The Place for Judicial Activism on the Part of a State's Highest Court

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Introduction**

The term "judicial activism" tends to have a different meaning for each reader. It is most often used to describe the attitude of courts that, by adopting an aggressive and creative position, depart from what is expected by issuing unanticipated decisions and making new case law. Judicial activism, however, is not confined to substantive law. In this article the term will be used to encompass not only activism in the decision-making process, but also activism in the administration of the judicial branch of government. This writer believes that the state supreme courts should exercise restraint in the decision-making process but should be less timid and more active in the administration of the judiciary. This must be done if the judicial branch is to maintain its independence as a separate, even if not completely equal, branch of government. This article will address itself first to judicial activism in the area of substantive law, including some of the justifications for judicial restraint, and then to judicial activism in the field of judicial administration.

I. Judicial Activism in the Decision-Making Process

Those who believe that law should be found and not made are quick to reiterate that the courts should not be superlegislatures or continuing constitutional conventions. These critics contend that when courts depart from strict stare decisis to become lawmakers, they are acting contrary to the Constitution, to the common law, and to common sense. Critics view any

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such deviation with suspicion, if not contempt. Judicial activists, on the other hand, contend that judges not only should, but must make law to further the ends of justice and to ensure that the law is responsive to the needs of modern society. Some authors suggest that a judge is at his noblest when he is making new law,[1] and that yesterday's activism is today's stare decisis. Thus, for judicial activists, a court that makes new law is a court that does justice.

The truth, as usual, lies somewhere in the middle. Courts do make law as well as find it. Further, this is not a recent phenomenon; the Supreme Court in the early case of *Marbury v. Madison*[2] engaged in judicial activism. Whenever a court applies or refuses to apply a constitutional provision, statute, or prior case to a given fact situation, it gives that constitutional provision, statute, or case a new meaning, no matter how slight. If it is to keep pace with an increasingly complex and technical society, the law cannot remain static and brittle. By giving it new meaning, the courts mold the law to meet the needs of a changing society.

While most courts recognize the necessity for some change, courts today are pressured to go even further in reshaping the law to meet contemporary problems. They are asked to redress almost every evil, real or imagined, to provide, by judicial fiat, instant equality not only of opportunity but also of achievement, to redress every grievance no matter how ancient or trivial, and to soothe every hurt or insult no matter how slight or unintended. The courts are constantly told that they and only they can provide the relief requested or even demanded by an impatient public.

Professor Maurice Rosenberg of Columbia University Law School contends that the courts have three great advantages over legislatures in making new law. First, the courts are conclusive because their decisions, once final, are not readily changeable. Second, the courts can, for all their delays, reach a definite result sooner than legislatures. Third, the courts are better able to focus on a particular problem than are legislatures.[3] For Judge Day, judicial

1. "It is the function of our courts . . . to keep the doctrines up to date with the *mores* by continual restatement and by giving them a continually new content. This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril." Arthur L. Corbin, *quoted in* CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 135 (1921); *see also* Tate, *The Law-Making Function of the Judge*, 28 LA. L. REV. 211 (1968) [hereinafter cited as Tate]; Day, *Why Judges Must Make Law*, 26 CASE W. RES. L. REV. 563 (1976) [hereinafter cited as Day].

2. 5 U.S. (1 Cranch) 137 (1803).

3. *See* Rosenberg, *Anything Legislatures Can Do, Courts Can Do Better?*, 62 A.B.A.J. 587 (1976) [hereinafter cited as Rosenberg].

lawmaking is essential to the operation of our constitutional system of government.[4] The question, however, is not whether courts do make law, but rather when and how much new law they should make. Perhaps Karl Llewelyn's "law of leeways" is the best guideline:

> [A]n appellate court is free, without hesitation and without apology, to make any shift in content and direction of authorities which can be worked by the semi-automatic process by which authorities just take on new light, color, shape and wording—as they are reviewed against fresh circumstance; but that conscious reshaping must so move as to hold the degree of movement down to the degree which need truly presses.[5]

Holding "the degree of movement down" is judicial restraint, which can be justified by three arguments, among others: First, in exercising judicial restraint, the courts do what is expected of them, and this benefits society. Second, when they engage in lawmaking, not only do the courts usurp the historic and proper role of the legislature, they also engage in an activity for which they are ill equipped. The third reason for judicial restraint is the detrimental effect of judicial activism on the court's case load; an overloaded court cannot provide swift and individual justice.

