public administration* shall in their activities observe the equality of all persons under the law and shall maintain objectivity and impartiality.'[28]

Finally, it can also be said that the legal culture is not conducive to activism and law is not politicized for the simple reason that Swedish politics is not legalistic. Swedes do not turn naturally to the courtrooms of the country when they desire to effect social change, but to the legislative arena. Judges in Sweden resemble their counterparts on the Continent more than their fellow jurists in the United States. The Swedish judicial profession is essentially a civil service career, to be commenced when one is graduated from law school, rather than by appointment or election later in life after one already has achieved distinction as a practicing attorney. Furthermore, lawyers are not the dominant professional presence on the Swedish political landscape that they are in the United States, and there are in fact only a small handful of Riksdag members with legal training, even fewer who have been actively engaged in the practice of law.

In the final analysis, the main protection for the individual in Sweden is political, not judicial. We are left with the semi-rhetorical question posed by a Swedish scholar: 'Does the Supreme Court see as its foremost task to be a protector of citizens' legal rights or to function as the extended arm of power?'[29] Professors in the United States, who often have had occasion to ponder the same point when attempting to analyze the role of an academic dean, could no doubt suggest an answer. At any rate, we do know that Swedish judges, for all their qualifications, competence, and possibilities have not been activist policy-makers. The Swedish political and legal processes simply do not work that way, and most importantly, Swedes – at least when they are considering courts and laws – do not think that way.

NOTES

1. *New York Times*, March 23, 1989, p. 1. This was a summary of a U.S. Supreme Court opinion which held that the New York City Board of Estimate, as presently constituted, is an unconstitutional violation of the one-person, one-vote rule of the 14th Amendment.
2. Glendon Schubert, *Judicial Policy Making: The Political Role of the Courts*, rev. edn (Glenview, IL: Scott, Foresman, 1974), p. 213.
3. Herbert Jacob, *Justice in America: Courts, Lawyers, and the Judicial Process*, 4th edn (Boston: Little, Brown, 1984), pp. 25–46. Actually both roles may involve judicial policy-making.
4. For the German approach to this question, see the description of the General Part of the *Bürgerliches Gesetzbuch (B.G.B.)*, or Civil Code, in John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd edn (Stanford, CA: Stanford University Press, 1985), pp. 68–79.
5. Compare the Constitutional Council in France, which has a similar function, but which is organized quite differently.
6. See Stig Strömholm, *An Introduction to Swedish Law* (Stockholm: Norstedts, 1981), pp. 32–5. For a survey of the literature on this taxonomic question, see Rudolf B. Schlesinger, Hans W. Baade, Mirjan R. Damaska, and Peter E. Herzog, *Comparative Law: Cases – Texts – Materials*, 5th edn (Mineola, NY: The Foundation Press, 1988), p. 327.
7. *Instrument of Government*, Chapter 11: Article 14, contained in *Constitutional Documents of Sweden* (Stockholm: Norstedts, 1981).
8. This historical discussion is drawn primarily from pp. 10–13 of *Constitutional Documents of Sweden*, published by the Swedish Riksdag. It was written by Erik Holmberg and Nils Stjernquist, two of the most eminent authorities on the Swedish constitution. Both were heavily involved in the amendment process during this period.

9. For an enumeration of the various reports issued by this commission, see Erik Holmberg and Nils Stjernquist, *Var författning: Sjunde upplagan* (Stockholm: Norstedts, 1988), pp. 298–9.
10. *Constitutional Documents of Sweden, 1981*, p. 17. See *Instrument of Government* 2:12, paragraphs 3–5 for the procedures. Chapter 2 of the Instrument of Government lists in detail the fundamental freedoms and rights subject to constitutional guarantee. It should be noted that Sweden also has a separate Freedom of the Press Act, the first of which was enacted in 1766. This act has the status of fundamental law and probably should be included in any assessment of civil liberties protection in Sweden. See *Constitutional Documents of Sweden*, pp. 38–72, 133–64. Yet another area where civil rights are given legislative, if not constitutional, protection is in *The Swedish Code of Judicial Procedure*, published by the National Council for Crime Prevention, Stockholm, May 1985. See also Hans Danelius, *Human Rights in Sweden*, 3rd edn (Stockholm: The Swedish Institute, 1981).
11. Holmberg and Stjernquist, *Constitutional Documents of Sweden*, p. 31. The wording of the provision amounts to a compromise solution to the long controversy between the proponents and opponents of judicial review.
12. Hakan Strömberg, 'Normprövning i nyare rättspraxis,' *Förvaltningsrättslig Tidskrift*, Vol. 51 (1988): 121–43.
13. Gunnar Heckscher, *The Welfare State and Beyond: Success and Problems in Scandinavia* (Minneapolis: University of Minnesota Press, 1984), pp. 27ff. On the limited nature of Swedish liberalism, see Göran B. Nilsson, 'Swedish Liberalism at Mid-Nineteenth Century,' in Steven Koblik, *Sweden's Development from Poverty to Affluence* (Minneapolis: University of Minnesota Press, 1975), pp. 141–63. For an argument that Swedish liberalism was only briefly dominant, see Douglas Verney, 'The Foundations of Modern Sweden: The Swift Rise and Fall of Swedish Liberalism, unpublished paper delivered at the 43rd Annual Meeting of the Canadian Political Science Association, 8–11 June 1971.
14. H. M. Enzensberger, *Svensk Höst* (Stockholm: Dagens Nyheter, 1982), pp. 29–35.
15. Nils Stjernquist, in Rune Lavin (ed.), *Om lagradsgranskning* (Jurist förlaget i Lund, 1987), pp. 32, 47, 51.
16. Erik Anners (ed.), 'Konstitutionell demokrati eller majoritets diktatur,' in *Demokratin, Rättsäkerheten och Beskattningen* (Stockholm: Norstedts, 1988), p. 26.
17. For a brief treatment of the concept of legal culture, see Lawrence M. Friedman, *American Law: An Introduction* (New York: Norton, 1984), pp. 6–7, and Henry W. Ehrmann, *Comparative Legal Cultures* (Englewood Cliffs, NJ: Prentice-Hall, 1976).
18. Actually this position is not all that distant from the one held by James Bradley Thayer: 'An act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave

no room for reasonable doubt.' A long list of distinguished United States jurists – among them the likes of Frankfurter, Holmes, and Learned Hand – would no doubt concur. The Swedish Bar Association, however, has expressed its desire to have the word 'apparent' removed from Chapter 11, Article 14. *Sveriges Advokatsamfunds Rättsäkerhets program*, Stockholm, May 1988, p. 10.