A. Courts Should Live up to Society's Expectations

Sir Francis Bacon's early statement that "[j]udges ought to remember that their office is . . . to interpret law, and not to make law,"[6] has been repeated and oversimplified by several generations of high school civics teachers who have led our citizenry to believe that "it is somehow improper for judges to admit to law-innovation, law-choice, or law-revision."[7] Admittedly, civics teachers may have oversimplified the problem, but they do reflect the prevailing view of a vast majority of our society that lawmaking is not a proper function of the court. Courts are expected to find, not make, the law, and to the extent that they appear to step outside the parameters of judicial law-finding, they are perceived to venture beyond their proper function. Judges are not free artists: their job specification carries with it the moral obligation to follow an institutionalized pattern in deciding cases.[8] Indeed,

> [T]he legal system as an institution favors a policy of judicial (as distinguished from legislative or executive) conservatism. The policy finds life in rules and principles that reflect a presumption in favor of the status quo when a judge pursues the proper method of judicial decision. This pre-

4. *See* Day, *supra* note 1, at 575.
5. K. LLEWELLYN, THE BRAMBLE BUSH 156 (1960).
6. BACON'S ESSAYS, *Of Judicature*, *quoted in* Tate, *supra* note 1, at 233-34.
7. Tate, *supra* note 1, at 234.
8. Shuman, *Justification of Judicial Decisions*, 59 CALIF. L. REV. 715, 722 (1971) [hereinafter cited as Shuman].

> sumption, in turn, is given effect by the doctrine of stare decisis in that judges who play their role the way they should will give respect to prior decisions. Giving respect to or standing by prior decisions as obligated by stare decisis does not tell the judge how to decide a future case. Rather, it tells him and those who will assess his performance that whatever decision he reaches, he must account for all arguably relevant rules, principles, and policies announced in prior cases.[9]

While the legislative and executive branches of government ascertain the will of the majority and carry that will into effect, the courts frequently perform an opposite role, thwarting the popular will in order to protect the rights of the minority. Decisions of a court are often and of necessity unpopular with a majority of society as well as with the other two branches of government. To the extent that courts perform their role as expected, their decisions, even if unpopular, will have a greater chance of being accepted and followed by society. In addition, by maintaining a conservative stance, the courts help to preserve the sense of security and stability society requires. The more the other two branches of government engage in the politics of change, the greater the need for a stable and predictable judicial branch.

Professor Bodenheimer believes that the rise of liberalism in the western world and the attendant multiplicity of religions and philosophies, together with widespread erosion of traditional authorities, have emphasized society's need for judicial stability.[10] If the courts exercise judicial restraint, society can be expected to look to them as unchanging institutions whose decisions are predictable. But if the courts deviate from their expected method of decision-making and issue novel and creative decisions, the stability and security that society needs from the courts will wane.

B. Courts Are Poor Legislatures

Courts are not designed to be legislatures. They cannot marshall the facts necessary to play out the legislative role. They cannot conduct legislative hearings to obtain evidence and testimony, and they cannot, without doing violence to the adversary system, go outside the record to find additional information upon which to base a particular decision. Professor Rosenberg recognizes this when he suggests that the courts adopt certain legislative procedures.[11] He and Professors Miller and Barron have all recognized the need for gathering facts outside the record if the courts are to legislate effectively. They have suggested a public agency of scientists and

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9. *Id.* at 721.

10. *See* Bodenheimer, *Philosophical Anthropology and the Law*, 59 CALIF. L. REV. 653, 665-67 (1971).

11. Rosenberg, *supra* note 3, at 587-90.

social scientists to advise courts whose decision-making has become law-making.[12]

The courts should not yet abandon the adversary system completely and go beyond the record to cull from other sources the information required for their decisions. Such a course would not only yield decisions based upon facts untested by cross-examination, but would also make persons who are not officers of the court, and who have no obligation to the court as an institution, far too influential in the court's decision-making process. There is also the danger that legislation by the courts may be too hasty. Usually, courts can decide a case more quickly than the legislature can act; most extensive and competent legislation requires the work of several sessions before it is finally passed.[13] However, this delay gives the various interest groups the opportunity to present their views, ideally leading to better legislation.