19. See Mauro Cappelletti and William Cohen, *Comparative Constitutional Law: Cases and Materials* (Indianapolis: Bobbs-Merrill, 1979), pp. 73ff.
20. See Stjernquist, in Lavin, *Om lagradsgranskning*, p. 52.
21. See the *Rättssäkerhets grupp* symposium which was held in Stockholm on March 12, 1987, in Erik Anners, *Demokratin, rättssäkerketen och beskattningen*, pp. 22–6. See also Aleksander Peczenik, 'Försvara rättsstaten' in *Svensk tidskrift*, No. 6 (1988): 294–8, and Brita Sundberg-Weitman, *Rättsstaten ater* (Stockholm: Norstedt, 1984).
22. *Instrument of Government*, Chapter 8, Article 18.
23. The present Instrument of Government guarantees the independence of the judiciary in several provisions, i.e., Chapter 2, Article 11 and Chapter 11, Articles 1–4.
24. Kjell A. Modeer, 'Granskning eller prövning? – Högste domstolen som normbildare. Nagra rättshistoriska synpunkter' in Lavin, *Om Lagradsgranskning*, pp. 13ff., at page 27.
25. Bertil Bengtsson, 'Lagradets makt över lagstiftningen,' in Lavin, *Om lagradsgranskning*, p. 65.
26. See Gustav Petren, 'Lagradets Verksamhet,' in Lavin, *Om lagrads-granskning*, p. 55, and Bertil Fiskesjö, in Lavin, *Om lagradsgranskning*, p. 80.
27. Joseph B.Board, 'The Courts in Sweden,' in Jerold Waltman and Kenneth Holland (eds), *The Political Role of Law Courts in Modern Democracies* (London: Macmillan, 1988), pp. 195–6. On the judicial career in general, see Lotti Rydberg, *Domarkarriären* (Stockholm: Juristförlaget, 1988).
28. Emphasis added.
29. Hakan Strömberg, *Normprövning i nyare rättspraxis*, p. 143.

12 Judicial Activism in Japan

Hiroshi Itoh

JUDICIAL ACTIVISM: BY-PRODUCT OF THE 1947 CONSTITUTION

The Japanese judiciary under the Meiji Constitution did not play any meaningful political role at all. That basic law did not confer upon the courts the power to declare laws invalid on the ground of unconstitutionality. The judiciary, headed by the Great Court of Cassation, was confined to the resolution of criminal and civil disputes and did not have any power over the Administrative Court. Thus, in a few instances the Great Court of Cassation in a civil case and the Administrative Court in an administrative case handed down conflicting decisions on a virtually identical legal issue.[1] The courts in pre-1945 Japan were very much limited to settlement of private disputes, with their decisions having dubious value as precedent for similar cases in the future. The judiciary did not enjoy coequal status in relation to the Cabinet and the Imperial Diet.

United States forces during the occupation after World War II introduced the power of judicial review.[2] With the abolition of the Administrative Court and all other special tribunals, the judicial hierarchy under the Constitution of 1947 was streamlined into the Supreme Court, High Courts, District Courts, Summary Courts, and Family Courts. Article 81 of the Constitution stipulates, 'the Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.' Judicial review extends to criminal civil and administrative disputes. Since, unlike the Italian and German Constitutional Courts, also products of U.S. occupations, the Japanese Supreme Court is not a constitutional court to decide constitutional issues only, it may review constitutionality issues in the process of resolving civil, criminal, or administrative disputes.

The periods of the Meiji Constitution and Tokugawa rule painfully witnessed infringement of the people's rights and freedoms by the regime of the day. More recently, the late 1930s to the mid 1940s was a period of gross oppression and suppression of political dissidents by the military and fascist government in Japan. In order to avoid recurrence of such deprivation of civil rights and liberties, the 1947 Constitution enumerates

in more than thirty articles specific human rights guaranteed to the people. At the same time, it allows the government to restrict or even ban civil rights and liberties if they interfere with public welfare. By so doing, the Constitution tries to strike a balance between public and private interests.

The Constitution has three principal goals: pacifism, popular sovereignty, and fundamental human rights. These are achieved by means of the rule of law and judicial supremacy. The Supreme Court and lower courts have become the authoritative enforcers of the supremacy of the Constitution as well as definers of the authority of the three major branches of the national government, of the central and peripheral governments, and of government vis-a-vis the individual. We shall examine how the courts have defined through case law, the authority of the Diet, the Cabinet, administrative agencies, and prefectural and local governments. Also, through case law, we shall examine how the courts have protected individuals from deprivation of life, liberty, or property by governmental institutions. These two topics are closely related to each other, because the Court often declares either governmental policy or administrative decisions unconstitutional when they result in violation of individuals' human rights. In other words, in Japan there is a high degree of correlation between judicial activism, in which the Court invalidates public policies deemed unconstitutional, on the one hand, and liberalism, in which the Court upholds civil rights and liberties at the expense of the government's authority, on the other.

TYPES OF JUDICIAL ACTIVISM

Judicial activism and judicial restraint are defined in terms of conflict or harmony between judicial decisions and the policies of the political branches.[3] If a court upholds the constitutionality of a policy of the political branches, it exercises judicial restraint, thereby creating harmony on both sides. If a court declares a governmental policy unconstitutional, it comes into conflict with the political branches, thus becoming an activist court. There are three types of judicial activism. Each type will be demonstrated with one or two court decisions.

First, a political branch changes its policy and makes a new one while the court follows its own judicial precedent and declares the new policy unconstitutional, thus creating a conflict with the legislature or executive, hence engaging in judicial activism. *Kakukichi Co. v. Governor, Hiroshima Prefecture* (1975),[4] better known as the Pharmaceutical Code case, is a good illustration of this type of judicial activism. The plaintiff company applied to the Governor for a license which would enable it to open a new

drugstore. While its application was pending, the National Diet changed the Pharmaceutical Code, and the Hiroshima Prefectural Assembly changed its ordinance accordingly. Based on these legislative changes, the Governor denied the plaintiff a license. The Supreme Court unanimously held that both the Diet and the Prefectural Assembly violated the plaintiff's constitutional right to freedom of occupation when their legislation, as amended, unduly restricted licensing of new drugstores without showing rational legislative purposes to restrict locations of new stores. Thus, the Supreme Court, on the one hand, and the Diet and the Prefectural Government, on the other, came into conflict over a constitutionally protected civil right of the plaintiff, that is, freedom of occupation.

Next, *Yoneuchiyama v. Aomori Prefectural Assembly* (1953)[5] also illustrates judicial activism of the above-mentioned type, involving judicial review of the executive power of the Cabinet and the autonomous power of the prefectural assembly. The plaintiff, a prefectural assembly member, was temporarily expelled from the assembly for unruly conduct. When a District Court issued an injunction against the expulsion order, the prefectural assembly called on the Prime Minister to intervene on its behalf on the grounds that the expulsion order was an internal matter of the legislative branch and lay outside the purview of judicial power. Denying the Prime Minister's objections to the judicial injunction, the Supreme Court ruled that the Prime Minister failed to raise an objection while the case was still at the District Court. Thus, the Court narrowly construed the autonomous power of the political branches. Because the Court reacted negatively to actions taken by the Prime Minister and the prefectural assembly, this case falls within the same category of judicial activism.

Second, judicial activism emerges when both the Supreme Court and a political branch change their policies, but either in opposite directions or at a different pace. Here the Court is likely to hold once again the new policy of the political branch to be unconstitutional, especially if it involves some civil liberty issue.