Because of their self-imposed obligation to focus on the narrow issue before them, courts are necessarily bad legislatures. A legislative body is better able to consider a problem in its broadest sense; the legislature has the benefit of lobbyists on all sides and of expert testimony. Allowed to consider the forest as well as the trees, legislatures are better suited to enacting laws. Nor is lack of legislative action a justification for judicial activism. The latter may in fact cause the former: "Judicial activism also erodes the legislative process, because it tends to relieve legislators from accountability for social reconstruction and constitutional propriety."[14]

Rather than compete with the legislatures, the courts should cooperate with them by passing upon laws that they draft, the job for which the courts were designed, and the job they perform effectively. Furthermore, a court that has engaged in judicial legislation loses its objectivity and impartiality when the wisdom or constitutionality of its own "legislation" is challenged in subsequent litigation.

C. Judicial Activism Increases the Caseload

An effect of judicial activism that should be of great concern to the courts and to potential litigants is that such activism increases the caseload of the courts themselves. Judicial activism leads to uncertainty in the law, and uncertainty leads to more litigation. In Arizona, for example, as a result of judicial activism, the number of criminal appeals went from 20 in 1960 to

12. Rosenberg, *supra* note 3, at 590. Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1240-42 (1975).

13. Rosenberg, *supra* note 3, at 587.

14. Adams, *Judicial Restraint, the Best Medicine*, 60 JUD. 179, 181 (1976).

1,056 fifteen years later.[15] When the law is definite and certain, most people are willing to work within its parameters without continually resorting to the courts. But when the courts start taking into account matters outside the law, particularly so-called socially relevant matters, there is far less need to accept prior decisions as controlling and to abide by them.[16] In civil matters as well people resort to courts more frequently, expecting that regardless of what the law was before, it will be changed for their situation. Furthermore, the losing party automatically considers an appeal to be the next logical step after trial.

The Board of Governors of the Society of American Law Teachers recently issued a statement charging that the Burger Court is forging a set of restrictive doctrines which will substantially reduce the availability of the federal courts for public interest litigation.[17] The statement predicts that since state courts have not been especially receptive to lawsuits, many rights will remain without a remedy.[18] This statement is undoubtedly true. The United States Supreme Court is presently reluctant to take on more litigation for the same reason the lower courts are: it rightly perceives that excessive use of the courts can destroy the separate and equal nature of the judicial branch. Judge Carl McGowan of the United States Court of Appeals for the District of Columbia Circuit believes that neither the courts nor the Congress should unnecessarily increase the caseload of the federal judiciary.[19] Because of the critical importance in our society of the judiciary as the ultimate guardian and expositor of the Constitution, "it is not the concern of lawyers alone that its flame be not dimmed by either congressional neglect or a too expansive concept by court or legislature of how far its light can reach."[20]

Overloading a court can seriously damage if not destroy its effectiveness and the quality of its work. In opposing extensive provisions for judi-

15. Statistics provided by Noel Dessaint, Administrative Director of the Arizona Supreme Court. The increase in the number of criminal appeals has been a direct result of the activism of the United States Supreme Court in the field of criminal procedure, starting with Mapp v. Ohio, 367 U.S. 643 (1961). This author does not subscribe to the view that this has necessarily been bad. One result, however, has been that the expansion and extension of various procedural safeguards to criminal defendants in the state courts has greatly increased the workload of the state courts.

16. Schuman, *supra* note 8, at 725.

17. Society of American Law Teachers, Supreme Court Denial of Citizen Access to Federal Courts to Challenge Unconstitutional or other Unlawful Actions: the Record of the Burger Court, Unpublished Statement 2 (October 1976). The areas in which these restrictive doctrines are being enunciated are class actions, standing to sue, federal review of constitutional claims in state criminal and civil proceedings, attorneys' fees, and the power of the federal court to fashion equitable remedies. *Id.* at 2-3.