The Supreme Court decisions regarding legislative malapportionment and reactions of the Diet to them represent this second type of judicial activism. In *Koshiyama v. Chairman, Tokyo Election Control Commission* (1964),[6] better known as the malapportionment case, the Supreme Court upheld the power and manner of the Diet in apportioning Diet seats for each election district. Despite the fact that the plaintiff unsuccessfully challenged malapportionment in Tokyo, the Diet initiated partial reapportionments of its own. Later, however, the Court changed its precedent established in the *Koshiyama* case, and declared the general election of 1972 unconstitutional in *Kurokawa v. Chiba Prefecture Election Control Commission* (1976).[7]

The Court based its decision on the constitutional grounds that the apportionment schedule in the Diet's Election Code violated equality under law, which guarantees the principle of one-man, one-vote. Thus, both sides made their policy changes in the same direction, but the Supreme Court held the Diet's policy changes to be insufficient in view of the constitutional requirement for equality.

Third, the Court and political departments come in conflict with each other when the former changes its policy while the latter maintains the *status quo ante*. Here the Court becomes a driving force for change in public policy. This 'catalyst' type of judicial activism manifested itself most dramatically in a series of patricide cases. Article 205, Paragraph 2, of the Criminal Code imposes life imprisonment or not less than three years imprisonment at hard labor upon those convicted of inflicting bodily injury leading to the death of a lineal ascendant, while Article 205, Paragraph 1, imposes a fixed term of not less than two years upon those convicted of inflicting bodily injury leading to the death of other than a lineal ascendant. The provision of patricide is a remnant of criminal legislation directly influenced by Confucian ethics of respect for elders. In *Fukuoka District Prosecutor's Office v. Yamato* (1950),[8] a district court declared Article 205 unconstitutional in that it imposes an unreasonably harsh sentence, and the court sentenced Yamato, convicted of patricide, to three years confinement at hard labor but stayed execution for three years. Upon appeal, the Supreme Court reversed this lower court decision and upheld the constitutionality of the penal provision of patricide. Twenty-three years later, however, the Supreme Court in *Aizawa v. Japan* (1973) [9] renounced its *Yamato* precedent and declared Article 200 of the Criminal Code, which resembled Article 205, Paragraph 1, repugnant to the constitutional requirement for equal protection under law.

JUDICIAL ACTIVISM, CIVIL LIBERTIES, AND ADMINISTRATIVE ACTIONS

The extensive range of fundamental human rights protected by the 1947 Constitution may be analyzed into the following categories: (1) equality of rights under the law; (2) the economic freedom of citizens; (3) rights related to the quality of socioeconomic life; (4) the right to participate in election politics; (5) constitutional rights of criminally accused persons; and (6) intellectual rights and freedom.[10] Because most of these rights and liberties were unknown under the Meiji Constitution, the Japanese flocked to the courts with a large number of disputes testing their newly-acquired

rights. The courts handed down decisions energetically, but at one time in the early days backlogs reached seven thousand cases pending before the Supreme Court.

We shall list additional cases of judicial protection of individuals from deprivation of life, liberty or property by governmental institutions. An application of the Customs Code was held unconstitutional for permitting confiscation of a ship and cargo from a third party to a crime without giving it notice and hearing,[11] a violation of the due process requirement in the Constitution. In a bribery compensation case, an order to make payment in lieu of confiscation of bribe money was also reversed as denial of due process.[12] In a labor-management dispute involving the Tokyo Central Post Office, public employees were held to possess the constitutional rights of workers in private industry although the nature of their work tinged with public interest may dictate special restriction.[13] Finally, evidence obtained under duress from a criminal suspect was held unconstitutional and inadmissible.[14] There are many other decisions which show that the Supreme Court has undertaken to protect the constitutionally guaranteed procedural rights of the criminally accused person against law enforcement agencies.

If the courts have forfended government infringement on civil rights and liberties, they have also exercised judicial review over a new type of dispute in which one group of individuals allegedly transgresses rights and liberties of another individual or group. For example, at the end of his probationary period, a university graduate was denied life-long employment by a private company because of his leftist political activities during his university days, in spite of the prevailing practice to the contrary. In *Takano v. Mitsubishi Resin Co.* (1973)[15] the Supreme Court upheld the employer's freedom of contract.

In the MacArthur draft of the 1947 Constitution, judicial review was to be final regarding fundamental human rights. On all other matters the Diet would have the last word. The American framers seemed to believe in judicial review as an effective device to protect civil rights and liberties, although the idea of conferring finality upon judicial review regarding civil liberties was deleted from the final version of the document. As it turned out, the Supreme Court declared governmental actions infringing on civil rights and liberties unconstitutional much oftener than actions infringing on any other parts of the Constitution.

Japanese courts traditionally have been reluctant to leave administrative acts unreviewed. The courts have conducted trials *de novo* in reviewing exercises of administrative discretion. Only in a small percentage of cases have the courts accepted administrative fact-findings as expert opinions

and dispensed with trials *de novo*. At the same time, only in a small number of cases has the Supreme Court held administrative actions unconstitutional. In such instances judicial decisions are based on an abuse of administrative discretion or errors in administrative fact-finding. In *Hayashi et al. v. Governor, Aichi Prefecture et al.* (1971),[16] better known as the Agricultural Land Code case, the Supreme Court held that a provision of the government ordinance to enforce the Agricultural Land Code was an unconstitutional delegation of the legislative power to the Minister of Agriculture and Forestry. In the opinion of the Court, the Code was designed to set conditions for the sale of arable lands by evaluating long-range socioeconomic changes, but there was no urgency to change an estate originally acquired for agricultural purposes into a high priority public use land, the Court concluded. Accordingly, the Court held that plaintiffs could request directly the agricultural minister to sell their own lands back to them. If the minister failed to respond favorably, they could seek a judicial remedy. If the governor had already sold their former arable land, plaintiffs could seek judicial revocation of the transaction. Here the Court showed judicial activism but also instructed a specific measure for remedy. Likewise, the Supreme Court set aside administrative discretion and instructed a transportation agency to correct its arbitrary and unconstitutional denial of a driver's license. In another case,[17] the Tokyo transportation bureau denied a private taxicab driver a commercial license. In the opinion of the Court, the bureau failed to define guidelines for granting licenses and neglected to give the plaintiff a chance to present evidence of past experiences and eligibility. This unfair procedure rendered the administrative decision arbitrary and unlawful.

While the courts do review legality and constitutionality of administrative dispositions as challenged in specific and concrete litigations, they do not administer public institutions such as mental hospitals, prisons, schools, and local governments. Even where these and other public institutions are found by a court to be managed in an unconstitutionally substandard manner, the court will direct and instruct administering agencies to remedy the situation. Neither would it supervise any corrective remedies instituted by agencies unless such remedies are challenged in court anew.

Administration of public policies has exclusively been left to bureaucracy at the national, prefectural, and local levels. The bureaucrats either sublegislate Diet policies within broadly defined guidelines or implement them by means of administrative guidance. Bureaucrats apply administrative rules and regulations to socioeconomic activities in the private sector. They also issue nonlegal and nonbinding recommendations or issue warnings to cease and desist from some undesirable actions. Disregard of

administative guidance by private parties often brings about bureaucratic retaliation and sanctions against belligerent parties. In view of the pervasive power and influence of administrative agencies in Japan, the courts have seldom stepped beyond the conventional judicial function, and have not been involved in the actual process of administering judicial policies governing public institutions.