18. *Id.* at 3.

19. *See* McGowan, *Congress and the Courts*, 62 A.B.A.J. 1588 (1976).

20. *Id.* at 1591.

cial review in a bill creating a strong public utilities commission, the then New York Governor Charles Evans Hughes stated that, "no more insidious assault could be made upon the independence and esteem of the judiciary than to burden it with these questions of administration . . . . Let us keep the courts for the questions they were intended to consider."[21]

But even if increasing recourse to the courts does not destroy the effectiveness of the judicial branch, it can destroy individual justice. As our society becomes more complex and more impersonal, individuals feel an acute need for an institution to give personal attention to their particular cases. The cost of preserving a system of individual justice is high, but easily justifiable. "[T]he court system must not become just another bureaucracy, cramming litigation papers into suitable slots or at least the closest-fitting cubbyhole."[22]

II. Activism and Judicial Administration

Although judicial restraint may be preferred in the decision-making process, the courts must not be timid where their own prerogatives are concerned. To maintain their independence, the courts must follow a path of activism in the field of judicial administration:

> [T]he separation of powers doctrine, properly understood, imposes on the judicial branch not merely a *negative* duty not to interfere with the executive or legislative branches, but a *positive* responsibility to perform its own job efficiently. This *positive* aspect of separation of powers imposes on courts affirmative obligations to assert and fully exercise their powers, to operate efficiently by modern standards, to protect their independent status, and to fend off legislative or executive attempts to encroach upon judicial prerogatives.[23]

The court has inherent power to do whatever is necessary for it to function as a court. Whether this power be described as implied, essential, or incidental, the court has the authority to do what is "essential to the existence, dignity and functions of the court as a constitutional tribunal . . . from the very fact that it is a court."[24] The state's highest court should use this power in three distinct ways. First, it should make rules governing the procedures for the operation of all the courts in the state judicial system. Second, it should control, by court rule, the admission to practice and the continuing supervision and discipline of members of the bar. Finally, it should remove members of the judiciary who are guilty of misconduct or become disabled and are no longer able to serve as judges.

21. *Id.* at 1589.

22. Tate, *Containing the Law Explosion*, 56 JUD. 228, 234 (1973).

23. Carrigan, *Inherent Powers and Finance*, 7 TRIAL 22, 22 (Sept./Oct. 1971).

24. Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A.J. 635, 636 (1935) [hereinafter cited as Dowling].

A. Rule-Making

The state's highest court should actively exercise its power to prescribe rules of procedure for the operation of the state judicial system. This power should not be shared with any other agency or branch of government.

The courts of England made their own rules of procedure from the earliest times of which we have a record. George Grayson Tyler notes that a rule dated 1457 confers on the prothonotaries in the Court of Common Pleas the function of drawing up "general rules, for regulating and settling the practice of the court, and the proceedings therein; and to certify the court in matters of practice, when required."[25] By the time the American Constitution was drafted, the King's Bench at Westminster had been exercising the power to make general rules of procedure for the courts under its jurisdiction. *Tidd's Practice* was the standard book for colonial American as well as English procedure. As Dean Roscoe Pound has pointed out:

> Hence, if anything was received from England as a part of our institutions, it was that the making of these general rules of practice was a judicial function. Indeed, this was well understood in the beginning of American law. At the very outset, the Supreme Court of the United States, in answer to an inquiry by the Attorney General, said that the practice of the court of King's Bench would obtain for the time being, but that presently the court would promulgate some rules of practice. Not only was this done by the Supreme Court of the United States, but the old Supreme Court of New York, before 1847, promulgated rules of practice, very many of which were simply turned into sections of the Code of Procedure and are in force under that guise today.[26]

Unfortunately, in both England and the United States the legislative branch began to encroach upon the judiciary in the rule-making function.