Judicial review and case law have been firmly established in Japan, but the country is still run by statutory law. Modern Japan began in the latter part of the nineteenth century by introducing the European, especially German, civil law system, and traditionally public policy has taken the form of legislation by the Diet and sublegislation by the bureaucracy. Even today case law, or judge-made law, constitutes only a fraction of the entire picture of making and administering public policies in Japan.

At the same time, both the people and government officials, particularly bureaucrats, trust the courts and judges in general and hold them in great esteem. Thus, judges could affect and change public attitudes and values. Yet judges traditionally refrain from making public remarks and public appearances directed at influencing public opinion on social issues. Most judges are reluctant to publish their own views in newspapers or journals. They are extremely self-conscious of appearing to advocate particular political or social causes. They have confined their work to conflict resolution in individual trials in accordance with legislative intent and purpose, instead of prescribing their own norms.

JUDICIAL IMPACT UPON JAPANESE SOCIETY

While judges do not attempt to impose their values and opinions upon society, their decisions and court opinions are intensely analyzed and interpreted by other judges, lawyers, legal scholars, and the mass media. Through these court observers, then, judicial opinions and underlying value judgments are transmitted to the public. The vast majority of judges in Japan, consciously or unconsciously, convey the prevailing ideologies of judicial conservatism and judicial restraint promulgated during the long reign of the conservative Liberal Democratic Party (LDP). One of the important functions of the judiciary as part of the governing organ is to put the seal of legitimacy upon and generate support for actions of other branches of government. The Supreme Court rarely declares governmental policies unconstitutional and invalid unless unconstitutionality is 'obvious at first glance' or unless administrative discretion is exercised in a grossly unreasonable and arbitrary manner. Overall, the Supreme Court justices

over the past forty-some years have defined the public welfare as based on law, order, and stability, rather than on the individual's rights and freedoms.

Some Supreme Court justices, like Tsuyoshi Mano, Kotaro Irokawa, and Jiro Tanaka, are known to have argued in their court opinions for an active judicial role in shaping public policies. Once in a great while their activist views are expressed in law journals in the form of short nonlegal essays. Given Japan's illiberal history, their judicial views are amazingly reflective of Western liberalism in that they place a premium upon fundamental human rights and limited government.

Japanese judges and other legal professionals are traditionally trained in Western law, especially German, French, and United States laws. So they occasionally make reference to or even cite foreign legal doctrines and case laws to reinforce their arguments. Yet, reliance on foreign opinions or writings is not confined to activist judges. Both activist and non-activist judges do occasionally refer to the United States Supreme Court decisions and opinions. Justice Y. Saito cited Justice Felix Frankfurter's plurality opinion in *Colegrove v. Green* (1946)[18] to support his argument that the judiciary should not enter the political thicket of election malapportionment. Or in the *Sunagawa* case (1959)[19] Justices Toshiro Irie and Hachiro Fujita made reference to the doctrine of the political question in the United States and the act of state doctrine in England to strengthen their opinion that the Court should not decide the constitutionality of the Self-Defense Force and American military bases in Japan because the very national survival is at stake. Japanese judges are generally aware of the active political role the United States Supreme Court plays in the American political system. Because they are basically oriented toward judicial restraint, as expounded by Justice Louis Brandeis in *Ashwander v. T.V.A.* (1936),[20] they do not consider activist decisions of the United States court useful to rely upon and would rarely cite them.

If the courts have been hesitant to change public values and opinions, some of their decisions clearly have had the effect of redistributing political power and economic wealth. The prosecution, trial, and conviction of former Prime Minister Kakuei Tanaka in 1976 for receiving bribes from the Lockheed aircraft company led to his disgrace and loss of political influence. In 1988 and 1989 the prosecutions of many ruling LDP leaders contributed to a shift of seats in the Diet from the LDP to the Japan Socialist Party (FSP), which in the 1989 general election won a majority in the House of Councillors, although it failed to follow up with a similar victory in the 1990 elections to the more powerful House of Representatives. Because of scandals, in the two-year period 1988–1989 Japan was governed by three

different prime ministers. Given the losses suffered by the powerful LDP, it is noteworthy to remark that political interference with these trials was non-existent.

In the areas of industrial pollution and sex discrimination, the courts have also played a redistributive role, taking from the haves and giving to the have nots. In the early 1970s, a group of lower court judges were among the first in the world to articulate a policy forcing corporate polluters to compensate large numbers of victims, an achievement all the more remarkable given the absence of the class action suit in Japan.[21] Women, unlike pollution victims, in rural areas, deliberately and energetically resorted to the strategy of improving their economic situation by filing lawsuits demanding equal wages for equal work, equal opportunity for promotion and improvement in working conditions.[22] The abolition of the Administrative Court by the 1947 Constitution has permitted the lower courts to award sizable sums in compensation to large numbers of victims of administrative wrong doing. However, in the *Osaka International Airport Noise Pollution* case (1987),[23] the Supreme Court sustained a lower-court injuction to stop annoying night flights but dismissed the portion of the case where the plaintiffs were demanding financial compensation for injuries caused by noise pollution. The prospect of many similar suits being filed against all the major airports scattered throughout the country made judicial restraint appear the more feasible alternative.

PROSPECT AND IMPLICATIONS OF JUDICIAL ACTIVISM

The type of judicial activism in which the Supreme Court follows its own judicial policy in spite of a policy change on the side of the political branches occurs very rarely in Japan. It is even rarer to expect judicial activism in which the Court and other governmental branches change their respective policies in different directions or in the same direction at a different pace. For one thing, the courts are extremely reluctant to deviate from judicial precedent for fear of upsetting the *status quo ante* or the predictability of governmental policy-making. For another thing, the current LDP government and its conservative predecessors have made incremental policy changes or no changes at all. These types of judicial activism are likely to occur only when the LDP government starts appointing politically active judges or when the government is replaced by a political party whose public policy ideas are vastly different from those of the LDP. The chance is extremely small that the LDP will appoint progressive judges who would decide contrary to the appointer's policies on

national security, public welfare, and fundamental human rights. Indeed, such a government would be quite unstable and unpredictable.

There is the possibility that the LDP-government will eventually be defeated in the House of Representatives elections and replaced either by progressive members of the LDP, after forming a coalition government with some opposition parties like the Clean Government Party or the Social Democratic Party, or by the Japan Socialist Party forming an anti-LDP coalition government including other opposition parties. Should a JSP-led government be elected, there may be judicial activism of the right where the Court adheres to LDP policies. Or, should the JSP-led government start appointing progressive judges of its own, there may be judicial activism of the left that may reverse public policies made under the LDP's long reign. In the long run, however, the new government and the new Court are likely to restore harmony with each other.

Finally, the catalyst type of judicial activism is less likely to take place under a more progressive LDP-led coalition government or a JSP-led coalition government, because new governments will be more libertarian than the present and past governments and the Supreme Court will not be a driving force to advance libertarian decisions in civil rights and liberties cases. The likelihood of these prospects being realized, however, heavily depends on reactions of national bureaucrats to a new government of such progressive orientation. Japan is basically a bureaucratic state in which high-ranking administrators wield an enormous amount of influence over all phases of public policy-making and enforcement. Should bureaucrats resist changes, there would be frequent instances of judicial activism vis-a-vis the bureaucracy on many basic national issues.

The Japanese judiciary seldom has been the subject of controversy over its role in the political system. Judges have defined their role primarily as interpreters of public policies as questioned in actual litigation between concrete parties with a legal dispute. They prefer a passive or even no role in public policy-making and implementation. Yet, the Supreme Court has projected different images among different court observers. Probably there are many more critics than admirers of the Court. Critics argue that the judiciary, particularly the Supreme Court, has followed subserviently the LDP lead in public policy and blindfoldedly put the official seal of legitimacy on LDP policies and actions. They point out that the Supreme Court too often defers to the political branches and leaves bureaucrats with almost unrestricted political and administrative discretion. Finally, the Court is accused of having abandoned its role as guardian of the fundamental human rights of the people.

Support for the Supreme Court often comes from the conservatives in government and the business/financial community. Conservatives praise the Court for providing law, order, and stability and contributing to the rebuilding of the Japanese nation in the post-war era. In the *Urawa* case,[24] a district court gave a light sentence to a mentally deranged young mother who allegedly committed mercy-killing of her children in order to spare them from the hardship of their lives. A Diet committee called the sentence unreasonably light and demanded in vain legislative investigation. The Supreme Court, in turn, scolded the LDP-led Diet for interfering with the independence of the judiciary. Conservatives also denounced the young lawyers association (*seihokyo*), made up of progressive judges and other legal professionals, in the early 1970s as a bunch of communist radicals. They also denounced some libertarian decisions in public safety cases and labor strikes as manifestation of these communist-oriented judges. Rhetoric over 'the reactionary, oppressive Supreme Court' and 'radical communist judges' eventually subsided, but the political left and right still disagree over the judiciary's performance during the long period of conservative domination of the government.

As alluded to above, all lower courts are granted the power of judicial review in Japan, although their rulings are subject to review by the Supreme Court. From time to time, the Supreme Court has been criticized for reversing libertarian activist decisions by junior judges sitting on the lower courts. There are a number of lower court decisions that disagree with the policies of other governmental institutions, thereby giving rise to judicial activism. In the area of national defense and national security, lower courts in the *Sunagawa* case (1959) and the *Nagunuma Nike Missile Base* case (1973)[25] consistently declared the Japanese Self Defense Force and American military bases in Japan unconstitutional in violation of, *inter alia*, the no-war provision of the Constitution. Upon appeal, however, the Supreme Court reversed the lower court rulings and held the military organization and bases constitutional. In the area of civil liberties, the lower courts condemned police violation of the academic freedom of university students and university autonomy in the *Popolo Players* case (1963),[26] but once again the Supreme Court reversed the decision below and convicted student activists for a minor criminal offense. Thus, judicial activism is found in lower courts as well, but it is hard to generalize that lower courts are more or less active than the Supreme Court because overall the Supreme Court and lower courts agree with each other much oftener than is popularly believed.

The implications of an activist judiciary are significant for the political system. Whenever the Supreme Court declares public policy

unconstitutional, the political branches often show their sensitivity to the Court's pronouncements and attempt to take corrective measures. In the Pharmaceutical Code case (1975), a case involving the confiscation of the property of a third party to a crime (1962),[27] and the Forestry Code case (1987),[28] the Diet immediately revised the provisions of each law which the Court had ruled unconstitutional and offered legislative remedies. Only in the Patricide case (1973) and the malapportionment case (1976), has the Diet yet to respond positively to the Court's decisions that Article 200 of the Criminal Code and the election apportionment schedule, respectively, violate the equality clause of the Constitution. Even though the Supreme Court has rendered Diet policies unconstitutional only in half a dozen cases over forty-some years, the political branches unequivocally have manifested their acceptance of the institution of judicial review and have contributed to judicial supremacy and the rule of law in Japan's political system.

Should the courts play an active role at all? Most Japanese judges would answer in the negative. The Constitution, legal conditions, and intellectual climate are probably favorable for the courts to play an active role in policy-making, but social and political conditions are not. Consequently, instead of trying to realize the constitutional aspiration of pacifism, popular sovereignty, and fundamental human rights, the judiciary will continue to leave to the political branches the task of achieving these goals by acknowledging the widest possible degree of political and administrative discretion and autonomy. Only when unconstitutionality of public policy becomes 'so obvious at first glance,' or administrative discretion becomes so unreasonably arbitrary and capricious as to infringe upon fundamental human rights, will the judiciary render public policies null and void. Anything beyond this level of judicial activism would most probably be viewed both inside and outside the judiciary as a transgression of the judiciary into the realm of legislation. For the past five decades, the judiciary, with its newly acquired power of judicial review, has sailed cautiously and slowly through an uncharted ocean. Why should or would it risk its own established place under the Japanese Constitution by confronting the strong political branches and a powerful bureaucracy firmly entrenched in Japanese government and tradition?

NOTES

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3. Hiroshi Itoh, *The Japanese Supreme Court: Constitutional Policies* (New York: Markus Weiner 1989), p. 162.
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5. Supreme Court, Grand Bench, 26 January 1953; 7 *Minshu* 12.
6. Supreme Court, Grand Bench, 5 February 1964; 18 *Minshu* 270.
7. Supreme Court, Grand Bench, 14 April 1976; 30 *Minshu* 223.
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9. Supreme Court, Grand Bench, 4 April 1973; 27 *Keishu* 265.
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11. *Nakamura et al. v. Japan* (1962); Supreme Court, Grand Bench, 28 November 1962; 16 *Minshu* 1593.
12. *Yoshida v. Japan* (1965); Supreme Court, Grand Bench, 28 April 1965; 19 *Keishu* 203.
13. *Toyama et al. v. Japan* (1965); Supreme Court, Grand Bench, 26 October 1966; 161 *Saibanshu Keiji* 185.
14. *Abe v. Japan* (1966); Supreme Court, Second Petty Bench, 1 July 1966; 20 *Keishu* 537.
15. Supreme Court, Grand Bench, 12 December 1973; 27 *Minshu* 1536.
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17. Supreme Court, First Petty Bench, 28 October 1971; 25 *Minshu* 1037.
18. 328 U.S. 549.
19. Supreme Court, Grand Bench, 16 December 1959; 13 *Keishu* 3225.
20. 297 U.S. 288.
21. Frank K. Upham, *Law and Social Change in Postwar Japan* (Cambridge, MA: Harvard University Press, 1987), p. 49.
22. Upham, *Law and Social Change in Postwar Japan*, pp. 129–144.
23. *Japan v. Yanagawa*; Supreme Court, Grand Bench, 16 December 1981; 35 *Minshu* 1369.
24. Urawa District Court, 2 July 1948; *The Hoso Shimbun*, 27 November 1948, p. 6.
25. *Ito et al. v. Agricultural Minister*; Sapporo District Court, 7 September 1973; *Hanrei Jiho* No. 712, p. 26.
26. Supreme Court, Grand Bench, 22 May 1963; 17 *Keishu* 370.
27. *Nakamura v. Japan*; Supreme Court, Grand Bench, 28 November 1962; 16 *Keishu* 1953.
28. *Hiraguchi v. Hiraguchi*; Supreme Court Grand Bench, 22 April 1987; 41 *Minshu* 408.