Dean Pound believed that in England the regulation of procedure went through four stages, legislative interference appearing only in the third stage, after the judicial tribunals in the second stage had formalized in rules of court what was originally the customary procedure of the tribunal. In the third stage, "Parliament makes sweeping changes both in fundamentals and in detail. For a season legislation is called on to bear the brunt of procedural reform."[27] It should be noted, however, that even when the Parliament did

25. Tyler, *The Origin of the Rule-Making Power and Its Exercise by Legislatures*, 22 A.B.A.J. 772, 774 (1936) (citation omitted) [hereinafter cited as Tyler]. According to Tyler, this rule alone indicates the antiquity of court rules, even though Tidd's tables for the Court of King's Bench include no rules prior to 1604. "[I]t is hardly to be supposed that none existed prior to that time. It is probable Tidd merely had no occasion to cite them. We have the opinion of Jenks that court-made rules of practice go back uninterruptedly through the years until they are lost in the still unexamined archives of the fourteenth century." *Id.*

26. Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599, 601 (1926) [hereinafter cited as Pound].

27. *Id.* at 599. By 1873 the English courts had regained control of their own rules. *Id.*

intrude upon the court's rule-making function, it tacitly recognized the inherent power of the courts to make rules. The code of procedure adopted by Parliament in 1852 contained a provision permitting the judges to alter or amend any of the rules enacted by Parliament.[28] The Judicature Act of 1873 "returned" the jurisdiction of the court rules back to the courts.[29]

In the United States, legislative encroachment upon the rule-making power of the courts was led by David Dudley Field and his Codes of Procedure. Written in an era of legislative supremacy, these codes of procedure for courts were an abject failure. Unfortunately, the courts acquiesced in this exercise of legislative power; some of the state courts went so far as to hold that the rule-making power could only be exercised by the courts if granted to them by the legislature.[30]

The United States Supreme Court still recognizes legislative supremacy in rule-making. The United States Code, which authorizes rule-making by the Supreme Court generally, provides specifically: "Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported."[31] The Supreme Court relied on this congressional authority for its decision in *Hanna v. Plumer*:[32]

> For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.[33]

By the turn of the century, many writers were convinced not only that the enactment by the legislative branch of rules of procedure for the courts was an encroachment on the power of the court, in which by misfortune some courts had acquiesced, but also that the results of these rules had been dismal.[34] State courts later followed in defending their prerogatives and

28. Sunderland, *The Exercise of the Rule-Making Power*, 12 A.B.A.J. 548, 548-49 (1926) [hereinafter cited as Sunderland]; Tyler, *supra* note 25, at 774. As adopted by Parliament, this code contained 239 sections. Sunderland, *supra* at 549.

29. Tyler, *supra* note 25, at 774-75.

30. Note, *The Judiciary and the Rule-Making Power*, 23 S. CAL. L. REV. 377, 381 (1971); Fair v. State, 220 Ga. 750, 141 S.E.2d 431 (1965).

31. 28 U.S.C. § 2072 (1970).

32. 380 U.S. 460 (1965).

33. *Id.* at 472.

34. Dowling, *supra* note 24, at 636; Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform*, 43 MISS. L.J. 287 (1972); Pound, *supra* note 26, at 601; Sunderland, *supra* note 28, at 549; Tyler, *supra* note 25, at 774. Dean Pound blamed the relinquishment by the courts of their inherent power to make their own

today recognize that the rule-making power is historically deposited with them as part of their inherent power.[35] Professor Wigmore goes further than most commentators by declaring:

> [*T*]*he legislature* (federal or state) *exceeds its constitutional power* when it attempts to impose upon the judiciary *any rules for the dispatch of the judiciary's duties*; and that therefore *all legislatively declared rules for procedure*, civil or criminal, *in the courts, are void,* except such as are expressly stated in the Constitution.[36]

The state's highest court can and should be bold and liberal in the exercise of its rule-making power. Here judicial activists are needed and restraint is a detriment. The judiciary should not share this power with the legislature or with anyone else, although it can and should invite members of the bar to assist in drafting rules. The actual making of the rules, however, is a court function to be guarded jealously.

B. Integration of The Bar by Court Rule

Another area in which the state's highest court should actively assert its inherent power is in the admission to practice and the control of the members of the bar. Historically, while the courts have sought to protect their inherent power to supervise the bar, attempts to take this power away from them have been persistent.

In colonial America, attorneys were admitted upon motion by the court, usually after an apprenticeship and occasionally after an oral examination. This was not, however, the universal practice. One colony, New Jersey, required that attorneys "practicing . . . for hire" be admitted by the governor.[37] Legislative interference was also not unknown. The Virginia

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rules on the "rule-of-thumb apprentice training of the bulk of the profession, which led them to feel that the whole of the law was bound up in procedure and hence that the legislature must prescribe judicial procedure or abdicate control over the law." Pound, *supra* note 26, at 601. But historically this rule-making power has belonged to the courts: "For the common-law courts have governed procedure by general rules from the middle ages to the present, and the first public action of the Supreme Court of the United States was to make a rule adopting the practice of the Court of King's Bench as the practice of that tribunal." *Id.*

35. Garabedian v. Donald William, Inc., 106 N.H. 156, 157, 207 A.2d 425, 426 (1965); Craft v. Commonwealth, 343 S.W.2d 150, 151 (Ky. 1961). The court in *Craft* points out that "it has generally been recognized that courts (even without express authority given by the constitution, statute, or rule of a supreme court of a state) have *inherent power* to prescribe rules to regulate their proceedings and to facilitate the administration of justice." *Id.* (citation omitted) (emphasis added).

36. Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 NW. U.L. REV. 276, 276 (1928).

37. R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 155 (1953).

Legislative Assembly in 1643 passed a law that required lawyers to be licensed and their fees regulated, and all such "mercenary attorneys" were expelled because "many troublesome suits [were being] multiplied by the unskillfulness and covetousness of attorneys, who have more intended their own profit and their inordinate lucre than the good and benefit of their clients." Thirteen years later, the law was repealed.[38] In 1786, in Massachusetts, lawyers were voted a "grievance" and a bill was passed by the House to throw open the courts to all persons of good character.[39]

When the United States became a nation, antagonism toward lawyers increased. With the election of Andrew Jackson as President, a wave of popular democracy swept over the country and legislation was passed in many states to permit any man to practice law as a check against a monopoly by a favored class. The Constitution of Indiana in 1851 provided: "Every person of good moral character who is a voter is entitled to practice law in any of the courts in this state."[40]

Many courts voluntarily shared with the legislature control over the practice of the law. The Arizona Supreme Court followed the then current majority rule when it held that the Arizona legislature could prescribe minimum qualifications for admission to the bar, which the court would follow in addition to such other requirements as it might impose.[41] The Supreme Court of Pennsylvania stated the minority view when invalidating a similar statute passed by the Pennsylvania legislature:

> [The Act of 1887] is an encroachment upon the judiciary department of the government. . . .
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> It is an imperative command to admit any person to practice law upon complying with certain specified conditions. . . . No judge is bound to admit, or can be compelled to admit, a person to practice law who is not properly qualified, or whose moral character is bad. . . . The attorney is an officer of the court, and is brought into close and intimate relations with the court. Whether he shall be admitted, or whether he shall be disbarred, is a judicial and not a legislative, question.[42]

As the number of bar associations increased, a movement began for the creation of an integrated bar requiring membership as a condition of admission to practice law. Quite often this was accomplished by legislation rather than by court rule, an approach whose problems were soon apparent. The bar association was controlled by the legislature. The dues, the membership

38. Hallam, *Early Courts and Lawyers*, 25 YALE L.J. 386, 386-87 (1916).

39. *Id.* at 388.

40. B. SCHWARTZ, THE LAW IN AMERICA 78 (1974); IND. CONST. art. VII, § 21 (repealed 1932).

41. *In re* Greer, 52 Ariz. 385, 81 P.2d 96 (1938).

42. *In re* Splane, 16 A. 481, 483 (Pa. 1889).

of the board of governors of the bar and their committee members, and other matters of a professional nature were under the supervision of a frequently antagonistic legislature, or at least one with little understanding of the problems of the practice of law. As a result, state supreme courts commenced integrating the bar by court rule. These movements have generally withstood attack.[43]