13 Judicial Activism in the USSR

Peter B. Maggs

The editor of this volume has defined 'activist courts' as those that exercise power over governmental institutions. Soviet history has seen radical shifts in judicial activism. Lenin established power over the Russian government through military might and 'Red terror.' Terror involved both non-judicial repression and quasi-judicial revolutionary tribunals directed against persons, including numerous government officials, suspected of anti-Bolshevik leanings. In the late 1920s, there was a temporary restoration of legalism. Courts for a brief period took an active role in deciding issues of the authority of government agencies. Under Stalin, the judiciary exercised great power over government institutions. The Courts were powerful instruments of terror directed at the officials of those institutions. From Stalin's death through Gorbachev's first few years, the courts exercised very little power over governmental institutions. By the end of the 1980s, Gorbachev was trying to increase the power of the courts over governmental institutions as part of his announced intention to make the Soviet Union a 'state governed by law.' It remains to be seen if he will succeed.

Writing in 1985, the year that Gorbachev took office, a leading American analyst of Soviet law convincingly argued that the Soviet judiciary was politically impotent.[1] As he and other authors have demonstrated, under Brezhnev judges were not only helpless against the central Party leadership but also helpless against high-level bureaucrats and even local party officials. During the late 1980s, Gorbachev began to implement a policy designed to give the judiciary some power over local Party officials and government bureaucrats, though not over the top Party leadership. This policy has made some progress, but not as much as his policy of giving power to republic legislatures. In 1985, these legislatures were rubber stamping machines operated by telephone from Party headquarters in Moscow. By early 1990, many republic Supreme Soviets were defying Moscow by enacting legislation and resolutions aimed at republic autonomy or even independence.

Institutional changes in progress at the start of the 1990s suggest that the judiciary may indeed gain more power over government institutions. Perhaps because he is a lawyer by training, Gorbachev has seen the judiciary as a major instrument for enforcement of national policy upon local authorities. He reduced the power of local Party authorities to control the appointment and removal of judges, so as to make the courts more an instrument of national policy. He reduced the role of the Procuracy in supervising court activities. He broadened standing of citizens and organizations to bring cases testing compliance by public bodies to the law. He created a Commission on Constitutional Review, essentially a Constitutional court, as a means of enforcing central policy on the republics.

As of 1990, there were four types of judicial institutions in the USSR: the regular courts, the comrades' courts, State Arbitration, and the quasi-judicial Commission on Constitutional Review. Unlike the United States, which has parallel systems of Federal and State Courts, the Soviet Union has a system of courts in each republic and only one federal court, the USSR Supreme Court. Comrades' courts at workplace and residence units serve as informal labor discipline and dispute settlement machinery. State Arbitration has both adjudication and rule-making powers to resolve problems between Soviet state enterprises arising from their economic activities. The Commission on Constitutional Review provides screening of legislation for constitutionality at various levels of government.

JUDICIAL POLICY-MAKING

The USSR and Republic Supreme Courts, State Arbitration, and potentially the Commission on Constitutional Review have policy-making functions. The Supreme Courts have the power to issue 'guiding explanations' of the law.[2] State Arbitration has the same power and in addition may exercise rule-making powers by delegation from the USSR Council of Ministers.[3] The Commission on Constitutional Review has no specific rule-making powers, but could take on an important role in developing Constitutional law policy.

The Supreme Courts' power to issue 'guiding explanations' gives them quasi-legislative power, since these explanations are binding on all government agencies. While in theory, guiding explanations are supposed to explain the law, not to make law, in practice the Supreme Courts have made law on a number of occasions with their guiding explanations.[4] In most cases this law-making is interstitial – providing rules when the legislation

is unclear. In a few cases, however, judicial law-making through guiding explanations has gone contrary to the apparent language of the legislation. In terms of quantity, the number of pages of 'guiding explanations' may well exceed the number of pages of the legislation that the courts are 'explaining.'[5]

The legislation creating the Commission for Constitutional Review does not grant it explicit policy-making powers. However, in performing its role (to be discussed at greater length below) in determining the constitutionality of legislation, the Commission must inevitably make policy decisions. It is notable that the leading Soviet jurist V. N. Kudriavtsev indicated to the Congress of People's Deputies that the Commission on Constitutional Review should not apply strict constitutional scrutiny to economic legislation carrying out *perestroika*:[6]

> And I think that the Committee should of course implement a policy of legality, of democratization, of observance of the rights of citizens and of struggle with departmental law-making.
>
> Here there is a difficult question; it was raised by deputies from the Baltic area and it should not be avoided. The difficulty is in the fact that our Constitution is old and our legislation will be renewed. Dear comrade from the Baltic area, you could adduce another example, well, for instance, a law on leasing is passed and there is nothing in the Constitution on leasing. Does this mean that the Committee for Constitutional Supervision should, therefore, put a limit on the law on leasing, declare it to be unconstitutional? This is not a simple question, therefore a sensible practice should be adopted.

JUDICIAL DEFINITION OF AUTHORITY

The USSR and Republic Supreme Courts, State Arbitration, and potentially the Commission on Constitutional Review all have functions in the definition of authority. Until the late 1980s, problems of definition of authority were of a relatively minor nature. The Communist Party maintained a cohesive and uniform policy throughout the country, so that even when the boundaries of authority between different organizations were poorly designed, there was little chance for conflict. The Brezhnev regime had let a great deal of power slip away to the various ministries, which operated virtually unchecked by the governmental apparatus. Starting in 1988, the situation changed dramatically. The introduction of relatively free elections

caused politicians in a number of republics to look to the voters' wishes rather than to orders from Moscow. The central Party authorities lost control of the Party machines in a number of republics. The members of Republic Supreme Soviets began to introduce legislation challenging the accepted lines of division of authority and challenging the powers of the ministries.

From the formation of the Soviet Union until the early 1930s, the USSR Supreme Court had the power to screen legislation for constitutionality. It used this power fairly extensively to define the authority of various government bodies and to hold unconstitutional legislation that stepped over the bounds.[7] Stalin may have seen this power as threatening to his absolute authority. He removed the power of screening legislation for constitutionality from the Supreme Court and entrusted it to the Procuracy and the Presidium of the USSR Supreme Soviet. The Procuracy, run by Stalin's henchman Vyshinsky, was mainly concerned with controlling abuses of authority by lower level agencies. The Presidium, which was totally subservient to Stalin, had the power, under Stalin's 1936 Constitution, to annul legislative acts of the USSR and republic Councils of Ministers.