The procedure Arizona followed in extracting itself from partial control of the bar is indicative of one court's "activism" in this regard. The Arizona bar was integrated by a statute of the Arizona Legislature in 1932. The statute was quite inclusive, regulating the method of election and the number of members of the Board of Governors, as well as the composition, jurisdiction, and venue of the various state ethics committees. The bar association was compelled to go to the legislature for even the slightest change in its organization.[44] The conflict culminated when certain legislators introduced a bill that would have provided that any member of the legislature who had served four years could be admitted to the bar on the basis of legislative experience.[45] Also, a state reorganization bill was introduced that would have placed the Board of Governors of the State Bar under a proposed Department of Commerce.[46] In response, the Board of Governors of the State Bar of Arizona passed a resolution urging the Arizona Supreme Court to adopt its own rules organizing the state bar.[47] The Arizona Supreme Court responded by issuing a press release[48] announcing that on January 19, 1973, they would consider the State Bar Resolution. The Supreme Court also requested the public to submit for its consideration any suggestions, objections, or criticism. Only a few people, including one legislator, availed

43. Lathrop v. Donohoe, 367 U.S. 820 (1961); *In re* Rhode Island Bar Ass'n, 106 R.I. 752, 263 A.2d 692 (1970); *In re* Unification of New Hampshire Bar, 109 N.H. 260, 248 A.2d 709 (1968); *In re* Integration of the Bar of Hawaii, 432 P.2d 887 (1967); Petition of Florida State Bar Ass'n, 40 S.2d 902 (1949); Petition for Integration of Bar of Minnesota, 216 Minn. 195, 12 N.W.2d 515 (1943); *In re* Integration of State Bar of Oklahoma, 185 Okla. 505, 95 P.2d 113 (1939); *In re* Integration of Nebraska Bar Ass'n, 133 Neb. 283, 275 N.W. 265 (1937).

44. Historically, Arizona has never had a large number of lawyers in the State Legislature. At the present time, there are not more than 6 lawyers out of 90 members of both houses.

45. S. 191, 28th Leg., 2d Sess. (1968). The statement was made by a member of the legislature, "After all, who knows more about the laws than we do who make them."

46. S. Con. Res. 15, 30th Leg., 1st Sess. (1970). It should be noted that the State Bar of Arizona had never received public funds for any of its operations and was completely self-supporting, although the amount of the dues that the attorneys paid had to be approved by the legislature. ARIZ. REV. STAT., S. CT. RULE 27(k) (1973).

47. Correspondence between Arizona State Bar Association and Arizona Supreme Court, 10/28/72.

48. Press release by Arizona Supreme Court, 1/8/73.

themselves of this opportunity. Thereafter, the Arizona Supreme Court integrated the bar by court rule.[49]

Ever since that action was taken, the Arizona bar association has been one of the most active in the United States. Free of the restraints imposed by a suspicious legislature, it has enjoyed a greater independence than it did previously and has been better able to serve the needs of a rapidly growing bar in a rapidly growing state. The Arizona Supreme Court has the power to change the rules governing the bar. The court has changed the membership of the committee that provides for discipline of lawyers and has added two non-lawyer members. In short, the court, with the help of the bar, is in control of the qualification of the state bar. Integration by court rule has been of great benefit to the court, to the bar of Arizona, to the state, and to the taxpayers.

However, a caveat should be observed here. Such an integrated bar should be willing to support itself. As long as the legislature appropriates money for the discipline of attorneys or any other bar activity, as it does in some states, it of course retains a right to say how and by whom those funds shall be spent. Therefore, the bar must accept its financial responsibility, and the state's highest court should actively undertake to assure that it does so.

C. Discipline of Judges

The state's highest court should actively use its inherent power to preserve and maintain the integrity of the judicial system. The traditional method of removing a judge by way of impeachment is a cumbersome and difficult process, to be avoided except in the most flagrant cases. Alternatively, a judicial removal and disability commission created by constitutional amendment may recommend dismissal. California was the first state to establish such a commission,[50] and today some thirty-seven states and Puerto Rico have some type of administrative system for the removal and discipline of judges.[51] These commissions typically have the power to remove a judge from office permanently and to impose other forms of discipline. Because of the superiority of judicial removal and disability commissions over traditional methods such as impeachment and recall, the highest court of any state that does not yet have such a procedure should actively urge the adoption by constitutional amendment of a judicial removal and disability commission.

49. 17A ARIZ. REV. STAT., S. CT. RULE 27(a) (1973).