Stalin's Constitution also transferred a great deal of legislative power to the USSR government, thereby preventing conflicts of authority. The 1924 USSR Constitution provided for the enactment of 'Fundamental Principles' of legislation in a number of areas at the USSR level, and for detailed codes at the republic level. The Party required the republics to incorporate the Fundamental Principles and other all-union legislation in the republic codes, with the result that conflicts of authority did not arise. Stalin formalized this lack of autonomy by providing in his 1936 Constitution for the enactment of codes at the USSR level to replace the individual republic codes. However, no USSR Code ever appeared. This scheme of USSR dictation of the content of republic codes continued through 1987. By 1988, however, republic legislators, knowing that they were going to have to face the voters in free or semi-free elections, started defying orders from Moscow on the content of legislation. This defiance created a conflict of authority for which there was no judicial remedy.

The sudden appearance of authority conflict revealed the inadequacy of the conflict resolution mechanisms of the 1977 Constitution and led to Constitutional amendments in 1988 providing for a quasi-judicial Commission on Constitutional Review. Previously, the Presidium of the USSR Supreme Soviet had adjudicated issues of republic versus USSR authority. Article 121 of the USSR Constitution, as it was before the 1988 amendments, provided:

> The Presidium of the Supreme Soviet of the USSR:
>
> (1) exercises supervision of the observation of the USSR Constitution and ensures that the laws of the Union Republics and of the USSR correspond to the Constitution . . .
>
> (7) annuls decrees and resolutions of the USSR Council of Ministers and the Council of Ministers of the Union Republics in case they do not correspond to the Constitution.

Estonia has rejected an attempt of the USSR Presidium to invalidate Estonian legislation.[8] Estonia apparently considers that the explicit grant of the power to annul decrees and resolutions of the republics implied that there was no such power for edicts, laws, or constitutional amendments adopted by the republic Supreme Soviets or their Presidia. In 1988 amendments removed even the clause allowing the annulment of decrees and resolutions. It was clear that it envisioned the transfer of such disputes to the new Commission on Constitutional Review. During 1989, since the Commission was not yet in operation, the Presidium dealt with various items of legislation from the Baltic and trans-Caucasian republics, but limited itself to asking the republics to change legislation that the Presidium regarded as unconstitutional.[9]

In late 1988, the Supreme Soviet amended the USSR Constitution, authorizing establishment of a Commission on Constitutional Review, which, acting as a quasi-judicial body, would assess the constitutionality of legislation and the conformity of administrative regulations both to the Constitution and to the law. In June 1988, when Gorbachev sought to have the Congress of People's Deputies create the Commission, he met strong resistance from delegates from the Baltic republics. They saw the Commission as a mechanism for invalidating republic legislation and thereby keeping the republics subservient. Finally, after some compromises with republic interests, the Congress adopted a law on Constitutional Review in the USSR on 23 December 1989.[10] The Congress elected Sergei Sergeevich Alekseev, the Director of the Institute of Philosophy and Law of the Ural Division of the Academy of Sciences of the USSR (in Sverdlovsk) as Chairman of the Commission and as Deputy Chairman, Boris Mikhailovich Lazarev, the Head of a Sector of the Institute of State and Law of the Academy of Sciences of the USSR. It delegated to the Supreme Soviet the election of the remaining members of the Commission, who under the law were to be drawn at least one from each republic.

The Commission has jurisdiction to consider the constitutionality and legality of general legislative acts at both the USSR and republic levels, including the republic constitutions. It can consider legislation on its own

initiative or on the request of a variety of public bodies, the President of the Supreme Soviet (that is, Gorbachev) or one-fifth of its members. In a compromise with the Baltic republics, the transition provisions of the implementing legislation provided that the Commission would lack the power to consider the correspondence of republic legislation to the USSR Constitution and laws until changes were made in the USSR Constitution reflecting readjustments in the 'nationality-state' structure of the USSR. However, in an exception to this exception, the implementing law provided that the Commission would have the power (as of January 1, 1990) to intervene to protect 'the basic rights and freedoms of citizens.' This provision is undoubtedly meant to deal with the restrictions on voting rights that the Baltic states have placed on 'outsiders,' such as, Russians.

However, the Commission on Constitutional Review lacks the power to review the legality of regulations issued by individual Soviet ministries. While in theory the Soviet Procuracy has the right to review these regulations, in practice the Procuracy is reluctant to challenge powerful ministries, such as the Ministry of Finance. The result is a lack of any effective prior review of ministry actions for constitutionality and legality. In addition there is no effective way to challenge ministry regulations after they are issued. Economic entities (enterprises, co-operatives, and so forth) lack legal standing to have a court question regulations issued by ministries. One of the few exceptions is the right of enterprises to question in State Arbitration actions of superior agencies in the chain of command. Enterprises, however, almost never exercise this right, because of the power that superior agencies can exert over them. The result is a lack of subsequent review of ministerial regulations. Thus there is effectively no judicial or quasi-judicial review of ministry actions.

JUDICIAL EFFORTS TO CHANGE PUBLIC ATTITUDES OR VALUES

In his insightful book on Soviet law, first published in 1950 and revised in 1963, Professor Harold Berman presented a theory of the 'parental role' of Soviet law. He devotes a chapter to 'The Educational Role of the Soviet Court.'[11] This parental role consists of a long-term effort by the courts to instill the values of the Soviet system, complemented by short-term campaigns aimed at particular social problems. In their parental role, the courts are 'activist' in the sense that they are actively attempting to change public values. In a few cases, the courts appear to have taken an independent role in formulating and promoting values shared by legal professionals. But

the courts more often have been 'passive' in the sense that they have been promoting general Party policy or conducting specific campaigns ordered by the Party leadership.

In 1989 the Supreme Soviet adopted new Fundamental Principles of Legislation on the Judicial System, which reiterated the educational role of the courts.[12] Article 3.2 of this legislation gives the courts an explicit educational role:

> All activity of the court shall be directed at . . . upbringing citizens in the spirit of exact and undeviating observance of the USSR Constitution, the union republic constitutions, the autonomous republic constitutions and soviet laws, respect for the rights, honor, and dignity of citizens and for the rules of socialist societal life.

As Professor Berman explained, the court conducts this role by focusing its inquiry on the entire social situation and the whole person before it, rather than limiting itself to finding the narrow, legally-relevant facts. The Soviet practice of conducting a full trial even when the defendant admits guilt emphasizes the educational role of the courts. Another aspect of the educational role is the use of extramural court sessions, where the court goes to a factory, housing complex, or other such location, to hold a public criminal trial. This practice of show trials is obviously in serious conflict with the principle of presumption of innocence, since it would hardly do to have an acquittal at a show trial.

Every few years, the Party leadership has embarked on a 'campaign' against some undesirable social phenomenon: drunkenness, theft of state property, drug trafficking, vagrancy, among others. Usually the campaign has begun with policy pronouncements, often accompanied by legislation. Party officials have encouraged the courts to 'get tough' on defendants accused of the particular behavior and the courts have complied. These campaigns are clearly aimed at creating a public attitude intolerant of deviant behavior. The courts have repeatedly played an active role in the campaigns. These campaigns also threaten the presumption of innocence, because of the pressure on courts to convict defendants accused of offenses targeted in the campaign.

Occasionally, the courts appear to be educating the public to respect values cherished by legal professionals rather than official Party-line values. The USSR Supreme Court took the lead recognizing a presumption of innocence, using the exact language 'presumption of innocence' in its guiding explanations long before the phrase appeared in Soviet legislation. During the late 1980s, the President of the USSR Supreme Court

campaigned extensively against the pressures that had led Soviet courts to fail to acquit innocent defendants.