50. CAL. CONST. art. 6, § 8; CAL. GOV. CODE §§ 68701-755 (West 1970).

51. THE COUNCIL OF STATE GOVERNMENTS, STATE COURT SYSTEMS 24-31, Table 9 (rev. ed. 1976).

Although the state constitution may not provide for a judicial removal commission, the state's highest court nonetheless has the inherent authority to act to protect the integrity of the judicial process and to maintain public confidence in the administration of justice. For example, in states where it is a requirement that a judge be a member of the bar, the state supreme court can as a method of discipline disbar the judge, thereby insuring that he does not meet a requirement for continuation in office.[52] The state's highest court also has the power to promulgate standards of conduct for all judges in the state [53] and to discipline judges who violate the provisions of such standards.[54] Furthermore, the same sources that give a state supreme court the power to conduct hearings on possible judicial misconduct give it the power to punish such misconduct.[55]

If the era of legislative encroachment in the field of procedural rules of the court and in the control of admission to the bar is subsiding, a period of legislative interference in the field of judicial discipline seems to be on the rise. The Judicial Reform Act,[56] introduced by Senator Tydings, and the Judicial Tenure Act,[57] sponsored by Senators Nunn, Allen, and Garn, although declaring that the judiciary should act in this field, actually represented an attempt to permit legislative encroachment in the area.[58] In Illinois the legislature attempted to investigate a judge and had to be reminded by the courts that it could investigate for legislative purposes only.[59] If the highest courts of the states do not take a more active part in judicial discipline and removal, public pressure will prompt the legislative branch to encroach further upon the judiciary.

A state's highest court can and should take the lead in judicial discipline. It should recommend the creation of a judicial discipline commission if one does not exist. In addition, it should exercise its implied power whenever and wherever necessary. As the United States Supreme Court once stated: "[T]he courts ought not to hesitate . . . to protect themselves

52. *In re* Mattera, 34 N.J. 259, 268-70 (1961).

53. *In re* Code of Judicial Ethics, 36 Wis.2d 252, 254, 153 N.W.2d 873, 874 (1967).

54. Jenkins v. Oregon State Bar, 241 Ore. 283, 288-89, 405 P.2d 525, 527-28 (1965).

55. *In re* DeSaulnier, 360 Mass. 787, 807-09, 279 N.E.2d 296, 307-08 (1972); *In re* DeSaulnier, 360 Mass. 757, 759, 274 N.E.2d 455, 456 (1971); *In re* Mussman, 112 N.H. 99, 101-03, 289 A.2d 403, 404-06 (1972); *In re* Diener 268 Md. 659, 686-88, 304 A.2d 587, 594, 597 (1973).

56. S. 1506, 91st Cong., 1st Sess. (1969).

57. S. 1110, 94th Cong., 1st Sess. (1975).

58. *See* Battisti, *An Independent Judiciary or an Evanescent Dream*, 25 CASE W. RES. L. REV. 711, 729-32 (1975); Comment, *The Limitations of Article III on the Proposed Judicial Removal Machinery: S. 1506*, 118 U. PA. L. REV. 1064 (1970).

59. Cusack v. Howlett, 44 Ill.2d 233, 236-44, 254 N.E.2d 506, 508-12 (1969).

from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws."[60]

Conclusion

Judicial activism in the decision-making process should be avoided and restraint exercised if the courts are to keep the respect of the society they serve and if their opinions are to be followed. Courts are poor legislatures and should leave this task to the legislative branch. In addition, judicial activism leads to overuse of the courts, which could well destroy their effectiveness. But if the states' highest courts should be restrained in their approach to the decision-making process, they must be bolder and more active in exercising their inherent power in the field of judicial administration. At stake is the independence and effectiveness of the judicial branch of government. If the public is to be served and the litigant treated justly, the courts must exercise their inherent powers to regulate and to improve the administration of justice. Unless the judiciary is to become the dinosaur of the American political system, it must vigorously, effectively, and aggressively defend its own rights and prerogatives. This is the proper place for activism, not only by the state's highest court, but by federal courts as well.

60. *Ex parte* Wall, 107 U.S. 265, 288 (1882).