JUDICIAL REDISTRIBUTION OF POLITICAL POWER OR WEALTH

The last major redistributions of wealth in the Soviet Union occurred during the elimination of private businesses in the late 1920s and of private farms in the collectivization campaign of the 1930s. The courts played a significant, though secondary role in these campaigns, acting as foot soldiers obeying orders rather than as officers giving commands.[13] They ignored the legislation protecting property rights, refusing to interfere with the Party's policy of rapid confiscation of the property of urban business-owners and rural farmers. Some judges may have done so out of sincere support for the ideal of communism; many undoubtedly acted out of fear. The function of the courts in the transition to socialism raises a basic question of definition of judicial activism. Is it judicial activism when the courts actively support social change in open violation of written legislation because the judges fear extra-legal terror directed against themselves?

JUDICIAL ADMINISTRATION OF PUBLIC INSTITUTIONS

While the regular Soviet courts do not administer public institutions, State Arbitration does administer some aspects of the participation of state enterprises in the Soviet planned economy. In the past, Soviet courts have lacked the powers that they would need to administer public institutions. Legislation adopted in the fall of 1989 gave the courts more powers, but not enough to allow judicial administration of institutions.

There is one function of State Arbitration that comes somewhat close to the administration of public institutions. In the Soviet economy, planning agencies often issue orders to enterprises in somewhat general terms. They tell Enterprise A to sell a certain quantity of a particular product to Enterprise B and tell Enterprise B to buy the product. The law then requires the enterprises to negotiate a sales contract in conformity with the planners' orders, but leaves to the enterprises agreement on the exact subtypes of the product, packaging, delivery dates, and other details. If the enterprises cannot agree on the contract, either of them can bring a 'pre-contract' dispute to State Arbitration, which will write a contract for

the parties.[14] In this very limited sense, the quasi-judicial State Arbitration acts to manage industrial enterprises. As of early 1990, 'reforms' under Gorbachev had made some changes in terminology but no real change in the substance of the law of planned contracts.

If the Soviet economy becomes more of a market economy during the 1990s, planned contracts, and the role of State Arbitration in making contracts for state enterprises will decline. Thus the prospect is for less, not more judicial activism in the area of administration of public institutions.

JUDICIAL PROTECTION OF INDIVIDUALS

Soviet courts have attained more of a reputation for judicial *persecution* of individuals than for judicial *protection* of individuals. Except for brief periods in Soviet history, courts and quasi-judicial agencies have served as instruments for persecution of immense numbers of real and purported political opponents and for the subjugation of all governmental institutions to the power of the top levels of the Party. The reputation of the Soviet courts has never recovered from the notorious injustices of the Moscow purge trials of the late 1930s.[15] The courts and quasi-judicial tribunals unjustly convicted huge numbers of people in furthering the Party's policy to totally control all institutions and terrorize the people. In January 1990, the KGB stated that in the period from 1930 to 1953 'judicial and non-judicial agencies' sentenced, for political crimes, 3,778,234 people, of whom 786,098 were executed.[16]

The longstanding use of Soviet courts by the Party leaders to terrorize Soviet citizens and lower-level government institutions has tended to obscure the fact that, even in the blackest days of Stalinism, the courts were also protecting citizens' rights against government institutions. Under Stalin, special secret police tribunals handled many of the political cases. In ordinary non-political cases, the regular courts in the late 1930s and the early 1940s dispensed justice to non-political criminal defendants, finding a substantial percentage of them innocent.[17] Under Brezhnev, while the number of political cases was infinitely smaller, the role of the courts was in three ways more 'passive' than under Stalin. First, after Khrushchev abolished the secret police tribunals, the Party made the courts fully responsible for the dishonorable task of convicting morally innocent dissidents of political offenses. Second, as negative international publicity led the regime to search for alternatives to trying dissidents for political offenses, the courts took on the equally dishonorable function of

convicting innocent dissidents on trumped-up charges of common crimes based on perjured testimony.[18] Third, courts succumbed to a wide variety of pressures against granting acquittals, with the result that the acquittal rate for non-political defendants fell to a small fraction of what it had been under Stalin.[19] Under Brezhnev, Soviet law gave the courts no power to interfere with the practice of putting sane dissidents in psychiatric hospitals, but the courts would not have exercised this power if they had had it.

During the Khrushchev period and again under Gorbachev, the judicial system partly redeemed itself, by working actively to rehabilitate persons wrongly convicted of political offenses. In 1989 and 1990 the courts erased over 800,000 political convictions.[20]

Before 1989, Soviet courts had very limited powers of judicial review of administrative actions and very limited mechanisms for enforcing their decisions against government agencies on administrative matters. (The courts long had and exercised the power to give money judgments – for instance to give compensation to a citizen injured by a Post Office truck.) In 1988 the Supreme Soviet passed legislation allowing limited appeal to court by citizens claiming that they were wrongfully placed in mental hospitals.[21] In November 1989, the Supreme Soviet adopted new laws on contempt of court and on review of actions of government agencies and officials.[22] The contempt of court law provided for a substantial fine (up to 1000 rubles) against officials who failed to obey a court order, thus giving the court more leverage over officials. The law on review of government actions corrected a major shortcoming of the 1987 legislation on the same subject, which had proved almost worthless because it allowed suits only against actions by individual officials, not against actions by collegial bodies of officials.[23]

CONCLUSIONS

Soviet courts have been very active in the direct enforcement of the policies of the Party leadership and the orders of central and local Party officials, disregarding the formal governmental and legislative systems when they got in the way. At the same time they have had relatively weak powers to protect citizens against the government and almost no powers to protect economic entities against the activities of high government bureaucrats. The Party appears to be giving up some of its control over the courts. However, the Soviet Union cannot achieve its announced goal of becoming a 'state ruled by law' unless its courts obtain and exercise considerable additional powers to review the actions of government administrative agencies.

NOTES

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15. Compare *Sudebnyi otchet po delu antisovetskogo 'Pravo-Trotskistskogo bloka': rassmotrennomu Voennoi kollegiei Verkhovnogo Suda soiuza SSR 2–13 marta 1938 g. po obvineniiu Bukharina N. I. . . . i dr.* [Judicial Report on the Case of the Antisoviet 'Right Trotskyite Block'; Considered by the Military Division of the USSR Supreme Court, 2–13 March 1938, on the Charges Against N. I. Bukharin . . . and Others] (Moscow: Iuridicheskoe ixdatel 'stvo, 1938) with John Dewey, *et al.*, *Not Guilty: Report of the Commission of Inquiry Into the Charges Made Against Leon Trotsky in the Moscow Trials* (New York: Harper and Brothers, 1938).
16. SOVIET KGB REHABILITATION ACTIVITIES: RESULTS, TASS report, 13 February 1990, available on NEXIS data bank.
17. Peter H. Solomon, 'The Case of the Vanishing Acquittal: Informal Norms and the Practice of Soviet Criminal Justice,' Working Paper #33 (January 1987), Soviet Interview Project, University of Illinois at Urbana-Champaign.
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